









THE  
ENGLISH AND EMPIRE DIGEST  
WITH  
COMPLETE AND EXHAUSTIVE  
ANNOTATIONS.

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VOLUME XXXIX.



A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED  
FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL  
CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE  
OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE  
SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN  
GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

## VOLUME XXXIX.

*RECEIVERS.*

*REGISTRATION OF BIRTHS,  
MARRIAGES, AND DEATHS.*

*RENTCHARGES AND ANNUITIES.*

*REVENUE.*

*ROYAL FORCES.*

*SALE OF GOODS.*

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**The Titles in this Volume have been contributed as follows:—**

TITLE	CONTRIBUTED BY
<b>RECEIVERS.</b>	<b>ALEX. CAIRNS, Esq., and R.T. SHARPE, Esq., Barristers-at-Law.</b>
<b>REGISTRATION OF BIRTHS, MARRIAGES, AND DEATHS.</b>	<b>HAROLD G. MEYER, Esq., M.A., LL.B., Barrister-at-Law.</b>
<b>RENTCHARGES AND ANNUITIES.</b>	<b>E. C. P. LASCELLES, Esq., O.B.E., and A. F. ADKIN, Esq., Barristers-at-Law.</b>
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<b>SALE OF GOODS.</b>	<b>ALEX. CAIRNS, Esq., and W. SUMMERFIELD, Esq., M.A., B.C.L., LL.B., Barristers-at-Law.</b>

**In this Volume English Cases reported up to 1st January, 1928, are included, and other cases are included so far as the Volumes of Reports of the same were available in London on that date.**



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*See* INTOXICATING LIQUORS.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 ( <i>e.g.</i> , [1891] A. C.)	Eng.
A. Jur. Rep.	Australian Jurist Reports	Aus.
A. L. T.	Australian Law Times	Aus.
A. R.	Ontario Appeal Reports, 27 vols., 1876—1900	Can.
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1841	Eng.
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	Eng.
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)	Scot.
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	Eng.
Agra	Agra High Court	Ind.
Agra F. B.	Agra High Court, Full Bench	Ind.
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833	Ir.
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	Ir.
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649	Eng.
All.	New Brunswick Reports (Allen)	Can.
Alta. L. R.	Alberta Law Reports	Can.
Amb	Ambler's Reports, Chancery, 1 vol., 1716—1783	Eng.
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605	Eng.
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740	Eng.
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797	Eng.
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890	Eng.
App. Ct. Rep.	Appeal Court Reports	N.Z.
App. D.	South African Law Reports, Appellate Division	S. Af.
Architects' L. R.	Architects' Law Reports, 4 vols., 1904—1909	Eng.
Argus L. R.	Argus Law Reports	Aus.
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848	Scot.
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	Ir.
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839	Eng.
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	Eng.
Ashb.	Ashburner's Principles of Equity, 1902	Eng.
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)	Eng.
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754	Eng.
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law	Eng.
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani	Eng.
B.	Barber's Gold Law	S. Af.
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834	Eng.
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822	Eng.
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830	Eng.
B. & C. R. (preceded by date)	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) ( <i>e.g.</i> , [1918—19] B. & C. R.)	Eng.
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	Eng.
B. C. R.	British Columbia Reports	Can.
B. Dig.	Rose's Digest	Ind.
B. L. R.	Bengal Law Reports	Ind.
B. L. R. A. C.	Bengal Law Reports, Appeal Cases	Ind.
B. L. R. P. C.	Bengal Law Reports, Privy Council	Ind.
B. L. R. Sup. Vol.	Bengal Law Reports, Supp. Vol.	Ind.
B. R. A.	Butterworths' Rating Appeals, 2 vols., 1913—1925	Eng.
B. W. C. C.	Butterworths' Workmen's Compensation Cases, 1907—(current)	Eng.
Bac. Abr.	Bacon's Abridgment	Eng.
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854	Eng.

Baild. ... ..	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)	Eng.
Ball & B. ... ..	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814	Ir.
Bankr. & Ins. R. ... ..	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855	Eng.
Bar. & Arn. ... ..	Barron and Arnold's Election Cases, 1 vol., 1843—1846	
Bar. & Aust. ... ..	Barron and Austin's Election Cases, 1 vol., 1842	
Barn. Ch. ... ..	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741	
Barn. K. B. ... ..	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734	
Barnes ... ..	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760	
Batt. ... ..	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826	Ir.
Beat. ... ..	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830	Ir.
Beav. ... ..	Beavan's Reports, Rolls Court, 36 vols., 1838—1866	Eng.
Beav. & Wal. ... ..	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846	Eng.
Beaw. ... ..	Beawes's Lex Mercatoria	Eng.
Bell, C. C. ... ..	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860	Eng.
Bell, Ct. of Sess. ... ..	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792	Scot.
Bell, Ct. of Sess. fol. ... ..	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795	Scot.
Bell, Dict. Dec. ... ..	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833	Scot.
Bell, Sc. App. ... ..	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850	Scot.
Bellewe ... ..	Bellewe's Cases <i>temp.</i> Richard II., King's Bench, 1 vol.	Eng.
Belt's Sup. ... ..	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756	Eng.
Ben. ... ..	Benloe's Reports, Common Pleas, fol., 1 vol., 1357—1579	Eng.
Benl. ... ..	Benloe's (or Bendloe's) Reports, King's Bench, fol., 1 vol., 1440—1627	Eng.
Ber. ... ..	New Brunswick Reports (Berton)	Can.
Bing. ... ..	Bingham's Reports, Common Pleas, 10 vols., 1822—1834	Eng.
Bing. N. C. ... ..	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840	Eng.
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G. & R.	Nova Scotia Reports (Geldert & Russell) ... ..	Can.
G. I. Dig.	General Index Digest ... ..	Can.
G. W. D.	South African Law Reports, Griqualand West Local Division	S. Af.
G. W. L.	South African Law Reports, Griqualand West Local Division	S. Af.
Gal. & Dav.	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843	Eng.
Gale ...	Gale's Reports, Exchequer, 2 vols., 1835—1836 ... ..	Eng.
Gaz. L. R.	New Zealand Gazette Law Reports ... ..	N.Z.
Geld. Dig.	Geldert's Digest ... ..	Can.
Gib. Cod.	Gibson's Codex Juris Ecclesiastici Anglicani ... ..	Eng.
Giff. ...	Giffard's Reports, Chancery, 5 vols., 1857—1865 ... ..	Eng.
Gilb.	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714 ...	Eng.
Gilb. C. P.	Gilbert's History and Practice of the Court of Common Pleas	Eng.
Gilb. Ch.	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726 ... ..	Eng.
Gilm. & F.	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686 ... ..	Scot.
Gl. & J.	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828	Eng.
Glanv. ...	Glanville, De Legibus et Consuetudinibus Regni Angliæ ...	Eng.
Glanv. El. Cas.	Glanville's Election Cases, 1 vol., 1623—1624 ... ..	Eng.
Glascocck	Glascocck's Reports (Ireland), 1 vol., 1831—1832 ... ..	Ir.

Godb. ... ..	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637	
Gouldsb. ... ..	Gouldsbrough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601	
Gow ... ..	Gow's Reports, Nisi Prius, 1 vol., 1818—1820	Eng.
Gr. ... ..	Upper Canada Chancery (Grant)	Can.
Griffin's Patent Cases	Griffin's Patent Cases, 1884—1887	Eng.
Gwill ... ..	Gwillim's Tithe Cases, 4 vols., 1224—1824	Eng.
H. ... ..	Hertzog's Reports of the High Court of the South African Republic, 1893	S. Af.
H. & C. ... ..	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866	Eng.
H. & N. ... ..	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1862	Eng.
H. & Tw. ... ..	Hall and Twells' Reports, Chancery, 2 vols., 1848—1850	Eng.
H. & W. ... ..	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—1841	Eng.
H. B. R. (preceded by date)	Hansell's Reports of Bankruptcy and Companies' Winding up Cases, 3 vols., 1915—1917 ( <i>e.g.</i> , [1915] H. B. R.)	Eng.
H. C. ... ..	Reports of the High Court of Griqualand West	S. Af.
H. E. C. ... ..	Hodgin's Election Reports	Can.
H. L. Cas. ... ..	Clark's Reports, House of Lords, 11 vols., 1847—1866	Eng.
Hag. Adm. ... ..	Haggard's Reports, Admiralty, 3 vols., 1822—1838	Eng.
Hag. Con. ... ..	Haggard's Consistorial Reports, 2 vols., 1789—1821	Eng.
Hag. Ecc. ... ..	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833	Eng.
Hailes ... ..	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—1791	Scot.
Hale, C. L. ... ..	Hale's Common Law	Eng.
Hale, P. C. ... ..	Hale's Pleas of the Crown, 2 vols.	Eng.
Han. ... ..	New Brunswick Reports (Hannay)	Can.
Har. & Ruth. ... ..	Harrison and Rutherford's Reports, Common Pleas, 1 vol., 1865—1866	Eng.
Har. & W. ... ..	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836	Eng.
Harc. ... ..	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691	Scot.
Hard. ... ..	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669	Eng.
Hare ... ..	Hare's Reports, Chancery, 11 vols., 1841—1853	Eng.
Hawk. P. C. ... ..	Hawkins's Pleas of the Crown, 2 vols.	Eng.
Hay ... ..	Hay's Reports	Ind.
Hay & Marr. ... ..	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	Eng.
Hayes ... ..	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832	Ir.
Hayes & Jo. ... ..	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—1834	Ir.
Hem. & M. ... ..	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865	Eng.
Het. ... ..	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631	Eng.
Hob. ... ..	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625	Eng.
Hodg. ... ..	Hodges' Reports, Common Pleas, 3 vols., 1835—1837	Eng.
Hog. ... ..	Hogan's Reports, Rolls Court (Ireland), 2 vols., 1816—1834	Ir.
Holt, Adm. ... ..	W. Holt's Rule of the Road Cases, Admiralty, 1 vol., 1863—1867	Eng.
Holt, Eq. ... ..	W. Holt's Equity Reports, 2 vols., 1845...	Eng.
Holt, K. B. ... ..	Sir John Holt's Reports, King's Bench, fol., 1 vol., 1688—1710	Eng.
Holt, N. P. ... ..	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817	Eng.
Home, Ct. of Sess.	Home's Decisions, Court of Session (Scotland), fol., 1 vol., 1735—1744	Scot.
Hong Kong L. R.	Hong Kong Reports	Hong Kong
Hop. & Colt. ... ..	Hopwood and Coltman's Registration Cases, 2 vols., 1868—1878	Eng.
Hop. & Ph. ... ..	Hopwood and Philbrick's Registration Cases, 1 vol., 1863—1867	Eng.
Horn & H. ... ..	Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839	Eng.
Hov. Supp. ... ..	Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817	Eng.
How. C. ... ..	Howard's Chancery Practice	Ir.
How. C. S. ... ..	Howard's Supplement to Rules, etc., of the High Court of Chancery in Ireland	Ir.
How. E. E. ... ..	Howard's Equity Exchequer	Ir.
How. P. L. ... ..	Howard on the Popery Laws	Ir.
Hud. & B. ... ..	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831	Ir.
Hudson's B. C. ... ..	Hudson on Building Contracts, 2 vols.	Eng.
Hume ... ..	Hume's Decisions, Court of Session (Scotland), 1 vol., 1781—1822	Scot.
Hut. ... ..	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638	Eng.
Hy. Bl. ... ..	Henry Blackstone's Reports, Common Pleas, 2 vols., 1788—1796	Eng.
Hyde ... ..	Hyde's Reports	Ind.
I. C. L. R. ... ..	Irish Common Law Reports, 17 vols., 1849—1866	Ir.
I. Ch. R. ... ..	Irish Chancery Reports, 17 vols., 1850—1867	Ir.
I. Eq. R. ... ..	Irish Equity Reports, 13 vols., 1838—1851	Ir.

## xxvi      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

I. L. R. ...	Irish Law Reports, 13 vols., 1838—1851	Ir.
I. L. R. (Vol.) All.	Indian Law Reports, Allahabad	Ind.
I. L. R. (Vol.) Bom.	Indian Law Reports, Bombay	Ind.
I. L. R. (Vol.) Calc.	Indian Law Reports, Calcutta	Ind.
I. L. R. (Vol.) Lah.	Indian Law Reports, Lahore	Ind.
I. L. R. (Vol.) Mad.	Indian Law Reports, Madras	Ind.
I. L. R. (Vol.) Pat.	Indian Law Reports, Patna	Ind.
I. L. R. (Vol.) Ran.	Indian Law Reports, Rangoon	Ind.
I. L. T. ...	Irish Law Times, 1867—(current)	Ir.
I. L. T. Jo.	Irish Law Times Journal, 1867—(current)	Ir.
I. R. (preceded by date)	Irish Reports, since 1893 ( <i>e.g.</i> , [1894] 1 I. R.)	Ir.
I. R. (Vol.) C. L.	Irish Reports, Common Law, 11 vols., 1866—1877	Ir.
I. R. Eq.	Irish Reports, Equity, 11 vols., 1866—1877	Ir.
I. R., R. & L.	Irish Reports, Registry Appeals in the Court of Exchequer Chamber and Appeals in the Court for Land Cases Reserved, 1 vol., 1868—1876	Ir.
Ind. Awards	Industrial Awards Recommendations	N.Z.
Ind. Jur. N. S.	Indian Jurist, New Series	Ind.
Ind. Jur. O. S.	Indian Jurist, Old Series	Ind.
Ir. Cir. Rep.	Reports of Irish Circuit Cases, 1 vol., 1841—1843	Ir.
Ir. Jur.	Irish Jurist, 18 vols., 1849—1866	Ir.
Ir. L. Rec. 1st ser.	Law Recorder (Ireland), 1st series, 4 vols., 1827—1831	Ir.
Ir. L. Rec. N. S.	Law Recorder (Ireland), New Series, 6 vols., 1833—1838	Ir.
Irv.	Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867	Scot.
J. Bridg.	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—1621	Eng.
J. D. R.	Juta's Daily Reporter, reporting Cases in the Cape Provincial Division	S. Af.
J. P.	Justice of the Peace, 1837—(current)	Eng.
J. P. Jo.	Justice of the Peace (Weekly Notes of Cases)	Eng.
J. R.	Jurist Reports	N.Z.
J. R. N. S.	Jurist Reports, New Series	N.Z.
J. Shaw, Just.	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1848—1852	Scot.
Jac.	Jacob's Reports, Chancery, 1 vol., 1821—1823	Eng.
Jac. & W.	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821	Eng.
James	Nova Scotia Reports (James)	Can.
Jebb & B.	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol., 1841—1842	Ir.
Jebb & S.	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols., 1838—1841	Ir.
Jebb, C. C.	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840	Ir.
Jebb, Cr. & Pr. Cas.	Jebb's Crown and Presentment Cases	Ir.
Jenk.	Jenkins' Reports, 1 vol., 1220—1623	Eng.
Jo. & Car.	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839	Ir.
Jo. & Lat.	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1844—1846	Ir.
Jo. Ex. Ir.	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838	Ir.
John.	Johnson's Reports, Chancery, 1 vol., 1858—1860	Eng.
John. & H.	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862	Eng.
Jur.	Jurist Reports, 18 vols., 1837—1854	Eng.
Jur. N. S.	Jurist Reports, New Series, 12 vols., 1855—1867	Eng.
K.	Kotze's Reports of the High Court of the Transvaal Province, 1877—1881	S. Af.
K. & G.	Keane and Grant's Registration Cases, 1 vol., 1854—1862	Eng.
K. & J.	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858	Eng.
K. B. (preceded by date)	Law Reports, King's Bench Division, since 1900 ( <i>e.g.</i> , [1901] 2 K. B.)	Eng.
Kames, Dict. Dec.	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	Scot.
Kames, Rem. Dec.	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	Scot.
Kames, Sel. Dec.	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	Scot.
Kay	Kay's Reports, Chancery, 1 vol., 1853—1854	Eng.
Keb.	Keble's Reports, fol., 3 vols., 1601—1677	Eng.
Keen	Keen's Reports, Rolls Court, 2 vols., 1836—1838	Eng.
Keil.	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578	Eng.
Kel.	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	Eng.
Kel. W.	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734	Eng.
Keny.	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759	Eng.
Keny. Ch.	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	Eng.
Kerr	New Brunswick Reports (Kerr)	Can.

Kilkerran	...	...	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	...	Scot.
Kn. & Omb.	...	...	Knapp and Ombler's Election Cases, 1 vol., 1834—1835	...	Eng.
Knapp	...	...	Knapp's Reports, Privy Council, 3 vols., 1829—1836	...	Eng.
Knox	...	...	Knox's Reports	...	Aus.
Konst. & W. Rat. App.	...	...	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912	...	Eng.
Konst. Rat. App.	...	...	Konstam's Reports of Rating Appeals, 2 vols., 1904—1908	...	Eng.
L. & G. temp. Plunk.	...	...	Lloyd and Goold's Reports temp. Plunkett, Chancery (Ireland), 1 vol., 1834—1839	...	Ir.
L. & G. temp. Sugd.	...	...	Lloyd and Goold's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1835	...	Ir.
L. & Welsb.	...	...	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol., 1829—1830	...	Eng.
L. C. & M. Gaz.	...	...	Local Courts and Municipal Gazette	...	Can.
L. C. J.	...	...	Lower Canada Jurist	...	Can.
L. C. L. J.	...	...	Lower Canada Law Journal	...	Can.
L. C. R.	...	...	Lower Canada Reports	...	Can.
L. G. R.	...	...	Local Government Reports, 1902—(current)	...	Eng.
L. J. Adm.	...	...	Law Journal, Admiralty, 1865—1875	...	Eng.
L. J. Bey.	...	...	Law Journal, Bankruptcy, 1832—1880	...	Eng.
L. J. C. C.	...	...	Law Journal (County Courts Reporter), 1912—(current)	...	Eng.
L. J. M. C.	...	...	Law Journal, Common Pleas, 1831—1875	...	Eng.
L. J. Ch.	...	...	Law Journal, Chancery, 1831—(current)	...	Eng.
L. J. Eccl.	...	...	Law Journal, Ecclesiastical Cases, 1866—1875	...	Eng.
L. J. Ex.	...	...	Law Journal, Exchequer, 1831—1875	...	Eng.
L. J. Ex. Eq.	...	...	Law Journal, Exchequer in Equity, 1835—1841	...	Eng.
L. J. K. B. or Q. B.	...	...	Law Journal, King's Bench or Queen's Bench, 1831—(current)	...	Eng.
L. J. M. C.	...	...	Law Journal, Magistrates' Cases, 1831—1896	...	Eng.
L. J. N. C.	...	...	Law Journal, Notes of Cases, 1866—1892 (from 1893, see Law Journal)	...	Eng.
L. J. O. S.	...	...	Law Journal, Old Series, 10 vols., 1822—1831	...	Eng.
L. J. P.	...	...	Law Journal, Probate, Divorce and Admiralty, 1875—(current)	...	Eng.
L. J. P. & M.	...	...	Law Journal, Probate and Matrimonial Cases, 1858—1859, 1866—1875	...	Eng.
L. J. P. C.	...	...	Law Journal, Privy Council, 1865—(current)	...	Eng.
L. J. P. M. & A.	...	...	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	...	Eng.
L. Jo.	...	...	Law Journal Newspaper, 1866—(current)	...	Eng.
L. L. R.	...	...	Leader Law Reports	...	S. Af.
L. M. & P.	...	...	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851	...	Eng.
L. N.	...	...	Legal News	...	Can.
L. R. A. & E.	...	...	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865—1875	...	Eng.
L. R. C. C. R.	...	...	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875	...	Eng.
L. R. C. P.	...	...	Law Reports, Common Pleas, 10 vols., 1865—1875	...	Eng.
L. R. Eq.	...	...	Law Reports, Equity Cases, 20 vols., 1865—1875	...	Eng.
L. R. Exch.	...	...	Law Reports, Exchequer, 10 vols., 1865—1875	...	Eng.
L. R. H. L.	...	...	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875	...	Eng.
L. R. Ind. App.	...	...	Law Reports, Indian Appeals, Privy Council, 1873—(current)	...	Eng.
L. R. Ind. App. Supp. Vol.	...	...	Law Reports, India Appeals Privy Council, Supplementary Volume, 1872—1873	...	Eng.
L. R. Ir.	...	...	Law Reports (Ireland), Chancery and Common Law, 32 vols., 1877—1893	...	Ir.
L. R. P. & D.	...	...	Law Reports, Probate and Divorce, 3 vols., 1865—1875	...	Eng.
L. R. P. C.	...	...	Law Reports, Privy Council, 6 vols., 1865—1875	...	Eng.
L. R. Q. B.	...	...	Law Reports, Queen's Bench, 10 vols., 1865—1875	...	Eng.
L. R. Q. B.	...	...	Quebec Reports, Queen's Bench	...	Can.
L. R. Sc. & Div.	...	...	Law Reports, Scotch and Divorce Appeals, House of Lords 2 vols., 1866—1875	...	Eng.
L. T.	...	...	Law Times Reports, 1859—(current)	...	Eng.
L. T. Jo.	...	...	Law Times Newspaper, 1843—(current)	...	Eng.
L. T. O. S.	...	...	Law Times Reports, Old Series, 34 vols., 1843—1860	...	Eng.
L. Th.	...	...	La Themis	...	Can.
Lane	...	...	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	...	Eng.
Lat.	...	...	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628	...	Eng.
Laws. Reg. Cas.	...	...	Lawson's Registration Cases, 1895—(current)	...	Eng.
Ld. Raym.	...	...	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	...	Eng.
Le. & Ca.	...	...	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865	...	Eng.
Leach	...	...	Leach's Crown Cases, 2 vols., 1730—1814	...	Eng.
Lee	...	...	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758	...	Eng.
Lee temp. Hard.	...	...	T. Lee's Cases temp. Hardwicke, King's Bench, 1 vol., 1733—1738	...	Eng.

## xxviii      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Leg. Rep.	...	Legal Reporter	...	Ir.
Legge	...	Legge's Reports	...	Aus.
Leon.	...	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615	...	Eng.
Lev.	...	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1600—1696	...	Eng.
Lew. C. C.	...	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	...	Eng.
Ley	...	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629	...	Eng.
Lib. Ass.	...	Liber Assisarum, Year Books, 1—51 Edw. III.	...	Eng.
Lilly	...	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol.	...	Eng.
Litt.	...	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631	...	Eng.
Lloyd, L. R.	...	Lloyd's List Law Reports, 1919—(current)	...	Eng.
Lloyd, Pr. Cas.	...	Lloyd's Reports of Prize Cases, 10 vols., 1914—1924	...	Eng.
Lofft	...	Lofft's Reports, King's Bench, fol., 1 vol., 1772—1774	...	Eng.
Long. & T.	...	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol., 1841—1842	...	Ir.
Lords Journals	...	Journals of the House of Lords	...	Eng.
Lud. E. C.	...	Luder's Election Cases, 3 vols., 1784—1787	...	Eng.
Lumley, P. L. C.	...	Lumley's Poor Law Cases, 2 vols., 1834—1842	...	Eng.
Lush.	...	Lushington's Reports, Admiralty, 1 vol., 1859—1862	...	Eng.
Lut.	...	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1704	...	Eng.
Lut. Reg. Cas.	...	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853	...	Eng.
Lynd.	...	Lyndwood, Provinciale, fol., 1 vol.	...	Eng.
M.	...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	S. Af.
M. & S.	...	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	...	Eng.
M. & W.	...	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847	...	Eng.
M. C. C.	...	Mining Commissioner's Cases	...	Can.
M. C. R.	...	Montreal Condensed Reports	...	Can.
M. H. C. R.	...	Madras High Court Reports	...	Ind.
M. L. R. (Vol.) K. B. or Q. B.	...	Montreal Law Reports, King's Bench or Queen's Bench	...	Can.
M. L. R. (Vol.) S. C.	...	Montreal Law Reports, Superior Court	...	Can.
M. M. Cas.	...	Martin's Reports of Mining Cases	...	Can.
Mac.	...	Macassey's New Zealand Reports	...	N.Z.
Mac. & G.	...	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849—1852	...	Eng.
Mac. & H.	...	Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852	...	Eng.
M'Cle.	...	M'Clelland's Reports, Exchequer, 1 vol., 1824	...	Eng.
M'Cle. & Yo.	...	M'Clelland and Younge's Reports, Exchequer, 1 vol., 1824—1825	...	Eng.
Macfarlane	...	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts, 1838—1839	...	Scot.
Macl. & Rob.	...	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839	...	Scot.
Macph. (Cl. of Sess.)	...	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1862—1873	...	Scot.
Macq.	...	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—1865	...	Scot.
Macr.	...	Macrory's Patent Cases, 2 parts, 1847—1856	...	Eng.
Mad.	...	Madras High Court Reports	...	Ind.
Madd.	...	Maddock's Reports, Chancery, 6 vols., 1815—1822	...	Eng.
Madd. & G.	...	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.)	...	Eng.
Madox	...	Madox's Formulæ Anglicanum	...	Eng.
Madox, Exch.	...	Madox's History and Antiquities of the Exchequer, 2 vols.	...	Eng.
Mag.	...	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852	...	Eng.
Man. & G.	...	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—1845	...	Eng.
Man. & Ry. K. B.	...	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—1830	...	Eng.
Man. & Ry. M. C.	...	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830	...	Eng.
Man. L. J.	...	Manitoba Law Journal	...	Can.
Man. L. R.	...	Manitoba Law Reports	...	Can.
Man. R. temp. Wood	...	Manitoba Reports temp. Wood	...	Can.
Mans.	...	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914	...	Eng.
Mar. L. C.	...	Maritime Law Reports (Crockford), 3 vols., 1860—1871	...	Eng.
March	...	March's Reports, King's Bench and Common Pleas, 1 vol., 1639—1642	...	Eng.
Marr.	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	...	Eng.
Marsh.	...	Marshall's Reports, Common Pleas, 2 vols., 1813—1816	...	Eng.
Marsh	...	Marshall's Reports	...	Ind.
Mayn.	...	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326	...	Eng.
Meg.	...	Megone's Companies Acts Cases, 2 vols., 1889—1891	...	Eng.

...	...	...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	...	...	S. Af.
...	...	...	Merivale's Reports, Chancery, 3 vols., 1815—1817	...	...	...	Eng.
...	...	...	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843	...	...	...	Ir.
Mod. Rep.	...	...	Modern Reports, 12 vols., 1669—1755	...	...	...	Eng.
Mol.	...	...	Molloy's Report's, Chancery (Ireland), 3 vols., 1808—1831	...	...	...	Ir.
Mont.	...	...	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832	...	...	...	Eng.
Mont. & A.	...	...	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—1838	...	...	...	Eng.
Mont. & B.	...	...	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833	...	...	...	Eng.
Mont. & Ch.	...	...	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840	...	...	...	Eng.
Mont. & M.	...	...	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830	...	...	...	Eng.
Mont. D. & De G.	...	...	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844	...	...	...	Eng.
Moo. & P.	...	...	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	...	...	...	Eng.
Moo. & S.	...	...	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834	...	...	...	Eng.
Moo. Ind. App.	...	...	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872	...	...	...	Eng.
Moo. P. C. C.	...	...	Moore's Privy Council Cases, 15 vols., 1836—1863	...	...	...	Eng.
Moo. P. C. C. N. S.	...	...	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873	...	...	...	Eng.
Mood. & M.	...	...	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830	...	...	...	Eng.
Mood. & R.	...	...	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844	...	...	...	Eng.
Mood. C. C.	...	...	Moody's Crown Cases Reserved, 2 vols., 1824—1844	...	...	...	Eng.
Moore, C. P.	...	...	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827	...	...	...	Eng.
Moore, K. B.	...	...	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620	...	...	...	Eng.
Mor. Dict.	...	...	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	...	...	...	Scot.
Morr.	...	...	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893	...	...	...	Eng.
Mos.	...	...	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	...	...	...	Eng.
Mun. Rep.	...	...	Municipal Reports	...	...	...	Can.
Murd. Epit.	...	...	Murdoch's Epitome	...	...	...	Can.
Murp. & H.	...	...	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837	...	...	...	Eng.
Murr.	...	...	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	...	...	...	Scot.
My. & Cr.	...	...	Myne and Craig's Reports, Chancery, 5 vols., 1835—1841	...	...	...	Eng.
My. & K.	...	...	Myne and Keen's Reports, Chancery, 3 vols., 1832—1835	...	...	...	Eng.
N. A. C.	...	...	Native Appeal Cases	...	...	...	S. Af.
N. & S.	...	...	Nichols and Stop's Reports (Tasmania)	...	...	...	Tasmania
N. B. Dig.	...	...	New Brunswick Digest (Stevens)	...	...	...	Can.
N. B. Eq. Rep.	...	...	New Brunswick Equity Reports	...	...	...	Can.
N. B. R.	...	...	New Brunswick Reports	...	...	...	Can.
N. B. R. (All.)	...	...	New Brunswick Reports (Allen)	...	...	...	Can.
N. B. R. (Ber.)	...	...	New Brunswick Reports (Berton)	...	...	...	Can.
N. B. R. (Carl.)	...	...	New Brunswick Reports (Carleton)	...	...	...	Can.
N. B. R. (Chip.)	...	...	New Brunswick Reports (Chipman)	...	...	...	Can.
N. B. R. (Han.)	...	...	New Brunswick Reports (Hannay)	...	...	...	Can.
N. B. R. (Kerr)	...	...	New Brunswick Reports (Kerr)	...	...	...	Can.
N. B. R. (P. & B.)	...	...	New Brunswick Reports (Pugsley and Burbidge)	...	...	...	Can.
N. B. R. (P. & T.)	...	...	New Brunswick Reports (Pugsley and Trueman)	...	...	...	Can.
N. B. R. (Pug.)	...	...	New Brunswick Reports (Pugsley)	...	...	...	Can.
N. B. R. (Tru.)	...	...	New Brunswick Reports (Trueman)	...	...	...	Can.
N. I. (preceded by date)	...	...	Northern Ireland Law Reports, 1925—(current) ( <i>e.g.</i> , [1925] N. I.)	...	...	...	Ir.
N. L. R.	...	...	Natal Law Reports	...	...	...	S. Af.
N. P. D.	...	...	South African Law Reports, Natal Provincial Division	...	...	...	S. Af.
N. S. R.	...	...	Nova Scotia Reports	...	...	...	Can.
N. S. R. (Coch.)	...	...	Nova Scotia Reports (Cochran)	...	...	...	Can.
N. S. R. (G. & O.)	...	...	Nova Scotia Reports (Geldert and Oxley)	...	...	...	Can.
N. S. R. (G. & R.)	...	...	Nova Scotia Reports (Geldert and Russell)	...	...	...	Can.
N. S. R. (James)	...	...	Nova Scotia Reports (James)	...	...	...	Can.
N. S. R. (Old.)	...	...	Nova Scotia Reports (Oldrights)	...	...	...	Can.
N. S. R. (R. & C.)	...	...	Nova Scotia Reports (Russell and Chesley)	...	...	...	Can.
N. S. R. (R. & G.)	...	...	Nova Scotia Reports (Russell and Geldert)	...	...	...	Can.
N. S. R. (Thom.)	...	...	Nova Scotia Reports (Thomson)	...	...	...	Can.
N. S. W. Adm. or Ad.	...	...	New South Wales Reports, Admiralty	...	...	...	Aus.
N. S. W. B.	...	...	New South Wales Reports, Bankruptcy	...	...	...	Aus.
N. S. W. Bkpty. Cas.	...	...	New South Wales Bankruptcy Cases	...	...	...	Aus.
N. S. W. Eq.	...	...	New South Wales Reports, Equity	...	...	...	Aus.
N. S. W. Ind. Arbtrn. Cas.	...	...	New South Wales Industrial Arbitration Cases	...	...	...	Aus.
N. S. W. L. R.	...	...	New South Wales Law Reports	...	...	...	Aus.
N. S. W. Land App. Cts.	...	...	New South Wales Land Appeal Courts	...	...	...	Aus.
N. S. W. S. C. R. (Eq.)	...	...	New South Wales Supreme Court Reports (Equity)	...	...	...	Aus.
N. S. W. S. C. R. (L.)	...	...	New South Wales Supreme Court Reports (Law)	...	...	...	Aus.
N. S. W. S. C. R. N. S.	...	...	New South Wales Supreme Court Reports, New Series	...	...	...	Aus.
N. S. W. W. N.	...	...	New South Wales Weekly Notes	...	...	...	Aus.
N. W.	...	...	North-Western Provinces High Court Reports	...	...	...	Ind.
N. W. T. R.	...	...	North-West Territories Reports	...	...	...	Can.
N. Z. Jur.	...	...	New Zealand Jurist	...	...	...	N.Z.
N. Z. Jur. Mining Law	...	...	New Zealand Jurist Mining Law	...	...	...	N.Z.



# xxx      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

N. Z. Jur. N. S. ...	... New Zealand Jurist, New Series ...	N.Z.
N. Z. L. R. ...	... New Zealand Law Reports, 1883—(current) ...	N.Z.
N. Z. L. R. C. A. ...	... New Zealand Law Reports, Court of Appeal, 5 vols., 1883—1887 ...	N.Z.
Nels. ...	... Nelson's Reports, Chancery, 1 vol., 1625—1693 ...	Eng.
Nev. & M. K. B. ...	... Nevile and Manning's Reports, King's Bench, 6 vols., 1832—1836 ...	Eng.
Nev. & M. M. C. ...	... Nevile and Manning's Magistrates' Cases, 3 vols., 1832—1836 ...	Eng.
Nev. & P. K. B. ...	... Nevile and Perry's Reports, King's Bench, 3 vols., 1836—1838 ...	Eng.
Nev. & P. M. C. ...	... Nevile and Perry's Magistrates' Cases, 1 vol., 1836—1837 ...	Eng.
New Mag. Cas. ...	... New Magistrates' Cases (Bittleston, Wise and Parnell), 5 vols., 1844—1850 ...	Eng.
New Pract. Cas. ...	... New Practice Cases (Bittleston and others), 3 vols., 1844—1848 ...	Eng.
New Rep. ...	... New Reports, 6 vols., 1862—1865 ...	Eng.
New Sess. Cas. ...	... New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851 ...	Eng.
Nfld. L. R. ...	... Newfoundland Reports ...	Nfld.
Nolan ...	... Nolan's Magistrates' Cases, 1 vol., 1791—1793 ...	Eng.
Notes of Cases ...	... Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850 ...	Eng.
Noy ...	... Noy's Reports, King's Bench, fol., 1 vol., 1558—1649 ...	Eng.
O. B. & F. ...	... Ollivier Bell and Fitzgerald's Reports ...	N.Z.
O. B. S. P. ...	... Old Bailey Session Papers ...	Eng.
O. Bridg. ...	... Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1660—1666 ...	Eng.
O. F. S. ...	... Reports of the High Court of the Orange Free State, 1879—1883 ...	S. Af.
O. L. R. ...	... Ontario Law Reports ...	Can.
O'M. & H. ...	... O'Malley and Hardcastle's Election Cases, 1869—(current) ...	Eng.
O. P. D. ...	... South African Law Reports, Orange Free State Provincial Division ...	S. Af.
O. R. ...	... Ontario Reports ...	Can.
O. R. ...	... Official Reports of the South African Republic, 1894—1899 ...	S. Af.
O. R. C. ...	... Reports of the High Court of the Orange River Colony ...	S. Af.
O. S. ...	... Upper Canada Queen's Bench, Old Series ...	Can.
O. W. N. ...	... Ontario Weekly Notes ...	Can.
O. W. R. ...	... Ontario Weekly Reporter ...	Can.
Old. ...	... Nova Scotia Reports (Oldrights) ...	Can.
Ont. Dig. ...	... Digest of Ontario Case Law, 4 vols., 1823—1900 ...	Can.
Owen ...	... Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614 ...	Eng.
P. (preceded by date) ...	... Law Reports, Probate, Divorce, and Admiralty Division, since 1890 ( <i>e.g.</i> , [1891] P.) ...	Eng.
P. & B. ...	... New Brunswick Reports (Pugsley and Burbidge) ...	Can.
P. & T. ...	... New Brunswick Law Reports (Pugsley and Trueman) ...	Can.
P. Cas. ...	... Prize Cases Heard and Decided in the Prize Court During the Great War, 3 vols., 1914—1922 ...	Eng. & Col.
P. D. ...	... Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890 ...	Eng.
P. E. I. ...	... Prince Edward Island Reports ...	Can.
P. R. ...	... Ontario Practice ...	Can.
P. Wms. ...	... Peere Williams' Reports, Chancery and King's Bench, 3 vols., 1695—1735 ...	Eng.
Palm. ...	... Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629 ...	Eng.
Park. ...	... Parker's Reports, Exchequer, fol., 1 vol., 1743—1767; App. 1678—1717 ...	Eng.
Pat. App. ...	... Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822 ...	Scot.
Pater. App. ...	... Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873 ...	Scot.
Peake ...	... Peake's Reports, Nisi Prius, 1 vol., 1790—1794 ...	Eng.
Peake, Add. Cas. ...	... Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812 ...	Eng.
Peck. ...	... Peckwell's Election Cases, 2 vols., 1803—1806 ...	Eng.
Pelham ...	... Pelham (S. A.) Reports ...	Aus.
Per. & Dav. ...	... Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841 ...	Eng.
Per. & Kn. ...	... Perry and Knapp's Election Cases, 1 vol., 1833 ...	Eng.
Per. C. S. ...	... Perrault's Conseil Supérieur ...	Can.
Per. P. ...	... Perrault's Prévosté de Quebec, 1726—1756 ...	Can.
Ph. ...	... Phillips' Reports, Chancery, 2 vols., 1841—1849 ...	Eng.
Phil. El. Cas. ...	... Philipps' Election Cases, 1 vol., 1780 ...	Eng.
Phillim. ...	... J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821 ...	Eng.
Phillim. Eccl. Jud. ...	... Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875 ...	Eng.
Phip. ...	... Phipson's Digest of Natal Reports, 1858—1859 ...	S. Af.
Pig. & R. ...	... Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845 ...	Eng.
Pite. ...	... Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624 ...	Scot.
Plowd. ...	... Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I. ...	Eng.
Poll. ...	... Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682 ...	Eng.
Poph. ...	... Popham's Reports, King's Bench, fol., 1 vol., 1591—1627 ...	Eng.
Pow. R. & D. ...	... Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1850 ...	Eng.



# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Pratt ... ..	Pratt's Supplement to Bott's Poor Laws, 1833 ... ..	Eng.
Prec. Ch. ... ..	Precedents in Chancery, fol., 1 vol., 1689—1722 ... ..	Eng.
Price ... ..	Price's Reports, Exchequer, 13 vols., 1814—1824 ... ..	Eng.
Price ... ..	Price's Mining Commissioners' Cases ... ..	Can.
Pug. ... ..	New Brunswick Reports (Pugsley) ... ..	Can.
Py. R. ... ..	Pykes' Lower Canada Reports ... ..	Can.
Q. B. ... ..	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852 ... ..	Eng.
Q. B. (preceded by date)	Law Reports, Queen's Bench Division, 1891—1901 ( <i>e.g.</i> , [1891] 1 Q. B.) ... ..	Eng.
Q. B. D. ... ..	Law Reports, Queen's Bench Division, 25 vols., 1875—1890 ... ..	Eng.
Q. J. P. ... ..	Queensland Justice of Peace Reports ... ..	Aus.
Q. L. J. ... ..	Queensland Law Journal and Reports, 11 vols., 1879—1901 ... ..	Aus.
Q. L. R. ... ..	Quebec Law Reports ... ..	Can.
Q. L. R. (Beor) ... ..	Queensland Law Reports by Beor, 1876—1878 ... ..	Aus.
Q. P. R. ... ..	Quebec Practice Reports ... ..	Can.
Q. R. (Vol.) K. B. or Q. B.	Rapports Judiciaires de Québec, Cour du Banc du Roi, 1892—(current) ... ..	Can.
Q. R. (Vol.) S. C. ... ..	Rapports Judiciaires de Québec, Cour Supérieure, 1892—(current) ... ..	Can.
Q. S. C. R. ... ..	Queensland Supreme Court Reports, 5 vols., 1860—1881 ... ..	Aus.
Q. S. R. ... ..	Queensland State Reports, 6 vols., 1902—1906 ... ..	Aus.
Q. W. N. ... ..	Weekly Notes, Queensland ... ..	Aus.
R. ... ..	The Reports, 15 vols., 1893—1895 ... ..	Eng.
R. ... ..	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861—1867, 1871—1872, 1877—1878 ... ..	S. Af.
R. (Ct. of Sess.) ... ..	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898 ... ..	Scot.
R. A. C. ... ..	Ramsay, Appeal Cases ... ..	Can.
R. & C. ... ..	Nova Scotia Reports (Russell & Chesley) ... ..	Can.
R. & G. ... ..	Nova Scotia Reports (Russell and Geldert) ... ..	Can.
R. C. ... ..	La Revue Critique de Législation et de Jurisprudence de Canada ... ..	Can.
R. de J. ... ..	Revue de Jurisprudence ... ..	Can.
R. de L. ... ..	Revue de Législation et de Jurisprudence, 3 vols., 1845—1848 ... ..	Can.
R. E. D. ... ..	New South Wales, Reserved and Equity Decisions ... ..	Aus.
R. E. D. ... ..	Ritchie's Equity Decisions (Russell) ... ..	Can.
R. J. R. Q. ... ..	Quebec Revised Reports ... ..	Can.
R. L. N. S. ... ..	Revue Légale, New Series, 1895—(current) ... ..	Can.
R. L. O. S. ... ..	Revue Légale, Old Series, 21 vols., 1869—1892 ... ..	Can.
R. P. C. ... ..	Reports of Patent Cases, 1884—(current) ... ..	Eng.
R. R. ... ..	Revised Reports ... ..	Eng.
Rast. ... ..	Rastell's Entries ... ..	Eng.
Rayn. ... ..	Rayner's Tithe Cases, 3 vols., 1575—1782 ... ..	Eng.
Real Prop. Cas. ... ..	Real Property Cases, 2 vols., 1843—1847 ... ..	Eng.
Rep. Ch. ... ..	Reports in Chancery, fol., 3 vols., 1615—1710 ... ..	Eng.
Rep. in C. of A. ... ..	Reports in Courts of Appeal ... ..	N.Z.
Res. & Eq. Jud. ... ..	New South Wales Reserved and Equity Judgments ... ..	Aus.
Reserv. Cas. ... ..	Reserved Cases ... ..	Ir.
Rick. & M. ... ..	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889 ... ..	Eng.
Rick. & S. ... ..	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1894 ... ..	Eng.
Ridg. L. & S. ... ..	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795 ... ..	Ir.
Ridg. Parl. Rep. ... ..	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—1796 ... ..	Ir.
Ridg. temp. H. ... ..	Ridgeway's Reports temp. Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746 ... ..	Eng.
Ritch. Eq. Rep. ... ..	Ritchie's Equity Reports ... ..	Can.
Rob. Eccl. ... ..	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853 ... ..	Eng.
Rob. L. & W. ... ..	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1849—1851 ... ..	Eng.
Robert. App. ... ..	Robertson's Scotch Appeals, House of Lords, 1 vol., 1707—1727 ... ..	Scot.
Robin. App. ... ..	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841 ... ..	Scot.
Roll. Abr. ... ..	Rolle's Abridgment of the Common Law, fol., 2 vols. ... ..	Eng.
Roll. Rep. ... ..	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625 ... ..	Eng.
Rom. ... ..	Romilly's Notes of Cases, 1 part, 1767—1787 ... ..	Eng.
Roscoe's B. C. ... ..	Roscoe, Digest of Building Cases ... ..	Eng.
Rose ... ..	Rose's Reports, Bankruptcy, 2 vols., 1810—1816 ... ..	Eng.
Ross, L. C. ... ..	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols. ... ..	Eng.
Rowe ... ..	Rowe's Reports (England and Ireland), 1 vol., 1798—1823 ... ..	Eng.
Rul. Cas. ... ..	Campbell's Ruling Cases, 25 vols. ... ..	Eng.
Russ. ... ..	Russell's Reports, Chancery, 5 vols., 1824—1829 ... ..	Eng.
Russ. & M. ... ..	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833 ... ..	Eng.

# xxxii      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Russ. & Ry. ... ..	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823	Eng.
Rus. E. R. ... ..	Russell's Election Reports...	Can.
Ry. & Can. Cas. ... ..	Railway and Canal Cases, 7 vols., 1835—1854 ... ..	Eng.
Ry. & Can. Tr. Cas. ... ..	Railway and Canal Traffic Cases, 1855—(current) ... ..	Eng.
Ry. & M. ... ..	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826 ... ..	Eng.
Ryde & K. Rat. App. ... ..	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904 ... ..	Eng.
Ryde, Rat. App. ... ..	Ryde's Rating Appeals, 3 vols., 1871—1893 ... ..	Eng.
S. ... ..	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. Af.
S. A. L. J. ... ..	South African Law Journal ... ..	S. Af.
S. A. L. R. ... ..	South Australian Law Reports ... ..	Aus.
S. A. L. R. ... ..	South African Law Reports ... ..	S. Af.
S. A. R. ... ..	Reports of the High Court of the South African Republic, 1881—1892 ... ..	S. Af.
S. A. S. R. ... ..	South Australian State Reports, since 1921 ( <i>e.g.</i> , [1921] S. A. S. R.) ... ..	Aus.
S. O. ... ..	Reports of the Supreme Court of the Cape of Good Hope from 1880 ... ..	S. Af.
S. C. (preceded by date)	Court of Session Cases (Scotland), since 1906 ( <i>e.g.</i> , [1906] S. C.)	Scot.
S. C. (H. L.) (preceded by date)	Court of Session Cases (Scotland) (House of Lords), since 1906 ( <i>e.g.</i> , [1906] S. C. (H. L.)) ... ..	Scot.
S. C. (J.) (preceded by date)	Court of Justiciary Cases (Scotland), since 1906 ( <i>e.g.</i> , [1906] S. C. (J.)) ... ..	Scot.
S. O. R. ... ..	Canada, Supreme Court Reports ... ..	Can.
S. L. T. ... ..	Scots Law Times, 1893 (current) ... ..	Scot.
S. Q. R. ... ..	Queensland State Reports ... ..	Aus.
S. R. ... ..	Reports of the High Court of Southern Rhodesia ... ..	S. Af.
S. R. O. ... ..	Stuart's Lower Canada Reports ... ..	Can.
S. R. N. S. W. ... ..	New South Wales, State Reports ... ..	Aus.
S. R. Q. ... ..	Queensland Reports, Supreme Court ... ..	Aus.
S. V. A. R. ... ..	Stuart's Vice-Admiralty Reports ... ..	Can.
S. W. A. ... ..	South-West Africa Law Reports ... ..	S.-W. Af.
Saint ... ..	Saint's Digest of Registration Cases, 1843—1906, 1 vol. ... ..	Eng.
Salk. ... ..	Salkeld's Reports, King's Bench, 3 vols., 1689—1712 ... ..	Can.
Sask. L. R. ... ..	Saskatchewan Law Reports ... ..	Ir.
Sau. & Sc. ... ..	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840 ... ..	Eng.
Saund. ... ..	Saunders's Reports, King's Bench, 2 vols., 1666—1672 ... ..	Eng.
Saund. & A. ... ..	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904 ... ..	Eng.
Saund. & B. ... ..	Saunders and Bidder's Locus Standi Reports, 1905—(current) ... ..	Eng.
Saund. & C. ... ..	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848 ... ..	Eng.
Saund. & M. ... ..	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858 ... ..	Eng.
Sav. ... ..	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591 ... ..	Eng.
Say. ... ..	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1753 ... ..	Eng.
Sc. Jur. ... ..	Scottish Jurist, 46 vols., 1829—1873 ... ..	Scot.
Sc. L. R. ... ..	Scottish Law Reporter, 61 vols., 1865—1924 ... ..	Scot.
Sc. R. R. ... ..	Scots Revised Reports ... ..	Scot.
Sch. & Lef. ... ..	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806 ... ..	Ir.
Scott ... ..	Scott's Reports, Common Pleas, 8 vols., 1834—1840 ... ..	Eng.
Scott, N. R. ... ..	Scott's New Reports, Common Pleas, 8 vols., 1840—1845 ... ..	Eng.
Sea. & Sm. ... ..	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860 ... ..	Eng.
Sel. Cas. Ch. ... ..	Select Cases in Chancery, fol., 1 vol., 1685—1693 (Pt. III. of Cas. in Ch.) ... ..	Eng.
Selwyn's N. P. ... ..	Selwyn's Abridgement of the Law of Nisi Prius ... ..	Eng.
Sess. Cas. K. B. ... ..	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747 ... ..	Eng.
Sett. & Rem. ... ..	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1685—1727 ... ..	Eng.
Sh. (Ct. of Sess.) ... ..	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838 ... ..	Scot.
Sh. & MacI. ... ..	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838 ... ..	Scot.
Sh. Dig. ... ..	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868 ... ..	Scot.
Sh. Just. ... ..	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831 ... ..	Scot.
Sh. Sc. App. ... ..	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824 ... ..	Scot.
Sh. Teind Ct. ... ..	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831 ... ..	Scot.
Shep. Touch. ... ..	Sheppard's Touchstone of Common Assurances ... ..	Eng.
Show. ... ..	Shower's Reports, King's Bench, 2 vols., 1678—1695 ... ..	Eng.
Show. Parl. Cas. ... ..	Shower's Cases in Parliament, fol., 1 vol., 1694—1699 ... ..	Eng.
Sid. ... ..	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670 ... ..	Eng.

Sim. & St.	...	...	Simons' Reports, Chancery, 17 vols., 1826—1852	Eng.
Sim. N. S.	...	...	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826	Eng.
Skin.	...	...	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852	Eng.
Sm. & Bat.	...	...	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697	Eng.
Sm. & G.	...	...	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825	Ir.
Smith, K. B.	...	...	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857	Eng.
Smith, L. C.	...	...	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806	Eng.
Smith, Reg. Cas.	...	...	Smith's Leading Cases, 2 vols.	Eng.
Smythe	...	...	C. L. Smith's Registration Cases, 1895—(current)	Eng.
Sol. Jo.	...	...	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840	Ir.
Spence	...	...	Solicitors' Journal, 1856—(current)	Eng.
Spinks	...	...	Spence's Equitable Jurisdiction of the Court of Chancery	Eng.
St. R. Qd. (preceded by date)	...	...	Spinks' Prize Court Cases, 2 parts, 1854—1856	Eng.
Stair Rep.	...	...	Queensland State Reports, since 1902 ( <i>e.g.</i> , [1902] St. R. Qd.)	Aus.
Stark.	...	...	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681	Scot.
State Tr.	...	...	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823	Eng.
State Tr. N. S.	...	...	State Trials, 34 vols., 1163—1820	Eng.
Stewart	...	...	State Trials, New Series, 8 vols., 1820—1858	Eng.
Stockton	...	...	Stewart's Nova Scotia Admiralty Reports, 1803—1813	Can.
Story	...	...	Stockton's Vice-Admiralty Report and Digest	Can.
Stra.	...	...	Story's Commentaries on Equity Jurisprudence	Eng.
Stu. M. & P.	...	...	Strange's Reports, 2 vols., 1716—1747	Eng.
Stuart	...	...	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853	Scot.
Stuart, Adm.	...	...	Sessions Cases (Stuart)	Scot.
Stuart, Adm. N. S.	...	...	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856	Can.
Stuart, K. B.	...	...	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874	Can.
Sty.	...	...	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835	Can.
Sw.	...	...	Style's Reports, King's Bench, fol., 1 vol., 1646—1655	Eng.
Sw. & Tr.	...	...	Swabey's Report, Admiralty, 1 vol., 1855—1859	Eng.
Swan.	...	...	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865	Eng.
Swin.	...	...	Swanston's Reports, Chancery, 3 vols., 1818—1821	Eng.
Syme	...	...	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841	Scot.
T. & M.	...	...	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829	Scot.
T. H.	...	...	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851	Eng.
T. Jo.	...	...	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909	S. Af.
T. L.	...	...	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685	Eng.
T. L. R.	...	...	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current)	S. Af.
T. P.	...	...	The Times Law Reports, 1884—(current)	Eng.
T. P. D.	...	...	Reports of the Supreme Court of the Transvaal, 1910—(current)	S. Af.
T. Raym.	...	...	South African Law Reports, Transvaal Provincial Division	S. Af.
T. S.	...	...	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683	Eng.
Taml.	...	...	Reports of the Supreme Court of the Transvaal, 1902—1909	S. Af.
Tas. L. R.	...	...	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830	Eng.
Taunt.	...	...	Tasmanian Law Reports	Aus.
Tax Cas.	...	...	Taunton's Reports, Common Pleas, 8 vols., 1807—1819	Eng.
Tay.	...	...	Tax Cases, 1875—(current)	Eng.
Temp. Wood	...	...	Taylor's King's Bench Reports	Can.
Term Rep.	...	...	Manitoba Reports temp. Wood	Can.
Terr. L. R.	...	...	Term Reports (Durnford and East), fol., 8 vols., 1785—1800	Eng.
Thom.	...	...	Territories Law Reports	Can.
Toth.	...	...	Nova Scotia Reports (Thomson)	Can.
Town St. Tr.	...	...	Tothill's Transactions in Chancery, 1 vol., 1559—1646	Eng.
Trem. P. C.	...	...	Townsend, Modern State Trials	Eng.
Trist.	...	...	Tremaine Pleas of the Crown, 1 vol., 1667	Eng.
Tru.	...	...	Tristram's Consistory Judgments, 1 vol., 1872—1890	Eng.
Tudor, L. C. Merc. Law.	...	...	New Brunswick Reports (Trueman)	Can.
Tudor, L. C. Real Prop.	...	...	Tudor's Leading Cases on Mercantile and Maritime Law	Eng.
Turn. & R.	...	...	Tudor's Leading Cases on Real Property	Eng.
Tyr.	...	...	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825	Eng.
Tyr. & Gr.	...	...	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835	Eng.
	...	...	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836	Eng.
U. C. Jur.	...	...	Upper Canada Jurist	Can.
U. C. L. J. N. S.	...	...	Canada Law Journal, New Series, 1865—(current)	Can.

# xxiv      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

. C. L. . O. S.	Canada Law Journal, Old Series, 10 vols., 1855—1864	Can.
. C. R.	Upper Canada Reports, Queen's Bench	Can.
dal	Fiji Law Reports (Udal)	Fiji.
. L. R.	Victorian Law Reports	Aus.
. R. ...	Victorian Reports	Aus.
. R. (Adm.)	Victorian Reports (Admiralty)	Aus.
. R. (Eq.)	Victorian Reports (Equity)	Aus.
. R. (Law)	Victorian Reports (Law)	Aus.
ough. ...	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673	Eng.
ent. ...	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691	Eng.
ern. ...	Vernon's Reports, Chancery, 2 vols., 1680—1719	Eng.
ern. & Scr.	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788	Ir.
es. ...	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817	Eng.
es. & B.	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814	Eng.
es. Sen.	Vesey Sen.'s Reports, 2 vols., 1747—1756	Eng.
in. Abr.	Viner's Abridgment of Law and Equity, fol., 22 vols.	Eng.
in. Supp.	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	Eng.
	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857	S. Af.
A. L. R. ...	West Australian Law Reports	Aus.
A'B. & W. ...	Webb, A'Beckett and Williams' Victorian Reports	Aus.
& W. ...	Wyatt and Webb	Aus.
C. C. ...	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907	Eng.
H. C. ...	South African Law Reports, Witwatersrand High Court	S. Af.
Jo. ...	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640	Eng.
L. D. ...	South African Law Reports, Witwatersrand Local Division	S. Af.
L. R. ...	Western Law Reporter	Can.
L. T. ...	Western Law Times	Can.
N. (preceded by date)	Law Reports, Weekly Notes, 1866—(current) ( <i>e.g.</i> , [1866] W. N.)	Eng.
N. ...	Calcutta Weekly Notes	Ind.
	Weekly Reporter, 54 vols., 1852—1906	Eng.
	Sutherland's Weekly Reporter	Ind.
. R. ...	Weekly Reporter, reporting cases in the Cape Provincial Division	S. Af.
. W. & A'B. ...	Wyatt, Webb and A'Beckett	Aus.
. W. R. ...	Western Weekly Reports	Can.
allis by Lyne	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791	Ir.
eb. Pat. Cas. ...	Webster's Patent Cases, 2 vols., 1602—1855	Eng.
elsh, Reg. Cas.	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840	Ir.
ent. Off. Ex.	Wentworth's Office and Duty of Executors	Eng.
est ...	West's Reports, House of Lords, 1 vol., 1839—1841	Eng.
est temp. Hard.	West's Reports temp. Hardwicke, Chancery, 1 vol., 1736—1740	Eng.
est. Tithe Cas.	Western's London Tithe Cases, 1 vol., 1592—1822	Eng.
hite ...	White's Justiciary Reports (Scotland), 3 vols., 1886—1893	Scot.
hite & Tud. L. C.	White and Tudor's Leading Cases in Equity, 2 vols.	Eng.
ight ...	Wightwick's Reports, Exchequer, 1 vol., 1810—1811	Eng.
ill. Woll. & Dav.	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837	Eng.
ill. Woll. & H.	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839	Eng.
illes ...	Willes' Reports, Common Pleas, 1 vol., 1737—1758	Eng.
ilm. ...	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770	Eng.
ils. ...	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774	Eng.
ils. & S.	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835	Scot.
ils. Ch.	J. Wilson's Reports, Chancery, 2 vols., 1818—1819	Eng.
ils. Ex.	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817	Eng.
in. ...	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625	Eng.
m. Bl.	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779	Eng.
m. Rob.	William Robinson's Reports, Admiralty, 3 vols., 1838—1850	Eng.
ns. Saund.	Williams' Notes to Saunders' Reports, 2 vols.	Eng.
olf. & B.	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864	Eng.
olf. & D.	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858	Eng.
oll. ...	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841	Eng.
ood ...	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798	Eng.
A. D.	Young's Vice-Admiralty Reports	Can.

Y. & C. Ch. Cas.	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—1843	Eng.
Y. & C. Ex. ..	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1833—1841	Eng.
Y. & J. ...	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830	Eng.
Y. B. ...	Year Books	Eng.
Y. B. (Rolls Series)	Year Books (Rolls Series)	Eng.
Y. B. (Sel. Soc.)..	Year Books (Selden Society)	Eng.
Yelv. ...	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613	Eng.
	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832	Eng.



# ABBREVIATIONS

## USED IN THIS WORK.

(For Abbreviations used in citing Reports, *see* pp. xix—xxxv, *ante*.)

A.-G. . .	for Attorney-General.
Act. . .	„ Actiengesellschaft.
Admlty. . .	„ Admiralty.
Affd. . .	„ Affirmed.
Affg. . .	„ Affirming.
Akt. . .	„ Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Alta. . .	„ Alberta.
Anon. . .	„ Anonymous.
Apld. . .	„ Applied.
Appet. . .	„ Applicant.
Appln. . .	„ Application.
Appln. . .	„ Application to Register a Trade Mark.
Apprvd. . .	„ Appellant.
Arbn . . .	„ Approved.
Archbp. . .	Arbitration.
Art. . .	Archbishop.
Ass. Tax Case	Article.
Assce. . .	Assessed Tax Case.
Assocn. . .	Assurance.
	Association.
B. C. . .	Borough Council.
B. C. . .	British Columbia.
Bkpcy. . .	Bankruptcy.
Bkpt. . .	Bankrupt.
Bldg. Soc. . .	Building Society.
Bp. . .	Bishop.
C. A. . .	Court of Appeal.
C. & S. L. Ry. Co.	City & South London Railway Co.
C. C. A. . .	Court of Criminal Appeal.
C. C. R. . .	County Court Rules.
C. C. R. . .	Court of Crown Cases Reserved.
C. L. P. Act. . .	Common Law Procedure Act.
C. L. Ry. Co.	Central London Railway Co.
C. O. R. . .	Crown Office Rules.
C. S. U. C. . .	Consolidated Statutes of Upper Canada.
Ca. sa. . .	<i>Capias ad satisfaciendum</i> .
Cale. Ry. Co.	Caledonian Railway Co.
Ch. . .	Chancery.
Ch. Div. . .	Chancery Division.
Co. . .	Company.
Co-op. Assocn.	Co-operative Supply Association.
Comrs . . .	Commissioners.
Consd. . .	Considered.
Corpn. . .	Corporation.
Ct. . .	Court.
Ct. of Ch. . .	Court of Chancery.
Ct. of Eq. . .	Court of Equity.
Ct. of R. . .	Court of Review.
D. C. . .	Divisional Court.
Dbtd. . .	Doubted.

Deft. .	for Defendant.
Distd. .	„ Distinguished.
Div. Ct.	„ Divisional Court.
Eccl. Comrs.	Ecclesiastical Commissioners.
Eccl. Ct.	Ecclesiastical Court.
Ex. Ch.	Exchequer Chamber.
<i>Ex p.</i> .	<i>Ex parte.</i>
Exch. .	Exchequer.
Exor. .	Executor.
Exorship.	Executorship.
Expld. .	„ Explained.
Extd. .	„ Extended.
Extrix. .	„ Executrix.
<i>Fi. fa.</i> .	„ <i>Fieri facias.</i>
Foll'd. .	„ Followed.
G. & S. W. Ry. Co. . . . .	„ Glasgow & South Western Railway Co.
G. C. Ry. Co. . . . .	„ Great Central Railway Co.
G. E. Ry. Co. . . . .	„ Great Eastern Railway Co.
G. N. of Scotland Ry. Co. . . . .	„ Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co. . . . .	„ Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co. . . . .	„ Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland . . . . .	„ Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co. . . . .	„ Great Western Railway Co.
Govt. . . . .	„ Government.
Grdns. . . . .	„ Guardians or Guardians of the Poor.
H. C. of A. . . . .	„ High Court of Australia.
H. L. . . . .	„ House of Lords.
I. R. Comrs. . . . .	„ Inland Revenue Commissioners.
Insce. . . . .	„ Insurance.
JJ. . . . .	„ Justices.
Jud. Act . . . . .	„ Judicature Act.
K. B. Div. . . . .	„ King's Bench Division.
L. & B. Ry. Co. . . . .	„ London & Brighton Railway Co.
L. & N. E. Ry. Co. . . . .	„ London & North Eastern Railway Co.
L. & N. W. Ry. Co. . . . .	„ London & North Western Railway Co.
L. & S. W. Ry. Co. . . . .	„ London & South Western Railway Co.
L. & Y. Ry. Co. . . . .	„ Lancashire & Yorkshire Railway Co.
L. B. . . . .	„ Local Board.
L. B. & S. C. Ry. Co. . . . .	„ London, Brighton & South Coast Railway Co.
L. C. . . . .	„ Lord Chancellor.
L. C. & D. Ry. Co. . . . .	„ London, Chatham & Dover Railway Co.
L. C. C. . . . .	„ London County Council.
L. Elec. Ry. Co. . . . .	„ London Electric Railway Co.
L. G. Board . . . . .	„ Local Government Board.
L.J. . . . .	„ Lord Justice.
L.JJ. . . . .	„ Lords Justices.
L. M. & S. Ry. Co. . . . .	„ London, Midland & Scottish Railway Co.
L. T. & S. Ry. Co. . . . .	„ London, Tilbury & Southend Railway Co.
M. S. Act . . . . .	Merchant Shipping Act.
M. S. & L. Ry. Co. . . . .	Manchester, Sheffield & Lincolnshire Railway Co.
Mags. . . . .	Magistrates.
Man. . . . .	Manitoba.
Mentd. . . . .	Mentioned.
Met. Dist. Ry. Co. . . . .	Metropolitan District Railway Co.
Met. Ry. Co. . . . .	Metropolitan Railway Co.
Mid. G. W. Ry. Co. . . . .	Midland Great Western Railway Co.
Mid. Ry. Co. . . . .	Midland Railway Co.
Mtge. . . . .	Mortgage.
Mtgee. . . . .	Mortgagee.
Mtgor. . . . .	Mortgagor.
N. B. . . . .	New Brunswick.
N. B. Ry. Co. . . . .	North British Railway Co.
N. E. Ry. Co. . . . .	North Eastern Railway Co.
N. F. . . . .	Not Followed.
N. P. . . . .	Nisi Prius.



# ABBREVIATIONS.

XXXIX

N. S.	.	.	.	.	for Nova Scotia.
N. W. P.	.	.	.	.	„ North-West Provinces.
N. W. T.	.	.	.	.	„ North-West Territories.
Ont.	.	.	.	.	„ Ontario.
Ord.	.	.	.	.	„ Order.
Overd.	.	.	.	.	„ Overruled.
P. C.	.	.	.	.	„ Privy Council.
P. E. I.	.	.	.	.	„ Prince Edward Island.
Petn.	.	.	.	.	„ Petition or Election Petition.
Pltf.	.	.	.	.	„ Plaintiff.
Q. B. Div.	.	.	.	.	„ Queen's Bench Division.
Qu.	.	.	.	.	„ <i>Quære</i> .
Que.	.	.	.	.	„ Quebec.
R. C.	.	.	.	.	Rural Council.
R. D. C.	.	.	.	.	Rural District Council.
R. S. A.	.	.	.	.	Rural Sanitary Authority.
R. S. C.	.	.	.	.	Revised Statutes of Canada.
R. S. C.	.	.	.	.	Rules of the Supreme Court, 1883.
Refd.	.	.	.	.	Referred.
Regn. of Trade Mk.	.	.	.	.	Registration of Trade Mark.
Reg. of Trade Mks.	.	.	.	.	Registrar of Trade Marks.
Resp.	.	.	.	.	Respondent.
Restg.	.	.	.	.	Restoring.
Revsd.	.	.	.	.	Reversed.
Revsd.	.	.	.	.	Reversing.
Ry. Co.	.	.	.	.	Rail. Co. or Railway Co.
S. C.	.	.	.	.	Same Case.
S. C. (name of colony following)	.	.	.	.	Supreme Court of a Colony.
S. E.	.	.	.	.	Settled Estates.
S. E. & C. Ry. Co.	.	.	.	.	South Eastern & Chatham Railway Co.
S. E. Ry. Co.	.	.	.	.	South Eastern Railway Co.
S. P.	.	.	.	.	Same Point.
S.S.	.	.	.	.	Steamship.
Sask.	.	.	.	.	Saskatchewan.
Sched.	.	.	.	.	Schedule.
<i>Sci. fa.</i>	.	.	.	.	<i>Scire facias</i> .
Sect.	.	.	.	.	Section.
Set. Land Act	.	.	.	.	Settled Land Act.
Settlmt.	.	.	.	.	Settlement.
Soc.	.	.	.	.	Society.
Soc. Anon.	.	.	.	.	Société Anonyme, etc.
Solr.	.	.	.	.	Solicitor.
Trade Mk.	.	.	.	.	„ Trade Mark.
Tram. Co.	.	.	.	.	„ Tramways Company.
U. C.	.	.	.	.	„ Urban Council.
U. D. C.	.	.	.	.	„ Urban District Council
U. S. A.	.	.	.	.	„ United States of America.
Union Assmt. Com.	.	.	.	.	„ Union Assessment Committee.
Urban S. A.	.	.	.	.	„ Urban Sanitary Authority.
V.-C.	.	.	.	.	„ Vice-Chancellor.
Workmen's Comp. Act	.	.	.	.	„ Workmen's Compensation Act.
Y. T.	.	.	.	.	„ Yukon Territory.



## MEANING OF TERMS USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

- "APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case. --
- "APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.
- "CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.
- "DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.
- "DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.
- "EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.
- "EXTENDED" (Extd.).—Compare "APPLIED," *supra*.
- "FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.
- "NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.
- "OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.
- "REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.
- "MENTIONED" (Men'd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.



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<i>Contempt of Court</i> . . . . .	„ CONTEMPT OF COURT.	<i>Suretyship</i> . . . . .	„ GUARANTEE.
<i>Equitable Execution</i> . . . . .	„ EXECUTION.	<i>Trustees</i> . . . . .	„ TRUSTS AND TRUS- TEES.
<i>Mortgage</i> . . . . .	„ MORTGAGE.		
<i>Official Receiver</i> . . . . .	„ BANKRUPTCY; COM- PANIES.	<i>Winding Up</i> . . . . .	„ COMPANIES.



## Part I.—Appointment out of Court.

**1. Receiver of benefice—Leases of Ecclesiastical Benefices Act, 1571 (c. 20).]**—To a declaration in covenant by a sequestrator for rent due under a lease, whereby D., the rector of S., demised to deft. the rectory & parsonage, with the tithes, except the parsonage house, etc., for a term of fourteen years, if the rector should so long live, at the yearly rent of £980, deft. pleaded, that, before the sequestration, D. was indebted to V. & M. in large sums of money, & requested them to give time for payment, & also requested V. to lend him a further sum, which they consented to do, & V. lent the money, upon the terms that D. should execute the indenture in the declaration mentioned, & also another indenture for the purpose of authorising deft. to apply the rent as the agent & for the benefit of V. & M.; that D. did execute the indenture in the declaration mentioned, & also another indenture of the same date, between deft. of the one part, & D. of the other part, whereby, after reciting the demise to deft. of the rectory & parsonage, with the tithes, except the parsonage-house, & also reciting, that, by a deed of even date therewith, D. had appointed deft. his receiver, agent, & attorney, to collect the tithes, rents, etc., except as in the lease excepted, with a declaration that deft. might retain a percentage for his trouble; & it was thereby agreed that he should apply the surplus of the tithes, rents, etc., as D. should direct; D. covenanted with deft., & directed that the surplus of the tithes, rents, etc., should be applied, amongst other purposes, in payment of the debts due to V. & M., with interest, after payment of certain taxes, rates, & outgoings, & the premiums on policies of assurance on the life of D., for the benefit of V. & M. The plea then alleged, that the lease was executed as part of the same transaction; that D. well knew that deft. was the attorney & agent of V., & that the indenture was made by D. with deft. as such agent & attorney, & to enable him to apply the rent reserved by the lease, in the manner above mentioned; that there was due from D. to V. & M. moneys exceeding the damages in the declaration mentioned, & the rent due under the lease; & that deft. had applied the moneys alleged to be due for rent according to the provisions of the second indenture. Deft. pleaded also, that, before the execution of the lease, D. was indebted to V. & M. & others, & in consideration thereof, & of a further sum to be lent by V., & of deft. consenting to be V.'s agent, D. agreed with the deft. & V. to charge the rectory S. with that sum & the others, by making the lease in the declaration mentioned & appointing deft. receiver of the tithes, rents, etc., in order that he might apply the rent reserved by the lease in payment of the moneys so to be charged on the benefice; that the money was advanced by V.; & that D., in pur-

suance of the agreement, & in order to charge the benefice, executed the lease, & also an indenture appointing deft. receiver: that the lease was part of the same transaction, & was a charging of the benefice contrary to the statute. On special demurrers to these pleas:—*Held*: the former plea did not show any defeasance of the covenant to pay the rent reserved by the lease; but under the second indenture, there was an equitable assignment or valid appropriation of so much of the rent as was necessary to pay V. & M. their debts; & such assignment was a charge upon the benefice & therefore the lease, which was part of the same transaction, was void under 13 Eliz. c. 20.—*WATHEW v. CRAFTS* (1851), 6 Exch. 1; 20 L. J. Ex. 257; 16 L. T. O. S. 491; 155 E. R. 428.

**2. Receiver of rents—By rule of building society—Interference with action for breach of covenant.]**—Covenant by trustees of a benefit building society upon a mtge. security given by one of the members upon an advance made to him out of the funds of the society pursuant to the rules thereof, whereby deft. covenanted to pay money, & observe the rules of the society. The breaches alleged were the non-payment of the instalments of the money advanced, & of other sums due from him for subscriptions & fines.

Plea set out a rule of the society authorising the directors, in case of the member failing to pay or observe the rules, to appoint a person to collect the rents of the mtged. premises, & in case of obstruction by the member to sell the same; & then alleged that deft. had always been willing to permit any person appointed by the directors to collect the rents, but that they had neglected to do so:—*Held*: this plea was bad, as the right to appoint a receiver did not interfere with the right of action for breach of deft.'s express covenant.—*REEVES v. WHITE* (1852), 17 Q. B. 995; 21 L. J. Q. B. 169; 18 L. T. O. S. 271; 16 J. P. 118; 16 Jur. 637; 117 E. R. 1562.

*Annotations*:—*Mentd.* Callaghan *v.* Dolwin (1869), L. R. 4 C. P. 288; *Huckle v. Wilson* (1877), 2 C. P. D. 410; *Davies v. Second Chatham Permanent Benefit Bldg. Soc.*, *Mackenzie v. Everton & West Derby Permanent Benefit Bldg. Soc.* (1889), 61 L. T. 680.

**Appointment by debenture-holders.]—See COMPANIES, Vol. X., pp. 791–793, 794, 811, Nos. 4971–4983, 5004, 5184.**

**Appointment as remedy of mortgagee.]—See MORTGAGE, Vol. XXXV., pp. 528–531, Nos. 2598–2615.**

**Effect of appointment.]—See Part III., post.**

**Powers & duties.]—See Part IV., post.**

**Liabilities.]—See Part V., post.**

**Remuneration & allowances.]—See Part VII., post.**

**Accounts.]—See Part VIII., post.**

**Discharge.]—See Part IX., post.**

**Position of sureties.]—See Part X., post.**

## Part II.—Appointment by Court.

### SECT. 1.—JURISDICTION

#### SUB-SECT. 1.—IN GENERAL.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 45.

**3. Effect of Judicature Acts.]**—In an action for partition where one of the co-owners is in occupation though not in exclusive occupation of the property the ct. has jurisdiction under Jud. Act, 1873 (c. 66), s. 25 (8), to appoint a receiver until the hearing.—*PORTER v. LOPES* (1877), as reported in 7 Ch. D. 358.

*Annotations*:—*Reid*, Real & Personal Advance Co. v. McCarthy & Smith (1879), 40 L. T. 878; Carter v. Fey, [1894] 2 Ch. 541; Collison v. Warren, [1901] 1 Ch. 812. *Mentd.* Sartori v. Bartley (1879), 48 L. J. Ch. 519; Belcher v. Williams (1890), 45 Ch. D. 510; Hexter v. Pearce, [1900] 1 Ch. 341.

**4. — Whether jurisdiction enlarged.]**—Under that sub-sect. [Jud. Act, 1873 (c. 66), s. 25 (8)] the ct. may & does grant receivers when it never could have done so before. Thus, for instance, it has power to grant a receiver under that sect. where a plff. has himself the power of obtaining possession at law (*COTTON, L.J.*).—*ANGLO-ITALIAN BANK v. DAVIES* (1878), 9 Ch. D. 275; 47 L. J. Ch. 833; 39 L. T. 244; 27 W. R. 3, C. A.

*Annotations*:—*Appld.* Bryant v. Bull, Bull v. Bryant (1878), 10 Ch. D. 153. *Consd.* Re Watkins, *Ex p.* Evans (1879), 13 Ch. D. 252. *Appld.* Oliver v. Lowther (1880), 42 L. T. 47; Westhead v. Riley (1883), 25 Ch. D. 413. *Consd.* Holmes v. Millage, [1893] 1 Q. B. 551. *Reid*, Smith v. Cowell (1880), 6 Q. B. D. 75; Re Peace & Waller (1883), 24 Ch. D. 405; Re Pope (1886), 17 Q. B. D. 743; Re Whiteley, Whiteley v. Learoyd (1887), 56 L. T. 846; Cadogan v. Lyric Theatre, [1894] 3 Ch. 338; Harris v. Beauchamp, [1894] 1 Q. B. 801; Re Jones & Judgments Act, 1864 (1895), 39 Sol. Jo. 671; Tyrrell v. Painton, [1895] 1 Q. B. 202; Thompson v. Gill, [1903] 1 K. B. 760; R. v. Seife, [1908] 2 K. B. 121; Asburton v. Nocton, [1915] 1 Ch. 274; Re Pearce, Official Receiver v. Pearce (1918), 120 L. T. 334; Ideal Films v. Richards, [1927] 1 K. B. 374.

**5. — —.]**—Plff. in an action, which had been followed by a cross-action, obtained an order in both actions that his costs of the cross-action should be paid by deft. in the action, a married woman, entitled for life, for her separate use, to the dividends of a sum of stock, standing in the names of trustees, who were not parties to either action. Plff. had endeavoured to obtain a sequestration, but failed from not being able to find deft.'s address so as to serve the subpoena for costs. He then moved the ct. for a receiver, under Jud. Act, 1873 (c. 66), s. 25 (8). After service of the notice of motion, but before the motion was heard, the deft. made an affidavit, in which her address was set forth:—*Held*: the principle of *Anglo-Italian Bank v. Davies*, No. 4, ante, applied, & plff. was entitled to a receiver; & order made on the hearing of the motion accordingly.—*BRYANT v. BULL, BULL v. BRYANT* (1878), 10 Ch. D. 153; 48 L. J. Ch. 325; 39 L. T. 470; 27 W. R. 246.

*Annotation*:—*Appld.* Oliver v. Lowther (1880), 28 W. R. 381.

**6. — —.]**—*GAWTHORPE v. GAWTHORPE*, [1878] W. N. 91.

**7. — —.]**— before the Jud. Act, 1873 (c. 66), neither the Ct. of Q. B. nor the Ct. of Ch. could have made the order asked for on such an application as this. Then has the Judicature Act given the Court such a power? The question depends on sect. 25, sub-sect. 8. Those words are

very wide, & give to all the Divisions a larger power than the Ct. of Ch. possessed before. The power there given is of the largest kind, unless it is circumscribed in point of time by the words "interlocutory order." But it is said that interlocutory must mean something between action begun & final judgment. I cannot agree. In my opinion "interlocutory order" there means an order other than a final judgment or decree in an action (*BRETT, L.J.*).—*SMITH v. COWELL* (1880), 6 Q. B. D. 75; 50 L. J. Q. B. 38; 43 L. T. 528; 29 W. R. 227, C. A.

*Annotations*:—*Consd.* Morgan v. Hart, [1914] 2 K. B. 183. *Reid*, Manchester & Liverpool District Banking Co. v. Parkinson (1888), 22 Q. B. D. 173; Holmes v. Millage, [1893] 1 Q. B. 551.

**8. — —.]**—The ct. has a general power under Jud. Act, 1873 (c. 66), s. 25 (8), to appoint receivers (*CHITTY, J.*).—*Re CONEY, CONEY v. BENNETT* (1885), 29 Ch. D. 993; 54 L. J. Ch. 1130; 52 L. T. 961; 33 W. R. 701.

*Annotations*:—*Distd.* Holmes v. Millage, [1893] 1 Q. B. 551. *Reid*, Re Pemberton, Pemberton v. Royal Hospital for Incurables, [1907] W. N. 118. *Mentd.* Archer v. Archer, [1886] W. N. 66.

**9. — —.]**—(1) Before Jud. Act, 1873 (c. 66), the Ct. of Ch. exercised a jurisdiction in aid of judgments at law, & that jurisdiction was most frequently exercised in the case of a writ of *elegit* against land by the appointment of a receiver of the rents & profits of the land, which, when he had received them, were paid into ct. by the receiver, & in course of time were paid out to the judgment creditor in satisfaction *pro tanto* of his judgment. In this way he obtained payment of the money to which he was entitled under his judgment. There were, no doubt, some other cases in which the Ct. of Ch. would assist a creditor who had issued a *fi. fa.* against goods under a judgment at law. This was the extent of the jurisdiction of the Ct. of Ch. in aid of a judgment at Law before Jud. Act. That Act, by s. 25 (8), enabled the High Ct. to appoint a receiver "in all cases in which it shall appear to the ct. just or convenient that such order should be made," & it is under the jurisdiction thus conferred that the order now in question has been made (*FRY, L.J.*).

(2) The receiver holds the goods as agent for the ct., not for the creditor (*LORD ESHER, M.R.*).—*Re DICKINSON, Ex p.* CHARRINGTON & Co. (1888), 22 Q. B. D. 187; 58 L. J. Q. B. 1; 60 L. T. 138; 37 W. R. 130; 5 T. L. R. 82; 6 Morr. 1, C. A.

*Annotations*:—*As to* (2) *Appld.* Re Hastings, *Ex p.* Brown (1892), 61 L. J. Q. B. 654. *Consd.* Re Potts, *Ex p.* Taylor, [1893] 1 Q. B. 648; Re Pearce, *Ex p.* Official Receiver, The Trustees, [1919] 1 K. B. 354. *Reid*, Mason & Barry v. Soc. Industrielle et Commerciale des Métaux (1889), 5 T. L. R. 582; Re Tillett, *Ex p.* Kingscote (1889), 5 T. L. R. 269; Levasseur v. Mason & Barry (1890), 63 L. T. 700; Re Anglessey, De Galve v. Gardner, [1903] 2 Ch. 727. *Generally, Mentd.* Re Detmold, Detmold v. Detmold (1889), 58 L. J. Ch. 495.

**10. — —.]**—A judgment having been obtained in an action to recover money due, the judgment debtor died, leaving a will by which she appointed an exor. The judgment debtor at the time of her death was possessed of certain furniture & chattels, & was carrying on a business. The judgment remaining unsatisfied, the judgment creditors obtained an order at chambers appointing a certain person receiver of the furniture & chattels & of the business, & to get in & receive the debts

### PART II. SECT. 1, SUB-SECT. 1.

**31. Effect of Judicature Acts.]**—*KIRK v. BURGESS* (1888), 15 O. R. 608.—*CAN.*

## PART II.—APPOINTMENT BY COURT.

due to such business, & directing him to pay the balance which should appear due on his accounts in or towards satisfaction of the judgment. By a subsequent order the receiver was empowered to sell the furniture & the assets, property & effects of the business including the book debts:—*Held*: in the absence of any legal impediment to obtaining execution of the judgment in the ordinary course of law by *fi. fa.*, or attachment of debts, & there being no special circumstances showing it to be just or convenient that a receiver should be appointed, the order for appointment of a receiver was wrongly made, & ought to be rescinded.

Was there in this case any ground on which the ct. could properly make an order for the appointment of a receiver? It was said that it could be made under Jud. Act, 1873 (c. 66), s. 25 (8), which provides that an order may be made for the appointment of a receiver in all cases in which it shall appear to the ct. to be just or convenient that such order should be made. It is said that that sect. gives the ct. power to do what neither a ct. of law nor a ct. of equity could have done before the Act; & the case of *Smith v. Cowell*, No. 7, *ante*, seems to show that to be so, but the condition is that it shall appear to the ct. to be just or convenient that the order should be made (LORD ESHER, M.R.).—*MANCHESTER & LIVERPOOL DISTRICT BANKING CO. v. PARKINSON* (1888), 22 Q. B. D. 173; 58 L. J. Q. B. 262; 37 W. R. 264; 5 T. L. R. 135, C. A.

*Annotations*:—*Distd. Re Hartley, Nuttall v. Whittaker* (1892), 66 L. T. 588. *Apld. Goldschmidt v. Oberrheinische Metallwerke*, [1906] 1 K. B. 373. *Consd. Morgan v. Hart*, [1914] 2 K. B. 183. *Reid. Holmes v. Millage*, [1893] 1 Q. B. 551; *Harris v. Beauchamp*, [1894] 1 Q. B. 801.

11. —[—]—Under Jud. Act, 1873 (c. 66), s. 25 (8), the ct. has jurisdiction to appoint a receiver wherever it shall appear just or convenient so to do.—*FOXWELL v. VAN GRUTTEN*, [1897] 1 Ch. 64; 66 L. J. Ch. 53; 75 L. T. 368; 41 Sol. Jo. 80, C. A.

*Annotations*:—*Consd. John v. John*, [1898] 2 Ch. 573. *Reid. Marshall v. Charteris*, [1920] 1 Ch. 520.

12. —[—]—An order was made against debts in an action, who were defaulting trustees, for the payment of money into ct. Defts. having failed to comply with such order, an application was made by plffs. that a writ of attachment might issue against them. At debts' instance, however, the ct. made an order allowing payment by weekly instalments. L., one of debts., had made an affidavit on that occasion stating that all the property he possessed was the furniture in his house. It subsequently transpired that L. had executed bills of sale affecting the furniture; but that plffs., in other proceedings, had successfully disputed the validity of such bills of sale. An application was accordingly made on behalf of plffs. for the appointment of a receiver of the furniture by way of equitable execution. For de ft. L. it was contended that the legal & proper remedy of plffs. was by sequestration, & that the ct. had no jurisdiction to appoint a receiver:—*Held*: although under R. S. C., 1883, Ord. 42, r. 4, sequestration was the appropriate remedy yet under Jud. Act, 1873 (c. 66), s. 25 (8), the ct. had jurisdiction to appoint a receiver if it appeared just or convenient so to do; in the present case, it was

just & convenient to appoint a receiver, & an order must be made accordingly.

Every one knows that the construction which the cts. have put upon that sect. of the Act of Parliament is that it very much enlarges the practice of the ct., at any rate with regard to the appointment of a receiver (*KAY, J.*).—*Re WHITELEY, WHITELEY v. LEAROYD* (1887), 56 L. T. 846.

13. —[—]—An action by a married woman "suing in respect of her separate estate" was at the trial dismissed with costs, to be taxed & "payable out of her separate property, but not otherwise." The only separate property of plff. consisted of a share coming to her under a will. Before the taxation of debts' costs had been completed by certificate, the trustees of the will being about to distribute their estate & pay plff. her share, debts. applied for the appointment of a receiver to receive the share & hold it as security for the costs when taxed:—*Held*: independently of Jud. Act, 1873 (c. 66), s. 25, there was jurisdiction to protect by injunction or the appointment of a receiver the fund out of which the costs were payable, & a receiver ought to be appointed.

It [Jud. Act, 1873 (c. 66), s. 25] has not revolutionised the law, but it has enabled the ct. to grant injunctions & receivers in cases in which it used not to do so previously. I will not say where it had no jurisdiction to do so, that would be going too far, but where in practice it never did so, as, for example, in trespass & in the case of a first mtgee. who was out of possession (*LINDLEY, M.R.*).—*CUMMINS v. PERKINS*, [1899] 1 Ch. 16; 68 L. J. Ch. 57; 79 L. T. 456; 47 W. R. 214; 15 T. L. R. 76; 43 Sol. Jo. 112, C. A.

14. —[—]—The only sect. of Jud. Acts expressly applying to receivers is sect. 25 (8) of Jud. Act, 1873 (c. 66), which provides that a receiver may be appointed in all cases in which it shall appear to the ct. just or convenient that such order should be made (*VAUGHAN WILLIAMS, L.J.*).—*EDWARDS & Co. v. PICARD*, [1909] 2 K. B. 903; 78 L. J. K. B. 1108; 101 L. T. 416; 25 T. L. R. 815, C. A.

—**Appointment by way of equitable execution.**—*See, generally, EXECUTION, Vol. XXI., pp. 664 et seq.*

—**Right of mortgagee to a receiver.**—*See MORTGAGE, Vol. XXXV., p. 521, No 2505.*

15. **Jurisdiction independent of Judicature Acts.**—*CUMMINS v. PERKINS*, No. 13, *ante*.

16. **Discretionary exercise of jurisdiction—Governed by all the circumstances of the case.**—*OWEN & GUTCH v. HOMAN*, No. 397, *post*.

17. —[—]—The ct. has now a discretionary power to appoint a receiver whenever it appears to the ct. to be just & convenient. The discretion must be exercised with a view to all the circumstances of the case.—*JOHN v. JOHN*, [1898] 2 Ch. 573; 67 L. J. Ch. 616; 79 L. T. 362; 47 W. R. 52; 14 T. L. R. 583; 42 Sol. Jo. 731, C. A.

*Annotations*:—*Distd. Marshall v. Charteris*, [1920] 1 Ch. 520. *Mentd. Hewson v. Shelley*, [1913] 2 Ch. 384.

18. —**Probate proceedings.**—(1) A suit was instituted for the appointment of a receiver pending proceedings in the Probate Ct. to impeach

16 i. **Discretionary exercise of jurisdiction—Governed by all the circumstances of the case.**—The jurisdiction given to the cts. to appoint receivers must be most cautiously exercised.

whether it would be just & convenient to appoint a receiver.—*SHAROMAIN GURDWARA PARABANDHAK CMTEE. v. MAHANT DHARAM DAS* (1924), 1 L. R. 6 Lab. 74.—**IND.**

a. —[—]—In the appointment of a receiver the ct. acts only upon a proper case being made out for the

exercise of its jurisdiction according to well established principles, & in that sense only can a receiver be said to be *ex debito justitiae* whether the application be interlocutory or made at the hearing, whether the appointment of the receiver is the sole object of the action or only incidental to other relief, & whether the relief is sought at

into consideration, & then decide

**Sect. 1.—Jurisdiction: Sub-sects. 1 & 2, A. & B.]**

a will which had been already proved. A motion for a receiver was refused. The will was afterwards declared void, & pltf. then moved that the exors. might pay the costs of the suit for a receiver. The Vice-Chancellor made an order staying all proceedings in the suit without costs, except as to some infant defts. whose costs pltf. was ordered to pay:—*Held*: the appeal was one for costs only, & therefore it could not be entertained.

(2) The appointment of a receiver in such a suit is a matter entirely within the discretion of the Ct. —*GRIMSTON v. TIMNIS* (1870), 18 W. R. 781, L. J.

**19. — Whether subject to appeal—Appointment in action by debenture-holder.]**—The Ct. of Appeal will not, except in very special circumstances, interfere with the discretion of the judge in the appointment of a receiver & manager in a debenture-holder's action.—*Re NEW ZEALAND MIDLAND RY. CO., SMITH v. LUBBOCK* (1897), 13 T. L. R. 212, C. A.

— **Action to recover land.]**—*See REAL PROPERTY*, Vol. XXXVIII., pp. 783, 784.

**20. Appointment by court preferable—Where action pending.]**—A legal mtgee. being a possession of the mtgd. property, applied to the ct. for the appointment of a receiver:—*Held*: although the mtgee. might, under Conveyancing Act, 1881 (c. 41), appoint a receiver without coming to the ct., it was more desirable, where an action was pending, that the appointment should be made by the ct. under Jud. Act, 1873 (c. 66).—*TILLETT v. NIXON* (1883), 25 Ch. D. 238; 53 L. J. Ch. 199; 49 L. T. 598; 32 W. R. 226.

*Annotation*:—*Consol. Anchor Trust Co. v. Bell*, [1926] Ch. 805.

**SUB-SECT. 2.—PARTICULAR COURTS.****A. House of Lords.**

**21. On failure of lower court to appoint.]**—The creditors of a person resident in Ireland, filed a bill in the English Ct. of Ch., & obtained a decree for an account, etc., & afterwards, the property of the debtor lying chiefly in Ireland, filed a bill in the Ct. of Ch. there, praying to have the full benefit of the proceedings in the English suit. The Ct. of Ch. in Ireland dismissed such second bill as for want of jurisdiction:—*Held*: this House could either remit the case with directions, or appoint a receiver, & take such other proceedings as the Ct. of Ch. in Ireland might have done.—*HOULDITCH v. DONEGALL (MARQUESS)* (1834), 2 Cl. & Fin. 470; 8 Bli. N. S. 301; 6 E. R. 1232, H. L.

*Annotations*:—*Mentl. Price v. Dewhurst* (1837), Donnelly, 264; *Koster v. Sapte* (1838), 1 Curt. 691; *Henderson v. Henderson* (1844), 6 Q. B. 288; *Bank of Australasia v. Harding* (1850), 9 C. B. 681; *Paul v. Roy* (1852), 15 Beav. 433; *Barber v. Lamb* (1860), 8 C. B. N. S. 95; *Cookney v. Anderson* (1863), 1 De G. J. & Sm. 365; *Godard v. Gray* (1870), L. R. 6 Q. B. 139; *Abouloff v. Oppenheimer* (1882), 10 Q. B. D. 295; *Re Henderson, Nourion v. Freeman* (1887), 56 L. T. 829; *Re Maudslay & Field, Maudslay v. Maudslay & Field*, [1900] 1 Ch. 602.

**B. The Supreme Court of Judicature.**

*See Supreme Court of Judicature (Consolidation) Act*, 1925 (c. 49), ss. 45, 163 (1); R. S. C., Ord. 50, r. 6.

the instance of a judgment creditor, or of any one else.—*SMITH v. PORT DOVER & LAKE HURON RY. CO.* (1884), 8 O. R. 256; 12 A. R. 288.—*CAN.*

**b. —.]**—The ct. has power to appoint a receiver at any stage of the action & for any sufficient cause.—

*MERRIAM v. KENDERDINE REALTY CO. (No. 2)* (1915), 9 O. W. N. 35, 129; 34 O. L. R. 563.—*CAN.*

**c. —.]**—The appointment of receiver is a matter resting in the discretion of the ct.—*SIDHESWARI DABI v. ABHOYESWARI DABI* (1888), 1 L. R. 15 Calc. 818.—*IND.*

**22. Chancery Division.]**—Upon the purchase of a steam vessel, it was agreed among the purchasers that two of them should be the ship's husbands, & should not be removed except on certain grounds specified in the agreement. The ship's husbands thus appointed obtained a charterparty for her, & they privately stipulated for a weekly payment, by way of commission for themselves, in addition to the weekly sum payable by the terms of the charterparty. In the month of May following, the captain, who was a part owner, had a conversation with a clerk of the charterers, in which an observation of the latter led him to suspect that there was some underhand bargain: but the subsequent part of the conversation removed the suspicion. In Oct. he acquired correct knowledge of what had been done, & together with the other part owners, except the ship's husbands, gave the ship's husbands notice of dismissal. The ship's husband denied the right to dismiss them, & they possessed themselves of some of the machinery of the ship, which was at an engineer's for repairs. The other part owners thereupon filed a bill & moved for an injunction to restrain the ship's husbands from interfering with her sailing by detention of the machinery, & for a receiver of the machinery:—*Held*: the application was not too late; & on it appearing that a decree of possession could not be obtained in the Ct. of Admty., by reason of pltf's. being in possession of the hull, or at all events could not be obtained in time to enable the vessel to fulfil her engagement, the Ct. of Ch. had jurisdiction upon motion to appoint a receiver of the machinery, & to direct possession of it to be delivered to him: & an order was made accordingly, the captain being appointed receiver *ad interim*.

It was incumbent on defts. trusted & employed as they were to show pltf's. or one of them at least, acquainted, or in default for not having become acquainted, earlier certainly than the month of Oct. last, as the condition of being heard to allege effectually acquiescence, laches, or delay on pltf's. part (*KNIGHT BRUCE, L.J.*).—*BRENAN v. PRESTON* (1852), 2 De G. M. & G. 813; 1 W. R. 86; 42 E. R. 1090, L. J.J.

**23. —.]**—A bill having been filed by inspectors under a deed of inspectorship against debtor, charging him with obstructing them in their duties as inspectors & with collecting assets & applying them to his own purposes, pltf's. moved for an injunction & the appointment of a receiver:—*Held*: as the Ct. of Bkpcy. had apparently no jurisdiction to appoint a receiver, the Ct. of Ch. could do so.—*RICHER v. OWEN* (1868), 16 W. R. 963; *affd.*, 3 Ch. App. 820, L. J.J.

*Annotations*:—*Reid, Bell v. Bird* (1868), 1 L. R. 6 Eq. 635; *Martin v. Powning* (1869), 4 Ch. App. 356; *Stone v. Thomas* (1870), 5 Ch. App. 219.

**24. — Concurrent proceedings in Mayor's Court.]**—Debtor, against whom a bkpcy. petition had been presented under which a receiver had been appointed, died insolvent, having by will left all his property to his wife, & appointed her his extrix. Petitioning creditor thereupon filed a bill praying the appointment of a receiver until a personal representative should be duly constituted. Before the suit came on for hearing the extrix. proved the will, & thereupon pltf. amended

**d. — Whether questionable collaterally.]**—The propriety of an order or decree made in a cause in which the ct. has jurisdiction cannot be challenged collaterally.—*BHAIRAB CHANDRA DUTT v. NANDIRAM AGRANI* (1917), 1 L. R. 46 Calc. 70; 22 C. W. N. 520.—*IND.*

his bill, & prayed for administration of testator's estate & the appointment of a receiver. On the same day on which the amended bill was filed, a friendly creditor filed a bill for administration of testator's estate in the Lord Mayor's Ct., within whose jurisdiction the greater part of the assets was, & a decree was taken by consent & a receiver appointed:—*Held*: owing to the collusive nature of the proceedings in the Lord Mayor's Ct., a receiver should be appointed in the Chancery suit.—*NOTHARD v. PROCTOR* (1875), 1 Ch. D. 4; 45 L. J. Ch. 302; 33 L. T. 709; 24 W. R. 34, C. A.

*Annotation*:—*Mentd.* *Vickers v. Stevens & La Conception Gold Mining Co.* (1881), 44 L. T. 679.

—**Probate proceedings.**—*See* Part II., Sect. 6, sub-sect. 2 A. (a), *post*.

**25. Ct. of Appeal—Original application.**—*CHAPLIN v. YOUNG* (1862), 6 L. T. 97, L. C.

**26.** ———.]—In an action for the specific performance of an agreement to accept a lease of a farm, in which judgment had been given for deft., pltf. having appealed, the Ct. of Appeal, no previous application having been made to the Div. Ct. or a judge, appointed pltf. receiver & manager of the farm without security, on his undertaking to abide by any order which the ct. might make in the matter.—*HYDE v. WARDEN* (1876), 1 Ex. D. 309; 25 W. R. 65; 3 Char. Pr. Cas. 397, C. A.

**27. District registrar.**—On admissions by deft. on the pleadings, for accounts to be taken & inquiries to be made in a district registry & for the appointment of a receiver. A similar order made by the district registrar was, at the same time, pronounced to be *ultra vires* & irregular.—*BRASSINGTON v. CUSSONS* (1876), 24 W. R. 881; 3 Char. Pr. Cas. 361.

**28.** ———.]—District registrars have no power to appoint receivers.—*Re SMITH, HUTCHINSON v. WARD* (1877), 6 Ch. D. 692; 36 L. T. 178; 25 W. R. 452.

*Annotations*:—*Refd.* *Finlay v. Davis* (1879), 12 Ch. D. 735. *Mentd.* *Re Bowen, Bennett v. Bowen* (1882), 20 Ch. D. 538.

**29.** ———.]—In a creditor's action for the administration of testator's real & personal estate, which was commenced in a district registry, it was held, upon motion for judgment, that the ct. had jurisdiction to appoint a receiver.—*Re CAPPER, ROBERTSON v. CAPPER* (1878), 26 W. R. 434.

**30. Probate, Divorce & Admiralty Division—Probate proceedings—Power to appoint receiver in district registry.**—Although the ct. has power to direct accounts & inquiries to be taken & made in a district registry & has also power to appoint a receiver, it has no power to appoint a receiver in the district registry.—*WALKER v. ROBINSON* (1876), 34 L. T. 229; 24 W. R. 427; 3 Char. Pr. Cas. 266.

*Annotation*:—*Refd.* *Re Capper, Robertson v. Capper* (1878), 26 W. R. 434.

**31.** ———.]—*Re CAPPER, ROBERTSON v. CAPPER*, No. 29, *ante*.

**32.** ———.]—Jud. Act, 1873 (c. 66), s. 25 (8), enables any Judge of the High Ct. to appoint a receiver of deceased's estate, before grant of probate or administration, notwithstanding the absence of *lis pendens*; but applications for any such order being on the way to probate proceedings are properly made in the Probate Div., & if made

elsewhere will not be encouraged.—*Re PARKER, DEARING v. BROOKS* (1885), 54 L. J. Ch. 694.

*Annotations*:—*Expld.* *Salter v. Salter*, [1896] P. 291. *Refd.* *Re Wenge* (1911), 55 Sol. Jo. 553. *Mentd.* *In the Estate of Luke* (1909), 25 T. L. R. 825.

**33.** ———.]—Where an exor. had, before probate, & without the assent of his co-exor., intermeddled in the estate & made preparations to dispose of a portion of it, the ct. gave leave to the co-exor. to issue a writ against him claiming an injunction to restrain him from dealing with the estate before probate, & praying for the appointment of a receiver.—*In the Goods of MOORE* (1888), 13 P. D. 36; 57 L. J. P. 37; 58 L. T. 386; 52 J. P. 200; 36 W. R. 576.

*Annotation*:—*Refd.* *In the Estate of Luke* (1909), 25 T. L. R. 825.

**34.** ———.]—*Re MALLALIEW, RADCLIFFE v. MALLALIEW* (1891), 91 L. T. Jo. 398.

**35.** ———.]—*Re GREEN, GREEN v. KNIGHT*, [1895] W. N. 69.

*Annotation*:—*Refd.* *Re Wenge* (1911), 55 Sol. Jo. 553.

**36.** ———.]—A. entered a caveat against probate of a will. B., the exor. named in the will, warned it, & A. appeared. Before anything further had been done A. moved for an order for a receiver & administrator *pendente lite*:—*Held*: there was no jurisdiction to make the order, for the caveat proceedings did not constitute a *lis pendens*, & as no writ had been issued, there was no application to the ct. on which the ct. could act.—*SALTER v. SALTER*, [1896] P. 291; 65 L. J. P. 117; 75 L. T. 7; 45 W. R. 7; 12 T. L. R. 512; 40 Sol. Jo. 635, C. A.

**37.** ———.]—Pltf., as exor. of a will, propounded the will for probate, & deft. contested its due execution & claimed to be the heir-at-law & one of the next of kin. Pltf. did not admit deft.'s claim to be the heir-at-law, & alleged that the heir-at-law was a person residing in the United States. Pltf. moved for the appointment of a receiver & administrator *pendente lite* without citing the person in America stated to be the heir-at-law, upon the ground that rents had to be collected & payments made immediately. The ct. made the order.—*In the Goods of MESSITER-TERRY, MATHEW v. TOOZE* (1908), 24 T. L. R. 465; 52 Sol. Jo. 379.

**38. Admiralty proceedings—Action by equitable mortgagee of ship & freight.**—*THE EDDERSIDE, BELL v. EDDERSIDE SHIPOWNING CO., LTD.* (1887), 31 Sol. Jo. 744.

**39.** ———.]—In an action *in personam* by a pltf. claiming to be equitable mtgee. of the foreign ship *F.* & her freight to secure a liability incurred by him in accepting bills of exchange which had been drawn by the managing owner, it appeared that the alleged mtgee. was given to pltf. by the managing owner; that pltf., when he accepted the bills, thought the managing owner was sole owner, & that it was subsequently sworn on affidavit that the managing owner was only a part owner, but it did not appear whether the amount of the bills was in fact expended on the purposes of the ship. The *F.* was in an English port under charter to carry cargo to a foreign port, when, on application by pltf., the judge made an order appointing a receiver & authorising him to proceed with the ship to the foreign port & there receive the ship & all the

## PART II. SECT. 1, SUB-SECT. 2.—B.

**32.1. Probate, Divorce & Admiralty Division—Probate proceedings.**—*EASTWOOD v. EASTWOOD* (1867), 16 W. R. 320.—*IR.*

**e. High Court.**—The High Ct.

possesses the same powers with regard to the appointment of a receiver as are possessed & exercised by the cts. in England under Judicature Act.—*JAIRIESONDAS GANGADAS v. ZENABAI* (1890), 1 L. R. 14 Bom. 431.—*IND.*

**f. Judge in chambers.**—Receiver-

ship orders must be made by the ct. & cannot be made by a judge sitting in chambers.—*WAKEFIELD v. TURNER* (1898), 6 B. C. R. 216.—*CAN.*

**g. Continuation of appointment.**—A judge in chambers has



**Sect. 1.—Jurisdiction: Sub-sect. 2, B., C. & D.**  
**Sect. 2: Sub-sects. 1 & 2.]**

**freight due upon the voyage.** Defts. appealed:—**Held:** even assuming the managing owner to be only a part owner, yet, as it did not appear that the amount of the bills was not expended solely for the purposes of the ship, the ct. had authority to appoint a receiver to receive the whole of the freight, & in the circumstances, it was expedient that the order should stand.—**BURN v. HERLOFSON & SIEMENSEN, THE FAUST** (1887), 56 L. T. 722; 3 T. L. R. 382; 6 Asp. M. L. C. 126, C. A.

**Annotation:—Mentd.** Pringle v. Dixon (1896), 2 Com. Cas. 38.

**40. — Divorce proceedings.]—GORDON v. GORDON** (1912), *Times*, Nov. 26, Dec. 10.

**41. Bankruptcy proceedings.]—RICHES v. OWEN,** No. 23, *ante*.

**42. —.]—The Ct. of Bkpcy. has jurisdiction under Jud. Act, 1873 (c. 66), s. 25 (8), to appoint a receiver by way of equitable execution for the purpose of enforcing orders for the payment of money to the trustee in bkpcy.; but such an order will not, as a general rule, be made on an *ex p.* application.—**Re GOUDIE, Ex p. OFFICIAL RECEIVER**, [1896] 2 Q. B. 481; 65 L. J. Q. B. 671; 75 L. T. 277; 45 W. R. 80; *sub nom. Re GOUDIE, Ex p. OFFICIAL RECEIVER v. STRAND*, 3 Mans. 224.**

**Jurisdiction in lunacy.]—See LUNATICS, Vol. XXXIII., p. 169, No. 551.**

#### C. County Courts.

*See, generally,* COUNTY COURTS, Vol. XIII., p. 516, Nos. 657–660.

#### D. Other Courts.

**43. Mayor's Court.]—NOTHARD v. PROCTOR,** No. 24, *ante*.

**44. Lancaster Palatine Court.]—Re CONNOLLY BROTHERS, LTD., WOOD v. CONNOLLY BROTHERS, LTD.,** No. 113, *post*.

### SECT. 2.—APPLICATION FOR APPOINTMENT.

#### SUB-SECT. 1.—IN GENERAL.

*See R. S. C., Ord. 50, r. 6.*

**45. Necessity for appearance of persons interested in property.]—Where property is vested in trustees for the benefit of A., on a bill filed for the purpose of establishing securities given by A., the ct. will not direct any accounts against him in his absence, nor appoint a receiver.—**BROWN v. BLOUNT** (1830), 2 Russ. & M. 83; 9 L. J. O. S. Ch. 74; 39 E. R. 326.**

**Annotations:—Apld.** Shaw v. Shore (1835), 5 L. J. Ch. 79. **Distd.** Holmes v. Bell (1840), 2 Beav. 298. **Consd.** Kirwan v. Daniel (1849), 7 Hare, 347; Minter v. Kent, Sussex & General Land Soc. (1895), 72 L. T. 186. **Refd.** Lyde v. Hale (1835), 4 L. J. Ch. 180; M'Calmont v. Rankin (1850), 8 Hare, 1; Hele v. Bexley, Whitfield v. Bowyer, Whitfield v. Knight (1855), 20 Beav. 127. **Mentd.** Malcolm v. Scott (1843), 3 Hare, 39.

**46. — Mortgagee.]—A receiver cannot be appointed without mtgee. being before the ct., if a mtge. appears upon the face of pleadings.—**PRICE v. WILLIAMS** (1806), Coop. G. 31; 35 E. R. 466.**

**47. — Persons out of the jurisdiction.]—The grantor of an annuity secured by an equitable charge on certain lands which are subject to a prior**

charge, goes to reside abroad; but, by his agent, continues in the receipt of the rents & profits: the ct., on the application of the annuitant, will appoint a receiver, though the grantor has not appeared to the suit.—**TANFIELD v. IRVINE** (1826), 2 Russ. 149; 38 E. R. 292.

**Annotations:—Expld.** Shaw v. Shore (1835), 5 L. J. Ch. 79. **Refd.** Lyde v. Hale (1835), 4 L. J. Ch. 180; Meaden v. Sealey (1849), 6 Hare, 620. **Mentd.** Caddick v. Cook (1863), 1 New Rep. 463.

**48. —.]—In a suit for the specific performance of a contract for the sale of an estate in the West Indies, against a purchaser who resided there, & had got into possession without paying the purchase-money, & to which the consignees of the estate were also defts., an application for a receiver of the proceeds of the consignments was refused, the principal debt, the purchaser, having never been served with a subpoena.—**STRATTON v. DAVIDSON** (1830), 1 Russ. & M. 484; 39 E. R. 186, L. C.**

**Annotations:—Apld.** Shaw v. Shore (1835), 5 L. J. Ch. 79. **Refd.** Lyde v. Hale (1835), 4 L. J. Ch. 180.

**49. —.]—The ct. will not appoint a receiver, in a cause, where the persons representing the estate are out of the jurisdiction, & have not appeared in the suit.**

An annuity was granted out of property in Calcutta; the grantors became insolvent in India, & were afterwards made bkpts. in England. The assignees of insolvency in India received the rents, & sold the estate, but did not pay the annuity. The annuitant filed a bill against the assignees of bkpcy. in England, the assignees in India, & the purchaser, to obtain payment of the arrears. The assignees in India & the purchaser were out of the jurisdiction, & did not appear. The ct., under these circumstances, refused an application for an injunction & receiver.—**SHAW v. SHORE** (1835), 5 L. J. Ch. 79.

**50. —.]—Receiver granted against a debt, who was out of the jurisdiction.—**GIBBINS v. MAINWARING** (1837), 9 Sim. 77; 59 E. R. 287.**

**51. — Absconding defendant.]—Order for a receiver made before appearance against a debt., who had absconded to avoid service.—**DOWLING v. HUDSON** (1851), 14 Beav. 423; 51 E. R. 349.**

**Annotation:—Distd.** Caillard v. Caillard (1858), 25 Beav. 512.

**52. —.]—An order having been made to take the bill *pro confesso* against an absconding debt., & a decree made, the ct. refused to dispense with service of the decree before the expiration of the three years which debt. has allowed him to show cause against it. *Semble:* the appointment of a receiver may, in such a case, be proceeded with without service of the decree.—**JAMES v. RICE** (1854), 5 De G. M. & G. 461; 24 L. T. O. S. 57; 2 W. R. 658; 43 E. R. 949.**

**Annotations:—Mentd.** Fussell v. Daniel (1854), 10 Exch. 681; Hughes v. Lumley (1854), 4 E. & B. 274; Bond v. Bell (1857), 4 Drew. 157.

**53. —.]—Service of the writ in an action to recover possession of leasehold houses against an absconding debt., who had given the tenants notice to pay their rents to him, directed to be effected by leaving a copy of the writ at each of the houses, & by advertising in the *London Gazette* & the *Times*. In such a case the ordinary eight days' time will run from service of the copy of the writ & issue of the advertisements.**

You may also take an order for a receiver

jurisdiction to entertain an application to continue the appointment of a receiver made with the consent of debt. by the master in chambers.—

**POWELL v. SASKATCHEWAN LAND CO.** (1914), 30 W. L. R. 201; 7 W. W. R. 686.—**CAN.**

**h. Local master.]—In Saskatchewan**

a local master has jurisdiction to appoint a receiver.—**WAHL v. NUGENT**, [1924] 1 D. L. R. 157; [1924] 1 W. W. R. 49; 18 Sask. L. R. 1.—**CAN.**

(HALL, V.C.).—*CRANE v. JULLION* (1876), 2 Ch. D. 220; 24 W. R. 691; 2 Char. Pr. Cas. 209.

*Annotation*.—*Reid*, *Wolverhampton & Staffordshire Banking Co. v. Bond* (1881), 43 L. T. 721.

54. ———.]—Pltf., who resided in Ireland, & deft. entered into a partnership contract executed in London, deft. being described as a civil engineer of Victoria Street, Westminster, for the construction of a railway in Ireland. Deft. & his family went to reside in Ireland, he having to superintend the works in progress. The contract provided that the business should be carried on in Victoria Street & Ireland, & that the books should be kept at Victoria Street. After a very short time this clause was abandoned & the business & the books were carried on & kept in Ireland. Disputes having arisen, pltf., while residing for a short time in England, obtained leave from the Chief Clerk, upon an *ex p.* application in chambers, to issue & serve out of the jurisdiction a writ in an action for the taking of the accounts & for the appointment of a receiver & manager:—*Held*: under R. S. C. 1875, Ord. 11, rr. 1, 1A, the application of pltf. was improper, & the writ must be discharged with costs.—*TOTTENHAM v. BARRY* (1879), 12 Ch. D. 797; 48 L. J. Ch. 641; 28 W. R. 180.

55. ———.]—*Foreigner—Service of summons abroad.*—Pltf. having obtained judgment against deft., a foreigner resident out of the jurisdiction, a summons was issued by leave of a judge at chambers calling on deft. to show cause why a receiver should not be appointed. On an application for leave to serve this summons on deft. out of the jurisdiction:—*Held*: there was no jurisdiction to grant such leave.—*WELDON v. GOUNOD* (1885), 15 Q. B. D. 622; 1 T. L. R. 631, C. A.

*Annotations*.—*Reid*, *Re Bowron, Ex p. Brandon* (1886), 54 L. T. 128; *Re Busfield, Whaley v. Busfield* (1886), 32 Ch. D. 123.

56. ———.]—*Allen enemy.*—*ELLIS & EVERARD, LTD. v. HOCHBERG (COUNT)* (1914), 58 Sol. Jo. 809.

57. ———.]—*WILD (J.) & Co., LTD. v. KRUPPS (F.) AKT.* (1914), 58 Sol. Jo. 867.

58. ———.]—*Whether notice of motion sufficient.*—*HULBERT v. HANSON* (1848), 11 L. T. O. S. 197.

—*Effect of non-appearance of mortgagor.*—*See MORTGAGE, Vol. XXXV., p. 527, Nos. 2592-2597.*

59. *Prior incumbrancer objecting—Must assert legal right—& take possession.*—(1) A receiver appointed of the profits of a rectory under sequestration, & an injunction granted against enforcing sequestrations.

(2) The ct. will not allow a prior incumbrancer to object to the ct.'s appointing a receiver by anything short of a personal assertion of his legal right & a taking possession himself (*LORD ELDON, C.*).—*SILVER v. NORWICH (BP.)* (1816), 3 Swan. 112, n.; 36 E. R. 794, L. C.

*Annotations*.—*As to* (1) *Consd. Rhodes v. Mostyn* (1853), 1 Eq. Rep. 212. *Reid*, *White v. Peterborough (BP.)* (1818), 3 Swan. 109.

60. *Whether other claims may be joined.*—(1) The ct. will not treat a bill to restrain an acting partner from collecting or creating debts & appointing a receiver, as if it were in nature of a bill to restrain waste, whatever they might do where such partner should have been shown to have been guilty of culpable conduct or to be insolvent. Nor will they permit pltf. in aid of such a motion, to use an affidavit made & filed after the coming in of deft.'s answer: though in a case analogous

with that of irreparable waste, such an affidavit made & filed before answer may be used.

(2) An application for an injunction, & the appointment of a receiver should be made the subject of two successive motions.—*LAWSON v. MORGAN* (1815), 1 Price, 303; 145 E. R. 1410.

61. ———.]—Bill by infant pltf. by next friend for administration of the trusts of a settlement, for appointment of a guardian & receiver, & for an account of the proceeds of sales of part of the property which had been effected by deft., who was not a trustee of the settlement, & had not otherwise interfered. There was no other deft. A demurrer for multifariousness was overruled.—*THOMAS v. REES* (1855), 1 Jur. N. S. 197; 3 W. R. 281.

62. *Action for receiver—Not treated as action to restrain waste.*—*LAWSON v. MORGAN*, No. 60, *ante*.

63. ———.]—*Must not attempt discovery of merits of pending litigation.*—A bill for a receiver, pending a litigation as to probate, ought not to seek discovery in reference to the merits on that litigation.—*WOOD v. HITCHINGS* (1841), 3 Beav. 504; 10 L. J. Ch. 257; 49 E. R. 198.

*Annotation*.—*Reid*, *Horlock v. Patch* (1845), 10 Jur. 108.

64. *Executors condemned in costs in probate proceedings—Receiver pendente lite refused—Whether executors liable for further costs.*—*GRIMSTON v. TIMMS*, No. 18, *ante*.

65. *Indorsement of claim on writ—Appointment substantial object of action.*—Pltf. should indorse his writ with a claim for an injunction or receiver when the obtaining of either is a substantial object of his action.—*COLEBOURNE v. COLEBOURNE* (1876), 1 Ch. D. 690; 45 L. J. Ch. 749; 24 W. R. 235; 2 Char. Pr. Cas. 197.

#### SUB-SECT. 2.—BY WHOM MADE.

*See Metropolis Management Act, 1855 (c. 120), s. 188; Public Health Act, 1875 (c. 55), s. 239; Railway Companies Act, 1867 (c. 127), s. 4; Local Loans Act, 1875 (c. 83), s. 12; Licensing (Consolidation) Act, 1910 (c. 24); Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), ss. 45, 56 (1) (a), 225; R. S. C., Ord. 50, r. 6.*

66. *Defendant—Executor filing bill against co-executor.*—A motion by a deft. for a receiver is irregular, even in a case where one exor. filed a bill against his co-exor., insisting that a receiver was necessary.—*ROBINSON v. HADLEY* (1849), 11 Beav. 614; 18 L. J. Ch. 428; 14 L. T. O. S. 288; 50 E. R. 954.

67. ———.]—*Application before decree.*—*SARGANT v. READ*, No. 73, *post*.

—*Ex parte application.*—*See* No. 108, *post*.

68. *Appellant—Where decision deprives him of interest.*—*WOOD v. HITCHINGS*, No. 321, *post*.

69. *Creditor—Judgment creditor who has issued elegit.*—A judgment creditor, who has issued an *elegit*, is entitled to file a bill & have a receiver appointed.—*RHODES v. MOSTYN (LORD)* (1853), 1 Eq. Rep. 212; 21 L. T. O. S. 150; 22 L. T. O. S. 92; 17 Jur. 1007; 1 W. R. 866.

*Annotation*.—*Apld. Cadogan v. Lyric Theatre*, [1894] 3 Ch. 338.

70. ———.]—*Of unregistered loan society.*—A petition was presented by a creditor for winding up an unregistered loan society formed under Loan Societies Act, 1840 (c. 110), which at the

pltf. debtor cannot obtain an order for the appointment of a receiver over his own estate.—*PIERS v. LATOUCHE* (1826), 1 Hug. 310.—*IR.*

#### PART II. SECT. 2, SUB-SECT. 2.

*k. Creditor—Judgment creditor for collection of proceeds of promissory note*

—*Where attachment would lie.*—*MARSHALL v. ROGERS (Alta.)*, [1924] 1 D. L. R. 888.—*CAN.*

1. *Whether adult plaintiff.*—An adult

## RECEIVERS.

### Sect. 2.—Application for appointment: Sub-sects. 2, 3, 4 & 5.]

date of the petition consisted of less than seven members:—*Held*: under Cos. Act, 1862 (c. 89), ss. 199, 200, an order for winding up could not be made; but, the society desiring to be wound up, the ct. directed the petition to stand over in order that an action for dissolution of partnership might be commenced. An action having been commenced accordingly, the society was ordered to be dissolved, & at the request of creditors a person was appointed to act as receiver or liquidator.—*Re BOLTON BENEFIT LOAN SOCIETY, COOP v. BOOTH* (1879), 12 Ch. D. 679; 49 L. J. Ch. 39; 28 W. R. 164.

*Annotation*:—*Reid*. *Re Bowling & Welby's Contract*, [1895] 1 Ch. 663.

71. — *Of deceased person's estate.*]—*Re MALLALIEW, RADCLIFFE v. MALLALIEW* (1891), 91 L. T. Jo. 398.

72. — *Assignee of judgment creditor—Application under Railway Companies Act, 1867 (c. 127).*]—Under above Act, s. 4, a person to whom a judgment against a railway co. has been assigned may, without joining his assignor, apply for the appointment of a receiver & manager of the co.'s undertaking.—*Re FRESHWATER, YARMOUTH & NEWPORT RY. CO.* (1913), 29 T. L. R. 568; 57 Sol. Jo. 593.

73. *Plaintiff & defendant—Single order—Carriage of order given to one party.*]—Under R. S. C., 1875, Ord. 52, r. 4, deft. in an action may, before judgment, apply for an injunction & a receiver. Deft. may do so notwithstanding that pltf. has already served notice of motion for the like purpose; & in such case one order will be made on the two motions, but the conduct of the proceedings will in general be given to pltf. —*SARGANT v. READ* (1876), 1 Ch. D. 600; 45 L. J. Ch. 206; 2 Char. Pr. Cas. 81.

*Annotations*:—*Consd.* *Re Lloyd, Allen v. Lloyd* (1879), 12 Ch. D. 447. *Reid*. *Taylor v. Neate* (1888), 39 Ch. D. 538; *Burt, Boulton & Hayward v. Bull*, [1895] 1 Q. B. 276; *Collison v. Warren*, [1901] 1 Ch. 812. *Mentd.* *Carter v. Fcy*, [1894] 2 Ch. 541.

74. — — — — —]—*SHEPARD v. BEANE*, [1876] W. N. 61; 2 Char. Pr. Cas. 230.

75. *Plaintiff suing on behalf of class—Objection by one of class—Application to be made defendant.*]—In an action commenced by a bondholder on behalf of himself & all other bondholders, pltf. obtained an order for a receiver. One of the bondholders represented by pltf., being dissatisfied with the order, applied for leave to appeal:—*Held*: the order having been made in favour of the class to which appct. belonged, & having been obtained by pltf., who represented him in the action, he could not appeal against it. *Semble*: the proper course for the dissentient shareholder to pursue was to apply to the ct. below to be made a deft. to the action.—*WATSON v. CAVE* (No. 1) (1881), 17 Ch. D. 19; 44 L. T. 40; 29 W. R. 433.

*Annotations*:—*Reid*. *McHenry v. Lewis* (1882), 21 Ch. D. 202. *Mentd.* *May v. Newton* (1887), 34 Ch. D. 347.

*Mortgagee.*]—*See MORTGAGE, Vol. XXXV.*, pp. 520–522, 525, 531, Nos. 2496–2518, 2555, 2617–2620.

*Partner.*]—*See PARTNERSHIP, Vol. XXXVI.*, pp. 483, 484, Nos. 1460–1469.

### PART II. SECT. 2, SUB-SECT. 3.

*m. Pendente lite.*]—The order for appointment of a receiver can only be made where a suit has been instituted.—*Ex p. PEILLON* (1858), 2 Thom. 405.—*CAN.*

*n. — Foreclosure action.*]—*CROWE*

*v. HALLIDAY* (1788), 2 Ridg. Parl. Rep. 58.—*IR.*

921. *During amendment of pleadings.*]—Where an agreement was entered into under which deft.'s solr. was permitted to withdraw the defence pleaded by him & to prepare & deliver a new

### SUB-SECT. 3.—WHEN MADE.

*See R. S. C., Ord. 50, r. 6.*

76. *Before service of writ.*]—*PITCHER v. HELLIAR*, No. 78, *post*.

77. — — — — —]—*Re H.'s ESTATE, H. v. H.*, No. 103, *post*.

78. *Pendente lite—Appointment apart from his pendens.*]—A receiver of an infant's estate ordered upon filing the bill, & before a subpoena to appear had been served.—*PITCHER v. HELLIAR* (1781), 2 Dick. 580; 21 E. R. 396, L. C.

*Annotation*:—*Reid*. *Coward v. Chadwick* (1826), 2 Russ. 150, n.

79. — — — — —]—A receiver of the rents of real estates descended on an infant appointed on petition, without suit.—*Re LEEMING, Re GASCOYNE* (1851), 20 L. J. Ch. 550; 17 L. T. O. S. 231; 18 L. T. O. S. 3.

*Annotation*:—*Folld.* *Re Reynolds* (1852), 19 L. T. O. S. 311.

80. — — — — —]—Receiver of the rents of real estates appointed on petition.—*Re REYNOLDS* (1852), 19 L. T. O. S. 311.

81. — — — — —]—*Re PARKER, DEARING v. BROOKS*, No. 32, *ante*.

82. — *Appointment of new trustees.*]—Receiver appointed upon motion in a suit for the appointment of new trustees, reasons being assigned for the delay in bringing the cause to a hearing.—*BARTLEY v. BARTLEY* (1845), 9 Jur. 224.

83. — *Originating summons.*]—*Semble*: on an originating summons for foreclosure, the ct. has jurisdiction to appoint a receiver.—*GEE v. BELL* (1887), 35 Ch. D. 160; 56 L. J. Ch. 718; 56 L. T. 305; 35 W. R. 805.

*Annotations*:—*Mentd.* *Kingdon v. Kirk* (1887), 37 Ch. D. 141; *Jamaica Ry. v. Colonial Bank*, [1905] 1 Ch. 677.

84. — — — — —]—*SMEED, DEANE & CO., LTD. v. CUMBERLAND* (1887), 31 Sol. Jo. 659.

85. — — — — —]—*For administration.*]—In an administration action commenced by originating summons, a receiver may, in a proper case, be appointed immediately after the service of the summons, & before any order for administration has been made.—*Re FRANCKE, DRAKE v. FRANCKE* (1888), 57 L. J. Ch. 437; 58 L. T. 305.

86. — *Petition—As to appointment of executor—No action as to validity of will.*]—The ct. has no jurisdiction to appoint a receiver of the real estate of deceased when the only litigation is by petition in reference to the individual appointed exor., & there is no suit pending touching the validity of the will.—*GRANT v. GRANT* (1869), L. R. 1 P. & D. 654; 38 L. J. P. & M. 55; 20 L. T. 684; 33 J. P. 678.

87. — — — — —]—*In lunacy—Before service of petition.*]—*Re POUNTAIN*, No. 111, *post*.

88. — *Caveat proceedings.*]—*SALTER v. SALTER*, No. 36, *ante*.

89. *Before appearance.*]—*CAILLARD v. CAILLARD*, No. 104, *post*.

90. *Before defence.*]—*DUCKWORTH v. TRAFFORD* (1810), 18 Ves. 283; 34 E. R. 324, L. C.

91. — — — — —]—*WOODYATT v. GRESLEY*, No. 449, *post*.

92. *During amendment of pleadings.*]—After answer the bill was amended & a plea was put in to the amended bill:—*Held*: the original bill having been answered, the pendency of the plea

defence:—*Held*: an order for the appointment of a receiver, made while the first defence was on the record, & of which had not been abandoned, & of which neither deft., nor his solr., had notice, was irregularly made & must be set aside with costs.—*BOAK v. HIGGINS* (1900), 32 N. S. R. 494.—*CAN.*



to the amended bill did not prevent the hearing of a motion for a receiver.—*THOMPSON v. SELBY* (1841), 12 Sim. 100; 59 E. R. 1069.

**93. After decree.]**—A receiver appointed after decree upon motion, in an urgent case.—*THOMAS v. DAVIES* (1847), 11 Beav. 29; 50 E. R. 727.

*Annotation:*—*Distd. Fallows v. Dillon* (1852), 1 W. R. 101.

**94. — Partition action—Pending appeal.]**—*WRIGHT v. VERNON*, No. 426, *post*.

**95. — Administration summons—Order made in proper case.]**—*BROOKER v. BROOKER*, No. 345, *post*.

**— Equitable execution.]**—*See* EXECUTION, Vol. XXI., pp. 664 *et seq*.

**96. At trial of action.]**—(1) Under Jud. Act, 1873 (c. 66), s. 25 (8), the ct. has a discretion as to the appointment of a receiver.

(2) A receiver may be appointed at the instance of a legal mtgee., but he has no absolute right to a receiver.

(3) The power given by Jud. Act, 1873 (c. 66), s. 25 (8), can be exercised at the trial of an action as well as upon an interlocutory application.

(4) I will, the mtgors. not objecting, appoint [the mtgee.] himself receiver, without salary & without security (NORTH, J.).—*Re PRYTHERCH, PRYTHERCH v. WILLIAMS* (1889), 42 Ch. D. 590; 59 L. J. Ch. 79; 61 L. T. 799; 38 W. R. 61.

*Annotation:*—*Generally, Mentd. Anchor Trust Co. v. Bell*, [1926] Ch. 805.

**97. On interlocutory application.]**—*Re PRYTHERCH, PRYTHERCH v. WILLIAMS*, No. 96, *ante*.

**Mortgage proceedings.]**—*See* MORTGAGE, Vol. XXXV., p. 527, Nos. 2588–2591.

#### SUB-SECT. 4.—HOW MADE.

*See* R. S. C., Ord. 50, r. 6; Ord. 54, r. 12 (c).

**98. In open court—Appointment in place of receiver already in possession.]**—Application for the appointment of a receiver in the first instance must be made to the ct., but if a fresh receiver is sought in the place of one already appointed, that may be done in chambers.—*GROTE v. BING* (1852), 20 L. T. O. S. 124; 1 W. R. 80.

**99. In chambers—Appointment due to vacancy occasioned by death of owner.]**—*GROTE v. BING*, No. 98, *ante*.

**100. — Appointment by consent.]**—Application for appointment of receiver by consent should be by summons at chambers.—*BLACKBURN v. RAVENHILL* (1852), 22 L. J. Ch. 108; 20 L. T. O. S. 88; 16 Jur. 1085; 1 W. R. 51.

**101. — Protection of property—Defaulting trustees.]**—Where in an administration suit, begun by bill, an order had been in force for some years, under which trustees were directed to continue

to receive testator's income, but were ordered to pay the annuities given by his will, to pass their accounts & pay their balances into ct., the appointment subsequently of a receiver was held to be not a matter affecting the right to property, but only one connected with the management of property within Court of Chancery Act, 1852 (c. 80), & there was, consequently, jurisdiction to make the appointment in chambers in the first instance.—*BOOTH v. COLTON* (1868), 18 L. T. 384; 16 W. R. 683, L. JJ.

**Appointment by way of equitable execution.]**—*See* EXECUTION, Vol. XXI., pp. 670, 671, Nos. 2499–2511.

**Receiver in mortgage suits.]**—*See* MORTGAGE, Vol. XXXV., pp. 527, 506, Nos. 2588–2591, 2985–2989.

#### SUB-SECT. 5.—EX PARTE APPLICATION.

*See* R. S. C., Ord. 50, r. 6.

**102. Whether granted—Before service of writ.]**—*PITCHER v. HELLIAR*, No. 78, *ante*.

**103. — —.]**—Where bkpcy. & consequent loss to a trust estate is expected, a receiver may be appointed before the service of the writ in an action.—*Re H.'s ESTATE, H. v. H.* (1875), 1 Ch. D. 276; 45 L. J. Ch. 749; 24 W. R. 317; 2 Char. Pr. Cas. 80.

**104. — Before appearance.]**—*Ex p.* motion, before appearance, for a receiver refused.—*CAILLARD v. CAILLARD* (1858), 25 Beav. 512; 53 E. R. 733.

**105. — Pending grant of administration.]**—The ct., on an *ex p.* application, appointed a manager & receiver to carry on the business of an intestate pending proceedings in the Ct. of Probate for a grant of letters of administration.—*BLACKETT v. BLACKETT* (1871), 24 L. T. 276; 19 W. R. 559.

*Annotation:*—*Reid. Re Baker, Giddings v. Baker* (1882), 26 Sol. Jo. 682.

**106. — Protection of property.]**—Appointment of receiver where house falling into disrepair pending action of ejectment by landlord of house against tenant refused.—*HABERSHON v. GILL* (1875), Bitt. Prac. Cas. 45; 1 Char. Cham. Cas. 14.

*Annotation:*—*Expld. Pease v. Fletcher* (1875), 1 Ch. D. 273.

**107. — Action for specific performance.]**—*TAYLOR v. ECKERSLEY*, No. 280, *post*.

**108. — Application by defendant.]**—*HICK v. LOCKWOOD*, [1883] W. N. 48.

**109. — In special case.]**—A receiver ought not to be granted *ex p.* except in cases of extreme emergency (LINDLEY, L.J.).—*PIPERNO v. HARMSTON* (1886), 3 T. L. R. 219; *sub nom.* *PEPERNO v. HARMSTON*, 31 Sol. Jo. 154, C. A.

**110. — —.]**—*WALBROOK & Co. v. JONES & LEWIS* (1887), 3 T. L. R. 609, C. A.

**93 i. After decree.]**—A receiver will not be appointed in this ct. after a final decree.—*BARKER v. ROE* (1842), Long. & T. 655.—*IR.*

**o. — By new action.]**—A pltf. who has obtained a judgment declaring him entitled to certain royalties thereafter to accrue must bring a new action for a receiver & an account, & may not have such relief upon a motion in the first action.—*HOFFMAN v. MCCLOY* (1917), 38 O. L. R. 446; 33 D. L. R. 526.—*CAN.*

**p. — Decree for account in foreclosure action.]**—The ct. refused a receiver in a foreclosure suit after a decree to account & a report finding but half a year's interest due, there being no special circumstances.—*HACKETT v. SNOW* (1847), 10 L. Eq. 11. 220.—*IR.*

**q. Where other remedy available—Power to garnish.]**—An order for a receiver should not be made in respect of a fund which may be reached by garnishing process.—*MILLAR v. THOMPSON* (1900), 19 P. R. 294.—*CAN.*

**r. — Remedy ineffective.]**—When the circumstances are such as to justify the granting of an injunction against the disposition of goods, & it appears that an injunction is likely to be ineffective, the ct. may go the further step of appointing a receiver to take actual possession of the goods.—*KAY v. RATZ* (Alta.), [1918] 3 W. W. R. 885; 44 D. L. R. 145.—*CAN.*

#### PART II. SECT. 2, SUB-SECT. 5

**106 i. Whether granted—Protection of property.]**—After judgment a receiver

may be appointed *ex p.* in case of emergency or where there is danger apprehended in the disposal of property.—*STARK v. ROSS* (1896), 17 P. R. 237.—*CAN.*

**t. — Extreme urgency.]**—Save in cases of extreme urgency, a receiver should not be appointed upon an *ex p.* application.—*CHAPMAN v. ROSE-SNIDER FUR Co., ROSE v. ROSE-SNIDER FUR Co.* (1922), 69 D. L. R. 639; 51 O. L. R. 603.—*CAN.*

**u. — For management of business.]**—A receiver ought not to be appointed *ex p.*, especially for the purpose of taking possession of & managing a going business, except under extraordinary circumstances.—*TRUSTS & GUARANTEE Co. v. DRUMHELLER POWER Co.* (Alta.), [1924

**Sect. 2.—Application for appointment: Sub-sects. 5, 6, 7 & 8. Sect. 3.]**

**111. — Interim receiver of alleged lunatic's estate.**—In a proper case ct. will pending an application for an inquisition appoint an interim receiver of the estate of the supposed lunatic & if the case is urgent will do so upon an *ex p.* application.—*Re POUNTAIN* (1888), 37 Ch. D. 609; 57 L. J. Ch. 465; 59 L. T. 76, C. A. Annotations:—*Reid* *Re Plenderleith*, [1893] 3 Ch. 332; *Re Clarke*, [1898] 1 Ch. 336.

**112. —**—*Re PATRICK*, *BILLS v. TATHAM* (1888), 32 Sol. Jo. 798.

**113. —**—(1) Where a debenture-holder in a co. carrying on business in the County Palatine of Lancaster, the debentures creating a first charge on all the co.'s assets, & stipulating that the co. should not create any subsequent charge in priority thereto, commenced a representative action in the Ch. Div. of the High Ct. to enforce the debentures & gave notice of motion for the appointment of a receiver, & before the motion came on for hearing, the owner of an equitable charge granted by the co. after the issue of the debentures on land acquired by it in Manchester commenced an action in the Lancaster Palatine Ct. with full knowledge of the High Ct. action, to enforce his security & obtained *ex p.* the appointment of a receiver, who was subsequently continued on notice, notwithstanding that in the meantime, to the knowledge of the Palatine Ct., a different person had been appointed receiver in the High Ct. action. Upon a motion in the Ch. Div. by pltf. in the High Ct. action for an injunction to restrain pltf. in the Palatine action, who had since been added as deft. to the High Ct. action, from further proceeding with the Palatine action:—*Held*: the ct. had jurisdiction to grant the injunction & that jurisdiction ought to be exercised on the ground that the Palatine action was vexatious.

(2) Except under extraordinary circumstances the ct. ought not to appoint a receiver *ex p.*

(3) I understand the receiver appointed by the Vice-Chancellor is in actual possession & as he is an officer of the Palatine Ct., I think the proper course would be to apply in that action for his discharge (*PARKER, J.*).—*Re CONNOLLY BROTHERS, LTD.*, *WOOD v. CONNOLLY BROTHERS, LTD.*, [1911] 1 Ch. 731; 80 L. J. Ch. 409; *sub nom. Re CONNOLLY BROTHERS, LTD.*, *WOOD v. CONNOLLY BROTHERS, LTD.*, 104 L. T. 693, C. A.

Annotations:—*As to* (1) *Reid*, *Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536; *Cohen v. Rothfield*, [1919] 1 K. B. 410.

**114. — Leave to serve notice of motion with originating summons—Action for foreclosure.**—*SMEED, DEANE & Co., LTD. v. CUMBERLAND* (1887), 31 Sol. Jo. 659.

**115. — Alimony in arrear—Bill of sale on husband's furniture.**—Where money was due to the wife for arrears of alimony & taxed costs, & her husband had a bill of sale on his furniture, the ct., on an *ex p.* application, appointed a receiver of the amount said to be standing in the husband's name at his bank over the next motion day, & limited to the amount stated in the affi-

davits.—*ANGLISS v. ANGLISS* (1893), 69 L. T. 462; 1 R. 532.

**116. — Previous inquiry as to intervention of Board of Trade—Receivership of company.**—Before an *ex p.* application is made by counsel for the appointment of a receiver of a co. he must inquire whether the Board of Trade have intervened, under their emergency powers, to appoint an inspector or other officer to supervise & control the business of the co.—*Re DENTON (WILLIAM), LTD., SMITH v. THE CO.* (1916), 33 T. L. R. 88; 61 Sol. Jo. 131.

**Concurrent application for interim injunction—Equitable execution.**—*See* EXECUTION, Vol. XXI., p. 672, No. 2514.

**SUB-SECT. 6.—EVIDENCE IN SUPPORT.**

**117. Affidavit—Made & filed after defendant's defence—Whether available to plaintiff.**—*LAWSON v. MORGAN*, No. 60, *ante*.

**118. — What allegations must be answered—Allegations not contained in statement of claim.**—*DAWSON v. YATES*, No. 153, *post*.

**119. — Misleading affidavit—Misdescription of deponent—Effect of.**—(1) In a debenture-holders action by pltf. S. had been by order of Nov. 24, 1916, appointed receiver & manager of the property & assets of defts. In an affidavit of W., described as a "director of public companies," he stated that for five years past he had known S., of No. 1, R. street, A., "accountant," the proposed receiver & manager, that the accountant had carried on business as such for upwards of five years at No. 1, R street & elsewhere in the City of London, & that S. was a person of respectability & a fit & proper person to be appointed receiver & manager of defts.' property & assets. S. was, according to the evidence, secretary to a political league, & had an office at No. 1, R street for two months past, & there was no evidence that he had carried on business as an accountant. On motion to discharge S. from the receivership:—*Held*: the appointment had been procured by means of a misleading affidavit, & the receiver must be discharged.

(2) "Director of public companies" or "merchant" is not a proper description of a deponent in an affidavit, & does not conform to the requirements of R. S. C., Ord. 38, r. 8.—*Re CHURCH PRESS, LTD., VICTORIA HOUSE PRINTING CO., LTD. v. CHURCH PRESS, LTD.* (1917), 116 L. T. 247.

**SUB-SECT. 7.—EFFECT OF DEATH OF PARTY.**

**120. Order for receiver made.**—*LEDGARD v. HODGES* (1844), cited in 12 Ch. D. at p. 294. Annotation:—*Apld. Re Parker, Cash v. Parker* (1879), 12 Ch. D. 293.

**121. — Plaintiff to secure appointment of administrator de bonis non.**—In a creditor's action for administration against an extrix. a decree had been made & a summons taken out for

2 D. L. R. 208; [1924] 1 W. W. R. 1029.—CAN.

**b. — Deft. absconding to avoid service.**—A receiver appointed on application of pltf., over the estate of deft., who absconded, to avoid being served with a subpoena to answer.—*MAQUIRE v. ALLEN* (1899), 1 Ball & B. 75.—IR.

*appointment on death*

*of receiver.*—The application for a reference for the appointment of a new receiver in the room of one who had died, may be by a motion *ex p.*—*MOLLOY v. HAMILTON* (1874), 8 I. R. Eq. 499.—IR.

**d. — Equitable execution.**—Application for the appointment of a receiver by way of equitable execution

should be by motions *ex p.*, & not on notice, except in pension cases.—*FLANNERY v. RYAN*, [1919] 2 I. R. 338.—IR.

**e. Concurrent application for interim injunction.**—*NEWHOUSE v. NORTHERN LIGHT, POWER & COAL CO., LTD. (Y. T.)* (1913), 26 W. L. R. 632; 15 D. L. R. 249.—CAN.

a receiver; but pending the summons the sole deft. died. The ct., on the application of pltf., appointed an interim receiver, whose powers were to extend for ten days after the appointment of an administrator *de bonis non*, pltf. undertaking to use all possible speed in obtaining the appointment of such administrator & to accept short notice of motion to discharge the receiver.—*Re PARKER, CASH v. PARKER* (1879), 12 Ch. D. 293; 48 L. J. Ch. 691; 40 L. T. 878; 27 W. R. 835.

*Annotations*.—*Distd. Re Shephard, Atkins v. Shephard* (1889), 43 Ch. D. 131. *Foll. Re Clark, Clark v. Clark* (1910), 55 Sol. Jo. 64.

**122. —[Protection of property pending constitution of representative.]**—On the death of a sole deft. after a motion has been launched for a receiver in respect of property alleged to be in his hands as trustee, the ct. has jurisdiction, in spite of the abatement of the action caused by his death, to appoint a receiver to protect the property pending the constitution of a representative of deceased.—*Re CLARK, CLARK v. CLARK* (1910), 55 Sol. Jo. 64.

#### SUB-SECT. 8.—EFFECT OF ACQUESCENCE OR DELAY.

**123. Acquiescence.**—Motion for a receiver on a mining concern refused upon a claim of partnership in the equitable interest, not raised, until the concern at a great expense became prosperous, & denied by the answer.—*NORWAY v. ROWE* (1812), 19 Ves. 144; 34 E. R. 472, L. C.

*Annotations*.—*Reid. Rock v. Mathews* (1848), 2 De G. & Sm. 227; *Sheppard v. Osenford* (1855), 1 K. & J. 491; *Talbot v. Hope-Scott* (1858), 4 K. & J. 96. *Mentd. Hodgson v. Dean* (1825), 2 Sim. & St. 221; *Deere v. Guest* (1836), 1 My. & Cr. 516; *Boddington v. Woodley* (1838), 8 Sim. 167; *Bowser v. Colby* (1841), 1 Hare, 109; *Manser v. Jenner* (1843), 2 Hare, 600; *Prendergast v. Turton* (1843), 13 L. J. Ch. 268; *Tatam v. Williams* (1844), 3 Hare, 347; *Galbreath v. Armour* (1845), 4 Bell, Sc. App. 374; *Haigh v. Jagger* (1845), 2 Coll. 231; *Boyd v. Boyd* (1848), 11 L. T. O. S. 325; *Albert (Prince) v. Strange* (1849), 1 Mac. & G. 25; *Cowell v. Watts* (1850), 2 H. & Tw. 224; *Re German Mining Co.* (1854), 2 Eq. Rep. 983; *Hart v. Clarke* (1854), 19 Beav. 349; *Myers v. United Guarantee, etc. Co., United Guarantee, etc. Co. v. Cleland* (1855), 7 De G. M. & G. 112; *Holmes v. Powell* (1856), 8 De G. M. & G. 572; *Clarke & Chapman v. Hart* (1858), 6 H. L. Cas. 633; *Clements v. Hall* (1858), 27 L. J. Ch. 349; *Whalley v. Whalley* (1860), 2 De G. F. & J. 310; *Hunter v. Stewart* (1861), 4 De G. F. & J. 168; *Erlanger v. New Sombbrero Phosphate Co.* (1878), 3 App. Cas. 1218; *Rule v. Jewell* (1881), 18 Ch. D. 660; *Palmer v. Moore*, [1900] A. C. 293.

**124. —[The comrs. of a canal make an agreement for letting the tolls, not warranted by the Act under which they derive their authority, & prejudicial to an interest expressly reserved by the Act to the public; this agreement is acquiesced in for forty-seven years, without complaint on the part of any of the shareholders, &, during that period, the lessee remains in undisturbed possession of the tolls: the ct. will not, at the suit of shareholders, disturb his possession by the appointment of a receiver.]**—*GRAY v. CHAPLIN* (1826), 2 Russ. 126; 38 E. R. 283, L. C.

*Annotation*.—*Reid. Bedford v. Ellis*, [1901] A. C. 1.

**125. —[Where property has been administered & applied without complaint according to a uniform course of management for a long series of years, the ct. will not, by an interlocutory order,**

disturb the possession upon the ground that such application is a breach of trust, unless it is perfectly clear that the party in whom the property is vested is a mere naked trustee, & has not, even to a limited extent, any of the rights or interests of an owner.

A motion for the appointment of a receiver of the estates vested in the Irish Society, at the instance of one of the London cos. claiming a beneficial interest in the income of the estates, was therefore refused.—*SKINNERS' CO. v. IRISH SOCIETY* (1836), 1 My. & Cr. 162; 40 E. R. 338.

**126. —[Chaytor v. Maclean]** (1848), 11 L. T. O. S. 2.

**127. Delay.**—*KIRWAN v. KIRWAN* (1830), Donnelly, 71; 47 E. R. 233.

**128. —[There would be a great deal of difficulty in this case in appointing a receiver because pltf. has allowed defts. materially to alter their position (MALINS, V.-C.).]**—*THOMSON v. ANDERSON* (1870), L. R. 9 Eq. 523; 39 L. J. Ch. 468; 22 L. T. 570; 34 J. P. 500; 18 W. R. 445.

*Annotations*.—*Mentd. Fraser v. Ehrensperger* (1883), 129 Q. B. D. 310; *Re Mitchell & Izard & Governor of Ceylon* (1888), 21 Q. B. D. 408.

#### SECT. 3.—RECEIVER NOT CLAIMED BY WRIT.

*See R. S. C., Ord. 50, r. 6.*

**129. Whether order made.**—*OSBORNE v. HARVEY*, No. 454, *post*.

**130. —[Receiver appointed on motion after decree, though not prayed for by the bill.]**—*BOWMAN v. BELL* (1844), 14 Sim. 392; 14 L. J. Ch. 119; 60 E. R. 409.

*Annotation*.—*Distd. Fallows v. Dillon* (1852), 1 W. R. 101.

**131. —[Bickford v. Chalker]** (1850), 14 Jur. 997.

**132. —[Chalk v. Sanders]** (1850), 15 L. T. O. S. 296; 14 Jur. 847.

**133. —[Motion by pltf. in a creditor's suit after decree, but before report, for the appointment of a receiver, the bill not praying for a receiver, refused with costs.]**—*FALLOWS v. DILLON (LORD)* (1852), 1 W. R. 101.

**134. —No fresh action necessary.**—*Held*: so long as the final judgment in an action remains unsatisfied, the action is a "cause or matter pending" within Jud. Act, 1873 (c. 66), s. 24 (7), & consequently, in an action by creditor against debtor in which pltf. has obtained final judgment the ct. has power, under that sub-sect. in order to satisfy the judgment, to grant equitable execution against deft. by appointing a receiver upon motion in that action, although the writ may not have been indorsed with a claim for a receiver; it being unnecessary in such a case to bring another action for the purpose.

A receiver was sometimes appointed by the Ct. of Ch., & I suppose may still be appointed by the Ch. Div., not to act till some other receiver who had been appointed in some other proceeding was discharged (*JESSEL, M.R.*).—*SALT v. COOPER* (1880), 16 Ch. D. 544; 50 L. J. Ch. 529; 43 L. T. 682; 29 W. R. 553, C. A.

*Annotations*.—*Distd. Wills v. Luff* (1888), 38 Ch. D. 197. *Consd. Holmes v. Millage*, [1893] 1 Q. B. 551. *Expld. Re Hearn, De Bertodano v. Hearn*, (1913), 108 L. T. 452.

#### PART II. SECT. 3.

**1291. Whether order made.**—A prayer for a receiver is not necessary to get a receiver appointed, if the facts stated authorise the appointment of one.—*MALCOLM v. MONTGOMERY* (1824), 2 Mol. 500.—*IR.*

#### PART II. SECT. 2, SUB-SECT. 8.

**1271. Delay.**—Pltf. in an administration suit obtained an order for a receiver in 1822. It was not made absolute or acted upon until 1834. The ct. directed that if it should appear that it was by pltf.'s default that the receiver was not appointed, & if he

might, through such appointment, have kept down the interest on his own demand, he should not now be entitled to so much of the interest on his debt as would have been paid by the receiver, had he been appointed as early as he might have been.—*NEWBY v. DREW* (1844), 7 I. Eq. R. 349; 1 Jo. & Lat. 446.—*IR.*

**Sect. 3.—Receiver not claimed by writ. Sect. 4**  
**Sub-sect. 1, A. & B. (a), (b) & (c).]**

**Consd. Ideal Films v. Richards**, [1927] 1 K. B. 374. **Refd. Leggett v. Western** (1884), 12 Q. B. D. 287; **Walmsey v. Mundy, Ex p. Goodenough** (1884), 50 L. T. 317; **Re Whiteley, Whiteley v. Learoyd** (1887), 56 L. T. 846; **Brerton v. Edwards** (1888), 21 Q. B. D. 226; **Harris v. Beauchamp**, [1894] 1 Q. B. 801. **Mentd. Ponnammā v. Arumogam**, [1905] A. C. 383.

**SECT. 4.—CHOICE[OF PERSON TO BE APPOINTED.**

**SUB-SECT. 1.—PROPER PERSONS.**

**A. In General.**

*See R. S. C., Ord. 50, r. 6.*

**135. Practising barrister.]**—The master's judgment is conclusive in appointing a receiver, unless some substantial objection is shown. It is no objection to a receiver, that he is a practising barrister: but the solr. in the cause cannot be receiver.—**GARLAND v. GARLAND** (1793), 2 Ves. 137; 30 E. R. 561, L. C.

*Annotation:—Refd. A.-G. v. Day* (1817), 2 Madd. 246.

**136. —.]**—**WILKINS v. WILLIAMS** (1798), 3 Ves. 588; 30 E. R. 1169, L. C.

*Annotation:—Refd. A.-G. v. Day* (1817), 2 Madd. 246.

**137. —.]**—**WYNNE v. NEWBOROUGH (LORD)**, No. 223, *post*.

**138. Person inexperienced in estate management.]**—**WILKINS v. WILLIAMS** (1798), 3 Ves. 588; 30 E. R. 1169, L. C.

*Annotation:—Refd. A.-G. v. Day* (1817), 2 Madd. 246.

**139. Member of Parliament.]**—**WYNNE v. NEWBOROUGH (LORD)**, No. 223, *post*.

**140. Person recommended by testator.]**—**WYNNE v. NEWBOROUGH (LORD)**, No. 223, *post*.

**141. Relationship to family.]**—**WYNNE v. NEWBOROUGH (LORD)**, No. 223, *post*.

**142. Peer.]**—A peer not to be the receiver. There is an objection to appointing a peer receiver; in many instances a receiver may be committed (**LORD ELDON, C.**).—**A.-G. v. GEE** (1813), 2 Ves. & B. 208; 35 E. R. 298, L. C.

**143. Person residing at great distance from property.]**—**WYNNE v. NEWBOROUGH (LORD)**, No. 223, *post*.

**144. —.]**—The ct. has jurisdiction to appoint a receiver & manager of the undertaking & assets of a co. on the application of the holder of a debenture issued by the co., secured by a floating charge, if the principal money thereby secured has become due before the time when the application is made, although at the date of the issue of the writ no default had been made in payment of interest, the money was not payable, & the security was not in jeopardy.

The holder of a debenture secured by a floating charge on the assets of the co. issued a writ in an action claiming an account, execution of the trusts of the debenture trust deed, realisation of the security, & the appointment of a receiver & manager. At the date of the issue of the writ the principal money secured was not due & no default had been made in payment of interest. Pltf. moved for the appointment of a receiver & manager, but the motion was refused

on the ground that the money was not due, no default had been made, & the security was not in jeopardy. After the money became due pltf. served another notice of motion for the appointment of a receiver & manager. This was opposed on the ground that pltf. had no cause of action when he issued his writ & that the action could not be maintained:—**Held**: pltf. as the holder of a floating security had a right to issue his writ before the money became payable, & the ct. had jurisdiction, inasmuch as the money was now payable, to appoint a receiver & manager.

The management of such an estate as this does not require constant attention, & I do not see why a manager should not do the work as well from Birmingham as any one residing in London (**WARRINGTON, J.**).—**Re CARSHALTON PARK ESTATE LTD., GRAHAM v. THE CO., TURNELL v. THE CO.**, [1908] 2 Ch. 62; 77 L. J. Ch. 550; 99 L. T. 12; 24 T. L. R. 547; 15 Mans. 228.

**145. Person having given security to Crown—In respect of particular office.]**—(1) When the master has approved one of two persons proposed, the ct. will not disturb the master's choice, unless the person he chooses is shown to be unfit, but does not enter into the more or less of fitness in the competitors (**PLUMER, V.-C.**).

(2) The master received their proposal of P. as receiver, but did very right in afterwards rejecting him upon finding he was Receiver-General for the county of C.; for having given, as such, security to the Crown, if he were to become indebted to the Crown & to the charity, the Crown might, by its prerogative process, sweep away all his property (**PLUMER, V.-C.**).

(3) I have not found any one contested case in which the receiver was a nominee only of the master, exclusive of the persons interested; though some of the masters, certainly, say they are entitled, if the parties interested neglect to propose, to make such nomination. This, however, is a special case, & one in which it is not necessary to decide upon the rights of the masters (**PLUMER, V.-C.**).—**A.-G. v. DAY** (1817), 2 Madd. 246; 56 E. R. 325.

**146. Guardian of Infant—No claim as of right.]**

A ct. of equity does not recognise the character of common law guardian as conferring a right to be receiver of the infant's estate.—**Ex p. BOURNE** (1846), 7 L. T. O. S. 43.

**147. Illiterate person.]**—When a receiver has been appointed the ct. will not remove him on the mere ground of his being an illiterate person unless some other reason can be given, such as mismanagement, dishonesty, or incompetency to manage the estate.

The duty of a receiver is merely to collect the rents & account for them to the parties interested (*per CUR.*).—**CHAYTOR v. MACLEAN** (1848), 11 L. T. O. S. 2.

**148. Official receiver.]**—**BRITISH LINEN CO. v. SOUTH AMERICAN & MEXICAN CO.**, No. 189, *post*.

**Receivers in company cases.]**—*See COMPANIES*, Vol. X., pp. 794, 795, Nos. 5004–5012.

**Receivers on behalf of mortgagees.]**—*See MORTGAGE*, Vol. XXXV., p. 520, Nos. 2494, 2495.

**PART II. SECT. 4, SUB-SECT. 1.—A.**

**1. Person inexperienced in estate management—Undertaking to act under directions of another person.]**—The appointment of a person as receiver over a kind of property, the management of which he does not understand, with an undertaking to act under the direction of a person who does understand it, is improper.—

**LUPTON v. STEPHENSON** (1848), 11 E. R. 484.—**IR.**

**g. Person unexceptionable to all parties.]**—A receiver, though an officer of the ct., stands in the position of trustee to all interested in the estate or fund. Therefore, in making the appointment the ct. will endeavour to select a person unexceptionable to all parties, not only fit & competent,

but also acceptable.—**SIMPSON v. OTTAWA & PRESOTT RY. CO.**, 1 Ch. Ch. 99.—**CAN.**

**h. Beneficed clergyman.]**—A clergyman having cure of souls, cannot act as a receiver, since the passing 5 Geo. 4, c. 91, s. 2.—**MAYNE v. MAYNE** (1825), 2 Mol. 362.—**IR.**

**k. Solicitor's clerk.]**—*Re STOKES* (1844), 7 L. E. R. 450.—**IR.**

**Receivers of partnership property.]—**See Nos. 170-173, *post*; **PARTNERSHIP**, Vol. XXXVI., p. 488, Nos. 1516-1529.

**B. Interested Party.**

**(a) In General.**

See R. S. C., Ord. 50, r. 6.

**149. Partiality—Next friend of infant.]—**The next friend of infant petitioners, not permitted to act as receiver.—**STONE v. WISHART** (1817), 2 Madd. 64; 56 E. R. 258.

**150. — Son of next friend of infant.]—**I think it is not right that the son of the next friend should be the receiver (**LORD ELDON, C.**).—**TAYLOR v. OLDHAM** (1822), Jac. 527; 37 E. R. 949.

**151. — Father.]—**The ct. will not in general, on minute circumstances, interfere with the master's appointment of a receiver, but on principle will do so.

The father evidently has a partiality, which renders him unfit for the office of receiver (**SHADWELL, V.-C.**).—**BLAKEWAY v. BLAKEWAY** (1833), 2 L. J. Ch. 75.

**152. — Hostility towards one of parties.]—****GILES v. NUTTALL, Re HOUSE IMPROVEMENT ASSOCN., LTD.** (1885), 78 L. T. Jo. 130, 352, C. A.

**153. Party to action—By consent.]—**Where facts, not founded on allegations in the bill, are introduced into affidavits in support of an application for a receiver, the ct. will disregard them, & a deft. acts properly in not answering them.—**DAWSON v. YATES** (1839), 1 Beav. 301; 2 Jur. 960; 48 E. R. 956.

**154. — Pending appeal.]—****HYDE v. WARDEN**, No. 26, *ante*.

**155. — Only in exceptional circumstances.]—****Re LLOYD, ALLEN v. LLOYD**, No. 159, *post*.

—**Compare** Sub-sect. 1, B. (d), *post*.

**156. Pecuniary interests conflicting with duties of office.]—****FRIPP v. CHARD RY. CO., FRIPP v. BRIDGEWATER & TAUNTON CANAL, ETC., CO.** (1853), 11 Hare, 241; 1 Eq. Rep. 503; 22 L. J. Ch. 1084; 17 Jur. 887; 1 W. R. 477; 68 E. R. 1264.

**Annotations:—****Reid.** Ames v. Birkenhead Docks Trustees (1855), 20 Beav. 332; **Griffin v. Bishop's Castle Ry.** (1867), 16 L. T. 345. **Mentd.** Preston v. Yarmouth Corpn. (1872), 20 W. R. 358; **Stephens v. Crown, Stephens v. Clark**, [1901] 1 Ch. 894.

**(b) Solicitor having Conduct of Case.**

**157. General rule.]—****GARLAND v. GARLAND**, No. 135, *ante*.

**158. Solicitor under lunacy commission—Receivership of lunatic's estate.]—**Solr. under commission of lunacy not to be appointed receiver of the estate of the lunatic.—**Ex p. PRINCE** (1817), 2 Mer. 452; 35 E. R. 1013.

**159. Member of firm of plaintiff's solicitors.]—**A., who was a member of a firm of solrs., was appointed exor. of a will, probate of which was contested. Immediately after testator's death A. commenced against his widow an action in the Ch. Div. to administer his estate, the writ in which was by leave of the ct. amended by asking for a receiver pending the litigation in the Probate Div. A.'s firm appeared for both pltf. & deft. in

the Ch. action, & an order was made appointing A. to be receiver of the personal estate until the decision of the Probate action, & also to receive the rents of the real estate, the only security ordered being the payment of £2,000 into ct., though the rents were about £3,500 per annum. The widow afterwards obtained an order to change her solrs., & moved to discharge A. from being receiver. She denied having given the firm any authority to appear for her, & it was established, at all events, beyond doubt that she had never sanctioned the appointment of A. as receiver:—**Held:** the appointment of A. as receiver was improper, for that the appointment of a member of the firm of pltf.'s solrs. to be receiver makes it impossible to secure the proper checking of the receiver's accounts, & a party to the action ought not, except in an extreme case, to be appointed a receiver without the assent of the other party; A. was accordingly discharged from being receiver.—**Re LLOYD, ALLEN v. LLOYD** (1879), 12 Ch. D. 447; 41 L. T. 171; 23 W. R. 8, C. A.

**(c) Trustees.**

**160. Whether appointed.]—****ANON.** (1797), No. 229, *post*.

**161. —.]—**(1) A trustee cannot be receiver, whether he is sole trustee, or jointly with others. (2) Receiver not passing his accounts shall always pay interest upon the balances in his hands.—**v. JOLLAND** (1802), 8 Ves. 72; 32 E. R. 278, L. C.

**Annotations:—****Reid.** Dixon v. Wilkinson (1859), 4 De G. & J. 508; **Re Dangar's Trusts** (1889), 41 Ch. D. 178. **Mentd.** British Mutual Investment Co. v. Cobbold (1875), L. R. 19 Eq. 627.

**162. — Without remuneration—In special case.]—**Trustee not to be receiver; unless a special case & without emolument.—**SYKES v. HASTINGS** (1805), 11 Ves. 363; 32 E. R. 1128, L. C.

**163. —.]—**General rule, that a trustee shall not be the receiver with emolument.—**SUTTON v. JONES, JONES v. SUTTON** (1809), 15 Ves. 584; 33 E. R. 875, L. C.

**164. — When no other can be procured.]—****HIBBERT v. JENKINS** (1805), cited in 11 Ves. 363; 32 E. R. 1128, L. C.

**Annotation:—****Expld.** Sykes v. Hastings (1805), 11 Ves. 363.

**165. Trustee paid receiver of testator's estate—Continuation on behalf of infant beneficiary.]—**Testator appointed, as trustee & exor., a person who, for many years, had been the paid receiver & manager of his estate. The tenant for life being an infant, the ct. continued the exor. as receiver at a salary.—**NEWPORT v. BURY** (1857), 23 Beav. 30; 53 E. R. 12.

**166. — Trustee in bankruptcy—Appointment by consent.]—**Where a receiving order had been made against members of a firm other than an infant partner, & after the date of such receiving order debtor executed an instrument dissolving the partnership, & transferring the assets to the solvent infant partner, the ct., on the application of the trustee in the bkpcy., declared the transfer void as against the trustee & appointed him, but by consent, receiver of the partnership assets.—**Re**

**PART II. SECT. 4, SUB-SECT. 1.—**  
**B. (a).**

**1. Party to action.]—**It is no objection to a receiver that he is a party in the cause.—**DOWNSHIRE (MARCHESS) v. TYRRELL** (1831), Hayes, 354.—**IR.**

**m. —.]—****TURNER v. DONEGAL (LORD)** (1845), 8 I. Eq. R. 235.—**IR.**

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**n. Heir-at-law.]—**The heir-at-law may be appointed the receiver, but except by consent, without poundage.—**FINGAL (EARL) v. BLAKE** (1829), 2 Mol. 50, 61.—**IR.**

**o. Person acting under direction of defendant.]—**The appointment of a receiver who acts under the directions of a deft. is objectionable.—**LUFTON v. STEPHENSON** (1848), 11 I. Eq. R. 484.—**IR.**

**p. Deb'tor.]—****Re GOLDING** (1888), 21 L. R. Ir. 194.—**IR.**

**PART II. SECT. 4, SUB-SECT. 1.—**  
**B. (b).**

**157 i. General rule.]—**A solr. is eligible as receiver, but he cannot act as solr. in any of the proceedings which it may be necessary for him to take as receiver.—**WILSON v. POK** (1825), 1 Hog. 322.—**IR.**



*Sect. 4.—Choice of person to be appointed: Sub-sect. 1, B. (c), (d), & C.; sub-sects. 2 & 3.]*

BEAUCHAMP BROTHERS, *Ex p. CARR & BEAUCHAMP* (1895), 2 Mans. 151; 15 R. 240.

**167. Trustee allowed to propose himself — Appointment with remuneration.]—**BRODIE *v. BARRY* (1811), 3 Mer. 695; 36 E. R. 267, L. C.

*Annotation:—*Refd. *Browell v. Reid* (1842), 6 Jur. 530.

**168. — One of two trustees declining to act — Infant beneficiary.]—**Where one of two trustees of real estate declines to act, the ct. will appoint a receiver on behalf of infant *cestuis que trust*; but with liberty to either of the trustees to offer himself.—*TAIT v. JENKINS* (1842), 1 Y. & C. Ch. Cas. 492; 62 E. R. 985.

**169. — To act without remuneration — Whether master bound to accept proposal.]—**Where a trustee offers to act as receiver without salary he will be allowed to propose himself, but the master is not bound to accept him.—*BANKS v. BANKS* (1850), 14 Jur. 659.

(d) *Persons with Special Interests or Qualifications.*

**170. Whether interest bar to appointment — Partner.]—**WILSON *v. GREENWOOD* (1818), 1 Swan. 471; 1 Wils. Ch. 223; 36 E. R. 469, L. C.

*Annotations:—*Consd. *Collins v. Barker*, [1893] 1 Ch. 578. Refd. *Francis v. Spittle* (1840), 9 L. J. Ch. 230; *Re Fernandes, Ex p. Hope* (1844), 3 Mont. D. & De G. 720; *Hall v. Hall* (1850), 3 Mac. & G. 79; *Tibbitts v. Phillips* (1853), 10 Hare. 355; *Whitmore v. Mason* (1861), 2 John. & H. 204; *Mackintosh v. Pogose*, [1895] 1 Ch. 105; *Re Johnson, Johnson, Ex p. Matthews & Wilkinson*, [1904] 1 K. B. 134; *Re Wombwell* (1921), 37 T. L. R. 625.

**171. —**—*BLAKENEY v. DUFAUR* (1851), 15 Beav. 40; 51 E. R. 451.

**172. —**—*Under the provisions of a partnership deed between two medical men, pltf. paid to deft. £100 as a premium on the purchase of one third of deft.'s business. Deft. had offered pltf., before the purchase, an opportunity of seeing the nature of the business, but of that offer he had not availed himself, & he retained out of the purchase-money so much as amounted to his estimated share of the business for the first year. Upon a bill filed for a dissolution of the partnership, for repayment of the £100, for assessment of pltf.'s damages, for an indemnity, an injunction & a receiver:—*Held: deft. to be receiver of the debts of the business, & an account to be taken of all the profits, but under the circumstances no costs on either side.—*AIREY v. BORHAM* (1861), 29 Beav. 620; 4 L. T. 391; 54 E. R. 768. *Annotation:—*Refd. *Belfield v. Bourne* (1893), 69 L. T. 788.

**173. —**—*Deft. not objecting, pltf. P., the senior partner, would be appointed receiver (BACON, V.-C.).—*PLEWS *v. BAKER* (1873), L. R. 16 Eq. 564; 43 L. J. Ch. 212.

*Annotations:—*Consd. *Law v. Garrett* (1878), 8 Ch. D. 26.

L. T. 552.

—*See, also, PARTNERSHIP, Vol. XXXVI., p. 488, Nos. 1516–1529.*

**174. — Tenant for life.]—**The tenant for life & two others having been by order in a cause appointed trustees of the will of 1787, & there being great & continuing decay of the house property, a receiver was, at the instance of the two

other trustees, appointed over the whole of the house property, but not over the manors & farms. The tenant for life was himself appointed receiver, he giving security, & to act without salary.—*POWYS v. BLAGRAVE* (1853), 18 Jur. 462; *subsequent proceedings* (1854), 4 De G. M. & G. 448, L. C.

**175. — Executor appointed receiver of testator's business.]—**WELLS *v. WALES* (1855), 4 De G. M. & G. 816; 3 W. R. 217; 43 E. R. 727; *sub nom. WELLS v. WALE, WESTLEY v. LESLIE*, 24 L. T. O. S. 286, L. C.

*Annotation:—*Refd. *Neave v. Douglas* (1857), 26 L. J. Ch. 756.

**176. — Lien holder.]—**U. S. A. *v. PRIOLEAU*, No. 475, *post*.

**177. — Person skilled in management of collieries.]—**Pltf. filed a bill to rescind a contract entered into by him to purchase a leasehold colliery, on the ground of misrepresentation. It was essential that the colliery should be worked to prevent flooding & avoid forfeiture of the lease. Pltf., who was in possession, moved for a receiver, & manager until the hearing. The ct. appointed a receiver & manager accordingly.

Pltfs. will nominate a receiver & defts. will be heard in chambers, but it will be my duty to see that a man is appointed who is skilled in the management of collieries & who will do the best he can for both parties (MALINS, V.-C.).—*GIBBS v. DAVID* (1875), L. R. 20 Eq. 373; 44 L. J. Ch. 770; 33 L. T. 293; 23 W. R. 786.

—*Liquidator.]—*See COMPANIES, Vol. X., pp. 794, 795, Nos. 5004–5012.

#### C. Creditors or Their Nominees.

**178. Whether creditor himself appointed.]—**The practice of a mtgee. in possession charging fees as a receiver, although he receives the profits for the liquidation of his debt, would, according to the language of the cases referred to, have such a tendency to usury, that the general rule of cts. of equity should be not to allow such a change (LORD WYNFORD).—*SAYERS v. WHITFIELD* (1829), 1 Knapp, 133; 12 E. R. 271.

*Annotations:—*Refd. *Henckell v. Daly* (1828), 1 Moo. P. C. C. 51; *Leith v. Irvine* (1833), 1 My. & K. 277; *Faulkner v. Daniel* (1843), 3 Hare, 199; *Bertrand v. Davies* (1862), 31 Beav. 429.

**179. —**—*Pltf., who had obtained judgment against defts., husband & wife, was upon his application ex p. appointed receiver [without security] of the income of the wife's reversionary interest under a will.—*FUGGLE *v. BLAND* (1883), 11 Q. B. D. 711, D. C.

*Annotations:—*Apld. *Westhead v. Riley* (1883), 25 Ch. D. 413; *Tyrell v. Painton*, [1895] 1 Q. B. 202.

**180. —**—*CUMMINS v. PERKINS*, [1899] 1 Ch. 16; 68 L. J. Ch. 57; 79 L. T. 456; 47 W. R. 214; 15 T. L. R. 76; 43 Sol. Jo. 112, C. A.

**181. Nominee of creditor.]—**WILKINS *v. WILLIAMS* (1798), 3 Ves. 588; 30 E. R. 1169, L. C.

*Annotation:—*Refd. *A.-G. v. Day* (1817), 2 Madd. 246.

**182. —**—*Pltfs. were equitable mtgees. of the shares of H. in the Woollen Cloth co., & the Dhobah co. were general creditors of H. Both cos. having notice of pltf.'s rights, the Dhobah co. commenced proceedings in the Lord Mayor's Ct., & attached the dividends on the shares in the*

#### PART II. SECT. 4, SUB-SECT. 1.— B. (d).

a. *Where otherwise unexceptionable.]—*Although the appointment of a receiver should not be lightly disturbed, still where there was personal ill-feeling between the person appointed & some of those interested, & a person

who had been proposed by other parties to the cause was, owing to his business habits, likely to be better qualified to discharge the duties of receiver, & was entirely unexceptionable, the ct., vacated the appointment made by the master, & ordered the other to be appointed.—*BRANT v. WILLOUGHBY* (1876), 17 Gr. 627.—CAN.

#### PART II. SECT. 4, SUB-SECT. 1.—C.

**178 i. Whether creditor himself appointed.]—**GILROY *v. CONN* (1912), 21 O. W. R. 626; 3 O. W. N. 732, 899; 1 D. L. R. 580; 2 D. L. R. 131.—CAN.

**178 ii. —**—*M'GARRY v. WHITE* (1885), 16 L. R. Ir. 322.—IR.

hands of the Woollen Cloth co. The same solr. was employed for both cos., & two persons were directors in both cos. No defence was made, & the Dhobah co. obtained payment:—*Held*: pltf. was entitled to a receiver of the future dividends.

If pltf. will mention some person whom they think proper to appoint receiver, & give notice to the other side, if no objection is made, I will, in the decree, introduce that person's name as receiver, instead of requiring proceedings to be taken . . . in chambers (ROMILLY, M.R.).—*ANDERSON v. KEMSHEAD* (1852), 16 Beav. 329; 51 E. R. 806.

**183. — Whether court bound to nominate.]**—Appointment of receiver is in the discretion of the master, who need not state his reasons. To support an exception there must be a substantial objection.

The interest of the owner of the equity of redemption seems fully equal to the other, & there is no danger of the mtgee. losing her money; under these circumstances there is no reason to set aside the master's report (LORD THURLOW, C.).—*THOMAS v. DAWKIN* (1792), 1 Ves. 452; 3 Bro. C. C. 508; 30 E. R. 433, L. C.

*Annotation*:—*Refd. A.-G. v. Day* (1817), 2 Madd. 246.

**184. — —.]**—It is the duty of the ct. to appoint the person nominated by appt. as receiver & manager, if he is a fit & proper person; & a standing rule of the county ct. "to appoint the high bailiff receiver & manager in every case, whether nominated or not, unless very special reasons are shown for appointing another person," is *ultra vires* & wrong.—*Re WALTON, Ex p. WALTON* (1882), 51 L. J. Ch. 539; 46 L. T. 433; 30 W. R. 642.

**185. More than one action—Receiver appointed in each—Carriage of order to plaintiff first serving notice of motion.]**—Where there were two suits for administration, & a motion for a receiver in each suit came on upon the same day, the receiver was appointed in both suits, & the ct. gave the carriage of the order to pltf. by whom the first notice of motion for the receiver had been given.—*HART v. TULK* (1849), 6 Hare, 611; 67 E. R. 1306.

*Annotation*:—*Mentd. Newton v. Chorlton* (1853), 10 Hare, App. 1, XXXI.

**186. Nomination by trustees of debenture-holders—In preference to nomination by individual debenture-holder.]**—*Re SEPTIMUS PARSONAGE & CO., LTD., ARTS v. SAME, LAW GUARANTEE & TRUST SOCIETY, LTD. v. SAME* (1901), 17 T. L. R. 420.

#### SUB-SECT. 2.—JOINT RECEIVERS.

See R. S. C., Ord. 50, r. 6.

**187. Party to action — With nominee of other party.]**—*RAMSDEN v. FAIRTHROP*, No. 383, *post*.

**188. Of partnership property.]**—*COOMBER v. ATKINS* (1895), 39 Sol. Jo. 793.

**189. Appointment of single receiver detrimental to property.]**—On July 24, 1893, a petition was presented for the compulsory winding up of a co. On July 26, 1893, a writ was issued in a debenture-holders' action for the realisation of pltf.'s security; & on Aug. 2, 1893, an order was made appointing T., who was an accountant nominated by pltf.s., to be receiver & manager of the property comprised in the debentures. On the same date an order was made to wind up the co. The debentures comprised (*inter alia*), the uncalled capital of the co. of which there was a considerable amount. There was also capital which had been called up but not got in. The debenture-holders were fully secured. An application by the official receiver

& provisional liquidator was made in the debenture-holders' action, asking that the order of Aug. 2, 1893, appointing the receiver & manager in that action might be discharged, appt. undertaking, if so required by the ct., to keep a separate account on behalf of the debenture-holders of the assets received by him as such provisional liquidator; or in the alternative that appt. might be appointed receiver & manager or receiver in the action, in the place of or jointly with the debenture-holders' receiver & manager. The judge decided that the order of Aug. 2, 1893, appointing the receiver must be discharged, & the official receiver be appointed in his place as receiver on the terms of his giving the undertaking above-mentioned as to keeping a separate account. Pltf.s. appealed. Upon the hearing of the appeal further evidence was adduced showing that many of the securities included in the debentures could only be realised to advantage by a person in touch with the financial world:—*Held*: unless there were strong reasons to the contrary, it was extremely undesirable to have two or three persons concerned in the winding up of a co.; but the present was a peculiar case, inasmuch as the further evidence showed that a great many of the assets mortgaged to the debenture-holders were of such a nature that it was difficult to suppose they could be realised satisfactorily by an official of the ct., or by anyone who was not in touch with the financial world; therefore the proper course was to appoint T. receiver of the particular securities referred to in the further evidence, leaving the official receiver to receive the remainder of the assets & the uncalled capital.—*BRITISH LINEN CO. v. SOUTH AMERICAN & MEXICAN CO.*, [1894] 1 Ch. 108; 10 T. L. R. 48; 37 Sol. Jo. 840; *sub nom. INDUSTRIAL & GENERAL TRUST, LTD. v. SOUTH AMERICAN & MEXICAN CO.*, 63 L. J. Ch. 169; 69 L. T. 693; 42 W. R. 181; 1 Mans. 92; 7 R. 64, C. A.

**190. —.]**—In an action against (a) a Dutch corpn., trustees of a debenture deed, (b) the receivers, appointed under this deed resident in England, & (c) an English co. having property & assets in Brazil to enforce an alleged prior equitable charge made in England, upon property & assets in Brazil, & now vested in first deft., on the application of pltf.s. a receiver of the assets in the debenture deed was also appointed.

"It would be probably so inconvenient & detrimental to the property to appoint a separate receiver that I think it would be right to appoint defts. S. & C. to act as receivers for pltf.s. in this action, if they are willing to do so" (BYRNE, J.).—*DUDER v. AMSTERDAMSCH TRUSTEES KANTOOR*, [1902] 2 Ch. 132; 71 L. J. Ch. 618; 87 L. T. 22; 50 W. R. 551.

*Annotation*:—*Mentd. Bank of Africa v. Cohen*, [1909] 2 Ch. 129.

#### SUB-SECT. 3.—RECEIVERS OF FOREIGN PROPERTY.

**191. Appointment of resident in foreign country.]**—*DREWRY v. DARWIN* (1765), 1 Seton's Judgments & Orders, 7th ed. 777.

*Annotation*:—*Fold. Hinton v. Gall* (1854), 2 Eq. Rep. 479.

**192. — Receiver appointed in England to receive remittances.]**—*HANSON v. WALKER* (1815), 1 Seton's Judgments & Orders, 7th ed. 777.

**193. — Sureties must be resident in England.]**—*COCKBURN v. RAPHAEL*, No. 532, *post*.

**194. — Existing agent of foreign property.]**—Where appts. were willing that the present agent of the Irish estates, who had never experienced any difficulty in collecting the rents, should be

**Sect. 4.—Choice of person to be appointed: Sub-sects. 3 & 4, A., B. & C. Sect. 5: Sub-sects. 1**

appointed receiver, the ct. considering that the difficulties attending the appointment of a receiver of Irish estates by the English ct. were considerably modified by that circumstance, appointed him receiver.—*BOLTON v. CURRE* (1894), 70 L. T. 759; 38 Sol. Jo. 579.

**195. Appointment of receiver in England—Authority to employ agent abroad.]—**Appointment of a receiver of an estate in India. The receiver to be in England, acting by an agent. Inquiry directed, what should be the term, beyond which he should not be permitted to let.—*v. LINDSEY* (1808), 15 Ves. 91; 33 E. R. 689.  
**Annotation:—***Reid. Houlditch v. Donegal* (1834), 8 Bli. N. S. 301.

**196. ———.]—**A receiver will be appointed to collect personal estate in a foreign country & not only to get in rents, but also to sell the real estates in such foreign country & receive the produce thereof when sold.

If found expedient the receiver should be authorised to appoint an agent in Italy (ROMILY, M.R.).—*HINTON v. GALLI* (1854), 2 Eq. Rep. 479; 24 L. J. Ch. 121.

**197. ———.]—***UNDERWOOD v. FROST* (1857), 1 Seton's Judgments & Orders, 7th ed. 776.

**198. Joint receivers.]—***DUDER v. AMFERDAMSCH TRUSTEES KANTOOR*, No. 190, *ante*.

#### SUB-SECT. 4.—NOMINATION.

##### A. In Court.

See R. S. C., Ord. 50, r. 6.

**199. When parties consent.]—***WILSON v. GREENWOOD* (1818), 1 Swan. 471; 1 Wils. Ch. 223; 36 E. R. 469, L. C.

**Annotations:—***Expld. Hall v. Hall* (1850), 3 Mac. & G. 79. *Consd. Collins v. Barker*, [1893] 1 Ch. 578. *Reid. Francis v. Spittle* (1840), 9 L. J. Ch. 230; *Tibbits v. Phillips* (1853), 10 Hare, 355. *Mentd. Re Fernandes, Ex p. Hope* (1844), 3 Mont. D. & De G. 720; *Knight v. Browne* (1861), 30 L. J. Ch. 649; *Whitmore v. Mason* (1861), 2 John. & H. 204; *Mackintosh v. Pogose*, [1895] 1 Ch. 505; *Re Johnson Johnson, Ex p. Matthews & Wilkinson*, [1904] 1 K. R. 134; *Re Wombwell* (1921), 37 T. L. R. 625.

**200. ———.]—***ANDERSON v. KEMSHEAD*, No. 182, *ante*.

**201. ———.]—***PLEWS v. BAKER* (1873), L. R. 16 Eq. 564; 43 L. J. Ch. 212.

**Annotations:—***Consd. Law v. Garrett* (1878), 8 Ch. D. 26. *Reid. Compagnie du Senegal v. Woods* (1883), 53 L. J. Ch. 166. *Mentd. Minifie v. Railway Passengers Assoc.* (1881), 44 L. T. 552; *Joplin v. Postlethwaite* (1889), 61 L. T. 629.

**202. ———.]—**R. S. C., 1883, Ord. 55, r. 10, applies to an administration action commenced before, but tried after, those rules came into operation. An order was therefore made referring such an action to chambers to determine whether it was necessary that a general administration of the estate should be directed.

The parties consenting, I will appoint the gentleman who is proposed as receiver now (NORTH, J.).—*Re LLEWELLYN, LANE v. LANE* (1883), 25 Ch. D. 66; 53 L. J. Ch. 602; 49 L. T. 399; 32 W. R. 287.

**203. ———.]—***MAKINS v. IBOTSON (PERCY) & SONS*, No. 276, *post*.

**204. ———.]—***HODGKINS v. SINCLAIR* (1893), 37 Sol. Jo. 777.

**205. ———.]—**If the parties can agree as to a proper person to be appointed receiver, his name

may be inserted in the order. If not, there must be the usual reference to chambers (BYRNE, J.).—*NAISH v. ODY* (1897), 41 Sol. Jo. 726.

**206. ———.]—***BUDGETT v. IMPROVED PATENT FORCED DRAUGHT FURNACE SYNDICATE, LTD.*, [1901] W. N. 23.

**207. Nominee alone interested in property.]—**An application by a married woman for a receiver of estates settled to her separate use, granted without a reference to the master to approve of a fit person, notwithstanding a strong affidavit of the unfitness of the person nominated to be the receiver.

Here the only person interested is Mrs. B. . . . & therefore, notwithstanding the affidavit for deft., I am of opinion that Mrs. B. may appoint whomsoever she pleases to be a receiver of her own property (SHADWELL, V.-C.).—*BAGOT v. BAGOT* (1838), 2 Jur. 1063.

**208. In urgent case—Interference with sailing of ship.]—***BRENAN v. PRESTON*, No. 22, *ante*.

**209. ——— Threatened sale of property.]—**Testator devised all his real & personal estate to his daughter & her husband for life, "with reversion at their deaths to his granddaughter S.," & he appointed the husband of his daughter sole exor. On bill filed by S. against the exor. alleging irreparable waste & injury to testator's estate, some parts of testator's personal estate having been taken in execution by the sheriff under a judgment recovered against the exor. for his own private debt, & a threatened immediate sale thereunder, S. was appointed receiver *instantly* on waiving all salary, & giving the usual security.—*RAWSON v. RAWSON* (1864), 11 L. T. 595.

**210. Review of appointment—Withdrawal.]—**The appointment of deft. who is an exor. & trustee to be a consignee, with the usual profits, is a matter for the discretion of the ct.; but when such a discretion has been exercised, & an appointment made under it has been acted upon, the ct. will not afterwards withdraw its sanction from the appointment so made.—*MORISON v. MORISON* (1838), 4 My. & Cr. 215; 3 Jur. 528; 41 E. R. 85, L. C.

**211. ——— By Court of Appeal.]—**The ct. will not allow an appeal from an order of a Vice-Chancellor as to the choice of a receiver.—*LEY v. LEY* (1856), 25 L. J. Ch. 600; 27 L. T. O. S. 267, L. J.J.

**212. ——— Objection on question of principle.]—***COOKES v. COOKES* (1865), 2 De G. J. & Sm. 526; 46 E. R. 479, L. J.J.

**213. ———.]—**The Ct. of Appeal discharged an order of the ct. below by which, where a co. was being wound up, subject to the supervision of the ct., & a liquidator had been appointed, a receiver of the co.'s property was appointed in a suit by an equitable mtgee., & an injunction awarded to restrain the liquidator from receiving the profits of the co.'s undertaking or interfering with its property, & appointed the liquidator to be receiver in his stead, & this was done as a matter of principle, & not merely on the ground that expense would be saved.—*PERRY v. ORIENTAL HOTELS CO.* (1870), 5 Ch. App. 420; 23 L. T. 525; 18 W. R. 779, L. J.

**Annotations:—***Distd. Boyle v. Bettws Llantwit Colliery Co.* (1876), 2 Ch. D. 726. *Apld. Tottenham v. Swansea Zinc Ore Co.* (1884), 53 L. J. Ch. 776. *Expld. British Linen Co. v. South American & Mexican Co.*, [1894] 1 Ch. 108. *Reid. Re Pound & Hutchins* (1889), 42 Ch. D. 402; *Re Joshua Stubbs, Barney v. Joshua Stubbs*, [1891] 1 Ch. 475.

**Appointment of liquidator in place of receiver.]—**See COMPANIES, Vol. X., pp. 794, 795, Nos. 5006-5008.



*B. Reference to Master.*

See R. S. C., Ord. 50, r. 6.

**214. Reference with special direction—Preference to nominee of one party.]—**DILLON v. MOUNT-CASHELL (LADY) (1727), as reported in 4 Bro. Parl. Cas. 306; 2 E. R. 207.

*Annotation:—***Mentd.** *Re* Salisbury's Estate (1876), 24 W. R. 380.

**215. ———.]—**COCKBURN v. RAPHAEL (1825), 2 Sim. & St. 453; 4 L. J. O. S. Ch. 60; 57 E. R. 419.

**216. ———.]—**In order to give effect to the claim of the tenant for life the ct., in contravention of a previous letting by the trustees of the will to a person who had notice of the trusts, granted a receiver of the property, with a direction to let it to the tenant for life upon the terms of giving such security.

If the master shall approve of any person or persons to be proposed by pltf., let such person or persons be appointed by the master in preference (KNIGHT-BRUCE, V.-C.).—BAYLIES v. BAYLIES (1844), 1 Coll. 537; 63 E. R. 533.

**217. ——— No preference.]—**NORTON v. GOVER, [1877] W. N. 206.

**218. Discretion of master—Master need not state reasons.]—**THOMAS v. DAWKIN, No. 183, *ante*.

**219. Application for reference refused—Appointment by court.]—**BROWN v. OAKSHOTT (1853), 20 L. T. O. S. 268.

**220. Parties unable to consent.]—**ANDERSON v. KEMSHEAD, No. 182, *ante*.

**221. ———.]—**NAISH v. ODY, No. 205, *ante*.

**222. Whether master's judgment treated as conclusive.]—**GARLAND v. GARLAND, No. 135, *ante*.

**223. ———.]—**Petition to change a receiver. The master's judgment not absolutely conclusive, but the ct. interferes with reluctance. The recommendation of testator, & the respect due to a considerable family, are to be attended to in the appointment. The circumstances of the person proposed, in this instance a relation of the family, a residence, distant from the estate, being in Parliament, & a practising barrister in town, though no absolute disqualification, are to be considerably regarded.—WYNNE v. NEWBOROUGH (LORD) (1808), 15 Ves. 283; 33 E. R. 761, L. C.

**224. Interference with appointment—Court interferes reluctantly.]—**WYNNE v. NEWBOROUGH (LORD), No. 223, *ante*.

**225. ——— Proof of impropriety of appointment.]—**Exception to a master's report of a proper person to be receiver overruled; as the report ought to stand till the party approved is impeached as an improper person.—CREUZÉ v. LONDON (BR.) (1787), 2 Bro. C. C. 253; 2 Dick. 687; 29 E. R. 140, L. C. *Annotations:—***Consd.** *A.-G. v. Day* (1817), 2 Madd. 246. **Mentd.** *Bamford v. Bamford* (1843), 13 L. J. Ch. 25.

**226. ———.]—**THOMAS v. DAWKIN, No. 183, *ante*.

**227. ——— Comparison of merits of competitors.]—***A.-G. v. DAY*, No. 145, *ante*.

**228. ——— Special grounds.]—**The ct. will not interfere with the master's appointment of a consignee unless upon special grounds & a strong case.—BOWERSBANK v. COLASSEAU (1796), 3 Ves. 164; 30 E. R. 949.

*Annotations:—***Apprvd.** *Tharpe v. Tharpe* (1806), 12 Ves. 317. **Consd.** *A.-G. v. Day* (1817), 2 Madd. 246.

**PART II. SECT. 4, SUB-SECT. 4.—B.**  
r. On refusal of legatee to bring legacies into account—Where estate insufficient for payment of debts.—BENNET v. GOING (1828), 1 Mol. 529.—IR.

**PART II. SECT. 5, SUB-SECT. 1.**  
t. Security of receiver only —

*Whether sufficient.]—*The ct. will not in any case appoint a receiver upon his own security only.—BAILIE v. BAILIE (1839), 1 I. Eq. R. 413.—IR.

**PART II. SECT. 5, SUB-SECT. 2.**  
a. When increased—Appointment extended over additional lands.]—Where

**229. ———.]—**The ct. will not control the master's appointment of a receiver without a special case. The trustee cannot be receiver.—ANON. (1797), 3 Ves. 515; 30 E. R. 1134, L. C. *Annotation:—***Refd.** *A.-G. v. Day* (1817), 2 Madd. 246.

**230. ———.]—**To maintain an exception to the master's appointment of a receiver a strong case of disqualification is necessary.—THARPE v. THARPE (1806), 12 Ves. 317; 33 E. R. 121, L. C. *Annotation:—***Refd.** *A.-G. v. Day* (1817), 2 Madd. 246.

**231. ——— On trivial grounds.]—**BLAKEWAY v. BLAKEWAY, No. 151, *ante*.

**232. ——— On matter of principle.]—**BLAKEWAY v. BLAKEWAY, No. 151, *ante*.

*C. Review of Appointment.*

See Nos. 19, 210–213, 224–231, *ante*.

## SECT. 5.—SECURITY.

## SUB-SECT. 1.—IN GENERAL.

See R. S. C., Ord. 50, rr. 16–18.

**233. Necessity for.]—**U. S. A. v. PRIOLEAU, No. 475, *post*.

**234. ———.]—**A receiver may be appointed over the whole of a property at the instance of a mtgee. of an undivided share.

I will grant a receiver on pltf.'s undertaking to be answerable for the receipts of the receiver, he giving besides the usual security (FRY, J.).—SUMSION v. CRUTWELL (1883), 31 W. R. 399.

**235. ———.]—**OPPERT v. LONDON JOINT STOCK ASSOCN. (1892), 36 Sol. Jo. 789.

*Annotation:—***Refd.** *Re* Hampshire Land Co. (1894), 1 Mans. 428.

**—— On discharge of surety.]—**See Nos. 1074, 1075, *post*.

**—— Receiver of lunatic's estate.]—**See LUNATICS, Vol. XXXIII., p. 175, No. 639.

**When dispensed with.]—**See Sub-sect. 7, *post*.

**Effect on right to possession.]—**See Nos. 799–804, *post*.

**Property of companies.]—**See COMPANIES, Vol. X., pp. 795, 796, Nos. 5018–5023.

**Partnership property.]—**See PARTNERSHIP, Vol. XXXVI., p. 488, Nos. 1526–1529.

## SUB-SECT. 2.—AMOUNT.

**236. When increased—Liquidator appointed receiver.]—**(1) The liquidators will give security, if that is asked for, in addition, of course, to their security as liquidators & they will give that security within three weeks (CHITTY, J.).

(2) It is not the practice of the ct. to allow receivers, who are officers of this ct. & appointed for the purpose of securing the funds to receive whatever they are entitled to get in under the order without giving security, unless the parties are *sui juris* & consent (CHITTY, J.).—BARTLETT v. NORTHUMBERLAND AVENUE HOTEL CO., LTD. (1885), 53 L. T. 611; *on appeal*, 53 L. T. 612, C. A.

*Annotations:—***Generally, Refd.** *Re* Joshua Stubbs, Barney v. Joshua Stubbs, [1891] 1 Ch. 187; *British Linen Co. v. South American & Mexican Co.*, [1894] 1 Ch. 108.

a receiver is extended over additional lands, he must perfect additional security, or be removed from receivership altogether.—WISE v. ASHE (1839), 1 I. Eq. R. 210.—IR.

b. ———.]—KELLY v. RUTLEDGE (1845), 8 I. Eq. R. 228.—IR.

**Sect. 5.—Security: Sub-sects. 2, 3, 4, 5, 6 & 7, A., B., C., D. & E.]**

**237. When reduced—Payment into court.]—**POOLE *v.* WOOD (1832), cited in 1 Seton's Judgments & Orders, 7th ed., at p. 741.

**238. ———.]—**Order made that mtge. securities be deposited with the master in order that the amount of security to be given by the receiver to be applied by the ct. might be diminished.—BATHER *v.* KEARSLEY (1844), as reported in 13 L. J. Ch. 321.

**Annotation:—***Mentd.* M'Leod *v.* Lyttleton (1852), 1 Drew. 36.

**239. ——— Receiver having lien over property in his hands.]—**U. S. A. *v.* PRIOLEAU, No. 475, *post*.

#### SUB-SECT. 3.—TIME FOR GIVING.

**240. Within time specified in order.]—**In future, wherever a receiver, or receiver & manager, is appointed by any judge of the Ch. Div., & ordered to give security within a specified time, the appointment is to be drawn in such a form that the receivership, or receivership & managership, is to lapse, unless the security is given within that time, or unless in the meantime an extension of time is obtained from the judge in Chambers.

The practice adopted by NEVILLE, J., in *Rowley v. Desborough*, No. 242, *post*, to be applied in all the Cts. of the Ch. Div.—*Re SIMS & WOODS, LTD., WOODS v. THE CO.* (1916), 60 Sol. Jo. 539.

**241. ——— Three weeks.]—**BARTLETT *v.* NORTH-UMBERLAND AVENUE HOTEL CO., LTD., No. 236, *ante*.

**242. ———.]—**The order appointing a receiver & manager, or receiver or manager, with liberty to act at once, should be drawn up in the Ch. Div. in such a form that, if security is not given within twenty-one days thereafter, the appointment will automatically lapse.—*ROWLEY v. DESBOROUGH* (1916), 60 Sol. Jo. 429.

**243. ———.]—***Re SANDOW, LTD., SKIPWITH v. SAME*, [1916] W. N. 262.

**244. Extension of time—By whom granted—Judge in chambers.]—***Re SIMS & WOODS, LTD., WOODS v. THE CO.*, No. 240, *ante*.

**245. Failure to give within time—Lapse of appointment.]—***Re SIMS & WOODS, LTD., WOODS v. THE CO.*, No. 240, *ante*.

**246. ———.]—***ROWLEY v. DESBOROUGH*, No. 242, *ante*.

**Position of receiver pending perfecting of security.]—***See* Sub-sect. 6, *post*.

#### SUB-SECT. 4.—FORM.

*See* R. S. C., Ord. 50, r. 16, 16A.

**247. Bond with sureties.]—**The course of the ct. requires a security by the receiver, & two sureties, in a recognisance, & taking the assignment of a mtge. belonging to a receiver very improper, & ought not to have been done.—*MEAD v. ORRERY (LORD)* (1745), 3 Atk. 235; 26 E. R. 937, L. C.

**Annotations:—***Reid.* Ludgater *v.* Channell (1847), 15 Sim. 479. *Mentd.* *Taner v. Ivie* (1752), Belt's Sup. 386; *Bonney v. Ridgard* (1784), 1 Cox Eq. Cas. 145; *Whale v. Booth* (1784), 4 Doug. K. B. 36; *Andrew v. Wrigley* (1792), 4 Bro. C. C. 125; *Farr v. Newman* (1792), 4 Term Rep. 621; *Shirreff v. Wilks* (1800), 1 East, 48; *Hill v. Simpson* (1802), 7 Ves. 152; *M'Leod v. Drummond* (1810), 17 Ves. 152; *Keane v. Roberts* (1819), 4 Madd. 332; *Wilson v. Moore* (1834), 1 My. & K. 337; *Bellamy v. Sabine* (1857), 1 De G. & J. 566; *Graham v. Drummond*, [1896] 1 Ch. 968.

**248. ———.]—***Re BRITISH POWER TRACTION & LIGHTING CO., LTD., HALIFAX JOINT STOCK*

*BANKING CO., LTD. v. BRITISH POWER TRACTION & LIGHTING CO., LTD.*, [1910] 2 Ch. 470; 79 L. J. Ch. 666; 103 L. T. 451; 54 Sol. Jo. 749.

**249. Assignment of mortgage.]—***MEAD v. ORRERY (LORD)*, No. 247, *ante*.

**250. Bond of foreign company.]—***Re VENEZUELA GOLDFIELDS* (undated), cited in [1904] 2 K. B. at p. 853; 74 L. J. K. B. at p. 24; 91 L. T. at p. 730, C. A.

**Annotation:—***Mentd.* *Aldrich v. British Griffin Chilled Iron & Steel Co.*, [1904] 2 K. B. 850.

**Bond of guarantee company.]—***See* Nos. 285–288, *post*.

#### SUB-SECT. 5.—WHERE GIVEN.

*See* R. S. C., Ord. 50, r. 17.

**251. General rule—In chambers.]—**Under R. S. C., Ord. 50, r. 17, which provides that, when any judgment or order is pronounced or made in ct. appointing a person therein named to be receiver, the ct. or a judge may adjourn to chambers the cause or matter then pending, in order that the person named as receiver may give security as in the last preceding rule mentioned, & may thereupon direct such judgment or order to be drawn up, the appointment of a provisional liquidator of a co. can be adjourned into chambers.—*Re HOYLAND SILKSTONE COLLIERY CO., LTD.* (1883), 53 L. J. Ch. 352; 49 L. T. 567.

**252. In London—Action commenced in district registry.]—***Re CAPPER, ROBERTSON v. CAPPER*, No. 29, *ante*.

#### SUB-SECT. 6.—POSITION OF RECEIVER PENDING PERFECTING OF SECURITY.

**253. When appointment conditional.]—***EDWARDS v. EDWARDS*, No. 799, *post*.

**254. ——— Liability in respect of money received & expended as receiver.]—**(1) A receiver is liable to account as such for all moneys coming to his hands in that capacity at any time, whether before or after the date of the perfecting of his security.

(2) A surety who has undertaken to account for what the receiver "should receive & become liable to pay as such receiver" is liable to account for all such moneys as above mentioned.

(3) The principle that the appointment of a receiver is merely conditional until his security is perfected, applies only to cases where the question is as to his title as against third parties. It has no application where the question is as to his own liability, or that of his sureties, in respect of moneys received & expended by him as receiver.—*SMART v. FLOOD & CO.* (1883), 49 L. T. 467.

**Effect on right to possession.]—***See* Part III., Sect. 3, *post*.

**Failure to give security within specified time—Lapse of appointment.]—***See* Nos. 245, 246, *ante*.

#### SUB-SECT. 7.—WHEN SECURITY DISPENSED WITH.

##### A. In General.

**255. Receiver nominated by parties.]—**Persons named by the parties appointed receivers upon their own recognisance only.—*RIDOUT v. PLYMOUTH (EARL)* (1737), 1 Dick. 68; 21 E. R. 193.

**Annotation:—***Fold.* *Manners v. Furze* (1847), 12 Jur. 129.

**256. ———.]—***CARLISLE (COUNTESS) v. CARLISLE (EARL)* (1761), 1 Dick. 68; 21 E. R. 193.

**257. ———.]—**On the application of all the parties to a cause, the ct. made an order appointing at once a party named by them to be receiver

of the partnership estate & effects, the absolute property of the parties to the cause, without requiring him to give any other than his own personal security, notwithstanding a previous order made in the cause directing a reference to the master in the usual form to appoint a receiver of the partnership estate & effects.—*MANNERS v. FURZE* (1847), 11 Beav. 30; 17 L. J. Ch. 70; 10 L. T. O. S. 362; 12 Jur. 129; 50 E. R. 727.

*Annotation* :—*Reid*. *Tylee v. Tylee* (1853), 17 Beav. 583.

**258. — Nomination by testator.]**—Testator directed “that A. be appointed receiver of his real & personal estate,” & died seised of no real estate, except an estate in the West Indies, having by his will directed a sum of money to be invested in the purchase of lands in England. A. appointed manager of the West India estate, upon entering into a personal recognisance to account for the produce.—*HIBBERT v. HIBBERT* (1808), 3 Mer. 681; 36 E. R. 261.

*Annotations* :—*Consd.* *Houlditch v. Donegal* (1834), 8 Bl. N. S. 301. *Reid*. *Shaw v. Lawless* (1838), 5 Cl. & Fin. 129.

#### B. By Consent of Parties.

**259. Security waived.]**—(*CHARISLE (COUNTESS) v. BERKLEY (LORD)* (1759), Amb. 599; 27 E. R. 390.

*Annotation* :—*Folld.* *Wilson v. Wilson* (1817), 9 L. T. O. S. 291.

**260. —.]**—*WILSON v. WILSON* (1817), 9 L. T. O. S. 291; 11 Jur. 793.

*Annotations* :—*Mentd.* *Haggar v. Neatby* (1854), Kay, 379; *Middlebrook v. Bromley* (1863), 2 New Rep. 224.

**261. —.]**—*FRASER v. BURGESS*, No. 1132, *post*.

**262. Parties must be competent to consent.]**—A receiver will not be appointed without sureties, though not objected to if persons not competent to consent are interested.—*TYLEE v. TYLEE* (1853), 17 Beav. 583; 51 E. R. 1161.

**263. —.]**—*BARTLETT v. NORTHUMBERLAND AVENUE HOTEL CO., LTD.*, No. 236, *ante*.

#### C. Receiver Without Salary.

**264. Who appointed without salary — Testamentary guardian.]**—*GARDNER v. BLANE* (1842), 1 Hare, 381; 66 E. R. 1080.

**265. —.]**—*WELLS v. WALES* (1855), 4 De G. M. & G. 816; 3 W. R. 217; 43 E. R. 727; *sub nom.* *WELLS v. WALE*, *WESTLEY v. LESLIE*, 24 L. T. O. S. 286, L. C.

*Annotation* :—*Reid*. *Neave v. Douglas* (1857), 26 L. J. Ch. 756.

**266. — Mortgagee.]**—After resolutions for the voluntary winding up of a colliery co. had been duly passed & registered & a liquidator had been appointed, an action was commenced against the co. by their mtgees. to enforce their mtge. security. The mtgees. then applied for the appointment of a receiver & manager & the ct., on evidence showing that the liquidator had no funds to carry on the colliery, & that unless it were carried on the property would be ruined, appointed the mtgees. receivers & managers without security & without salary.—*BOYLE v. BETTWS LLANTWIT COLLIERY CO.* (1876), 2 Ch. D. 726; 45 L. J. Ch. 748; 34 L. T. 844.

*Annotation* :—*Reid*. *Re Pound & Hutchins* (1889), 42 Ch. D. 402.

**267. —.]**—*Re PRYTHERCH, PRYTHERCH v. WILLIAMS*, No. 96, *ante*.

**268. — Judgment creditor.]**—*MACNICOLL v. PARNELL*, No. 520, *post*.

**269. — Receiver of partnership business.]**—*TAYLOR v. NEATE* (1888), as reported in 39 Ch. D. 538; 4 T. L. R. 748.

*Annotations* :—*Mentd.* *Burt, Boulton & Hayward v. Bull*, [1895] 1 Q. B. 276; *Re David & Matthews*, [1899] 1 Ch. 378.

#### D. Equitable Execution.

**270. Undertaking by judgment creditor & receiver—Not to act without leave of court.]**—In an action for equitable execution, upon a judgment obtained by pltf., in the Q. B. Div., an order was obtained for the appointment of a receiver, the indorsement on the brief being, “Usual order for appointment of F. S. as receiver until trial or further order, on pltf.’s undertaking to be answerable for his receipts, without prejudice to prior incumbrancers.” The registrar refused to draw up the order without the receiver giving security. A draft order was then prepared in which the receiver was to pay the costs of the action & of the receivership out of the sums received by him. The form of the draft order was said to be used in the Q. B. Div., & has been sanctioned by CHITTY, J., in the Ch. Div. The order was originally obtained for the purpose of getting a charge on the property, with no intention of the receiver entering into possession or receiving anything, therefore he would have nothing out of which to pay the costs. On motion *ex p.* for directions, the ct. made an order directing such receiver to be appointed without security, pltf. & the receiver undertaking not to act without the leave of the ct. The costs to be costs in the action.—*HEWETT v. MURRAY* (1885), 54 L. J. Ch. 572; 52 L. T. 380.

**271. Judgment creditor appointed receiver.]**—*FUGGLE v. BLAND*, No. 179, *ante*.

**272. —.]**—*MACNICOLL v. PARNELL*, No. 520, *post*.

#### E. Matters of Urgency.

**273. Undertaking by plaintiff until security given—To answer for receipts of receiver.]**—*TRUMAN & CO. v. REDGRAVE* (1881), 18 Ch. D. 547; 50 L. J. Ch. 830; 45 L. T. 605; 30 W. R. 421.

*Annotations* :—*Reid*. *Makins v. Ibotson* (1890), 63 L. T. 515; *Grafton v. Taylor*, *Manvers v. Taylor* (1891), 7 T. L. R. 588; *Whitley v. Challis*, [1892] 1 Ch. 64; *Poole v. Downes* (1897), 76 L. T. 110.

**274. —.]**—*SUMSION v. CRUTWELL*, No. 234, *ante*.

**275. —.]**—*EVANS v. LLOYD*, [1889] W. N. 171.

*Annotation* :—*Reid*. *Minter v. Kent, Sussex & General Land Soc.* (1895), 72 L. T. 186.

**276. —.]**—By the arts. of assocn. of a limited co. the management of the business & the control of the co. were vested in the directors. Under a power in the memorandum of assocn. the co. issued debentures purporting to charge all the co.’s property both present & future, including its uncalled capital. Upon a motion by pltf., who was the only debenture-holder, in an action by him against the co. to enforce his securities, the judge appointed the managing director of the co. receiver of its property & also manager of its business pending realisation, with a view to enabling the co.’s business to be sold as a going concern; pltf. undertaking to provide a sum for wages & current expenses, & also to be answerable for the receipts of the receiver & manager pending his giving security, & to procure

*Sect. 5.—Security: Sub-sect. 7, E.; sub-sect. 8, A., B. & C. Sect. 6: Sub-sects. 1 & 2, A. (a).]*

the realisation of the property as soon as possible.—**MAKINS v. IBOTSON (PERCY) & SONS**, [1891] 1 Ch. 133; 60 L. J. Ch. 164; 63 L. T. 515; 39 W. R. 73; 2 Meg. 371.

*Annotation:—Reid. Edwards v. Standard Rolling Stock Syndicate*, [1893] 1 Ch. 574.

**277. ————.] — DEBENTURE - HOLDERS' ACTIONS** (1900), 16 T. L. R. 256.

*Annotation:—Consd. Woods v. Winskill*, [1913] 2 Ch. 303.

**278. ————.] — Extent of undertaking—Debenture-holders' action.] — DEBENTURE - HOLDERS' ACTIONS** (1900), 16 T. L. R. 256.

*Annotation:—Consd. Woods v. Winskill*, [1913] 2 Ch. 303.

**279. ————.] — Undertaking as to damages—Appointment made ex parte.] — RAWSON v. RAWSON**, No. 209, *ante*.

**280. ————.] —**In an action to enforce specific performance of a parol agreement to execute a bill of sale of personal chattels, upon an *ex p.* motion before appearance of deft. there being evidence of immediate danger of the chattels in question being disposed of, an order was made appointing pltf., without security, *interim* receiver for fourteen days, or until a receiver should be appointed under a reference to chambers for that purpose which the Vice-Chancellor had directed. Pltf. undertook to deal with the property only under the direction of the ct., & to abide by any order which the ct. might make as to damages or otherwise.—**TAYLOR v. ECKERSLEY** (1876), 2 Ch. D. 302; 45 L. J. Ch. 527; 34 L. T. 637; 24 W. R. 450; 2 Char. Pr. Cas. 84, C. A.

*Annotations:—Reid. Minter v. Kent, Sussex & General Land Soc.* (1895), 72 L. T. 186; *Shears v. Jones*, [1922] 2 Ch. 802.

**281. ————.] — EVANS v. LLOYD**, [1889] W. N. 171.

*Annotation:—Reid. Minter v. Kent, Sussex & General Land Soc.* (1895), 72 L. T. 186.

**282. Undertaking where no security to be given —To abide by orders of court—Plaintiff appointed receiver.] — HYDE v. WARDEN**, No. 26, *ante*.

**283. ————.] — TAYLOR v. ECKERSLEY**, No. 280, *ante*.

#### SUB-SECT. 8.—SURETIES.

##### A. Who may be.

**284. Residents in England—Receiver of foreign property residing abroad.] — COCKBURN v. RAPHAEL**, No. 532, *post*.

**285. Guarantee society.] —**The security of a guarantee society may be taken in cases of receivership.—**COLMORE v. NORTH** (1872), 42 L. J. Ch. 4; 21 W. R. 43; *sub nom.* **COLEMORE v. NORTH**, **COLEMORE v. RADCLIFFE**, 27 L. T. 405, L. C. & L. J.J.

**286. ————.] —**The security of a guarantee society may be taken in the case of a receiver in a probate action.—**CARPENTER v. QUEEN'S PROCTOR** (1882), 7 P. D. 235; *sub nom.* **CARPENTER v. TREASURY SOLICITOR**, 51 L. J. P. 91; 31 W. R. 108; *sub nom.* *In the Goods of STOKES*, **CARPENTER v. TREASURY SOLICITOR**, 46 L. T. 821; 46 J. P. 663.

#### PART II. SECT. 5, SUB-SECT. 8.—A.

**285 i. Guarantee society.] —**The ct. will permit a receiver to enter into security by means of a guarantee assoc., & the master is to fix the rate of percentage to be paid by the receiver to the assoc.—**HOBHOUSE v. HAMILTON** (1850), 15 L. T. O. S. 372.—**IR.**

• *Solicitor having conduct of cause.] — IRISH v. DICKSON* (1845) cited in

*Bennett on Receivers*, at p. 107.—**IR.**

**1. Party to action.] — RYDER v. DICKSON** (1835), cited in *Bennett on Receivers*, at p. 107.—**IR.**

• *Practising barrister.] — KELLY v. KELLY*, [1850] 2 Ir. Jur. 140.—**IR.**

#### PART II. SECT. 6, SUB-SECT. 1.

*285 i. General rule—Preservation of*

**287. ————.] —**By a judgment for dissolution of a partnership between two agricultural implement makers, deft., one of the partners, was appointed receiver & manager, & undertook to act without salary. He carried on the business very successfully for more than eighteen months, & then purchased it with the sanction of the ct. He was a skilled mechanic, & during his receivership worked in the business as a common workman. In his accounts he claimed to be allowed two premiums of £25 each paid to a guarantee society which had become surety for his duly accounting, & the sum of £2 per week for the manual work done by him as a workman. The master allowed both items. The judge held that a receiver & manager appointed without salary or remuneration was entitled to be allowed in his accounts premiums paid by him to a guarantee society as his surety, & that the two premiums ought therefore to be allowed, but that the £2 per week ought not, for that the receiver, being in a fiduciary position, could not employ himself. The decision on the first point was not appealed from:—**Held**: the £2 per week ought also to be allowed, for that, although the receiver had acted irregularly & run great risk in not asking for wages at the time of his appointment, he was entitled to be paid for services which had proved beneficial to the estate, & which it was no part of his duty as receiver & manager to perform.—**HARRIS v. SLEEP**, [1897] 2 Ch. 80; 66 L. J. Ch. 596; 76 L. T. 670; 45 W. R. 680, C. A.

**288. ————.] — Re SPIRITINE, LTD., OWEN v. SPIRITINE, LTD.** (1902), 18 T. L. R. 679; 46 Sol. Jo. 614, C. A.

**289. Foreign company.] — Re VENEZUELA GOLD-FIELDS** (undated), cited in [1904] 2 K. B. at p. 853; 74 L. J. K. B. at p. 24; 91 L. T. at p. 730, C. A.

*Annotation:—Reid. Aldrich v. British Griffin Chilled Iron & Steel Co.*, [1904] 2 K. B. 850.

#### B. Rights and Liabilities.

*See Part X., post.*

#### C. Discharge.

*See Part X., Sect. 5, post.*

#### SECT. 6.—IN WHAT CASES APPOINTMENT MADE.

##### SUB-SECT. 1.—IN GENERAL.

*See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 45.*

**290. General rule—Preservation of property—Pending litigation.] —**(1) In a suit for partition of a leasehold estate, a receiver of the rents of the whole estate granted, under the circumstances.

(2) Application for receiver of an estate, made by the tenant in common of one moiety & opposed only by one of the persons interested in the other moiety, who has incumbered his share, granted, under the circumstances.

(3) The jurisdiction of this ct. to appoint a receiver has for its object the preservation of property pending litigation, in order that ultimately the rights of all parties interested may

*property—Pending litigation.] — KELLY v. BUTLER* (1839), 1 I. Eq. R. 435.—**IR.**

**290 ii. ————.] — WHITE LAW v. SANDYS (1848), 12 I. Eq. R. 393.—**IR.****

**290 iii. ————.] — CARRICK-FERGUS MUNICIPAL COMRS. v. LOCKHART (1869), 3 I. R. Eq. 515.—**IR.****

*b. Applicant must show title —*

be fairly adjusted (STUART, V.-C.)—SEARLE v. SMALES (1855), 25 L. T. O. S. 106; 3 W. R. 437.  
291. ————]—SHEPPARD v. OXENFORD, No. 1095, *post*.

292. ————]—When just & convenient.]—JOHN v. JOHN, No. 17, *ante*.

Compare Part II., Sect. 1, sub-sect. 1, *ante*.

293. No one available for appointment.]—In order to form a contract by letter, of which the ct. will decree a specific performance, nothing more is necessary than that the amount & nature of the consideration to be paid on one side, & received on the other, should be ascertained, together with a reasonable description of the subject matter of the contract. It is the clearly established doctrine that the ct. will carry into execution an agreement so constituted. It is not necessary to be satisfied that the parties actually meant the same thing, provided a clear assent be given to a certain proposition arising *de facto* out of the terms of the correspondence.

I cannot grant a receiver of this property; because if this be a binding contract, whom should I appoint to receive it, & if it be not a binding contract, I have no right to appoint a receiver (LORD ELDON, C.).—KENNEDY v. LEE (1817), 3 Mer. 441; 36 E. R. 170, L. C.

Annotations:—Mentd. Thornbury v. Bovill (1842), 1 Y. & C. Ch. Cas. 554; Thomas v. Blackman (1844), 1 Coll. 301; Churton v. Douglas (1859), John. 174; Chipmuck v. Ely

(1878), 47 L. J. Ch. 773; Rossiter v. Miller (1878), 3 App. Cas. 1124; Ginesi v. Cooper (1880), 14 Ch. D. 596; Pearson v. Pearson (1884), 27 Ch. D. 145; Preston v. Luck (1884), 27 Ch. D. 497; Hawkesworth v. Chaffey (1886), 54 L. T. 72; Chillingworth v. Esche (1923), 92 L. J. Ch. 461.

294. Application for appointment premature.]—A receiver ought not to be appointed in this early stage of the cause. . . . In some future stage of this proceeding such grounds may be exhibited to the Ch. as will justify the appropriation of the produce of the estate to the satisfaction of his claims set up. . . . Such grounds have not yet been exhibited (LORD ELDON, C.).—HOPE INSURANCE CO. v. MUNNINGS (1822), 1 L. J. O. S. Ch. 49, L. C.

295. Nothing for receiver to receive.]—A receiver will only be granted in cases where the amount of the judgment debt warrants the expense & where there is fair reason to suppose that there is something for the receiver to receive.—I. v. K., [1884] W. N. 63; Bitt. rep. in Ch. 185.

296. ————]—An application was made to obtain maintenance for two infants entitled to successive estates tail in remainder after the death of their father under a scheme whereby a certain yearly sum was to be paid until the first of the children attained twenty-one, in consideration of a large sum of money to be paid to the lender, & to be charged, as well as the premium of a policy to be taken out by the lender to cover the contingency of both children dying under twenty-one, upon their interests in remainder:—*Held*: under Judgment Act, 1864 (c. 112), the ct. could only order a sale & conveyance of the debtor's interest in land after the land had been delivered in execution, but in this case, owing to the reversionary character of the interests, the only mode of execution was the appointment of a receiver; & there being nothing for him to receive, the ct. would not invent some theoretical execution for

the purpose of giving itself power to make a judgment binding on the infants' interests.—*Re HAMILTON (INFANTS)* (1885), 31 Ch. D. 291; 55 L. J. Ch. 282; 53 L. T. O. S. 840; 34 W. R. 203, C. A.

Annotations:—*Consd. Re Harrison & Bottomley*, [1899] 1 Ch. 465. *Refd. Re Jones & The Judgments Act*, 1861 (1895), 39 Sol. Jo. 671; *Woods v. Harrison* (No. 2) (1899), 43 Sol. Jo. 242. *Mentd. Cadman v. Cadman* (1886), 33 Ch. D. 397; *Re De Teissier's Trusts*, *De Teissier v. De Teissier* (1892), 37 Sol. Jo. 47; *Re Hambrough's Estate*, *Hambrough v. Hambrough*, [1909] 2 Ch. 620; *Re Badger*, *Badger v. Badger*, [1913] 1 Ch. 385.

297. ————]—I cannot see my way to make the order, because, the book debts having been received, & the proceeds expended, there will be nothing for a receiver to receive (PICKFORD, J.).—*HARPER v. McINTYRE* (1907), 51 Sol. Jo. 701.

298. ————]—Railway not open for traffic.]—Without deciding that there is jurisdiction to appoint a receiver in such a case [appointment under Railway Companies Act, 1867 (c. 127), s. 4, where railway not yet open for public traffic] but assuming that there is jurisdiction, still a receiver ought not to be appointed when there is not, & probably will not, until the line is opened for traffic, be any money for him to receive.—*Re KNOTT END RAILWAY ACT*, 1898, [1901] 2 Ch. 8; 70 L. J. Ch. 463; 84 L. T. 433; 49 W. R. 469; 17 T. L. R. 353; 45 Sol. Jo. 361, C. A.

299. No person in whose name action may be brought.]—*WOOD v. HITCHINGS*, No. 324, *post*.

300. Appointment acting detrimentally.]—Granting a receiver may act detrimentally to customers, & therefore I shall not appoint one (KINDERSTLEY, V.-C.).—*ANDREWS v. PUGH* (1854), as reported in 3 W. R. 50.

301. Applicant must show title.]—A receiver of the rents, etc. of real estate will not be appointed at the instance of a person who has been found to be testator's heir-at-law by the chief clerk's certificate, on a reference for that purpose in a creditors' suit.

I decline to make the order. . . . The title of appct. as heiress-at-law is not admitted, but on the contrary disputed. Should the creditors find it necessary hereafter to apply for a receiver, I may probably grant such an application (WOOD, V.-C.).—*TOPPING v. SEARSON* (1862), 6 L. T. 449.

## SUB-SECT. 2.—PARTICULAR INSTANCES.

### A. Administration of Estates.

#### (a) Proceedings Pending in Probate Division.

302. Jurisdiction to make appointment in Chancery proceedings.]—Injunction, restraining a transfer, & a receiver appointed, to preserve the property during a litigation in the Ecclesiastical Ct. upon the will.—*KING v. KING* (1801), 6 Ves. 172; 31 E. R. 997, L. C.

Annotations:—*Consd. Richards v. Chave* (1806), 12 Ves. 462. *Appld. Ball v. Oliver* (1813), 2 Ves. & B. 95. *Consd. Rendall v. Rendall* (1841), 1 Hare, 152. *Expld. Newton v. Ricketts* (1847), 9 L. T. O. S. 430. *Refd. Edwards v. Edwards* (1853), 10 Hare, App. LXIII.

303. ————]—The Ct. of Ch. will not interfere by appointing a receiver upon the mere ground, that two wills are in controversy in the Spiritual Ct.; & no special case; as that the property is in danger, & cannot be secured by administration *pendente lite*.—*RICHARDS v. CHAVE* (1806), 12 Ves. 462; 33 E. R. 175, L. C.

Annotation:—*Consd. Ball v. Oliver* (1813), 2 Ves. & B. 95.

Appointment to enforce appearance—Where defendant resident outside jurisdiction.]—*ARTHURS v. ARTHUR* (1824), 1 Hog. 95.—*IR*.

k. ————]—Application by annuitant.]—*RICHARDS v. GOOLD* (1827), 1 Mol. 22.—*IR*.

l. ————]—Application by lay im-

propriator—For payment of tithe rent-charge.]—*GREVILLE v. FLEMING* (1845), 2 Jo. & Lat. 335.—*IR*.



**Sect. 6.—In what cases appointment made: Sub-sect. 2, A. (a).]**

**304.** —.—.]—BUCKLAND v. SOULTEN (1824), 4 Y. & C. Ex. 373, n.; 164 E. R. 1051, L. C.

**Annotation:—***Reid*. Middleton v. Sherburne (1841), 4 Y. & C. Ex. 358.

**305.** —.—.]—Pending a litigation as to administration in the Ecclesiastical Ct., a bill was filed praying a receiver, & that upon the administrator being appointed & brought before the ct. the rights of the parties might be declared, & the estate administered.—*DE FEUCHÈRES v. DAWES* (1842), 5 Beav. 110; 11 L. J. Ch. 394; 6 Jur. 594; 49 E. R. 519.

**306.** —.—.]—Proceedings in Ch. having been taken by persons having claims upon the estate of an intestate, against his widow, who was alleged to have possessed herself of part of the estate, but who had not taken out administration, the Ct. of Ch. appointed a receiver, with authority to collect, get in, & receive the estate, & to apply to the Ct. of Probate for administration. The widow, & all the next of kin, & persons entitled in distribution having been cited, upon their non-appearance to the citation, the ct. made a general grant of administration to the receiver.—*In the Goods of MAYER* (1873), L. R. 3 P. & D. 39; 42 L. J. P. & M. 57; 29 L. T. 247; 37 J. P. 696.

**307.** —.—.]—*Re MALLALIEW, RADCLIFFE v. MALLALIEW* (1891), 91 L. T. Jo. 398.

**308.** —.—.]—*Re GREEN, GREEN v. KNIGHT*, [1895] W. N. 69.

**Annotation:—***Reid*. *Re Wenge* (1911), 55 Sol. Jo. 553.

**309.** —.—.]—Among the papers of a person supposed to have died intestate was found a will purporting to be cancelled, & one of the next of kin issued a writ in the Ch. Div. against the exor. named in the will asking for the appointment of a receiver of deceased's estate until a legal personal representative had been constituted, & moved for a receiver. Pending the hearing of the motion deft. commenced an action in the Probate Ct. for probate in solemn form, &, on the hearing of the motion, opposed the appointment of a receiver on the ground that it was wholly unnecessary, it being the usual practice in the Probate Ct. to appoint a receiver or administrator *pendente lite*. The facts were not in dispute & the estate was not in jeopardy:—*Held*: no ground was shown for ousting the jurisdiction of the ct., & a receiver was appointed.—*Re OAKES, OAKES v. PORCHERON*, [1917] 1 Ch. 230; 86 L. J. Ch. 303; 115 L. T. 913; 61 Sol. Jo. 202.

**310.** —.—.]—**Whether ousted by jurisdiction to appoint administrator.**—Jurisdiction of a ct. of equity for an account of personal estate & a receiver, pending a litigation for probate; though an administration *pendente lite* might be obtained in the Ecclesiastical Ct.—*ATKINSON v. HENSHAW* (1812), 2 Ves. & B. 85; 35 E. R. 251, L. C.

**Annotations:—***Appl.* Ball v. Oliver (1813), 2 Ves. & B. 95. *Distd.* Jones v. Frost (1822), Jac. 466. *Expld.* Newton v. Ricketts (1847), 9 L. T. O. S. 430. *Reid.* Watkins v. Brent (1835), 1 My. & Cr. 97. *Mentd.* Mitchell v. Thomas (1847), 6 Moo. P. C. 137.

**311.** —.—.]—Jurisdiction of a ct. of equity pending a disputed administration in the Ecclesiastical Ct. to protect the property by a receiver not ousted by the power of the Ecclesiastical Ct. to appoint an administrator *pendente lite*.—*BALL v. OLIVER* (1813), 2 Ves. & B. 96; 35 E. R. 255.

**Annotations:—***Expld.* Newton v. Ricketts (1847), 9 L. T. O. S. 430. *Reid.* Watkins v. Brent (1835), 1 My. & Cr. 97.

**312.** —.—.]—**Pendency of suit not distinctly alleged.**—Demurrer allowed to a bill praying that a pretended will might be delivered up to be

cancelled & an injunction & receiver till letters of administration should be granted; the pendency of a suit in the Ecclesiastical Ct. not being distinctly alleged & the Ct. of Ch. not having jurisdiction to try the validity of the will.—*JONES v. FROST* (1822), Jac. 466; 37 E. R. 926, L. C.

**Annotations:—***Distd.* Marr v. Littlewood (1837), 2 My. & Cr. 454. *Consd.* Rendall v. Rendall (1841), 1 Hare, 152. *Mentd.* Allen v. M'Pherson (1847), 1 H. L. Cas. 191.

**313.** —.—.]—**Validity of will in dispute.**—A receiver will not be appointed at the instance of a party claiming as devisee under a will, the validity of which is to be determined by an issue, unless claimant satisfies the ct. that there is a reasonable probability of his succeeding on the issue, & that the property will be endangered by being left in the possession of the heir-at-law.—*CLARK v. DEW* (1829), 1 Russ. & M. 103; 39 E. R. 40, L. C.

**314.** —.—.]—**After grant of probate—Pending proceedings to recall probate.**—The ct. will not grant an injunction & receiver against exors. who have obtained probate, on the ground of proceedings in the Ecclesiastical Ct. to recall probate.—*ANON.* (1833), 2 L. J. Ch. 123.

**315.** —.—.]—*MARR v. LITTLEWOOD*, No. 938, *post*.

**316.** —.—.]—*CONNOR v. CONNOR*, No. 361, *post*.

**317.** —.—.]—The exor., having obtained probate, is armed with full authority from the proper tribunal over testator's personal estate, & the ct. will not grant an injunction, or appoint a receiver, on account of the pending of a suit in the Ecclesiastical Ct. to recall such probate.—*NEWTON v. RICKETTS* (1848), 11 L. T. O. S. 81, L. C.

**318.** —.—.]—**Property in danger.**—The simple fact of there being a suit in the Ecclesiastical Ct. to recall the probate, will not induce the ct. to interfere either by the appointment of a receiver or by granting an injunction to control the legal right of the exor. to deal with testator's personal estate, where there is no imputation of misconduct or insolvency against the exor., & actual danger to the funds is not alleged.

Where it can be shown that the property is not safe, or there is no existing legal personal representative, the Ct. will interfere, but not otherwise.—*NEWTON v. RICKETTS* (1847), 10 Beav. 525; 16 L. J. Ch. 372, n.; 9 L. T. O. S. 430; 11 Jur. 662; 50 E. R. 684, L. C.

**319.** —.—.]—Bill by one of the next of kin against the exors. & one of the legatees in a will fraudulently obtained by them from a person of unsound mind, praying for an account & for an injunction & receiver pending a suit in the Ecclesiastical Ct. to recall the probate:—*Held*: maintainable in this ct. & demurrer for want of equity overruled.—*DIMES v. STEINBERG* (1854), 2 Sm. & G. 75; 65 E. R. 309.

**320.** —.—.]—**Necessity for strong case.**—This ct. will appoint a receiver, pending a suit in the Ecclesiastical Ct. to recall probate on a case of strong presumption.

Taking into consideration the evidence respecting the incapacity of this testator, the manner in which the will was obtained, the sort of surprise by which the probate was acquired, & the danger of the property; & grounding myself on the jurisdiction in this ct., to protect property pending a liquidation in another ct., I am of opinion that this is a fit case for a receiver & an injunction (LEACH, V.-C.).—*RUTHERFORD v. DOUGLAS* (1822), 1 Sm. & St. 111; 57 E. R. 45.

**Annotations:—***Reid.* Watkins v. Brent (1835), 1 My. & Cr. 97; Newton v. Ricketts (1847), 9 L. T. O. S. 430.

**321.** —[.]—(1) Where probate or administration has been granted by the Ecclesiastical Ct. a receiver will not be appointed pending litigation to recall probate or grant of administration, unless a special case be made out for such appointment.

(2) Where no probate or administration has been granted it is of course to appoint a receiver, pending a *bonâ fide* litigation in the Ecclesiastical Ct., to determine the right to probate or administration, unless a special case can be made for refusing such appointment.

(3) The fact that the litigation in the Ecclesiastical Ct. is on the question of which of two alleged wills shall be admitted to probate, & that deft. in the suit in equity is named exor. in both wills, is not a ground for refusing to appoint a receiver.—*RENDALL v. RENDALL* (1841), 1 Hare, 152; 11 L. J. Ch. 93; 66 E. R. 986.

**322.** ———— **Executor agreeing to test validity of will.**—The institution of a suit in the Ecclesiastical Ct., for the purpose of recalling probate, is not a ground upon which alone this ct. will interfere to restrain the exor. from receiving the assets. Where, however, the exor. had agreed, through this proctor, that the validity of the testamentary paper by which he was appointed, should be tried in the suit to recall probate, an order was made for an injunction & a receiver, & that order was affirmed on appeal.—*WATKINS v. BRENT* (1835), 1 My. & Cr. 97; 5 L. J. Ch. 49; 40 E. R. 313.

*Annotations* :—*Consd.* *Marr v. Littlewood* (1837), 2 My. & Cr. 454. *Appl.* *Rendall v. Rendall* (1841), 1 Hare, 152. *Consd.* *Newton v. Ricketts* (1847), 9 L. T. O. S. 430. *Appl.* *Newton v. Ricketts* (1848), 11 L. T. O. S. 81. *Consd.* *Devey v. Thornton* (1851), 9 Hare, 222; *Dimes v. Steinberg* (1854), 2 Sm. & G. 75. *Refd.* *Horlock v. Patch* (1845), 10 Jur. 108.

**323.** — & to order payment into Court money belonging to estate.]—Although the ct. will appoint a receiver on account of the pendency of a suit in the Ecclesiastical Ct., respecting the validity of a will, it will not, on that account alone, order the person named as exor. to pay into ct. money in his hands belonging to the deceased's estate.—*REED v. HARRIS* (1836), 7 Sim. 639; 5 L. J. Ch. 126; 58 E. R. 983.

*Annotation* :—*Consd.* *Edwards v. Edwards* (1853), 10 Hare, App. II. lxiii.

**324.** — Pending appeal to Privy Council—No one in position to protect estate in interim.]—An appeal was pending in the Privy Council from a sentence of the Ecclesiastical Ct. rejecting the testamentary papers of deceased declaring an intestacy; limited administration *pendente lite* had ceased by the sentence, & an inhibition had issued from the Privy Council which inhibited the Ecclesiastical Ct. proceeding. There being no person in the meantime authorised to protect & collect the estate :—*Held* : (1) these circumstances, of themselves alone, justified the appointment of a receiver by this ct.; (2) a receiver might in such case be granted on the application of a party applt., who, assuming the decision of the Ecclesiastical Ct. to be correct, had no interest in the estate of deceased; (3) the circumstance of there being no person in whose name an action might be brought to recover the property is not a sufficient objection to the appointment of a receiver.

The application, however, is made by pltf. alone; every other person, who, in my view of the case, may be interested in the estate, opposes the application (*LONGDALE, M.R.*).—*WOOD v. HITCHINGS* (1840), 2 Beav. 289; 48 E. R. 1192;

*sub nom.* *WOOD v. HITCHINGS*, *GOODLAKE v. WOOD*, 4 Jur. 858, L. C.

*Annotations* :—*As to* (1) *Refd.* *Rendall v. Rendall* (1841), 1 Hare, 152; *Re Spurling*, [1809] 1 Ch. 199.

**325.** — Under special circumstances.]—*Semble* : under special circumstances, it will appoint a receiver of the real estate.—*MIDDLETON v. SHERBURNE* (1841), 4 Y. & C. Ex. 358; 10 L. J. Ex. Eq. 75; 160 E. R. 1044; *on appeal sub nom.* *SHERBURNE v. MIDDLETON* (1842), 9 Cl. & Fin. 72, H. L.

*Annotations* :—*Refd.* *Lancashire v. Lancashire* (1846), 9 Beav. 259. *Mentd.* *Boyse v. Rossborough* (1857), 6 H. L. Cas. 1.

**326.** — When appointment as of course.]—*RENDALL v. RENDALL*, No. 321, *ante*.

**327.** — Same person executor in each disputed will.]—*RENDALL v. RENDALL*, No. 321, *ante*.

**328.** — Proof that property in danger.]—The ct. will not grant a receiver pending litigation in the Ecclesiastical Ct. for probate of a will, unless it is shown that the property is in such a position that it requires protection in the meantime, & that it might be lost or in danger if there were no one to receive it.—*WHITWORTH v. WHYDON* (1850), 2 H. & Tw. 445; 2 Mac. & G. 52; 14 Jur. 142; 47 E. R. 1758, L. C.

**329.** — After appointment of administrator *pendente lite*.]—Where, after proceedings had been commenced in the Probate Ct. to test the validity of a will, a bill was filed for a receiver of alleged testator's personal estate, & a motion made for a receiver, which motion stood over, & during this pendency the Ct. of Probate appointed an administrator *pendente lite*, under Court of Probate Act, 1857 (c. 77), s. 70 :—*Held* : it was the intention of the legislature to extend the powers of an administrator *pendente lite* appointed by the Ct. of Probate, & such administrator having the same power of protecting the property as a receiver, the ct. refused to appoint a receiver.—*VERET v. DUPREZ* (1868), L. R. 6 Eq. 329; 37 L. J. Ch. 552; 18 L. T. 501; 16 W. R. 750.

*Annotation* :—*Consd.* *Parkin v. Seddons* (1873), L. R. 16 Eq. 34.

**330.** — Appointment to benefit all parties.]—Where litigation is impending in the Ct. of Probate, the Ct. of Ch., if the interests of all parties require it, will appoint a receiver.—*GRIMSTON v. TURNER* (1870), 22 L. T. 292; 18 W. R. 724.

**331.** — After administration granted—Necessity for strong case.]—Upon the death of a person intestate, two persons, claiming to be co-heiresses-at-law & sole next of kin of the intestate, entered into possession of the intestate's real estate, & obtained a grant of letters of administration of the personal estate. Pltf., who claimed to be heir-at-law & one of the next of kin of the intestate, commenced proceedings in ejectment for the recovery of the real estate, & also took proceedings in the Probate Ct. for a recall of the letters of administration, & then filed a bill for the appointment of a receiver pending the litigation. One of the co-heiresses demurred to the whole bill; the other demurred, without answering, to so much of the bill as sought relief in respect of the real estate :—*Held* : both demurrers were good : the partial demurrer, because the ct. has no jurisdiction to appoint a receiver in a simple case of contested heirship; & the demurrer to the whole bill, on the ground that where administration has been granted the ct. will not exercise its jurisdiction to appoint a receiver of personal estate, unless a special case is made, a rule which will be strictly enforced, since Court of Probate Act, 1857 (c. 77), enables the Ct. of Probate to appoint an

**Sect. 6.—In what cases appointment made: Sub-sect. 2, A. (a), (b), (c), (d), (e) & (f).]**

administrator *pendente lite*, with powers similar to those of a receiver.—*HITCHEN v. BIRKS* (1870), L. R. 10 Eq. 471; 23 L. T. 335; 18 W. R. 1015.

**Annotation:—***Consd. Parkin v. Seddons* (1873), L. R. 16 Eq. 34.

**332. — Caveat entered.]—***PARKIN v. SEDDONS*, No. 428, *post*.

**333. — Transfer of application to Probate Division.]—***BARR v. BARR*, [1876] W. N. 44; 2 Char. Pr. Cas. 76.

**334. — Notwithstanding jurisdiction of Probate Division in same matter—Matter of urgency.]—***Re WRIGHT, MORRISON v. JONES* (1888), 32 Sol. Jo. 721.

**Jurisdiction of Probate Division to make appointment.]—***Sec Sect. 1, sub-sect. 2, B., ante.*

(b) *Creditors' Actions.*

**335. Whether receiver appointed—Insufficiency of assets.]—**In a suit by a specialty creditor, his claim was admitted by the answer of the administratrix & heiress-at-law of debtor, who had died intestate. The cause was set down to be heard on bill & answer, without any replication having been filed:—*Held*: as it was admitted that the estate of intestate was insufficient to pay in full the demand of *pltf.*, the latter was entitled to have a receiver appointed.—*CHALK v. RAINE* (1849), as reported in 18 L. J. Ch. 472; 13 Jur. 781.

**336. — —.]—***HODGKINS v. SINCLAIR* (1893), 37 Sol. Jo. 777.

**337. — Administration action.]—***Re BAKER, GIDDINGS v. BAKER* (1882), 26 Sol. Jo. 682.

**338. — —.]—***HODGKINS v. SINCLAIR* (1893), 37 Sol. Jo. 777.

**339. — —.]—**The present practice is for the Ch. Div. to entertain applications for the appointment of a receiver pending the grant of probate or letters of administration.—*Re WENGE* (1911), 55 Sol. Jo. 553.

**340. — No personal representative before the court.]—***Re DAWSON, CLARKE v. DAWSON* (1900), 75 L. J. Ch. 201; 94 L. T. 130; 50 Sol. Jo. 223.

**Effect on executors' right to prefer creditors.]—***See EXECUTORS, Vol. XXIII., p. 368, Nos. 4371-4374.*

(c) *Conduct or Character of Executor.*

**341. Strong case required.]—**Receiver appointed before answer upon affidavit of misapplication & danger to the property in the hands of an exor.: the co-exors. consenting to the order. A strong case necessary against an exor.—*MIDDLETON v. DODSWELL* (1806), 13 Ves. 266; 33 E. R. 294, L. C.

**Annotation:—***Consd. Browell v. Reed* (1842), 1 Hare, 434.

**PART II. SECT. 6, SUB-SECT. 2.—**  
**A. (b).**

**335 i. Whether receiver appointed—Insufficiency of assets.]—**Upon a creditor's bill, a receiver of the rents & profits of the testator's real estate will not be appointed where *pltf.* does not allege in his bill & clearly prove the insufficiency of the personal estate to pay the debts, & does not pray for the application of the realty, or the rents & profits thereof, to that object.—*SANDERS v. CHRISTIE* (1850), 1 Gr. 137.—**CAN.**

**337 i. — Administration action.]—***ALLIANCE BANK, LTD. v. IRVING* (1865), 4 N. S. W. S. C. R. (Eq.) 17, 45.—**AUS.**

**337 ii. — —.]—***Re MORPHY, MORPHY v. NIVEN* (1886), 11 P. R. 321.—**CAN.**

**337 iii. — —.]—***TAYLOR v.*

*MACFARLANE* (1902), 22 C. L. T. 325; 4 O. L. R. 239; 1 O. W. R. 283.—**CAN.**

**m. — To receive debtor's share of estate—Where debtor acting as administrator.]—**At the instance of execution creditors, a receiver was appointed to receive the debtor's share of his deceased wife's estate, of which he was the administrator.—*SMITH v. EGAN* (1896), 17 P. R. 330.—**CAN.**

**n. Appointment of judgment creditor—Interference with discretion of executors.]—**An order was made appointing the judgment creditor receiver to receive the amount of his judgment from the exors., whenever they should exercise their discretion to pay the judgment debtor the amount of the judgment, or any part thereof. Prohibition was granted against the enforcement of this order:—*Held*: if the order was intended to interfere

**342. Misapplication of property—Misapplication by one executor—Consent of co-executor to order.]—***MIDDLETON v. DODSWELL*, No. 341, *ante*.

**343. Poverty.]—**Though this ct. will appoint a receiver upon misconduct of the exor., it will not upon the single ground, that he is in mean circumstances.—*ANON.* (1806), 12 Ves. 4; 33 E. R. 2.

**Annotation:—***Reid. Browell v. Reid* (1842), 11 L. J. Ch. 272.

**344. Misconduct.]—***ANON.* (1806), No. 343, *ante*.

**345. — —.]—**In the case of fraud or misbehaviour upon the part of a personal representative during the proceedings under an administration summons at chambers, the ct. will interfere summarily to protect the property brought within its jurisdiction, & will, if necessary, grant an injunction & order a receiver, without requiring that a bill should be previously filed for that purpose.—*BROOKER v. BROOKER* (1857), 3 Sm. & G. 475; 26 L. J. Ch. 411; 65 E. R. 743; *sub nom. Re BROOKER'S ESTATE, BROOKER v. BROOKER*, 3 Jur. N. S. 381; 5 W. R. 382.

**346. Maladministration—No corrupt intention.]—**S. B. by his will, appointed B. together with certain other persons his exors. & trustees, who all, with the exception of B. disclaimed; in consequence of which B. acted alone in the trusts of the will. It having appeared that B. had, during his acting in the trust, been guilty of improvident expenditure, & among other things, had converted farming lands into a racecourse:—*Held*: although no corrupt intention appeared to have prompted B. in committing wilful waste, but he had acted solely under a mistaken notion of his duties of a trustee, yet his conduct was quite sufficient to justify the ct. in appointing a receiver.—*WHITEHEAD v. BENNETT* (1845), 6 L. T. O. S. 185.

**347. — —.]—***Re GORDON, LEVENSTEIN v. GORDON* (1900), 44 Sol. Jo. 626.

**348. Fraud.]—***BROOKER v. BROOKER*, No. 345, *ante*.

**349. Execution of will improperly obtained.]—***HAMILTON v. GIRDLESTON*, [1876] W. N. 202.

*See, also, EXECUTORS, Vol. XXIII., pp. 44, 45, Nos. 204-210.*

(d) *Representative Outside Jurisdiction.*

**350. Whether appointment made.]—***PITCHER v. HELLIAR* (1781), 2 Dick. 580; 21 E. R. 396, L. C.

**Annotation:—***Distd. Coward v. Chadwick* (1825), 2 Russ. 150, n.

**351. — —.]—**Where an exor. resides abroad, it is not necessary that the parties interested should establish a case of misconduct to entitle them to a receiver.—*WESTBY v. WESTBY* (1847), 2 Coop. temp. Cott. 210; 47 E. R. 1131.

with the action of the exors., it should not have been made; & if it did not so interfere, it was nugatory.—*Re MCINNES v. MCGAW* (1898), 30 O. R. 38.—**CAN.**

**PART II. SECT. 6, SUB-SECT. 2.—**  
**A. (c).**

**o. Misapplication of property.]—***In the Goods of MOXLEY*, [1916] 2 L. R. 145.—**IR.**

**344 i. Misconduct.]—***BALD v. THAMPSON* (1870), 17 Gr. 154.—**CAN.**

**344 ii. — —.]—***SULLIVAN v. HARTY* (1883), 9 P. R. 500.—**CAN.**

**347 i. Maladministration.]—***MEACHAM v. DRAPER* (1851), 2 Gr. 316.—**CAN.**

**p. Waste.]—***SANDERS v. CHRISTIE* (1860), 1 Gr. 137.—**CAN.**



**352.** —[.]—A receiver appointed of real & personal estate where the devise in trust & personal representatives were in Jersey, & therefore out of the jurisdiction.—*SMITH v. SMITH* (1853), 10 Hare, App. II. lxxi.; 68 E. R. 1156.

*Annotation*:—*Consd. Re Maudslay & Field, Maudslay v. Maudslay & Field*, [1900] 1 Ch. 602.

**353.** —[.]—Where the administrator of a foreigner who died intestate in England went beyond the jurisdiction, & an administrator *ad litem* of intestate's estate was subsequently appointed under Court of Probate Act, 1857 (c. 77), s. 74, the ct., in a suit instituted by the liquidator of a French assocn. on behalf of himself & other creditors of intestate, made a decree for an account of the personal estate in England, the appointment of a receiver, etc., but gave no direction with respect to the administrator.—*COLLAS v. HESSE* (1864), 10 L. T. 221; 12 W. R. 565.

**354.** —[.]—Where a sole exor. was abroad, & the beneficiaries under the will were unable to obtain an account from the person left in control of the property during the exor.'s absence, the ct. sanctioned the appointment of a receiver.—*DICKINS v. HARRIS* (1866), 14 L. T. 98.

(e) *Insolvency of Executor.*

**355. Whether appointment made.**—[.]—Where assignees have possessed themselves of effects which belonged to bkpt., as exor. only, the ct. upon an application of testator's creditors, will, for the securing his effects, appoint a receiver, to whom the assignees shall account for so much as they have got in of testator's estate.—*Re WINSMORE, Ex p. ELLIS* (1742), 1 Atk. 101; 26 E. R. 66, L. C.

*Annotation*:—*Reid, Re Howard & Gibbs, Ex p. Shaw, Pearson, etc.* (1822), 1 Gl. & J. 127.

**356.** —[.]—After an order had been made on summons for the administration of the real & personal estate of testatrix, the sole exor. & trustee became bkpt.:—*Held*: a receiver ought to be appointed, & the fact of the assignees not being before the ct. was not a sufficient reason for refusing to appoint one.—*Re JOHNSON, STEELE v. COBHAM* (1866), 1 Ch. App. 325; 14 L. T. 242; 14 W. R. 493, L. J.

**357.** —[.]—*GAWTHORPE v. GAWTHORPE*, [1878] W. N. 91.

*See, also, EXECUTORS*, Vol. XXIII., pp. 45, 46, Nos. 211–219.

(f) *Other Cases.*

**358. Property bequeathed on implied trusts.**—[.]—Testator bequeathed the residue of his real & personal estate to his widow, her heirs, exors. & administrators, “having a perfect confidence she will act up to those views which I have communicated to her, in the ultimate disposal of my property after her decease.” Testator's widow died intestate. The bill alleged that testator had bequeathed the residue of his property to his wife, on the faith of a promise that she would dispose of his property in favour of pltf.s., who were natural children of testator. The ct., on motion supported by affidavits verifying the allegation, granted a receiver of the real estates against their heir & second husband of the widow.

—*PODMORE v. GUNNING* (1832), 5 Sim. 485; 58 E. R. 420.

*Annotations*:—*Reid, Middleton v. Sherburne* (1841), 4 Y. & C. Ex. 358. *Mentd. Gingell v. Home* (1839), 9 Sim. 539; *Reynolds v. Kortright* (1854), 18 Beav. 417.

**359. No one in whose name action to recover property might be brought.**—[.]—*WOOD v. HITCHINGS*, No. 324, *ante*.

**360. Death of one executor—Other refusing to act.**—[.]—A. & B. were trustees & exors. A. paid more than he received, in the expectation of repayment out of a mtge. forming part of the assets. A. died & B. refused to act. In an administration suit, a receiver of the mtge. was appointed against the representatives of A.—*PALMER v. WRIGHT* (1846), 10 Beav. 234; 8 L. T. O. S. 358; 50 E. R. 572.

*Annotation*:—*Mentd. Liddell v. Norton* (1853), *Kay*, App. XI.

**361. Grant of administration disputed—No fraud or maladministration charged.**—(1) The pendency of a suit in the Ecclesiastical Ct. to have a probate or letters of administration recalled, is not of itself a sufficient ground to induce the ct. to grant an injunction & receiver against the personal representative.

(2) The question is, whether a receiver should be appointed, where pltf. made no claim as widow at the time the administration was granted; nor does it appear that at that time she had any intention to make such a claim. . . . There is no danger of maladministration of the estate. The administration is properly granted, & no case has been made against debts, of any intention to misapply the funds. . . . This is not the same sort of case as where the right to administration is in contest; but it is a person claiming adversely to the present legal title. The administrators are the persons legally authorised to get in the outstanding personal estate of the intestate. . . . Debts, have properly consented at once to bring in the funds, as in the ordinary case of a disputed title. The order must be discharged (*LORD COTTENHAM, C.*).—*CONNOR v. CONNOR* (1847), 15 Sim. 598; 16 L. J. Ch. 371; 9 L. T. O. S. 349; 11 Jur. 662, n.; 60 E. R. 751, L. C.

*Annotation*:—*As to* (1) *Folld. Newton v. Ricketts* (1847), 10 Beav. 525.

**362. Danger of assets being taken outside jurisdiction.**—[.]—A person holding by the warrant of her Majesty the office of Judicial Assessor to the native princes, & being also Chief Judge of her Majesty's dominions on the Gold Coast of Africa, took possession of the personal effects of a British subject, who died intestate, domiciled at Cape Coast Town, in Africa, & claimed to be the official administrator of these assets, by usage, in his capacity of Judicial Assessor, & as such, to be entitled to 7½ per cent. commission upon them. He afterwards transmitted part of the assets to this country to be sold, & the proceeds carried to the account of intestate's estate, & came to this country himself on leave of absence for a short time. The father of intestate, being his sole next of kin, obtained letters of administration to him in England, & filed his bill against the Judicial Assessor for administration, & for a receiver. & upon motion for a receiver in the suit:—*Held*:

PART II. SECT. 6, SUB-SECT. 2.—  
A. (e).

**355 i. Whether appointment made.**—[.]—Where a person named as an exor. was at the time of the making of the will in excellent credit & circumstances, but before the death of the testator became insolvent & made an assignment for the benefit of his creditors &

also apparently became intemperate, an injunction was granted restraining him from interfering with the estate; & the appointment of a receiver was directed.—*JOHNSON v. MCKENZIE* (1890), 20 O. R. 131.—*CAN.*

**355 ii.** —[.]—*MILLS v. PALLIN* (1898), 1 N. B. Eq. Rep. 601.—*CAN.*

PART II. SECT. 6, SUB-SECT. 2.—  
A. (f).

**q. Death of one executor.**—[.]—*BLOOMFIELD v. BROOKE* (1880), 8 P. R. 266; 16 C. L. J. N. S. 145.—*CAN.*

**r. Executors declining to act—Appointment for payment of legacy.**—[.]—*CALLAGHAN v. HOWELL* (1897), 29 O. R. 329.—*CAN.*

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the Ct. of Ch. had jurisdiction to sustain the application, as the assets & the Judicial Assessor were both in this country, whatever might be the nature of his authority; & there being the danger of his taking the assets again out of the jurisdiction, although he might be the proper representative of the intestate in Africa, a good case was made for the appointment of the receiver.—*HERVEY v. FITZPATRICK* (1854), Kay, 421; 2 Eq. Rep. 444; 23 L. J. Ch. 564; 2 W. R. 338; 69 E. R. 178; *sub nom.* *HERVEY v. FITZGERALD*, 23 L. T. O. S. 10.

**363. Accrual of arrears of rent.]—***Re BY-WATER'S ESTATE*, *SARGENT v. JOHNSON* (1855), 1 Jur. N. S. 227.

**364. Will conferring power of sale—Doubt as to person in whom vested.]—**Where it was doubtful whether a power of sale of realty, given to the extrix. by the will, vested under a codicil in a co-exor. thereby nominated, the ct. appointed a receiver of the rents & profits of the real estate.—*YEITTS v. PALMER* (1863), 2 New Rep. 255; 8 L. T. 528; 9 Jur. N. S. 954; 11 W. R. 765.

**365. Estate without administration—Infants entitled.]—**Upon motion on behalf of the infant children, a receiver & manager of intestate's estate & business was appointed, where the administratrix was dead & there was no existing administration to the estate.—*STEER v. STEER* (1864), 2 Drew. & Sm. 311; 11 L. T. 502; 13 W. R. 225; 62 E. R. 640.

**366. Citation of persons claiming interest—Necessity for.]—**Before a receiver of real estate will be appointed by the ct., under Court of Probate Act, 1857 (c. 77), s. 71, it is necessary that it should appear on affidavit that the heir-at-law, or devisee, or other person having or pretending interest in the real estate, has been cited under sect. 61.—*PURDEY v. FIELD & HATCH* (1864), 3 Sw. & Tr. 576; 33 L. J. P. M. & A. 73; 28 J. P. 265; 12 W. R. 1088; 164 E. R. 1399.

**367. Against executor de son tort.]—**Bill stating a will & codicils giving pltf. an annuity & appointing deft. exor.; that deft. had proved the will & also previously meddled with the assets & praying administration. Plea that deft. had not proved the will:—*Held*: the plea was good since the only relief that could be given against an exor. *de son tort* in absence of the proper exor. is the appointment of a receiver.—*CARY v. HILLS* (1872), L. R. 15 Eq. 79; 42 L. J. Ch. 100; 28 L. T. 6; 21 W. R. 166.

*Annotations:—Mentd.* *Coote v. Whittington* (1873), L. R. 16 Eq. 534; *Rowell v. Morris* (1873), L. R. 17 Eq. 20.

**368. Before probate—To carry on business.]—***SPENCER v. SHAW*, [1875] W. N. 115.

**369. —.]—***Re PARKER, DEARING v. BROOKS*, No. 32, *ante*.

**370. Before administration.]—***Re PARKER, DEARING v. BROOKS*, No. 32, *ante*.

**371. Executors declining to act—Person entitled to administer not represented.]—**Pltf. was entitled to a legacy under the will of testator. Two of the exors. of the will had decided to renounce, & the third had not yet made up his mind whether he would act or not. Pltf. commenced an administration action & applied for a receiver, alleging that there was danger to the assets:—*Held*: without deciding whether the ct. has jurisdiction to appoint a receiver pending pro-

bate, inasmuch as testator's widow, who was the proper person to have administration in case none of the exors. acted, was not represented, & as the assets were not, in the opinion of the ct., in any danger, the application must be refused.—*Re HENDERSON, MACLEOD v. LANE* (1886), 2 T. L. R. 322, L. JJ.

**372. To prevent tort against estate—Trespass.]—**An administrator can bring an action in respect of a trespass against the real estate in the interval between the death of testator & the grant of the letters of administration, & he can, if necessary, before the grant obtain the appointment of a receiver to prevent a wrong being done to the estate.—*In the Goods of PRYSE*, [1904] P. 301; *sub nom.* *Re PRYSE*, 73 L. J. P. 84; 90 L. T. 747, C. A.

*Annotation:—Mentd.* *Hewson v. Shelley*, [1913] 2 Ch. 384.

**To prevent executors exercising right of retainer.]—***See* EXECUTORS, Vol. XXIII., p. 377, Nos. 4458–4465.

**B. Actions for Recovery of Land.**

*See* REAL PROPERTY, Vol. XXXVIII., pp. 783, 784.

**C. Bankruptcy Proceedings.**

**Interference with receiver.]—***See* BANKRUPTCY, Vol. IV., p. 16, Nos. 61, 62.

**In what court proceedings against receiver must be taken.]—***See* BANKRUPTCY, Vol. IV., p. 16, No. 63.

**Whether appointment stays execution.]—***See* BANKRUPTCY, Vol. IV., p. 87, No. 788.

**Whether receiver may take out debtor's summons.]—***See* BANKRUPTCY, Vol. IV., p. 87, No. 789.

**Official receiver & special manager.]—***See* BANKRUPTCY, Vol. IV., pp. 195–204, Nos. 1796–1881.

**Appointment of interim receiver.]—***See* BANKRUPTCY, Vol. IV., p. 204, Nos. 1882–1885.

**Whether appointment constitutes creditor a "secured creditor."]—***See* BANKRUPTCY, Vol. IV., pp. 360, 361, Nos. 3360–3365.

**Appeal by receiver—Form of notice.]—***See* BANKRUPTCY, Vol. IV., p. 532, No. 4882.

**Receivership under inspectorship deed—Misfeasance of receiver—Liability of inspectors.]—***See* BANKRUPTCY, Vol. V., p. 1105, No. 9018.

**D. As between Co-Owners.**

**373. Co-owners of land—Exclusive occupation by one owner—Failure to give security.]—**Tenant in common in possession, ordered to give security for payment of the proportion of rents to his co-tenants; otherwise a receiver.—*STREET v. ANDERTON* (1793), 4 Bro. C. C. 414; 29 E. R. 965. *Annotation:—Distd.* *Tyson v. Fairclough* (1824), 2 Sim. & St. 142.

**374. —.]—**If one tenant in common is excluded by his co-tenants, the ct., upon satisfactory evidence of the exclusion, will appoint a receiver over the whole estate.—*SANDFORD v. BAILLARD* (No. 2) (1864), 33 Beav. 401; 33 L. J. Ch. 450; 10 Jur. N. S. 251; 35 E. R. 423.

**375. — No exclusion.]—**Motion by tenant in common for a receiver against his co-tenant in possession, refused; it not amounting to a case of exclusion.—*MILBANK v. REVETT* (1817), 2 Mer. 405; 35 E. R. 995.

*Annotation:—Consd.* *Tyson v. Fairclough* (1824), 2 Sim. & St. 142.

**PART II. SECT. 6. SUB-SECT. 2.—D.**

**375i. Co-owners of land—No exclusion.]—**On a bill for a partition by one tenant in common against another a receiver will not be granted, if a

case of exclusion is not shown.—*SPRATT v. AHEARNE* (1834), 1 Jo. Ex. Ir. 50.—*IR.*

t. — *Whether one co-owner bound*

*to accept appointment of receiver of other moiety—Where annuities charged on both moieties.]—**GTIBSON v. WILLS* (1863), 5 Ir. Jur. 176.—*IR.*

**376.** —[Motion for a receiver by one tenant in common against his co-tenant, on the ground that the latter had given notice to the tenants to pay their rents to him only, & had advertised the estate for sale, refused, because the conduct complained of did not amount to an exclusion.—*TYSON v. FAIRCLOUGH* (1824), 2 Sim. & St. 142; 1 Coop. temp. Cott. 479; 57 E. R. 300. *Annotation* :—*Expld.* *Searle v. Smales* (1855), 25 L. T. O. S. 106.

**377. Receiver of plaintiffs' share only.**—The ct. refused, on the application of one of several equitable tenants in common, to appoint a receiver over the whole estate, against an equitable tenant in common in possession, there being no exclusion, but limited the appointment of receiver to the share of pltf's. only.—*SANDFORD v. BALLARD* (1861), 30 Beav. 109; 7 Jur. N. S. 651; 54 E. R. 830.

**378. — Partition action pending.**—*PORTER v. LOPES*, No. 3, *ante*.

**379. — Receiver of plaintiff's share only.**—A receiver of a moiety of an estate, claimed by pltf. as tenant in common with deft., who was in possession of the whole, granted, under the circumstances.—*HARGRAVE v. HARGRAVE* (1846), 9 Beav. 549; 15 L. J. Ch. 250; 7 L. T. O. S. 467; 50 E. R. 456.

*Annotation* :—*Refd.* *Searle v. Smales* (1855), 25 L. T. O. S. 106.

**380. — Failure to give security.**—*MURRAY v. COCKERELL*, [1866] W. N. 223.

—[See, also, No. 377, *ante*.]

**381. — Consideration of legal & equitable rights.**—In appointing a receiver, the ct. will not proceed further upon the equitable right of a tenant in common, than it would upon his legal right.—*KNOWLES v. CLAYTON* (1824), 2 L. J. O. S. Ch. 181.

**382. — Motion opposed by one only of persons interested.**—*SEARLE v. SMALES*, No. 290, *ante*.

**383. — Joint receivers.**—Where there was a dispute between tenants in common of real estate in reference to the receipt of rents, the ct. appointed one of the disputants who had an estate for life of one-fifth of the property, & another person nominated by the other parties, joint receivers of the whole estate.—*RAMSDEN v. FAIRTHROP* (1863), 1 New Rep. 389.

**Mortgagee of undivided share.**—*See* MORTGAGE, Vol. XXXV., p. 525, Nos. 2557–2558.

**384. Ship owners—Want of good faith.**—*BRENAN v. PRESTON*, No. 22, *ante*.

**385. — Appointment just & convenient.**—The ct. will appoint a receiver in a co-ownership suit where circumstances exist which in the opinion of the ct. render such a course just & convenient.—*THE AMPHILL* (1880), 5 P. D. 224; 29 W. R. 523.

**386. Newspaper owners—Refusal to render accounts.**—K. obtained a decree that he was entitled to a moiety of a newspaper, subject to a lien thereon in favour of his co-owner H., & the decree directed certain accounts to be taken. H. had mortgaged his interest, including his lien on K.'s share, to M. K. had no interest in the premises where the business of printing & publishing the newspaper was carried on, nor in the plant used in the business. The books of account were in the possession of H. Great delay took place in taking the accounts directed by the decree, both H. & M. placing every obstacle they could in the way. Ultimately M. purported, as mtgee., to sell the whole interest in the newspaper to J. Thereupon K. filed another bill against M. & H. &

J., praying that the sale to J. might be declared void as against K., & that the newspaper might be sold by the ct., & that till sale a receiver & manager might be appointed, & that, if necessary, this suit might be treated as supplemental to the first suit :—*Held* : a receiver & manager ought to be appointed.—*KELLY v. HUTTON, KELLY v. M'MURRAY* (1869), 20 L. T. 201; 17 W. R. 425, L. JJ.

*Annotation* :—*Mentd.* *Lee v. Haley* (1869), 21 L. T. 546.

**387. Partnership property—Carrying on undertaking.**—*SKIP v. HARWOOD* (1746), 1 Dick. 114; 21 E. R. 211; *subsequent proceedings, sub nom.* *WEST v. SKIP* (1749), 1 Ves. Sen. 239, L. C.

**388. — Securing interest of deceased partner.**—*BALDWIN v. BOOTH*, [1872] W. N. 229.

—[See, further, PARTNERSHIP, Vol. XXXVI., pp. 482 *et seq.*

**Mines.**—*See* MINES, Vol. XXXIV., pp. 625, 669, Nos. 221, 657–659.

#### E. As between Covenantor and Covenantee.

**389. Covenant to give effect to mortgage.**—Where a tenant in tail in remainder had agreed to pay a sum of money after the death & failure of issue of his brother, the tenant in tail in possession, & had secured the money by a mtge. of the estate, & covenanted to levy a fine & suffer a recovery to give effect to the mtge., but on coming into possession of the estate refused to perform his covenant, the ct. appointed a receiver of the rents.—*FREE v. ILINDE* (1827), 2 Sim. 7; 57 E. R. 693.

**390. Covenant to pay annuity—Charged by incumbent on benefice.**—In 1803, 43 Geo. 3, c. 84, repealed 13 Eliz. c. 20, which prohibited the charging of benefices. In 1817, 43 Geo. 3, c. 84, was repealed, & the effect of such repeal was to revive 13 Eliz. c. 20. In 1811 an incumbent duly charged his then present benefice with an annuity, & covenanted that, if he should afterwards be preferred to any other benefice, he would fully charge the same with the annuity; & that in the meantime the same should be charged and chargeable with the annuity. In 1814, the incumbent was preferred to another benefice, but no legal charge upon it was executed until the year 1818 :—*Held* : the deed of 1811 constituted a good equitable charge, which attached upon the new benefice as soon as it was acquired. There being subsequent incumbrancers, an order for a receiver was made at the hearing, & affirmed on appeal.—*METCALFE v. YORK* (ARCHBP.) (1836), 1 My. & Cr. 547; 6 L. J. Ch. 65; 40 E. R. 485, L. C.

*Annotations* :—*Refd.* *Wellesley v. Wellesley* (1839), 4 My. & Cr. 561; *Long v. Storie* (1849), 3 De G. & Sm. 308; *Ludgater v. Channell* (1851), 16 L. T. O. S. 337; *Mornington v. Keane* (1858), 2 De G. & J. 292; *Tuckley v. Thompson* (1860), 1 John. & H. 126; *Holroyd v. Marshall* (1862), 10 H. L. Cas. 191; *Tailby v. Official Receiver* (1888), 13 App. Cas. 523; *Western Wagon & Property Co. v. West*, [1892] 1 Ch. 271; *Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345; *Re Wait*, [1927] 1 Ch. 606. *Mentd.* *Montagu v. Sandwich* (1886), 32 Ch. D. 525; *Re Mirams*, [1891] 1 Q. B. 594.

**391. Covenant in deed of arrangement by debtor.**—Debtor executed an inspectorship deed for the benefit of his creditors, which was duly assented to & registered under Bkpcy. Act, 1861 (c. 134). The deed contained the usual covenants. The debtor having broken these covenants, & having refused to submit to the control of the inspectors, & having collected & applied to his own use assets which were subject to the provisions of the deed, the inspectors filed a bill praying for the appointment of a receiver to get in the outstanding estate of debtor subject to the deed. The judge appointed a receiver accordingly, on the undertaking of pltf's. to submit to any order

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which might thereafter be made as to payment over to the Ct. of Bkpcy. by the receiver of any moneys to be received by him.—*RICHES v. OWEN* (1868), 3 Ch. App. 820; 16 W. R. 1072, L. J.J.

**Annotations:—***Distd.* *Bell v. Bird* (1868), 16 W. R. 1165. *Consd.* *Martin v. Powning* (1869), 4 Ch. App. 356. *Reid.* *Stone v. Thomas* (1870), 5 Ch. App. 219.

**F. In Aid of Creditors and Mortgagees.**

**392. Purpose of appointment—To prevent debtor dealing with property.]—***NATIONAL PROVINCIAL BANK OF ENGLAND v. THOMAS* (1876), 24 W. R. 1013; 3 Char. Pr. Cas. 396.

**393. Money received in ambiguous capacity.]—**A. had acted in some measure as the agent of both parties, in negotiating a loan, by way of annuity secured on a rentcharge for the life of the grantor, & afterwards in paying the annuity, & keeping up a policy of insurance. A. received from the grantor a sum of money for the repurchase of the annuity, & persuaded the grantee to execute a re-assignment without signing any receipt for the consideration money, which re-assignment was to be kept by A. until it should be paid, A. falsely representing, that the grantor wished to delay the payment for some time; & without the grantor's knowledge, the annuity was paid regularly to the annuitant by A. until he died insolvent:—*Held*: the question in what character A. received the money for repurchasing the annuity was sufficiently doubtful to warrant the appointment of a receiver on motion.—*VANDELEUR v. BLGRAVE* (1838), 2 Jur. 176.

**394. By mortgagee—Against judgment creditor in possession—Fraud & collusion not proved.]—**The bill, stating the title of plffs. as equitable mtgees. by deposit of deeds, & that certain persons represented by defts. had got possession of the mtged. estates under elegits sued out by them in concert with the mtgor., upon judgments obtained subsequently to the date of the equitable mtge., in the names of those parties, but at the instance of the mtgor., & for fictitious debts, prayed that plffs. might be declared entitled as equitable mtgees. to priority over the elegits & the judgments so obtained, & that such judgments & elegits might be declared fraudulent & void as against plffs., & that the mtge. security might be realised, & the proceeds paid to plffs. towards satisfaction of their debt, & that a receiver might, in the meantime, be appointed, & defts. restrained from receiving the rents of the mtged. premises, & also from permitting the mtgor. to receive them. An order for a receiver, which had been made by the Vice-Chancellor, was discharged, upon appeal, by the Lord Chancellor, his Lordship being of opinion that the charges of fraud & collusion were not made out against the parties who had obtained possession under the elegits, & that the question whether plffs. were entitled to priority over defts., independently of these charges, was not open to

them in the present state of the record, inasmuch as it was clear, from the frame of the bill, that the claim of plffs. did not profess to be founded upon any such ground.—*WHITWORTH v. GAUGAIN* (1841), Cr. & Ph. 325; 10 L. J. Ch. 317; 5 Jur. 523; 41 E. R. 515, L. C.

**Annotations:—***Reid.* *Langton v. Horton* (1842), 1 Hare, 549; *Brunton v. Neale* (1844), 14 L. J. Ch. 8; *Holroyd v. Marshall* (1862), 10 H. L. Cas. 191. *Mentd.* *Adams v. Paynter*, *Adams v. Lloyd*, *Adams v. Paynter* (1844), 8 Jur. 1063; *Castelli v. Cook* (1849), 7 Hare, 89.

**395. — Equitable mortgage—Question as to priority of incumbrances.]—***ROBERTS v. MADOCKS* (1843), 1 L. T. O. S. 408.

**396. — Later mortgagee acquiring possession.]—**On motion for a receiver at the suit of an equitable incumbrancer, where another equitable incumbrancer later in date had acquired a legal possession, the ct. refused to disturb the possession so acquired, & refused the motion for a receiver.—*BATES v. BROTHERS* (1853), 2 Sm. & G. 509; 2 Eq. Rep. 321; 23 L. J. Ch. 150; 22 L. T. O. S. 196; 17 Jur. 1174; 2 W. R. 116; 65 E. R. 503; *on appeal* (1854), 23 L. J. Ch. 922, L. J.J.

*See, further, MORTGAGE, Vol. XXXV., pp. 520 et seq.*

**397. As against surety—Surety in ignorance of circumstances affecting debt—Duty of creditor to make inquiries.]—**(1) It is a matter of discretion for the Ct. of Ch. whether it will or will not interfere by *interim* order respecting the property of a litigant. If the property is *in medio*, in the actual enjoyment of no one, the ct. will interfere for the benefit of all concerned. When a married woman, having separate estate, is a party to a suit, the interference will be accorded or refused according to the circumstances of the case.

(2) Where the ct. summarily interferes against the legal possession, it has a right to expect plff. to proceed with the most complete & honest diligence to obtain a decree. Delay in his proceedings constitutes an objection to the proposed interference.

(3) Though a creditor may not, in every case, be bound to inquire into the circumstances under which a third person becomes surety to him, he is so when the dealings between the parties are such as to lead to a suspicion of fraud.

A creditor of a partnership, consisting of two persons, had received from one of them joint & several promissory notes, accepted by himself & a third party, a married woman, having separate estate. The partnership was afterwards dissolved by deeds, by virtue of which the second partner, on giving up certain title deeds, was altogether exonerated from liability to the creditor, who, however, expressly reserved his rights on all notes & other securities which he held in his hands at the time of the execution of these deeds. These transactions were wholly unknown to the third party, who was the surety on the notes. There were various circumstances which might have awakened the suspicion of creditor, & he had not taken any steps to inform the surety as the notes

**PART II. SECT. 6, SUB-SECT. 2.—F.**

**a. Application by judgment creditor —Against company.]—**A mtgee. or judgment creditor of a railway co. is not entitled to enforce payment of his demand by sale or foreclosure of the railway; he is only entitled to have a manager or receiver of the undertaking appointed.—*GALT v. ERLE & NIAGARA RY. CO.* (1868), 14 Gr. 499.—*CAN.*

**b. — — — — —]—***MURDOCH v. WINDSOR & ANNAPOLIS RY. CO.* (1876), R. E. D. 137; 3 Cart. 368.—*CAN.*

**c. — — — — —]—***Appointment without taking out fl. fa.]—*Re CREDITORS RELIEF

ACT, 1883, *MUIRHEAD v. LAWSON, McLEAN'S CASE* (1884), 1 B. C. R. pt. 2, 113.—*CAN.*

**d. — — — — —]—***NOVA SCOTIA MINING CO. v. GREENER* (1898), 31 N. S. R. 189.—*CAN.*

**e. — — — — —]—***Against assignee of life policy of debtor.]—*Plffs., judgment creditors, were held entitled to a receivership order in respect to deft.'s interest in a fully paid up life policy which he had assigned to plffs. as security, reserving to himself the cash surrender value of the bonus additions.—*CANADIAN MUTUAL LOAN & INVEST-*

*MENT CO. v. NISBET* (1900), 31 O. R. 562.—*CAN.*

**f. — — — — —]—***Against purchaser with notice of judgment.]—**BARRETT v. MERRICK* (1836), 2 Jo. Ex. Ir. 193.—*IR.*

**g. — — — — —]—***Against purchaser without notice of judgment.]—**CHAPMAN v. DUNBAR* (1840), Fl. & K. 86.—*IR.*

**h. — — — — —]—***Against owner of equity of redemption—Where mortgagee in possession.]—*It is not sufficient cause against the appointment of a receiver upon a judgment under Will. 4, c. 35, ss. 5 & 6, that the debtor is only

became due that she had become or continued liable upon them. In a bill for an account & a receiver, filed by creditor, the surety put in an answer detailing these circumstances, & alleging fraud:—*Held*: this was not a case in which the ct. would interfere by appointing a receiver.—OWEN & GUTCH v. HOMAN (1853), 4 H. L. Cas. 997; 1 Eq. Rep. 370; 22 L. T. O. S. 58; 17 Jur. 861; 10 E. R. 752, H. L.

*Annotations*:—As to (1) *Consd.* *Viola v. Anglo-American Cold Storage Co.*, [1912] 2 Ch. 305. *Generally, Mentd.* *Newton v. Chorlton* (1853), 2 Drew. 333; *North British Insce. v. Lloyd* (1854), 10 Exch. 523; *Davies v. Stainbank* (1855), 6 De G. M. & G. 679; *Price v. Barker* (1855), 24 L. J. Q. B. 130; *Gardner v. Chapman* (1860), 6 Jur. N. S. 1254; *General Steam Navigation Co. v. Rolt* (1860), 6 C. B. N. S. 550; *Way v. Hearn* (1862), 11 C. B. N. S. 774; *Lee v. Jones* (1864), 17 C. B. N. S. 482; *Bateson v. Gosling* (1871), L. R. 7 C. P. 9; *Oriental Financial Corp'n. v. Overend, Gurney* (1871), 7 Ch. App. 142; *Muir v. Crawford* (1875), L. R. 2 Sc. & Div. 456; *Duncan, Fox v. North & South Wales Bank* (1880), 6 App. Cas. 1; *Rouse v. Bradford Banking Co.*, [1894] 2 Ch. 32; *Nicholas v. Ridley*, [1904] 1 Ch. 192.

**398. Specialty creditors—Against mortgagees of devisee for life of equitable interest.**—The ct. refused, upon motion by specialty creditors of testator, to appoint a receiver of the rents of real estate, where the persons in possession & in receipt of the rents of the estate were the mtgees. of a devisee for life of an equitable interest.—COOPE v. CRESSWELL, CALDWELL v. ELLISON, GREGORY v. CRESSWELL (1863), 9 L. T. 751; 12 W. R. 299.

**399. Against trustees of deed for benefit of creditors.**—WATERLOW v. SHARP, GARDNER v. SHARP, [1867] W. N. 64.

**400.** —[The Ct. of Ch. will not, at the instance of creditors, appoint a receiver over the trustees of such a deed, except where a very special case for such an appointment is made out.—BELL v. BIRD (1868), as reported in 16 W. R. 1165.

*Annotations*:—*Mentd.* *Martin v. Powning* (1869), 4 Ch. App. 356; *Stone v. Thomas* (1870), 5 Ch. App. 219.

**401. Application by judgment creditor—Against company—Appointment without prejudice to agreement for working of undertaking.**—CONTRACT CORPN. v. TOTTENHAM & HAMPSTEAD JUNCTION RY. CO., [1868] W. N. 242.

**402.** —[A judgment debtor had lands in Surrey subject to an equitable mtge.; & his judgment creditor obtained an order for a receiver of these lands. This order was not registered. After the appointment of the receiver, debtor sold the lands to a purchaser for value without notice:—*Held*: it was just & convenient for the ct. to appoint a receiver within the Jud. Act, 1873 (c. 66), s. 25 (8).—*Re POPE* (1886), 17 Q. B. D. 743; 55 L. J. Q. B. 522; 55 L. T. 369; 34 W. R. 693; 2 T. L. R. 826, C. A.

*Annotations*:—*Apld.* *Re Whiteley*, *Whiteley v. Learoyd* (1887), 56 L. T. 846. *Consd.* *Cadogan v. Lyric Theatre*, [1894] 3 Ch. 338. *Refd.* *Blackman v. Fysh*, [1892] 3 Ch. 109; *Ashburton v. Nooton*, [1915] 1 Ch. 274.

**403. Income from trust fund.**—A judgment debtor was entitled for his life to the income arising from a fund vested in trustees, payable half-yearly in Feb. & Aug. Upon application by the judgment creditor in Nov. for a garnishee

order attaching debtor's share of the income in the hands of the trustees, it appeared that the last half-yearly payment had been made, & that there was no money the proceeds of the trust property in the hands of the trustees:—*Held*: there was no debt owing or accruing at the time when the order was applied for which could be attached under R. S. C., 1875, Ord. 55, r. 2. *Semble*: the proper course for the judgment creditor to pursue was to apply for the appointment of a receiver, under the practice of the Ch. Div.—WEBB v. STENTON (1883), 11 Q. B. D. 518; 52 L. J. Q. B. 584; *sub nom.* *Re HATTON*, WEBB v. STENTON, 49 L. T. 432, C. A.

*Annotations*:—*Refd.* *Booth v. Trail* (1883), 12 Q. B. D. 8; *Macdonald v. Tacquah Gold Mines Co.* (1884), 13 Q. B. D. 535; *Wilmut v. Aiton* (1896), 74 L. T. 813; *Barnett v. Eastman* (1898), 67 L. J. Q. B. 517; *Sutton, Carden v. Goodrich* (1899), 15 T. L. R. 397; *Re Greenwood, Sutcliffe v. Gledhill*, [1901] 1 Ch. 887; *Wells v. Wells* (1914), 30 T. L. R. 437.

**404. Against assignee of policy of insurance—Alleged fraudulent assignment.**—In an action brought to set aside an assignment of a policy of assurance as fraudulent & void against creditors under Prevention of Fraudulent Alienations Act, 1571 (c. 5), the policy moneys having been received by the assignee & remaining in his hands, but invested on mtge. & capable of being traced, the ct. has jurisdiction to grant an interlocutory injunction restraining the assignee from receiving or dealing with the mtge. debt without the leave of the ct., or to appoint an *interim* receiver, in order to secure the property until the trial of the action, for the benefit of creditors.—*Re MOUAT. KINGSTON COTTON MILLS Co. v. MOUAT*, [1899] 1 Ch. 831; 68 L. J. Ch. 390; 80 L. T. 406; 43 Sol. Jo. 380; *sub nom.* *Re MOWAT, KINGSTON COTTON MILL Co. v. MOWAT*, 47 W. R. 506.

**405. Against society in nature of Friendly Society—Irregularity in expenditure of trust funds.**—*Re ONE & ALL SICKNESS & ACCIDENT INSURANCE ASSOCN., ROSSINGTON v. TRATHEN* (1908), *Times*, Dec. 12; *on appeal*, *Times*, Dec. 18, C. A.

**406. Creditor of building society—Charge on funds of society.**—BAKER v. LANDPORT & MID-SOMERSET BENEFIT BUILDING SOCIETY (1912), 56 Sol. Jo. 224.

**Administration of estates.**—See Sub-sect. 2, A. (b), *ante*.

Receiver in bankruptcy, generally, see BANKRUPTCY, Vol. IV., pp. 195 *et seq.*

**Writ of elegit—Application for sale.**—See EXECUTION, Vol. XXI., p. 579, No. 1550.

**Appointment by way of equitable execution.**—See EXECUTION, Vol. XXI., pp. 664 *et seq.*

### G. Where Title Disputed.

**407. Jurisdiction of court.**—It is a well settled rule that the ct. will not interfere to appoint a receiver at the instance of a person alleging a mere legal title in himself against other persons who are in possession of the estate.—TALBOT (EARL) v. HOPE SCOTT (1858), 4 K. & J. 96;

seised with an equity of redemption unless the mtgee. be in possession or will go into possession.—SMITH v. EGAN (1837), Sau. & Sc. 238.—IR.

**k.** —Where assets in danger.—HERBERT v. GREENE (1854), 3 I. Ch. R. 270.—IR.

**l.** —Pending action.—SLATER v. AUCKLAND CORPN. (1890), 8 N. Z. L. R. 328.—N.Z.

**m.** Debtor abroad.—PARENT v. LORTIE, 7 C. L. T. Occ. N. 195.—CAN.

**n.** By prior incumbrancer—Against J.—VOL.

*puisne incumbrancer with decree for sale.*—If a *puisne incumbrancer* has got a decree for a sale, which the rights of a prior incumbrancer, not in possession, prevent, that immediately gives the *puisne creditor* a right to a receiver.—ROBINSON v. THORPE (1824), 1 Mol. 24, 25, n.—IR.

**o.** Annuity reserved from trust for benefit of creditors.—Right of subsequent creditor.—A debtor vests all his estates on trustees for payment of debts, reserving to himself an annuity for his own life:—*Held*: a subsequent

*elegit creditor* who had extended a moiety of the annuity, is entitled to have a receiver appointed over the moiety, or a competent part of it.—PLASKET v. DILLON (LORD) (1825), 1 Hog. 324.—IR.

### PART II. SECT. 6, SUB-SECT. 2.—G.

**p.** Against party in possession or having legal estate.—To preserve the property.—The removal of a large amount of property by deft., & under circumstances which might fairly give rise to suspicion during the pendency



*Sect. 6.—In what cases appointment made: Sub-sect. 2, G., H., I. & J.]*

27 L. J. Ch. 273; 31 L. T. O. S. 392; 4 Jur. N. S. 1172; 6 W. R. 269; 70 E. R. 40.

*Annotations:—*Fold. *Carrow v. Ferrior, Dunn v. Ferrior* (1868), 3 Ch. App. 719. *N.F. Berry v. Keen* (1882), 51 L. J. Ch. 912; *Foxwell v. Van Grutten*, [1897] 1 Ch. 64. *Refd. Wright v. Wilkin* (1859), 7 W. R. 337. *Mentd. Lowndes v. Bettle* (1864), 33 L. J. Ch. 451.

408. —[The ct. will not grant a receiver of real estate pending litigation between adverse claimants where the claims are merely legal, notwithstanding that the possession at the time of filing the bill is vacant.—*CARROW v. FERRIOR, DUNN v. FERRIOR* (1868), 3 Ch. App. 719; 37 L. J. Ch. 569; 18 L. T. 806; 16 W. R. 922, L. JJ.; *subsequent proceedings, sub nom. CARROW v. FERRIOR* (No. 2), 37 L. J. Ch. 849.

*Annotation:—*N.F. *Berry v. Keen* (1882), 51 L. J. Ch. 912.

409. —*Effect of Judicature Acts.*—[The ct. has power under Jud. Act, 1873 (c. 66), s. 25, to appoint a receiver where the title to the property is disputed.—*BERRY v. KEEN* (1882), 51 L. J. Ch. 912, C. A.

*Annotations:—*Fold. *Foxwell v. Van Grutten*, [1897] 1 Ch. 64. *Refd. Marshall v. Charteris*, [1920] 1 Ch. 520.

410. *Against party in possession or having legal estate.*—[Receiver not appointed for heir-at-law to turn devisee out of possession.

Heir must recover at law against devisee.—*KNIGHT v. DUPLISSIS* (1751), 2 Ves. Sen. 360; 28 E. R. 230, L. C.

*Annotations:—*Mentd. *Burges v. Lamb* (1800), 16 Ves. 174; *Dashwood v. Magniac*, [1891] 3 Ch. 306.

411. —*Necessity for showing strong grounds.*—[The ct. will not order a receiver of an estate, where the matters in dispute depend on a mere legal title, except strong ground of title is shown, & the rents are in danger.—*MORDAUNT v. HOOPER* (1756), Amb. 311; 27 E. R. 211.

*Annotation:—*Dttd. *Carrow v. Ferrior, Dunn v. Ferrior* (1868), 3 Ch. App. 719.

412. —[—*HUGONIN v. BASELEY* (1806), 13 Ves. 105; 33 E. R. 234, L. C.

*Annotation:—*Refd. *Lloyd v. Passingham* (1809), 16 Ves. 59.

413. —[—A receiver may be appointed against the legal title in a strong case of fraud upon affidavits.—*LLOYD v. PASSINGHAM* (1809), 16 Ves. 59; 33 E. R. 906, L. C.; *subsequent proceedings* (1811), 3 Mer. 697, L. C.

414. —[—On a bill to set aside a purchase the answer of defts., the devisees of the purchaser, admitting great inadequacy of price & stating their ignorance as to other circumstances of fraud alleged, a receiver appointed.—*STILWELL v. WILKINS* (1821), Jac. 280; 37 E. R. 857, L. C.; *affg. S. C. sub nom. STITWELL v. WILLIAMS*, 6 Madd. 49.

*Annotations:—*Distd. *Carrow v. Ferrior, Dunn v. Ferrior* (1868), 3 Ch. App. 719. *Refd. George v. Evans* (1840), 4 Y. & C. Ex. 211.

415. —[—The ct. will not, before the hearing of the cause, appoint a receiver of the rents & profits of real estate, on the mere ground that the party making the application has a good title; no fraud or spoliation being alleged against the party in possession.—*TOLDERVY v. COLT* (1836), 1 Y. & C. Ex. 621; 1 M. & W. 250; Tyr. & Gr. 324; 5 L. J. Ex. Eq. 25; 160 E. R. 254. *Annotation:—*Mentd. *Gundry v. Pinniger* (1852), 1 De G. M. & G. 501.

of the suit in which the question of title to that property would be determined, is a sufficiently strong ground for the appointment of a receiver.—*SIA RAM DAS v. MAHABIR DAS* (1899), 1 L. R. 27 Cal. 279.—END.

g. —[—*HILL v. KIRWAN* (1824), 1 Hog. 175.—IR.

r. —[—*LOYD v. TRIMLESTON* (LORD) (1829), 2 Mol. 81.—IR.

t. —[—*DOBBIN v. ADAMS* (1845), 8 I. Eq. R. 157.—IR.

416. —[—A receiver will not be appointed where the rights, as between pltf. & deft., are doubtful, if deft. has obtained the legal estate without fraud, & no case of danger as to his security is alleged.

Pltf. sued as heir, & the answer neither admitted nor denied that he held that character.—*Held: this alone was not a sufficient ground for refusing a receiver.*—*LANCASHIRE v. LANCASHIRE* (1845), 9 Beav. 120; 15 L. J. Ch. 54; 6 L. T. O. S. 117; 9 Jur. 956; 50 E. R. 289.

417. —[—Where the right to property, which is the subject of litigation, depends on questions to be decided at law, the jurisdiction in equity to grant a receiver is only to be exercised when there is a reasonable probability of success, & the property, the subject of the suit, is in danger.

Testator executed two wills, one in 1815 & the other in 1818. Pltf. claimed as devisee under the former will, & impugned the validity of the latter will on the ground of the mental incapacity of testator; deft. was in possession under the latter will, which he had established against the heir at law in a suit to which pltf. was not a party. The legal estate being outstanding, pltf. filed his bill in this ct. to remove the impediments to his proceeding at law to set aside the will of 1818. The trial having taken place, & resulting in a verdict for pltf. —*Held: inasmuch as the verdict, unless confirmed by judgment, was of no legal value, & as defendant was in possession under the sanction of the ct., & such possession was not shown to have been obtained by violence or wrong, pltf. was not entitled to a receiver, & the fact that the legal estate in the property was outstanding in trustees, was immaterial to the question.*—*BAINBRIDGE v. BADDELEY* (1851), 3 Mac. & G. 413; 13 Beav. 355; 16 L. T. O. S. 549; 42 E. R. 320, L. C.

*Annotation:—*Consd. *Carrow v. Ferrior, Dunn v. Ferrior* (1868), 3 Ch. App. 719.

418. —[—A judicial factor will not be appointed where one of the parties has attained peaceable & unequivocal possession before the competition arises.

The ct. in such a case will not act on mere allegation unsupported by proof.—*CAMPBELL v. CAMPBELL* (1864), 4 Macq. 711, H. L.

419. —*Where all parties do not appear.*—[The ct. will not dispossess a deft., who is interested & has the legal title, & appoint a receiver before answer, unless all the other parties interested join in the application, except upon very strong grounds of objection.—*SMITH v. SMITH* (1836), 2 Y. & C. Ex. 353; 6 L. J. Ex. Eq. 70.

420. —*Destructive waste.*—[The ct. will not grant a receiver or injunction against a devisee in possession, except in a case of destructive waste.—*WRIGHT v. WILKIN* (1859), 7 W. R. 337; *on appeal*, 7 W. R. 431, L. C. & L. JJ.

421. —*With notice of his pendens.*—[Pltf., previous to his marriage with A.'s daughter, wrote a letter to A. inquiring what fortune his daughter was entitled to. A., in reply, wrote to pltf., & stated that certain houses were entailed on his daughter, after his decease. A. died, leaving his daughter, his only child, & having devised all his real estates to his wife. It was then discovered that A. was tenant in tail male

a. —[—The ct. will interfere by a receiver to preserve a property where there is danger of eviction, even although pltf.'s demand is disputed, if he has a *prima facie* right.—*FETHERSTONE v. MITCHELL* (1846), 9 I. Eq. R. 480.—IR.

of the houses, with reversion to himself in fee. In Jan. 1816, pltf. & his wife filed a bill against A.'s widow, who was in possession of the houses, to have the houses conveyed to pltf.'s wife, conformably to the representation in the letter, & for a receiver, & an injunction to stay proceedings at law. An injunction was granted, & the widow having put in her answer, the injunction was, in Jan. 1818, continued. On the same day pltf. obtained an order to amend, but did not act upon it, or take any further proceedings, till May, 1820. In Apr. 1818, the widow mortgaged the houses for five hundred years to H., & in May, 1819, she sold an annuity to M. & secured it by a conveyance of the houses to trustees in fee; & in May, 1819, she sold & conveyed the houses, subject to the mtge. & annuity, to W. in fee. Neither H., W. nor M. had then any notice of the suit, or of pltf.'s claim. In Jan. 1820, at which time M. had notice, the houses were purchased by M. & conveyed to him by H. & W. In May, 1820, the bill was amended. The widow having gone abroad without answering the amended bill, a decree was taken *pro confesso* against her in Nov. 1822. In Dec. following, pltf. had notice of the conveyance to M. but did not make him a party to the suit, & opposed his attending the master upon the inquiries directed by the decree. In Mar. 1831, pltf. filed a bill against M. stating the proceedings in the original suit, & praying that M. might be decreed to convey the houses to pltf.'s wife, & for a receiver. M. put in his answer, & relied on the delay in the proceedings of the original suit, the decree having been taken *pro confesso*, the want of notice in H. & W., & in himself, when he purchased the annuity, & on pltf. not having made him a party to that suit; but the ct., on motion, granted a receiver.—*LONDON v. MORRIS* (1832), 5 Sim. 247; 2 L. J. Ch. 35; 58 E. R. 329, L. C.

**422. — Party claiming under bare legal title.]**—*MORDAUNT v. HOOPER*, No. 411, *ante*.

**423. — —.]**—A ship belonging to defts., registered in the port of London, sustained serious damage on her voyage to New Zealand, & on her arrival there was surveyed & pronounced not seaworthy. The master was unable, either by loan or bottomry, to raise money for her repair, & he at length sold the ship to pltf., & on receiving payment of the purchase-money by a bill of exchange in London, executed to them a bill of sale of the ship. Pltf. repaired the ship & sent her to England with a cargo. Defts. refused to ratify the sale or consent to the registry of the ship in pltf.'s names, & on the arrival of the ship in the port of London, defts. put several men on board to take possession of the ship & cargo for them. Pltf. thereupon applied for an injunction to restrain defts. from interfering with the ship, or removing her out of the jurisdiction, & for a manager & receiver of the ship & cargo:—*Held*: (1) pltf. had no equitable, as distinct from a legal, title to the ship, & inasmuch as their title, if they acquired any, was a purely legal one, & the case of interference, if wrongful, was, therefore, a mere trespass, the ct. would not interfere in favour of pltf. by injunction; (2) pltf., according to the case made on the motion, if they failed at the hearing to establish their right to the ship, would be entitled to equitable relief in respect of the bill of exchange for the purchase-money; & they were entitled to have the trial of the legal right put in a course for determination, & to have the property protected in the meantime.—*RIDGWAY v. ROBERTS* (1844), 4 Hare, 106; 67 E. R. 580.

**424. — Plaintiff to proceed diligently to obtain decree establishing title.]**—*OWEN & GUTCH v. HOMAN*, No. 397, *ante*.

**425. — Discretion of court.]**—*OWEN & GUTCH v. HOMAN*, No. 397, *ante*.

**426. After decree in partition action—To preserve rents & profits—Pending appeal.]**—In a suit for determining the right as between pltf. & deft. to certain estates, a decree was made declaring the right of pltf. & one of defts. to two-thirds; owing to a previous partition suit, the decree contained no specific direction that deft. against whom the decree was should deliver up possession. The bill did not pray nor make a case for a receiver, nor did the decree appoint a receiver. After the decree, from which an appeal was pending, deft. did not deliver possession; there were charges & outgoings to be provided for, & owing to disputes between the parties, the tenants refused to pay their rents either to pltf. or to defts.

A receiver was appointed of the lands let to tenants, but not of the mansion house & land in the personal occupation of deft., the ct. expressly refusing to make the appointment of a receiver ancillary to the exclusion of deft. from possession & granting it only to provide for the due receipt of the rents, & providing for the preservation of the property, & the payment of liabilities & outgoings.—*WRIGHT v. VERNON* (1855), 3 Drew. 112; 61 E. R. 845.

**427. Dispute between grantees of rentcharges—Property untenanted.]**—In a suit on behalf of a number of grantees of rentcharges on the same property, who had powers of distress & entry, a receiver was appointed to protect the property pending the litigation, it being untenanted, & it being impossible to obtain tenants, for want of protection against the powers of the several grantees of the rentcharges.—*WHITE v. SMALE* (1856), 22 Beav. 72; 52 E. R. 1035.

*Annotations*:—*Refd.* *Carrow v. Ferrior*, Dunn v. Ferrior (1868), 3 Ch. App. 719. *Mentd.* *Clark v. Rivers* (1867), L. R. 5 Eq. 91; *Dawkins v. Penrhyn* (1877), 6 Ch. D. 318.

**428. Dispute between heir-at-law & devisee—Neither party in possession.]**—The ct. may appoint a receiver of personal estate pending the grant of probate which has been delayed on account of a caveat having been entered where a suit in the Probate Ct. has not been actually constituted. The ct. will, also, under the same circumstances, appoint a receiver *pendente lite* of the rents of real estate, if neither the devisee nor the heir-at-law is in actual possession.—*PARKIN v. SEDDONS* (1873), L. R. 16 Eq. 34; 42 L. J. Ch. 470; 28 L. T. 353; 21 W. R. 538.

**Fraud alleged.]**—*See* Nos. 413–416, *ante*.

**Actions to recover land.]**—*See* REAL PROPERTY, Vol. XXXVIII., pp. 783, 784.

#### H. Equitable Execution.

*See* EXECUTION, Vol. XXI., pp. 664–674, Nos. 2448–2536.

#### I. Matrimonial Causes—Enforcement of Orders.

*See* HUSBAND & WIFE, Vol. XXVII., p. 547, Nos. 5978–5988.

#### J. As between Mortgagor and Mortgagee.

*See* Nos. 394–396, *ante*; MORTGAGE, Vol. XXXV., pp. 520–532, 539, 589, 590, Nos. 2487–2638, 2684, 3277–3291.

**Sect. 6.—In what cases appointment made: Sub-sect. 2, K., L.**

**K. Recovery of Rentcharges and Annuities.**

**429. Effect on other incumbrancers on estate.]—**

A. having charged his estates by mtges. & other incumbrances to a very large amount, appointed B. to be his steward or receiver of all his estates with verbal directions to pay the interest to the mtgees., & to pay over the surplus of the rents to himself. On the making a fifth mtge. A. by deed appointed B. receiver of the estates comprised in that mtge. in trust to keep down the interest of that mtge., & to pay over the residue of the rents to himself. A. afterwards granted several annuities, which he charged on all the mtgd. premises, & demised the same to a trustee for securing the said annuities in manner therein mentioned, & subject thereto to permit A. to receive the surplus for his own benefit. At the time of granting these annuities A. represented the estates to be free from all incumbrances. On a bill filed by the annuitants against A. & B., without making any of the prior incumbrancers parties, the ct. will restrain B. from paying over any part of the rents to A. & will appoint a receiver, without prejudice to the prior mtgees. taking possession.—*DALMER v. DASHWOOD* (1793), 2 Cox, Eq. Cas. 378; 30 E. R. 174.

**430. —.]—ROBERTS v. MADOCKS** (1843), 1 L. T. O. S. 408.

**431. —.]—**Where A. & his incumbrancers, B., C., & D., joined in the appointment of a receiver, who covenanted to keep down the incumbrancers, according to their priorities, & pay the surplus to A.:—*Held*: a subsequent mtgee. from A. could not sustain a bill against the receiver & A. for an account of the rents & an injunction against paying the surplus to A. in the absence of B., C. & D.

I entertain no doubt, that the owner of an estate may enter into such an arrangement or contract with a steward or other person to receive the rents of his property, which will be binding not only on the owner but on any person to whom the owner may afterwards convey that property, with notice of the contract (*ROMILLY, M.R.*).—*FORD v. RACKHAM* (1853), 17 Beav. 485; 23 L. J. Ch. 481; 22 L. T. O. S. 112; 2 W. R. 9; 51 E. R. 1122.

*Annotation*:—*Reid. Jefferys v. Dickson* (1866), 1 Ch. App. 183.

**432. —.]—EYTON v. DENBIGH, RUTHIN & CORWEN RY. CO.**, No. 670, *post*.

**433. Validity of rentcharge disputed.]—BAZZELGETTI v. BATTINE, BATTINE v. BAZZELGETTI** (1821), 2 Swan. 156, n.; 36 E. R. 576.

*Annotations*:—*Reid. Pelly v. Wathen* (1849), 7 Hare, 351; *Knight v. Bowyer* (1858), 2 De G. & J. 421.

**434. Purchaser of lands charged refusing to pay.]—PRITCHARD v. FLEETWOOD**, No. 451, *post*.

**435. Grantor residing abroad—Agent in this country.]—TANFIELD v. IRVINE**, No. 47, *ante*.

**436. Property charged belonging to married woman.]—**Testator devised & bequeathed certain

copyhold & leasehold estates to trustees, upon trust to pay the rents & profits to A. for her life to her separate use, & without power of anticipation; & testatrix gave certain freehold estates to trustees in trust for A. for her life, to her separate use, & without power of anticipation. A. was a *feme sole* at the date of testator's will, & of his death. She was also a *feme sole* at the date of testatrix's will, but she was married at the death of testatrix. A. joined with her husband in granting annuities to pltf., charged upon the estates bequeathed by testator, & the estates devised by testatrix. On the insolvency of the husband, a bill was filed by pltf. to have the annuities paid out of the estates, & upon motion for an injunction & receiver, the ct. granted the motion as to the estates devised by testator, but not as to those devised by testatrix, on the ground that the rents of the former estates ought to be secured till the question in the cause could be determined, which could not be decided on an interlocutory motion.—*TULLETT v. ARMSTRONG* (1836), 1 Keen, 428; *Donnelly*, 131; 5 L. J. Ch. 303; 48 E. R. 371.

**437. Grantee having powers of distress or entry.]—WHITE v. SMALE**, No. 427, *ante*.

**438. —.]—**The annuity being charged upon land, with a power of distress superadded by Landlord & Tenant Act, 1730 (c. 28), pltf. had power to help himself, & was not entitled to a receiver.—*SOLLORY v. LEAVER* (1869), L. R. 9 Eq. 22; 39 L. J. Ch. 72; 21 L. T. 453; 18 W. R. 59. *Annotations*:—*Folld. Kelsey v. Kelsey* (1874), L. R. 17 Eq. 495. *Reid. Roper v. Roper* (1876), 3 Ch. D. 714.

**439. Estate of sufficient security.]—**Testator by his will bequeathed certain leaseholds to deft., upon condition that he paid thereout, or out of the rents thereof, an annuity of £70, by half-yearly payments, to pltf. during his life. The leaseholds were of amply sufficient value to secure payment of the annuity. The annuity had been regularly paid since the death of testator. One half-yearly payment of the annuity being in arrear, the annuitant filed his bill to enforce payment thereof, & for the appointment of a receiver:—*Held*: the annuity being charged on land of amply sufficient value to secure payment thereof, with a power of distress superadded by Landlord & Tenant Act, 1730 (c. 28), pltf. was not entitled to have a receiver appointed, & bill dismissed with costs.

There might be an annuity charged on property the rents of which would not be sufficient to pay the amount due, then I should have thought that a receiver might be necessary. Or where an annuity has been long in arrear, & a distress would not enable the annuitant to raise the amount due, in that case a receiver might be necessary (*MALINS, V.-C.*).—*KELSEY v. KELSEY* (1874), L. R. 17 Eq. 495; 30 L. T. 82; 22 W. R. 433.

**440. Receiver agent of grantor—Or personal representative—Charge of business to secure annuity.]—**Where a person has created a charge on a business to secure an annuity, & after his death the annuitant, in exercise of a power given

**PART II. SECT. 6, SUB-SECT. 2.—K.**

**429 l. Effect on other incumbrances on estate.]—***Rowe v. Gough, Gough v. Bolton*, [1909] 1 I. R. 98, H. L.—*IR.*

**b. Grantor residing abroad.]—**A receiver will be appointed over the possession of the grantor of a rentcharge, who resides out of the jurisdiction, on an affidavit that he stayed out of the jurisdiction to avoid service of process.—*QUIN v. GUNN* (1823), 1 Hog. 75.—*IR.*

**437 l. Grantee having powers of distress or entry.]—STEVELLY v. MURPHY**

(1840), 2 I. Eq. R. 448.—*IR.*

**c. Application by prior annuitant.]—**A prior annuitant may obtain a receiver over the possession of a custodee.—*O'NEILL v. WARD* (1824), 1 Hog. 111.—*IR.*

**d. Remedies at law ineffectual.]—**Receiver appointed over an annuity secured to the debtor by a trust term, where the creditor had taken ineffectual remedies against the debtor at law.—*DILLON v. PLASKETT* (1828), 1 Dow. & Cl. 320.—*IR.*

**e. Annuity charged on land.]—**

*HOGAN v. BODKIN* (1826), 1 Hog. 374.—*IR.*

**f. —.]—**Whenever an annuity is charged on land the party is entitled to come into a ct. of equity for that which is the appropriate relief in such cases, namely, the appointment of a receiver.—*SWIFT v. SWIFT* (1841), 3 I. Eq. R. 287.—*IR.*

**g. —.]—***BEAMISH v. AUSTEN* (1875), 9 I. R. Eq. 361.—*IR.*

**h. After decree for sale—On defendant failing to bring in title deeds.]—**After a decree for a sale in a suit to



by reference to a mtgee.'s power under Conveyancing & Law of Property Act, 1881 (c. 41), appoints a receiver & directs him within the terms of the power "to manage & carry on the business as he may think fit," the receiver becomes the agent of the mtgor.'s personal representative for the purpose of managing & carrying on the business.—*Re HALE, LILEY v. FOAD*, [1899] 2 Ch. 107; 68 L. J. Ch. 517; 80 L. T. 827; 47 W. R. 579; 15 T. L. R. 389; 43 Sol. Jo. 528, C. A.

**441. Arrears paid off—Discharge of receiver.]—***BRAHAM v. STRATHMORE*, No. 1006, *ante*.

**442. Receiver of tithe rentcharge.]—PEED v. KING** (1894), 11 T. L. R. 18, D. C.

*Annotation:—Distd. Eccl. Comrs. v. Upjohn*, [1913] 1 K. B. 501.

**443. —.]—ECCLESIASTICAL COMRS. v. UPJOHN**, [1913] 1 K. B. 501; 82 L. J. K. B. 435; 108 L. T. 417, D. C.

*L. As between Tenant for Life and Remainderman.*

**444. To prevent waste.]—VANN v. BARNETT** (1787), 2 Bro. C. C. 157; 29 E. R. 91.

*Annotations:—Consd. Metcalfe v. Pulvertott* (1812), 1 Ves. & B. 180. *Refd. Hugonin v. Baseley* (1806), 13 Ves. 105; *Lloyd v. Passingham* (1809), 16 Ves. 59; *Coward v. Chadwick* (1825), 2 Russ. 150, n. *Mentd. Jervis v. White* (1801), 6 Ves. 738.

**445. —.]—POWYS v. BLAGRAVE**, No. 174, *ante*.

**446. — Pulling down & rebuilding houses—Receiver pending rebuilding.]—**Testator devised his estates to B. for life without impeachment of waste, except voluntary waste in pulling down houses & not rebuilding the same or others of equal or greater value. B. pulled down the mansion house, with the intention of forthwith building a better on the site, & was proceeding with all reasonable dispatch to carry such intention into effect:—*Held*: the person entitled to the next vested remainder was not entitled to have a receiver of the rents appointed in order to secure the rebuilding of the mansion.—*MICKLETHWAIT v. MICKLETHWAIT* (1857), 1 De G. & J. 504; 26 L. J. Ch. 721; 30 L. T. O. S. 5; 3 Jur. N. S. 1279; 5 W. R. 861; 44 E. R. 818, L. J.

*Annotations:—Mentd. Halliwell v. Phillips* (1858), 4 Jur. N. S. 607; *Turner v. Wright* (1860), 2 De G. F. & J. 234; *Baker v. Sebright* (1879), 13 Ch. D. 179; *Stafford v. Sutherland* (1892), 36 Sol. Jo. 381; *Weld-Blundell v. Wolseley*, [1903] 2 Ch. 664.

**447. Decree to sell term for raising portions—Tenant for life obstructing decree—Refusal to produce title deeds.]—**Limitation of a term for five hundred years to raise portions for younger children, & afterwards estate limited to M. for life, with remainders over, & a decree made to sell the term for raising the portions. M., the tenant for life, refusing to produce the title deeds before the master, & obstructing the decree, an order was made on motion for a receiver of the rents & profits of the estate.—*BRISTOCKE v. MANSEL* (1818), 3 Madd. 47; 56 E. R. 427.

**448. Tenant for life of renewable leaseholds—Allowing leases to expire—Receiver to provide fund for renewal.]—**Testator devised a freehold estate to A. for life, with remainder to his first & other sons in tail male; & he directed that a church lease which he held for a term of twenty-one years,

renewable every seventh year, should be regularly renewed by the persons successively possessing the freehold estate under his will, & be enjoyed together with the same. A. omitted to renew in proper time, & the lease expired in 1798. A.'s eldest son came of age in 1800, & thereupon joined with his father in suffering a recovery of the freehold estate. A. died in 1830, & in 1831 the son filed his bill, praying compensation for the loss of the lease, out of his father's assets:—*Held*: there was no such laches or acquiescence on the part of pltf., as to debar him of his equitable remedy.

The ct. upon reasonable grounds being shown by the threats or acts of the tenant for life, might have granted a receiver, in order to provide a fund for renewal, or might possibly have compelled him to renew; or, if he had already suffered the lease to expire, the application might have been granted on that default for a receiver; though in such a case it could only have been to provide a fund for compensation (*LORD BROUGHAM, C.*).—*BENNETT v. COLLEY* (1833), 2 My. & K. 225; *Coop. temp. Brough*. 248; 39 E. R. 930.

*Annotations:—Mentd. Leeds v. Amherst* (1846), 2 Ph. 117; *Hawkins v. Gardiner* (1854), 2 Sm. & G. 441; *Baker v. Peck* (1860), 3 L. T. 656; *Blake v. Peters* (1862), 31 L. J. Ch. 884; *Higginbotham v. Hawkins* (1872), 41 L. J. Ch. 828.

**449. Transfer of stocks in fraud of remainderman—Rents of other property ordered to be applied to replace stocks.]—**On the marriage of N. & G., two settlements were executed: by one, a sum of stock & estates in W., the lady's property, were conveyed to trustees in trust for her for life, with remainder in trust for the children of the marriage, & by the other N. granted out of his estates a rentcharge to G. for life. She, after her husband's death, fraudulently obtained a transfer of the stock, & sold it out; &, afterwards, she assigned her life interest in the estates in W., & the rentcharge to A., for valuable consideration, but with notice of the fraud:—*Held*: the rents of the estates in W., & the rentcharge, were liable to be applied to replace the stock, & a receiver of them was granted before answer.—*WOODYATT v. GUESLEY* (1836), 8 Sim. 180; 59 E. R. 72.

*Annotations:—Refd. Hastie v. Hastie* (1875), 24 W. R. 242. *Mentd. Burridge v. Row* (1842), 1 Y. & C. Ch. Cas. 183; *Irby v. Irby* (1858), 25 Beav. 632; *Fox v. Buckley* (1876), 3 Ch. D. 508; *Re Weston, Davies v. Tagart*, [1900] 2 Ch. 164.

**450. Leasehold premises—Tenant for life not repairing according to covenant.]—**When a tenant for life of leasehold houses is allowed by the trustees to receive the rents, & the houses are not kept in a proper state of repair according to the covenants of the lease the ct. will, at the instance of one of the trustees, appoint a receiver of the rents, for the purpose of enforcing the proper repair, of the houses.—*Re FOWLER, FOWLER v. ODELL* (1881), 16 Ch. D. 723; 44 L. T. 99; 29 W. R. 891.

*Annotations:—Refd. Re Courtier, Coles v. Courtier, Courtier v. Coles* (1886), 34 Ch. D. 136; *Re Baring, Jeune v. Baring*, [1893] 1 Ch. 61. *Mentd. Re Giers, Cooper v. Giers*, [1899] 2 Ch. 54.

*M. As against Trustees.*

*See TRUSTS & TRUSTEES.*

raise the arrears of a rentcharge, the ct. will appoint a receiver if deft. do not bring in the title deeds pursuant to decree.—*HARRIS*

devised in trust for a lady (who afterwards became a nun), during whatever period of her natural life she continued unmarried.—*EVANS v. CASSIDY* (1847), 11 I. Eq. R. 243.—*IR.*

**PART II. SECT. 6, SUB-SECT. 2.—L.**

**1. To raise arrears of interest—**

*Accrued due during former life tenancy.]—*A receiver will not be appointed over a life estate to raise arrears of interest which accrue due during the time of a former tenant for life.—*GARNETT'S EXECUTORS v. PRATT* (1833), *Hayes & Jo.* 303.—*IR.*

*entering nunnery.]—*ct. granted a receiver, on a bill to raise arrears of an annuity

*Sect. 6.—In what cases appointment made: Sub-sect. 2, N. & O.]*

*N. As between Vendor and Purchaser.*

**451. As against purchaser—Purchase subject to rentcharge—Payment refused.]**—If a purchaser of the legal estate in lands, subject to an equitable rentcharge, refuse to pay the rentcharge, a receiver will be appointed.—*PRITCHARD v. FLEETWOOD* (1815), 1 Mer. 54; 35 E. R. 597, L. C.

**452. — Pending reference of title.]**—Receiver appointed on the motion of the vendor, pending a reference of title.—*BOEHM v. WOOD* (1820), 2 Jac. & W. 236; 37 E. R. 617, L. C.

*Annotation:—Apld. Gibbs v. David* (1875), L. R. 20 Eq. 373.

**453. — Inadequacy of price.]**—*STILWELL v. WILKINS*, No. 414, *ante*.

**454. — Land dealt with contrary to usual course of husbandry.]**—(1) Where a purchaser is let into possession of the estate under the contract, his dealing with the property in a manner contrary to former usage, or contrary to the usual course of husbandry, may be ground for ordering him to pay the purchase-money into ct., or for the appointment of a receiver; but will not authorise a decree against him to compel him to accept the title on the ground of waiver of objections. (2) A receiver may be appointed at the hearing though not prayed for.—*OSBORNE v. HARVEY* (1841), 1 Y. & C. Ch. Cas. 116; 11 L. J. Ch. 42; 62 E. R. 815.

*Annotation:—Generally, Mentd. Re Gloag & Miller's Contract* (1883), 23 Ch. D. 320.

**455. — To enforce lien.]**—Bill for unpaid vendors against two railway cos.—the purchasers & their lessees—in possession of the land, for specific performance of the contract; for payment of the purchase-money; for an injunction against both cos.; for a declaration of lien, & that it might be enforced by a sale; & that a receiver might be appointed of the rents & profits of the purchasers' estate. The ct. decreed specific performance & payment of the purchase-money within three months: Declared a lien as against both cos.; & gave leave, in case the money should not be paid, to apply for an injunction, & for the appointment of a receiver to enforce the lien.—*WINCHESTER (BP.) v. MID-HANTS RY. CO.* (1867), L. R. 5 Eq. 17; 37 L. J. Ch. 64; 17 L. T. 161; 32 J. P. 116; 16 W. R. 72.

*Annotations:—Generally, Mentd. Drax v. Somerset & Dorset Ry.* (1868), 38 L. J. Ch. 232; *Goodford v. Stonehouse & Nailsworth Ry.* (1869), 38 L. J. Ch. 307; *Marling v. Stonehouse & Nailsworth Ry.* (1869), 38 L. J. Ch. 306.

**456. — —.]**—A person who had sold to a railway co. some land over which the railway had been made & opened, obtained a decree ordering specific performance, & declaring his lien for the balance of purchase money. The co. having become insolvent, an order was made, on the petition of the vendor, for sale of the land & payment of the deficiency, & for an injunction restraining the co. until payment from running any engine over or otherwise using or continuing in possession of the land:—*Held*: an injunction was not the proper form of relief as it would make the land useless to both parties. The order for an injunction was therefore discharged & an order made for a receiver, with a direction to the co. to give him immediate possession.—*MUNNS v. ISLE OF WIGHT RY. CO.* (1870), 5 Ch. App. 414;

39 L. J. Ch. 522; 23 L. T. 96; 18 W. R. 781, L. J.

*Annotations:—Mentd. Lycett v. Stafford & Uttoreter Ry.* (1872), L. R. 13 Eq. 261; *Allgood v. Merrybent & Darlington Ry.* (1886), 33 Ch. D. 571; *Re Stucley, Stucley v. Kekewich*, [1906] 1 Ch. 67.

**457. — —.]**—By London, Chatham & Dover Railway (Arbitration) Act, 1869 (c. cxvi), s. 17, amongst the matters referred to the arbitrators were, the legal & equitable rights & interests of cos. whose lines were worked by the co., the rights of any persons having or claiming any lien upon any lands in which the co. were interested, & all matters in question in all suits in which the co. were parties; & it was enacted that the powers of the arbitrators should extend to ascertain & determine the matters aforesaid. It was also enacted, sect. 18, that the Crystal Palace Railway should be "worked & maintained" by the co. as an integral part of the co.'s undertaking; that certain half-yearly payments should be made to the Crystal Palace Railway co., & that such payments, & the property of the Crystal Palace Railway co., should be subject, "as respected creditors of that co., to the same rights & remedies as could now be enforced against the tolls & property of that co."

At this date the London, Chatham & Dover Railway co. were working the Crystal Palace Railway line under a resolution of their own directors, without any lease or agreement; & a suit was pending against both cos. by an unpaid vendor of lands of which possession had been taken by the Crystal Palace Railway company in 1864 & 1865, & upon part of which the line had been constructed. In this suit the London, Chatham & Dover Railway co., who were made co-defts. by amendment, had answered, pleading that they were unnecessary parties; but at the hearing, in Mar. 1868, it was declared that, upon default of payment within one month by the Crystal Palace Railway co. of what should be certified to be due, pltf's. would be entitled to a lien on the lands against both cos. Default was made by the Crystal Palace Railway co., & shortly afterwards proceedings in the suit were, by the arbitrator's first award, stayed as against the London, Chatham & Dover Railway co. only. Upon petition by pltf's., praying that the amount due under the above order for principal, interest, & costs might be raised by a sale of the lands, & in the meantime for an injunction & receiver, & other relief:—*Held*: London, Chatham & Dover Railway (Arbitration) Act, 1869 (c. cxvi), did not interfere with the rights of petitioners; & order made as prayed.—*ST. GERMAN (EARL) v. CRYSTAL PALACE RY. CO.* (1871), L. R. 11 Eq. 568; 24 L. T. 288; 19 W. R. 584.

**458. — —.]**—A. who was the owner of leasehold premises, on which the business of a private hotel was carried on, & furniture, entered into a contract for the sale of such lease, furniture, & the goodwill of the business to B. A portion of the purchase-money remained unpaid, & a draft assignment of the lease & mtge. to secure the unpaid purchase money were prepared, but never executed. In an action for specific performance of the contract, a motion was made for a receiver & manager of the premises, furniture & business:—*Held*: such a receiver & manager

**PART II. SECT. 6, SUB-SECT. 2.—N. m. As against purchaser.]**—Under Land Titles Act, s. 62 (3), the vendor cannot obtain the appointment of a receiver in aid of execution so long as execution cannot issue, but he may obtain the appointment of a receiver

to collect the rents & profits of the land.—*CANADIAN MORTGAGE INVEST.* [1922]

**n. — Vendor suing for specific performance.]**—A vendor suing for specific performance of an agreement

for the sale of land, under which the purchaser was in possession & which contained no provision for attornment or distress held not entitled before judgment to a receiver order with respect to a crop which had been cut & was lying on the ground at the time

might be appointed with power to take possession & carry on the business, but not to include any chattels other than those which would pass by an assignment of the lease.—*POOLE v. DOWNES* (1897), 76 L. T. 110.

**459. — Pending action to enforce lien—Purchaser admitting liability.]**—Where the unpaid vendor of land taken by a railway co. has commenced an action against the co. to enforce his lien, the ct. will not grant an injunction or a receiver against the co. before judgment has been obtained in the action, even though the co. admit their liability.—*LATIMER v. AYLESBURY & BUCKINGHAM RY. Co.* (1878), 9 Ch. D. 385; 39 L. T. 460; 27 W. R. 141, C. A.

**460. — Pending action for rescission.]**—An agreement for the sale of a leasehold interest in land provided that possession should be given to the purchaser on payment of a specified part of the purchase money he undertaking to pay the rent & other outgoings & also on taking possession, paying to the vendor the cost of a new fence. The specified part of the purchase-money having been paid, the purchaser was let into possession, but he failed to pay the cost of the fence & did not pay the rent & taxes, so that the vendor had to pay them in order to prevent the forfeiture of the lease. The vendor commenced an action for rescission of the agreement on the ground that he had been induced to enter into it by misrepresentation, & moved in the action for an order on deft. to deliver up possession of the land in default of his making the payments due under the agreement:—*Held*: the motion, seeking in effect the specific performance of some of the terms of the agreement was inconsistent with the claim for rescission made by the writ, & must therefore be refused.

But a receiver was appointed for the purpose of securing the payments in question.—*COOK v. ANDREWS*, [1897] 1 Ch. 266; 66 L. J. Ch. 137; 76 L. T. 16.

**461. As against vendor — Title impeached by third party.]**—Receiver granted before answer upon the bill of a purchaser *pendente lite*: viz. a suit, instituted by the wife of the vendor; claiming under a settlement; voluntary, as being after marriage.—*METCALFE v. PULVERTOFT* (1812), 1 Ves. & B. 180; 35 E. R. 71, L. C.

**462. — Pending action for rescission.]** — *GIBBS v. DAVID*, No. 177, *ante*.

#### *O. Where Previous Receiver Appointed.*

**463. Receiver to act in event of death of existing receiver.]**—*Qu.*: whether a second consignee of a West India estate can be appointed to succeed the first in the event of his death.—*FORBES v. HAMMOND* (1819), 1 Jac. & W. 88; 37 E. R. 309.

**464. Application by specialty creditors of testator—Receiver in possession under mortgage by devisee.]**—*COOPE v. CRESSWELL, CALDWELL v. ELLISON, GREGORY v. CRESSWELL*, No. 398, *ante*.

**465. Second receiver to obtain surplus—After satisfaction of claims in former proceedings.]**—Where an unpaid vendor to a railway co. has obtained an order in a suit, declaring his lien, but the co. have failed to pay, an order for sale by public auction or private contract, will be made on

petition; & where a receiver has already been appointed in another suit against the same co., liberty will be given to apply to appoint another receiver without prejudice to the former appointment, & to obtain any surplus after satisfying all claims in such other suit.—*WARE v. AYLESBURY & BUCKINGHAM RY. Co.* (1873), 28 L. T. 893; 21 W. R. 819, L. C.

**466. Suggestion of collusion or preference in former proceedings.]**—*NOTHARD v. PROCTOR*, No. 24, *ante*.

**467. —.**—A co. issued a series of debentures, each of which contained a condition that, at any time after the principal moneys thereby secured should have become payable, the L. corpn., one of the debenture holders, might by writing appoint a receiver of all or any part of the property thereby charged. In exercise of this power the corpn., who were also shareholders in the co., appointed a receiver:—*Held*: the corpn. were trustees of this power on behalf of all the debenture holders, & were bound to exercise it in their interest alone, & as it was shown that the appointment had been made in the interest of the shareholders, & not in that of the debenture holders, the ct. had jurisdiction to interfere to carry out the trust & accordingly to appoint its own receiver.—*Re MASKELYNE BRITISH TYPEWRITER, LTD., STUART v. MASKELYNE BRITISH TYPEWRITER, LTD.*, [1898] 1 Ch. 133; 67 L. J. Ch. 125; 77 L. T. 579; 46 W. R. 294; 14 T. L. R. 108; 42 Sol. Jo. 112, C. A.

**468. Appointment by court — Application by creditors for substitution of their nominee—Proof of status as creditors.]**—When a debtor has filed a liquidation petition & a receiver has been appointed by the ct., the persons who are named in debtor's list of creditors cannot have their nominee appointed receiver, in substitution for the receiver appointed by the ct., till they have established their status as creditors by proving their debts & holding a first meeting of creditors.—*Re CHESTERS, Ex p. RYLANDS* (1877), 6 Ch. D. 57; 46 L. J. Bcy. 120; 36 L. T. 839; 25 W. R. 786, C. A.

**469. Priority as between respective receivers—Receiver in Chancery action & in Bankruptcy.]**—In an action to enforce an agreement by B. an innkeeper to give a bill of sale of his furniture & effects, A. obtained the appointment of a receiver, who entered into possession on Mar. 16, 1876, & served the customers. During the night B. absconded, & next day Mar. 17, filed a liquidation petition, under which a receiver was appointed in bkpcy. The two receivers remained in joint possession:—*Held*: the case did not fall within Bills of Sale Act, 1854, c. 36, & the possession of A.'s receiver had taken the goods out of the order & disposition of B. at the time of his bkpcy.; & accordingly the title of A. prevailed over that of B.'s trustee in bkpcy.—*TAYLOR v. ECKERSLEY* (1877), 5 Ch. D. 740; 36 L. T. 442; 25 W. R. 527.

**470. Receiver not to act until former receiver discharged.]**—*SALT v. COOPER*, No. 134, *ante*.

**471. —.**—*Re CONNOLLY BROTHERS, LTD., WOOD v. CONNOLLY BROTHERS, LTD.*, No. 113, *ante*.

**472. Appointment in lunacy—Discharge of appointment in Chancery.]**—*CHAPLIN v. BARNETT* (1911), Times, Dec. 20, C. A.

of the order.—*BUDNYK v. KUSHNEYIK* ('Jta.'). [1925] 1 D. L. R. 246; [1924] 3 W. W. R. 900.—*CAN.*

**PART II. SECT. 6, SUB-SECT. 2.—O.**  
**o. General rule.]**—A receiver will

not be appointed over the possession of another receiver: but the proper motion is, that the receiver already appointed shall be extended to the cause in which it is sought to appoint one.—*VALLE v. O'REILLY* (1824), 1

Hog. 199.—*IR.*

**p. —.**—*BIDDULPH v.* (1825) 1 Hog. 244.—*IR.*

**q. —.**—*Re POWELL* (1836), 4 Ir. L. Rec. N. S. 130.—*IR.*

*Sect. 6.—In what cases appointment made: Sub-sect. 2, P. Sect. 7: Sub-sects. 1 & 2.]*

*P. Other Cases.*

**473. Pending execution of deeds of sale—Under order of court.]—**A receiver will be continued until deeds of sale under the decree are executed, for the purpose of collecting arrears of rent.—*QUIN v. HOLLAND* (1745), *Ridg. temp. H.* 295; 27 E. R. 835, L. C.

**474. Pending action in foreign court—Receiver of policy moneys on ships.]—**Pltfs. were a co. of ship owners on whose behalf deft., as their broker, had effected policies. Pltfs. had instituted proceedings in a competent ct. in Genoa against deft. for an account, to which suit deft. had appeared. Before final decree in the foreign ct., deft. commenced actions in England against the insurers upon one of the policies which had resulted in a loss:—*Held*: it was competent for pltfs. to file a bill to restrain the action & to have a receiver of the policy moneys pending the foreign litigation.—*TRANSATLANTIC CO. v. PIETRONI* (1860), *John.* 604; 2 L. T. 726; 6 Jur. N. S. 532; 70 E. R. 561. *Annotation*:—*Mentd.* *Dreyfus v. Peruvian Guano Co.* (1889), 41 Ch. D. 151.

**475. Property of foreign government—Taken subject to obligations entered into by former de facto government.]—**Certain cotton the public property of the Confederate States of America, was consigned by the Confederate Govt. to defts. P. & others, a firm carrying on business at Liverpool, in pursuance of an agreement between the Confederate Govt. & defts., whereby defts. were entitled out of the proceeds of the cotton to recoup themselves certain charges & expenses incurred by them under the provisions of the same agreement. The Confederate Govt. having been dissolved, & the Confederate States having submitted to the authority of the United States Govt., the latter govt. filed a bill praying to have the cotton, which had arrived at Liverpool, delivered up to them, & for an injunction & receiver. It appeared by the evidence that defts. had, under the agreement, a lien upon the cotton to the extent of at least £20,000. Deft. P. was appointed receiver, with power to sell the cotton; but he was required to give security for its value *ultra* the £20,000, the amount of defts.' lien.—*U.S.A. v. PRIOLEAU* (1865), 2 Hem. & M. 559; 35 L. J. Ch. 7; 13 L. T. 92; 11 Jur. N. S. 792; 13 W. R. 1062; 71 E. R. 580.

*Annotations*:—*Refd.* *The Beatrice* (otherwise *The Rappahannock*) (1866), 36 L. J. Adm. 9; *Smith v. Weguelin* (1869), L. R. 8 Eq. 198; *Peru Republic v. Dreyfus* (1888), 38 Ch. D. 348; *West Rand Central Gold Mining Co. v. R.*, [1905] 2 K. B. 391. *Mentd.* *Aksionairnoye Obschestvo A. M. Luther v. Sagor*, [1921] 1 K. B. 456.

**476. Dispute between members of governing body—Preventing proper conduct of affairs—Appointment until authoritative body constituted.]—**The existence of disputes between different members of the governing body of a co. which prevent its affairs being carried on properly, is a ground for the intervention of the ct. by injunction & receiver to protect the property of the co., but the interference of the ct. will be continued only until a governing body is duly appointed.—*FEATHERSTONE v. COOKE* (1873), L. R. 16 Eq. 298; 21 W. R. 835.

**477. S. P. TRADE AUXILIARY CO. v. VICKERS** (1873), L. R. 16 Eq. 303; 21 W. R. 836.

**PART II. SECT. 6, SUB-SECT. 2.—P.**

**r. Enforcement of order for payment of costs.]—***MADDEN v. DAVIS, HONEGAN v. DAVIS* (1842), Fl. & K.

**475.—IR.**

**t. To compel appearance—Where defendant resident outside jurisdiction.]—**Where deft. resides out of the jurisdiction of the ct.; & a bill is filed

**478. Pending action of trover.]—**Injunction to restrain deft. from parting with goods refused when an action of trover was pending respecting them. Receiver of the goods also refused.—*ANON.* (1875), 1 Char. Cham. Cas. 14; Bitt. Prac. Cas. 39.

**479. Pending reference to arbitration.]—**Where there is an agreement to refer all matters in dispute under a contract to arbn., & an action is subsequently brought under the contract in which it is found to be desirable, for the protection of the property which is the subject of the contract, that a receiver should be appointed or an injunction granted, it is competent for the ct. to appoint a receiver or grant an injunction, & by the same order to stay all further proceedings in the action, except for the purpose of carrying out the order for a receiver or an injunction, with a view to a reference to arbn.—*COMPAGNIE DU SENEGAL v. WOODS & Co.* (1883), 53 L. J. Ch. 106; *sub nom.* *COMPAGNIE DU SENEGAL ET DE LA CÔTE OCCIDENTALE D'AFRIQUE v. SMITH & Co. & WOODS & Co.*, 49 L. T. 527; 32 W. R. 111.

*Annotation*:—*Fold. Pini v. Roncoroni*, [1892] 1 Ch. 633.

**— In partnership cases.]—**See PARTNERSHIP, Vol. XXXVI., p. 484, Nos. 1471, 1477.

**480. Pending action for trespass—Interference with right of ferry—Receiver of moneys earned in interim.]—***PERCY v. THOMAS* (1884), 28 Sol. Jo. 533, D. C.

**481. Rents & profits of gasworks—Leased to defendant.]—***POCKLINGTON NEW GAS CO. v. STEARS* (1888), 4 T. L. R. 312, D. C.

**482. Enforcement of order for payment of costs.]—**An order for payment of costs, if made in the K. B. or the Ch. Divs., is final, in the sense that it is not interlocutory & can be enforced by a writ of *fi. fa.* or by a writ of *elegit* or by an attachment of debts, R. S. C. Ord. 42, rr. 17, 24, but it cannot, so far as I know, be enforced by granting an injunction to restrain a man from receiving his own property. It may, perhaps, be enforced by appointing a receiver . . . &, apparently, such an order may be made, although there is nothing at the moment to receive (*BIGHAM, J.*).—*BULLUS v. BULLUS* (1910), 102 L. T. 399; 26 T. L. R. 330; 54 Sol. Jo. 343.

*Annotations*:—*Mentd.* *Myers v. Myers, Carpendale, Radford & Thom*, [1918] P. 260; *Fanshawe v. Fanshawe*, [1927] P. 238.

**483. Trade union funds—Misapplication of moneys.]—**The rules of a trade union provided, (*inter alia*), that in the event of members being engaged in a strike or lockout officially recognised by the union, the union should pay dispute pay of 12s. a week & 2s. for each child under fourteen. A trade dispute, having arisen, was officially recognised as from Feb. 10, 1918. The union authorised the members on strike to sell to those still at work tickets at 2s. each for the benefit of the strikers. The proceeds of these tickets, amounting to a very large sum, were paid into the general account of the union & applied in payment of the dispute pay prescribed by the rules & partly in extra payments. In an action by three members of the union suing in a representative capacity on behalf of the members of their respective branches, claiming (a) a declaration that the ticket moneys could not be applied in discharge of the liability to pay dispute pay, but were held by the union, subject to certain deductions for commission & expenses, for the sole

against him, to raise a charge specifically affecting his lands; a receiver will be appointed over them, in order to compel his appearance.—*NASH v. HUGHES* (1833), *Hayes & Jo.* 400.—IR.

benefit of members subject to the dispute, & (b) other relief:—*Held*: (1) the payments were purely voluntary payments made for a particular purpose & not applicable to any other purpose, such as the payment of dispute pay, which was a liability arising under the rules; (2) plffs. were entitled to the declaration claimed as to the application of the proceeds & to an injunction to restrain the further misapplication thereof & if necessary to an account of the expenses properly to be deducted therefrom; (3) with regard to moneys already misapplied the ct. was precluded by Trade Union Act, 1871 (c. 31), s. 4, from granting relief either by the appointment of a receiver or by ordering an account.—*SANSOM v. LONDON & PROVINCIAL UNION OF LICENSED VEHICLE WORKERS* (1920), 36 T. L. R. 666.

**Enforcement of order for payment into court—Equitable execution.]—***See* EXECUTION, Vol. XXI., p. 667, Nos. 2472–2475.

**Interpleader proceedings—Appointment in lieu of sale.]—***See* INTERPLEADER, Vol. XXIX., p. 483, No. 340.

## SECT. 7.—PROPERTY IN RESPECT OF WHICH APPOINTMENT MADE.

### SUB-SECT. 1.—IN GENERAL.

**484. Property to be distinctly named in order.]—**(1) An order for a receiver ought to state distinctly, on the face of it, over what property the receiver is appointed.

(2) If he had been appointed receiver of the rents, the order would have gone on either to direct the owner to deliver possession, or the tenants to attorn (LORD LANGDALE, M.R.).—*CROW v. WOOD* (1850), 13 Beav. 271; 51 E. R. 104.

**485. Where appointment would effect forfeiture or destruction of interest.]—**The ct. will not appoint a receiver of the annual allowance paid to the Assistant Parliamentary Counsel to the Lords of the Treasury, before the hearing. *Qu.*: Whether that allowance be assignable.

Possibly, if a receiver were appointed, their Lordships might refuse to pay it to him; & no remedy in such a case could be had against them. Under these circumstances, the appointment of a receiver is, I think, improper (LORD LYNCHURST, C.).—*COOPER v. REILLY* (1830), 1 Russ. & M. 560; 39 E. R. 215, L. C.

*Annotation*:—*Mentd.* *Re Mirams*, [1891] 1 Q. B. 594.

**486. —.]—***HAMILTON v. BROGDEN*, [1891] W. N. 36.

*Annotation*:—*Distd.* *Holmes v. Mittage* (1893), 9 T. L. R. 217.

**487. —.]—**The fact that a contingent reversionary interest to an estate under a will which contained a forfeiture clause upon the reversioner charging same, or upon becoming bkpt., is not sufficient ground for discharging a receiver appointed in respect of the reversioner's interest, & such appointment does not, of itself, constitute a charge within the clause.—*CAMPBELL v. CAMPBELL & DAVIS* (1895), 72 L. T. 294.

**488. Undivided estate.]—***EVELYN v. EVELYN* (1750), 2 Dick. 800; 21 E. R. 482, L. C.

*Annotation*:—*Mentd.* *Tyson v. Fairclough* (1824), 2 Sim. & St. 142.

**489. Part only of estate.]—***CALVERT v. ADAMS* (1773), 2 Dick. 478; 21 E. R. 355.

**490. —.]—***HARGRAVE v. HARGRAVE*, No. 379, *ante*.

**491. Office of master forester.]—**A receiver having been appointed, in creditor's suit, of the office of master forester of a royal forest, an injunction was afterwards granted to restrain certain persons who owned lands in the forest, from sporting in it.—*BLANCHARD v. CAWTHORNE* (1833), 6 Sim. 155; 58 E. R. 552; *subsequent proceedings*, *Coop. temp. Brough*, 113, L. C.

**492. Realty as well as personalty.]—***WILLIAMS v. A.-G.* (1861), 1 Seton's Judgments & Orders, 7th ed., 730.

*Annotations*:—*Expld.* *Hitchen v. Birks* (1870), L. R. 10 Eq. 471. *Apld.* *Parkin v. Siddons* (1873), 42 L. J. Ch. 470.

**493. Newspaper.]—***CHAPLIN v. YOUNG* (1862), 6 L. T. 97, L. C.

**494. —.]—***KELLY v. HUTTON, KELLY v. McMURRAY*, No. 386, *ante*.

**495. Mines—Pending action to set aside contract for purchase.]—***GIBBS v. DAVID*, No. 177, *ante*.

**496. Contingent interest—Interest dependent on will by trustees.]—**An order was made, in an action in a county ct. appointing a receiver to receive the interest of a sum of money in the hands of trustees, & ordering the trustees to pay a specific amount of the interest to the receiver half yearly until the judgment in the action should be satisfied. The trustees were trustees of a will, by which they were directed to set apart & invest the sum in question, & were authorised at their absolute discretion from time to time & at such time or times as they should think proper to pay or apply the whole or any part of the income to or for the benefit of judgment debtor in such a manner in all respects as they should think proper. The trustees applied for a prohibition:—*Held*: as it depended on the discretion of the trustees whether anything should be paid to judgment debtor the receiver could not be entitled to receive the interest in their hands & an order for payment could not be made against the trustees who were strangers to the action, & therefore the county ct. judge had exceeded his jurisdiction & the proper remedy was by prohibition.—*R. v. LINCOLNSHIRE COUNTY COURT JUDGE* (1887), 20 Q. B. D. 167; 57 L. J. Q. B. 136; 58 L. T. 54; 36 W. R. 174, D. C.

### SUB-SECT. 2.—DEBTS DUE.

**497. Whether receiver appointed.]—**Receiver of the debts due to a business, appointed at the suit of persons to whom a share of the profits had been assigned against a subsequent assignee of the debts.—*CANDLER v. CANDLER* (1821), Jac. 225; 37 E. R. 834, L. C.

*Annotations*:—*Mentd.* *Whittaker v. Howe* (1841), 3 Beav. 383; *Aubin v. Holt* (1855), 2 K. & J. 66; *Scott v. Miller* (1859), John. 220; *Eddison v. Rothery* (1864), 11 L. T. 134.

**498. — Fund payable to judgment debtor.]—**Where pltf. had obtained an order against deft., a solr., for payment of a debt, & was unable to enforce judgment by a writ of *fi. fa.*, but had obtained an *ex parte* injunction against deft. restraining him from receiving the amount of certain taxed costs due to him in another action, the ct. was moved that the taxed costs might stand charged with the payment to pltf. of deft.'s debt, & that a receiver might be appointed so that equitable execution might be obtained against the fund. It was objected that such an order

## PART II. SECT. 7, SUB-SECT. 1.

**a. Mines—In possession of respondent.]—**11 & 12 Geo. 2, c. 10, does not authorise the appointment of a receiver over mines in respondent's possession.—*FRERE v. HIBERNIAN MINING Co.* (1828), 2 Hog. 30.—*IR.*



**Sect. 7.—Property in respect of which appointment made: Sub-sects. 2, 3, 4, 5, 6 & 7.]**

could not be made, & that no garnishee order could be granted on the fund:—*Held*: the ct. would make the order, as it had jurisdiction to appoint a receiver at the instance of judgment creditor against a fund payable to judgment debtor to which garnishee proceedings were inapplicable.—*WESTHEAD v. RILEY* (1883), 25 Ch. D. 413; 53 L. J. Ch. 1153; 49 L. T. 776; 32 W. R. 273.

*Annotations*:—*Distd. Holmes v. Millage*, [1893] 1 Q. B. 551. *Reid. Flegg v. Prentis*, [1892] 2 Ch. 428; *Harris v. Beauchamp*, [1894] 1 Q. B. 801. *Mentd. Archer v. Archer*, [1886] W. N. 66.

**499. — Sum due under arbitration award.]**—In an action for damages for misrepresentation it appeared that deft. was entitled to a sum of money under an award in an arbn. with a third person. The Court made a declaration of the right of pltf. to recover damages & directed an inquiry in chambers to ascertain the amount:—*Held*: pltf. was entitled to the immediate appointment of a receiver of the sum under the award.—*DUNCAN v. SCAIFE* (1888), 4 T. L. R. 716.

**500. — Book debts.]**—*MANCHESTER & LIVERPOOL DISTRICT BANKING CO. v. PARKINSON*, No. 10, *ante*.

**501. — —.]**—A firm of traders assigned their book debts to pltf., who gave no notice of the assignment to debtors. Pltfs. brought an action against the firm to enforce their security, which they registered as a *lis pendens*, & obtained an injunction & a receiver; but no notice of the action was given to debtors. The firm then assigned the same book debts to a banking co., who gave notice of their security to debtors. The banking co. had no notice of the action or of the order for an injunction & a receiver, unless the registration of the *lis pendens* amounted to constructive notice:—*Held*: the banking co. were not affected with notice by the registration of the *lis pendens*, & their security had priority over that of pltfs.

*Semble*: even if the registration had given the banking co. notice of the *lis pendens*, pltfs. would have lost their priority by their laches.—*WIGRAM v. BUCKLEY*, [1894] 3 Ch. 483; 63 L. J. Ch. 689; 71 L. T. 287; 43 W. R. 147; 10 T. L. R. 654; 38 Sol. Jo. 680; 7 R. 469, C. A. *Annotation*:—*Reid. Rutter v. Everett* (1895), 2 Mans. 371.

**502. — —.]**—*HARPER v. MCINTYRE*, No. 297, *ante*.

— **Effect of bankruptcy.]**—*See* *BANKRUPTCY*, Vol. V., pp. 774–775, Nos. 6657–6659.

**SUB-SECT. 3.—ECCLESIASTICAL PROPERTY.**

*See* 13 Eliz. c. 20.

**503. Profits of rectory.]**—*SILVER v. NORWICH (BP.)*, No. 59, *ante*.

**504. —.]**—A third incumbrancer on a rectory having obtained a sequestration, a receiver was appointed at the instance of the second incumbrancer.—*WHITE v. PETERBOROUGH (BP.)* (1818), 3 Swan. 109; 36 E. R. 793, L. C.

*Annotations*:—*Mentd. Tipping v. Power* (1842), 1 Hare, 405; *Armstrong v. Storer, Bazalgette v. Storer* (1851), 14 Beav. 535; *Ford v. Chesterfield* (No. 3) (1856), 21 Beav. 426.

**PART II. SECT. 7, SUB-SECT. 3.**

**506 I. Benefice with cure of souls.]**—*BATTERSY v. HOMAN* (1850), 16 L. T. O. S. 67.—*IR.*

**506 II. —.]**—A judgment is, under 3 & 4 Vict. c. 105, ss. 19, 21, 22, a

valid charge upon an ecclesiastical benefice, without issuing a sequestration; & the ct. will in a plenary suit grant a receiver over the benefice.—*HALE v. CARPENDALE* (1853), 5 Ir. Jur. 121.—*IR.*

*b. Tithe rentcharge.]*—A receiver

**505. Profits of canonry.]**—A canon of Windsor granted the canonry & the profits, etc., to pltfs., to secure a sum of money. So far as it appeared on an interlocutory, application, the estates were vested in the corp., & the canon was entitled to an aliquot share of the profits. There was no cure of souls, & the only duties were residence within the castle, & attendance in the chapel twenty-one days a year. Upon this state of circumstances:—*Held*: the security was valid, & a receiver of the profits was appointed.—*GRENFELL v. WINDSOR (DEAN & CANONS)* (1840), 2 Beav. 544; 48 E. R. 1292.

*Annotations*:—*Mentd. M'Bean v. Deane* (1885), 1 T. L. R. 624; *Re Mirams*, [1891] 1 Q. B. 594.

**506. Benefice with cure of souls.]**—A rector, who was also the patron of a living, gave warrants of attorney to various creditors, who had mtges. on the advowson, subject to an agreement that the judgment to be entered up by the first mtgee. should have priority over the rest, whenever execution should be issued:—*Held*: the agreement pointed so particularly to making the judgments charges on the living, that the ct. could not give effect to it by granting an injunction & a receiver.—*LONG v. STORIE* (1849), 3 De G. & Sm. 308; 12 L. T. O. S. 530; 13 Jur. 227; 64 E. R. 492.

*Annotation*:—*Consd. Bates v. Brothers* (1854), 2 Sm. & G. 509.

**507. —.]**—In Jan. 1851, A. obtained judgment, which was registered same day, against B., a beneficed clergyman. In the following Nov., C. obtained & registered a judgment against B. Subsequently C. was appointed sequestrator of the benefice. Upon bill filed by A. for the appointment of a receiver:—*Held*: he was not entitled.—*BATES v. BROTHERS* (1854), 2 Sm. & G. 509; 2 Eq. Rep. 803; 23 L. J. Ch. 782; 23 L. T. O. S. 305; 18 J. P. 661; 18 Jur. 715; 2 W. R. 636; 65 E. R. 503.

**508. —.]**—A receiver was appointed by the ct. in a suit by judgment creditor of a beneficed clergyman to enforce his judgment as a charge upon the living, the Vice-Chancellor who appointed the receiver, considering that the judgment was a charge. Another judgment creditor then issued a sequestration against the same living, & a motion being made in the cause for his committal for contempt, another Vice-Chancellor refused to make any order, but directed him to pay the costs, & he undertook to deal with the sequestration as the ct. should direct. At the hearing, the same Vice-Chancellor felt bound by the opinion expressed on the occasion of the appointment of the receiver, & decided accordingly:—*Held*: a receiver ought not to have been appointed; & judgment creditor who had issued a sequestration had a priority of charge, notwithstanding any contempt he might have committed by interfering when a receiver was appointed.—*HAWKINS v. GATHERCOLE* (1855), 6 De G. M. & G. 1; 3 Eq. Rep. 348; 24 L. J. Ch. 332; 24 L. T. O. S. 281; 19 J. P. 115; 1 Jur. N. S. 481; 3 W. R. 194; 43 E. R. 1120, L. JJ.

*Annotations*:—*Mentd. Arnold v. Gravesend Corp., Pallister v. Same* (1856), 25 L. J. Ch. 776; *Parry v. Jones* (1850), 1 C. B. N. S. 339; *Cope v. Doherty* (1858), 2 De G. & J. 614; *Burder v. O'Neill* (1863), 2 New Rep. 551; *Re Poland* (1866), 35 L. J. Eccl. 19; *Re Cambrian Ry.* (1868), 16 W. R. 346; *Norwich (BP.) v. Pearse* (1868), L. R. 2

cannot be appointed or extended over a tithe rentcharge by petition under 5 & 6 Will. 4, c. 55, or 3 & 4 Vict. c. 105.—*LYMBERRY v. HELSHAM* (1852), 1 I. Ch. R. 633.—*IR.*  
*c. Tithe & glebe*—Where annuity charged on present & future benefice.]—

A. & E. 281;  
*Garnett v. Br.* —  
*Ex p. Chick* (1879), 11 Ch. D. 731; *Bradlaugh v. Clarke* (1883), 8 App. Cas. 354; *Seward v. The Vera Cruz* (1884), 10 App. Cas. 59; *McBean v. Deane* (1885), 30 Ch. D. 520; *Re Leavesley*, [1891] 2 Ch. 1; *Baird v. Tunbridge Wells Corp.*, [1894] 2 Q. B. 867; *Eastman Photographic Materials Co. v. Comptroller-General of Patents, Designs & Trade Mks.*, [1898] A. C. 571; *Birmingham Corp. v. Birmingham Canal Navigations* (1905), 21 T. L. R. 548; *R. v. West Riding of Yorkshire County Council*, [1906] 2 K. B. 676; *Porthcawl U. C. v. Brogden*, [1917] 1 Ch. 534; *Banbury v. Bank of Montreal*, [1918] A. C. 626; *Re Plymouth Corp. & Walter*, [1918] 2 Ch. 354; *A.-G. v. Brown*, [1920] 1 K. B. 773; *Nicholle v. Nicholle*, [1922] 1 A. C. 284; *Rhonda's Claim*, [1922] 2 A. C. 339; *Woodfield v. Bond*, [1922] 2 Ch. 40; *Peterson v. Ardrossan Harbour Co.* (1926), 19 B. W. C. C. 621.

**Tithe rentcharge.**—See Nos. 442, 443, *ante*.

#### SUB-SECT. 4.—FURNITURE AND OTHER CHATTELS.

**509. Hairrooms.]—SHAFTESBURY (EARL) v. MARLBOROUGH (DUKE)** (1820), 1 Seton's Judgments & Orders, 7th ed. 735.

**510. Surplus proceeds of sale of mortgaged chattels.]—**A mtgee. of chattels in possession, & proceeding under the power in his deed of assignment to sell the mortgage property is, after satisfying the amount of his mtge. security & the expenses of the sale a trustee of the surplus proceeds; & where the mtgee., by his answer to the bill of an execution creditor, declared his intention to pay such proceeds to certain claimants in respect of an execution & an assignment both subsequent to the delivery to the sheriff of the writ of execution obtained by the plff., the surplus proceeds of the property already sold were ordered to be paid into ct., & a receiver appointed of the moneys to arise by the future sales.—*GOUTHWAITE v. RIPPON* (1839), 8 L. J. Ch. 139; 3 Jur. 7.

**511. Chattels comprised in agreement for bill of sale.]—TAYLOR v. ECKERSLEY**, No. 469, *ante*.

**512. Furniture.]—MANCHESTER & LIVERPOOL DISTRICT BANKING Co. v. PARKINSON**, No. 10, *ante*.

**513. —.]—WHITAKER v. COHEN**, No. 559, *post*.

**514. — Rent in respect thereof.]—HAMILTON v. BROGDEN**, [1891] W. N. 14.

**515. —.]—**A mtgor. & mtgee. of houses joined in making a lease of the houses & of furniture in them which belonged to the mtgor. at an inclusive rent payable to the mtgor. until the mtgee. should give notice to the contrary. The mtgee. entered into receipt of the rents, & a judgment creditor of the mtgor. obtained the appointment of a receiver of the interest of the mtgor. in the rent reserved by the lease. The mtgor. was under covenant not to remove the furniture from the houses without the mtgee.'s consent:—*Held*: creditor was entitled to have the rent apportioned as between the houses & the furniture, so that the receiver could recover the amount apportioned to the furniture, & it must be referred to a master to make the apportionment.—*HOARE & Co. v. HOVE BUNGALOWS, LTD.* (1912), 56 Sol. Jo. 686, C. A.

**— Life interest of married woman therein.]—**See No. 559, *post*.

#### SUB-SECT. 5.—FUTURE EARNINGS.

See *EXECUTION*, Vol. XXI., pp. 668, 669, Nos. 2478, 2490–2492.

A receiver will be appointed over the tithe & glebe of the grantor of an annuity who has charged it on the

benefice he had at the time of the grant, & covenanted to charge it on any benefice he might thereafter possess,

on his being promoted, if a sufficient arrear of the annuity is due.—*STRONGE v. ORMSBY* (1828), 2 Hog. 55.—*IR.*

#### SUB-SECT. 6.—INTERESTS IN REVERSION.

**516. Equitable execution—Reversionary interest in real estate.]—Re JONES & THE JUDGMENTS ACT**, 1864 (1895), 39 Sol. Jo. 671.

*Annotation*:—*Reid. Re Harrison & Bottomley*, [1899] 1 Ch. 465.

**517. — Equitable reversionary interest.]—FUGGLE v. BLAND**, No. 179, *ante*.

**518. —.]—**The ct. has jurisdiction to appoint, by way of equitable execution, a receiver of an equitable reversionary interest in personal estate.

The appointment of a receiver does not create a charge, but it operates as an injunction to restrain deft. from himself receiving the proceeds of sale & may possibly be useful (*LINDLEY, L.J.*).—*TYRRELL v. PAINTON*, [1895] 1 Q. B. 202; 64 L. J. P. 33; 71 L. T. 687; 43 W. R. 163; 39 Sol. Jo. 79; 11 R. 589, C. A.

*Annotations*:—*Apld. Re Jones & The Judgments Act*, 1864, (1895), 39 Sol. Jo. 671. *Consd. Re Angelsea, de Galve v. Gardner*, [1903] 2 Ch. 727. *Follid. Ideal Bedding Co. v. Holland*, [1907] 2 Ch. 157. *Consd. Bullus v. Bullus* (1910), 102 L. T. 399; *Singer v. Fry* (1915), 84 L. J. K. B. 2025. *Reid. Re A Debtor, Ex p. Peak Hill Goldfield*, [1909] 1 K. B. 430.

**519. —.]—IDEAL BEDDING CO., LTD. v. HOLLAND**, No. 730, *post*.

**520. — Reversionary interest in legacy.]—**A judgment debt being unsatisfied for want of goods of deft., who was entitled, expectant on the death of a tenant for life, to a legacy of much larger amount than the debt:—*Held*: a receiver should be appointed by way of equitable execution to receive a sufficient portion of the legacy when it should become receivable.

The order should be made for named plff. [judgment creditor] to be appointed receiver, without security & without salary (*LORD COLERIDGE, C.J.*).—*MAGNICOLL v. PARNELL* (1887), 35 W. R. 773.

*Annotations*:—*Follid. Tyrrell v. Painton* (1894), 11 R. 589. *Expld. Re Harrison & Bottomley*, [1899] 1 Ch. 465. *Reid. Campbell v. Campbell & Davis* (1895), 72 L. T. 294.

**521. Contingent reversionary interest.]—CAMPBELL v. CAMPBELL & DAVIS**, No. 487, *ante*.

#### SUB-SECT. 7.—PROPERTY ABROAD.

See, generally, *CONFLICT OF LAWS*, Vol. pp. 353–354, Nos. 373–380.

**522. Real estate.]—CASTLECOMER (LORD) v. CASTLECOMER (LADY)** (1727), Bunb. 249; 145 E. R. 603.

**523. —.]—DREWRY v. DARWIN** (1765), 1 Seton's Judgments & Orders, 7th ed. 777.

*Annotation*:—*Follid. Hinton v. Galli* (1854), 2 Eq. Rep. 479.

**524. —.]—HANSON v. WALKER** (1815), 1 Seton's Judgments & Orders, 7th ed. 777.

**525. —.]—UNDERWOOD v. FROST** (1857), 1 Seton's Judgments & Orders, 7th ed. 776.

**526. —.]—**If plff. in this ct. makes out a case which entitles him to a declaration of lien upon the real estate of deft. out of the jurisdiction, this ct. will make it, & in some cases grant a receiver; but it will leave plff. to make it available or not, as he can, by means of the foreign tribunals.—*NORRIS v. CHAMBRES* (1861), 29 Beav. 246; 30 L. J. Ch. 285; 3 L. T. 720; 7 Jur. N. S. 59; 9 W. R. 259; 54 E. R. 621; *on appeal*, 3 De G. F. & J. 583, L. C.

*Annotations*:—*Reid. Cookney v. Anderson* (1862), 31 Beav. 452. *Mentd. Cood v. Cood* (1863), 3 New Rep. 275; *Matthaei v. Galitzin* (1874), L. R. 18 Eq. 340; *Whitaker*

**Sect. 7.—Property in respect of which appointment made: Sub-sects. 7, 8, 9, 10, 11 & 12.]**

*v. Forbes* (1875), L. R. 10 C. P. 583; *Re Hawthorne, Graham v. Massey* (1883), 23 Ch. D. 743; *Companhia de Mocambique v. British South Africa Co., De Sousa v. British South Africa Co.*, [1892] 2 Q. B. 358; *Duder v. Amsterdamsch Trusteesh Kantoor*, [1902] 2 Ch. 132; *Deschamps v. Miller*, [1908] 1 Ch. 856; *Bank of Africa v. Cohen*, [1909] 2 Ch. 129.

527. —.]—*BOLTON v. CURRE*, No. 194, *ante*.

528. — **Mode of dealing with estate referred to master.]**—A receiver had been appointed of testator's estate, part of which was in India, & it having become necessary to have it remitted:—*Held*: the proper course was to refer it to the master, to inquire what would be the most advantageous course for receiving & remitting it to England.—*KEYS v. KEYS* (1839), 1 Beav. 425; 48 E. R. 1004.

*Annotation*:—*Refd. Re Maudslay & Field*, *Maudslay v. Maudslay & Field*, [1900] 1 Ch. 602.

529. — **Power to sell & receive produce.]**—*HINTON v. GALLI*, No. 196, *ante*.

530. **Personal estate.]**—*DREWRY v. DARWIN* (1765), 1 Seton's Judgments & Orders, 7th ed. 777.

*Annotation*:—*Folld. Hinton v. Galli* (1854), 2 Eq. Rep. 479.

531. —.]—*HODSON v. WATSON* (1788), 1 Seton's Judgments & Orders, 7th ed. 776.

532. —.]—The ct. will appoint a receiver in India of testator's assets, on the application of an exor. resident in England, but the receiver must give sureties resident in England.—*COCKBURN v. RAPHAEL* (1825), 2 Sim. & St. 453; 4 L. J. O. S. Ch. 60; 57 E. R. 419.

533. — **Personal representatives out of jurisdiction.]**—*SMITH v. SMITH*, No. 352, *ante*.

534. —.]—*HINTON v. GALLI*, No. 196, *ante*.

535. **Assets of company.]**—*EVANS v. PULESTON*, [1880] W. N. 127, C. A.

—.]—*See, also, COMPANIES*, Vol. X., p. 795, Nos. 5013–5017.

**Mortgaged property.]**—*See MORTGAGE*, Vol. XXXV., pp. 525, 531, Nos. 2559–2561, 2621–2623.

**SUB-SECT. 8.—PROPERTY OF ALIEN ENEMIES.**

*See ALIENS*, Vol. II., pp. 152–154, Nos. 233, 242–248.

**SUB-SECT. 9.—PROPERTY OF INFANTS.**

536. **Father trying to take profits—Father insolvent & of bad character.]**—*KIFFIN v. KIFFIN* (prior to 1721), cited in 1 P. Wms. 705; 24 E. R. 580.

*Annotation*:—*Refd. Beaufort v. Berty* (1721), 1 P. Wms. 703.

537. **Father partial.]**—*BLAKEWAY v. BLAKEWAY*, No. 151, *ante*.

538. **Guardians unwilling to administer infant's estate.]**—[The guardians] being unwilling to meddle with the estate a receiver must be appointed by the master (*LORD KING*, C.).—*BRIDGES v. HALES* (1729), Mos. 108; 25 E. R. 298.

539. **No action pending.]**—*Ex p. ODEL* (1731), cited in 2 Atk. 315; 26 E. R. 592.

*Annotations*:—*N.F. Ex p. Whitfield* (1742), 2 Atk. 315. *Mentd. Ex p. Myerscough* (1819), 1 Jac. & W. 151.

540. —.]—The ct. has not a jurisdiction to appoint a receiver unless a cause be depending.—*Ex p. WHITFIELD* (1742), 2 Atk. 315; 26 E. R. 592. *Annotations*:—*Folld. Ex p. Salter* (1792), 3 Bro. C. C. 500. *Mentd. Ex p. Thomas* (1752), Amb. 146; *Re Salisbury & Eccl. Comrs.* (1875), 2 Ch. D. 29.

541. —.]—*Ex p. SALTER* (1792), 3 Bro. C. C. 500; 29 E. R. 666, L. C.

*Annotations*:—*Folld. Ex p. Mountfort* (1809), 15 Ves. 445. *Mentd. Ex p. Myerscough* (1819), 1 Jac. & W. 151.

542. —.]—I have never in my experience observed an instance of the appointment of a receiver without a bill (*LORD ELDON*, C.).—*Ex p. MOUNTFORT* (1809), 15 Ves. 445; 33 E. R. 822. *Annotation*:—*Mentd. Ex p. Myerscough* (1819), 1 Jac. & W. 151.

543. **Administrator in poor circumstances—Threatened misapplication of property.]**—*HAVERS v. HAVERS* (1740), Barn. Ch. 22; 27 E. R. 538, L. C.

544. **Infant heir-at-law—Sale of estate for payment of debts.]**—Bill for sale of real estate for payment of debts. The heir-at-law being an infant, the parol demurred. The ct. will appoint a receiver as in other cases.—*SWEET v. PARTRIDGE* (1788), 1 Cox, Eq. Cas. 433; 2 Dick. 696; 29 E. R. 1236.

*Annotation*:—*Consd. Lechmere v. Brasier* (1821), 2 Jac. & W. 287.

545. **Where guardian appointed.]**—The appointment of a testamentary guardian of an infant by his father does not under Tenures Act, 1640 (c. 24), constitute any objection to the appointment of a receiver of the estate of the infant.—*GARDNER v. BLANE* (1842), 1 Hare, 381; 66 E. R. 1080.

**SUB-SECT. 10.—PROPERTY OF LUNATICS.**

*See LUNATICS*, Vol. XXXIII., pp. 175, 185, 186, 189–193, 218, Nos. 639, 640, 811, 812, 821–830, 858–930, 1265–1273.

**SUB-SECT. 11.—PROPERTY OF MARRIED WOMEN.**

*See, generally, HUSBAND & WIFE*, Vol. XXVII., pp. 254, 255, Nos. 2236–2243.

546. **Whether receiver appointed over property subject to restraint on anticipation.]**—*PERKS v. MYLREA*, [1884] W. N. 64; Bitt. Rep. in Ch. 128.

547. —.]—*R.*, a married woman, contracted a debt in 1878. In 1879 she married her present husband, when she settled all her estate upon trustees under a marriage settlement without power of anticipation. In 1881 pltf. obtained judgment against her for the debt contracted in 1878. *R.* did not know the terms of that judgment. In 1888 pltf. obtained the appointment of a receiver of her personal estate, *i.e.* the estate settled upon trustees under the marriage settlement, so as to satisfy the judgment debt. On a motion to alter the terms of the judgment & to discharge the appointment of a receiver:—*Held*: the terms of the judgment could not be altered so late in the day, & the receiver was rightly appointed.—*AXFORD v. REID* (1889), 53 J. P. 149; 5 T. L. R. 213, D. C.; *on appeal*, 22 Q. B. D. 548, C. A.

*Annotations*:—*N.F. Birmingham Excelsior Money Soc. v. Lane*, [1904] 1 K. B. 35. *Mentd. Re Wheeler's Settltmt. Trusts, Briggs v. Ryan*, [1899] 2 Ch. 717; *Public Trustee v. Wolf*, [1923] A. C. 544.

548. — **Post-nuptial settlement after debt contracted.]**—A woman at the time of her marriage in Dec. 1882, being then an infant, was entitled to a sum of money absolutely, to a sum for her separate use, & to certain freeholds. After her marriage, & while still an infant, she contracted a debt for which judgment was recovered against

**PART II. SECT. 7, SUB-SECT. 9.**

*d. Father of bad character.]*—*Re CORMICKS (MINORS)* (1840), 2 I. Eq. R. 264.—*IR.*



her separate estate. After this debt was contracted, & before the woman attained her majority, a post-nuptial settlement of all the property was made in 1884, under Infant Settlements Act, 1855 (c. 43), to the wife for her life for her sole & separate use with a restraint on anticipation, & after her death to her husband & children. This settlement was approved by the Ch. Div. of the High Ct. Judgment creditor applied to have a receiver appointed of the property, upon the ground that such settlement was void as against creditors under the last clause of Married Women's Property Act, 1882 (c. 75), s. 19:—*Held*: the settlement though made after the debt was contracted, was valid as against creditors by virtue of the first part of Married Women's Property Act, 1882 (c. 75), s. 19, & judgment creditor was not entitled to have a receiver appointed.—*HEMINGWAY v. BRAITHWAITE* (1889), 61 L. T. 224, D. C.

**549. — Judgment after cessation of coverture**—**Removal of restraint by discovery.**—A woman possessed of separate estate subject to a restraint on anticipation incurred a debt while under coverture. After the death of her husband judgment was recovered against her, & was limited to such of her separate property as was not subject to the restraint on anticipation. There being insufficient property to satisfy this judgment, application was made to appoint a receiver of the property which had been subject to the restraint:—*Held*: the removal of the restraint by the death of the husband did not make such property liable.—*PELTON BROTHERS v. HARRISON*, [1891] 2 Q. B. 422; 60 L. J. Q. B. 742; 65 L. T. 514; 56 J. P. 37; 39 W. R. 686; 7 T. L. R. 686, C. A.; *subsequent proceedings*, [1892] 1 Q. B. 118, C. A.

*Annotations*:—*Consd.* *Hood Barrs v. Cathcart*, [1894] 2 Q. B. 559; *Re Hewett, Ex p. Levene*, [1895] 1 Q. B. 328; *Re Wheeler's Settmt. Trusts, Briggs v. Ryan*, [1899] 2 Ch. 717; *Brown v. Dimbleby*, [1904] 1 K. B. 28. *Reid*. *Bird v. Barstow* (1891), 61 L. J. Q. B. 1; *Hill v. Alesbury* (1894), 10 T. L. R. 487; *Re Lumley, Hood-Barrs v. Cathcart* (1894), 70 L. T. 622; *Softlaw v. Welch*, [1899] 2 Q. B. 419. *Mentd.* *Re Lynes, Ex p. Lester*, [1893] 2 Q. B. 113.

**550. — — — — —**—Where a married woman, who was entitled to the income of trust funds for life, for her separate use, without power of anticipation, signed promissory notes in 1897, & her husband having subsequently died, judgment was, after his death, recovered against her in an action on the notes:—*Held*: a receiver could not be appointed to receive the before-mentioned income by way of equitable execution on the judgment.—*BROWN v. DIMBLEBY*, [1904] 1 K. B. 28; 73 L. J. K. B. 35; 89 L. T. 424; 52 W. R. 53, C. A.

*Annotations*:—*Reid*. *Studley v. Studley*, [1913] P. 119; *Wood v. Lewis*, [1914] 3 K. B. 73.

**551. — Income accrued due after judgment.**—Rents accruing after judgment of property subject to a restraint on anticipation cannot be taken in execution under a writ of sequestration, or by means of a receiver.—*Re LUMLEY, Ex p. HOOD BARRS*, [1894] 3 Ch. 135; *sub nom.* *Re LUMLEY, HOOD-BARRS v. CATHCART*, 63 L. J. Ch. 897; 71 L. T. 7; 42 W. R. 633; 10 T. L. R. 544; 38 Sol. Jo. 563; 7 R. 400, C. A.

*Annotations*:—*Mentd.* *Hood Barrs v. Heriot* (1897), 45 W. R. 507; *Gordon v. Gordon & Gordon* (1904), 52 W. R. 389.

**552. — — — — —**—Where judgment has been obtained against a married woman who is entitled under a settlement to income for her separate use with a restraint upon anticipation, there is no power to appoint a receiver of her income which has accrued due after the date of the judgment.—*WHITELEY v. EDWARDS*, [1896] 2 Q. B. 48; 65

L. J. Q. B. 457; 74 L. T. 720; 44 W. R. 530; 12 T. L. R. 429, C. A.

*Annotations*:—*Apld.* *Re Lumley, Ex p. Hood Barrs*, [1896] 2 Ch. 690. *Reid*. *Bolitho v. Gidley*, [1905] A. C. 98.

**553. — — — — —**—Income accrued due after judgment in respect of property subject to a restraint on anticipation cannot be taken in execution or by the appointment of a receiver.—*Re LUMLEY, Ex p. HOOD BARRS*, [1896] 2 Ch. 690; 65 L. J. Ch. 837; 75 L. T. 236; 45 W. R. 147; 12 T. L. R. 630, C. A.

*Annotation*:—*Mentd.* *Re Williams, Williams v. Grant* (1897), 76 L. T. 150.

**554. — Restraint reviving on second marriage.**—By a settlement made upon the marriage of deft. with P. her property was settled upon trust to pay the income to her for life for her separate use without power of anticipation, & there was an ultimate trust for her absolutely if she survived P. Deft. obtained a divorce from P. & subsequently married E. There was no evidence whether P. was alive or not. Pltf. obtained judgment against deft. as a married woman, & then obtained an order appointing a receiver of her interest under the settlement:—*Held*: the restraint on anticipation became operative upon the second marriage, & an order for a receiver ought not to have been made.—*STROUD v. EDWARDS* (1897), 77 L. T. 280, C. A.

**555. — In respect of ante-nuptial debt.**—*BIRMINGHAM EXCELSIOR MONEY SOCIETY v. LANE*, [1904] 1 K. B. 35; 89 L. T. 656; *sub nom.* *BIRMINGHAM EXCELSIOR MONEY SOCIETY v. HAYWOOD*, 73 L. J. K. B. 28; 52 W. R. 84; 20 T. L. R. 47; 48 Sol. Jo. 50, C. A.

**556. — To enforce payment of costs.**—A married woman, who is real pltf. in an action, may, when her action is dismissed with costs, be ordered, under Married Women's Property Act, 1893 (c. 63), s. 2, to pay costs, when taxed, out of the property settled for her separate use without power of anticipation, but it is not necessary to appoint a receiver.—*HUNTLY (MARCHIONESS) v. GASKELL*, [1905] 2 Ch. 656; 75 L. J. Ch. 66; 93 L. T. 785; 54 W. R. 164; 22 T. L. R. 20; 50 Sol. Jo. 26, C. A.

— — — — —*See, also*, HUSBAND & WIFE, Vol. XXVII., p. 132, Nos. 1076–1080.

**557. — Power of court to remove restraint—During coverture.**—Where a married woman is entitled to a life interest in property subject to a restraint on anticipation, the ct. has jurisdiction under Married Women's Property Act, 1893 (c. 63), s. 2, to appoint a receiver of, & to order a sale of, her life interest both during & after coverture.—*STUDLEY v. STUDLEY*, [1913] P. 119; 82 L. J. P. 65; 108 L. T. 657; 57 Sol. Jo. 425, C. A.

*Annotation*:—*Reid*. *Wood v. Lewis*, [1914] 3 K. B. 73.

**558. — — — — — After coverture.**—*STUDLEY v. STUDLEY*, No. 557, *ante*.

**559. Property in which married woman has life interest—Furniture.**—The ct. refused to appoint, on behalf of judgment creditor, a receiver of certain furniture in which judgment debtor, a married woman, had, under a settlement, a life interest.—*WHITAKER v. COHEN* (1893), 69 L. T. 451; 9 T. L. R. 505; 37 Sol. Jo. 562, D. C.

**560. — Appointment effecting forfeiture.**—*RAY v. BREMNER* (1894), 10 T. L. R. 428, D. C.

**Sect. 7.—Property in respect of which appointment made: Sub-sects. 13, 14 & 15, A. & B.; sub-sects. 16 & 17. Part III. Sect. 1.]**

**SUB-SECT. 13.—PROPERTY OF COMPANIES AND PUBLIC UNDERTAKINGS.**

See COMPANIES, Vol. X., pp. 1188, 1189, Nos. 8429–8439 & TITLES *passim*.

**SUB-SECT. 14.—PROPERTY IN HANDS OF SEQUESTRATOR.**

**561. Sequestration by third incumbrancer—Receiver appointed at instance of second.]—**WHITE v. PETERBOROUGH (Bp.), No. 504, *ante*.

**562. Appointment as discharge of sequestration.]—**Appointment of a receiver in the place of the sequestrators discharges the sequestration.—SHAW v. WRIGHT (1796), 3 Ves. 22; 30 E. R. 872.

**SUB-SECT. 15.—SALARIES AND PENSIONS.**

**A. Salaries.**

**Assignability of salaries in general.]—**See CHOSSES IN ACTION, Vol. VIII., pp. 436 *et seq*.

**563. Public officer—Chief Remembrancer of Irish Court of Exchequer.]—**By an Act of the Irish Parliament of the year 1772, a mtgee., when three half years' interest are in arrear, may by a summary application get a receiver appointed of the estate in mtge., in order to satisfy & keep down the arrears & growing payments of the interest. An application of this kind was made by resp. to the Ct. of Ch. in Ireland, & though applt. held the office of Chief Remembrancer of the Ct. of Exch. in that kingdom, yet he was not permitted to plead any privilege of office against such an application.—CLANBRASSILL (EARL) v. TAYLOR (1781), 5 Bro. Parl. Cas. 319; 2 E. R. 704.

**564. —Clerk of the peace.]—**The profits of the office of clerk of the peace being assigned for payment of creditors, a receiver was appointed, pending the question of the validity of the assignment.—PALMER v. VAUGHAN (1818), 3 Swan. 173; 36 E. R. 818, L. C.

*Annotation:—*Mentd. Liverpool Corpn. v. Wright (1859), 28 L. J. Ch. 868.

**565. —Assistant Parliamentary Counsel to Treasury.]—**COOPER v. REILLY, No. 485, *ante*.

**566. Emoluments of fellowship.]—**Motion by an incumbrancer on a fellowship for a receiver & injunction refused with costs.—BERKELEY v. KING'S COLLEGE, CAMBRIDGE (1830), 10 Beav. 602; 50 E. R. 714

*Annotation:—*Refd. Feistel v. King's College, Cambridge (1845), 10 Beav. 491.

**567. —.]—**An assignment of the emoluments of a fellow of a college in the university is valid in equity, & effect will be given to a security thereon, out of the dividends apportioned to such fellow, from time to time, in respect to his fellowship.

I will either appoint a receiver of such sums as may be hereafter appropriated, or adopt any other mode of securing pltf.'s interest which may be more satisfactory to the college (LORD LANG-

DALE, M.R.).—FEISTEL v. KING'S COLLEGE, CAMBRIDGE (1847), 10 Beav. 491; 16 L. J. Ch. 339; 7 L. T. O. S. 222; 11 Jur. 506; 50 E. R. 671.

**B. Pensions.**

**568. Pension for past services.]—**A pension for past services may be aliened; but a pension for supporting the grantee in the performance of future duties, is inalienable (LORD ELDON, C.).—DAVIS v. MARLBOROUGH (DUKE) (1818), 1 Swan. 74; 2 Wils. Ch. 130; 36 E. R. 303, L. C.; *subsequent proceedings* (1819), 2 Swan. 108, L. C. *Annotations:—*Consd. Cooper v. Reilly (1829), 2 Sim. 560; Hill v. Paul (1841), 8 Cl. & Fin. 295; *Re* Marlborough's Parliamentary Estates (1891), 8 T. L. R. 179; *Re* Marlborough's Blenheim Estates & Settled Land Acts (1892), 8 T. L. R. 582. *Refd.* Westmeath v. Westmeath (1834), 3 Knapp. 42; Grenfell v. Windsor (Dean & Canons) (1840), 2 Beav. 544; Cadogan v. Lyric Theatre (1894), 63 L. J. Ch. 775.

**569. Pension for supporting grantee in performance of future duties.]—**DAVIS v. MARLBOROUGH (DUKE), No. 568, *ante*.

**570. Trustee of pension out of jurisdiction.]—**Receiver appointed of a Govt. pension the trustee being out of the jurisdiction.—NOAD v. BACKHOUSE (1843), as reported in 2 Y. & C. Ch. Cas. 529; 63 E. R. 237.

**Army & Navy pensions.]—**See ROYAL FORCES, pp. 323, 326, 327, *post*.

**SUB-SECT. 16.—SHIP, FREIGHT OR CARGO.**

**571. Ship.]—**Although a second mtgee [of a ship] has no legal as distinguished from equitable right to possession, & although he cannot take possession as against a first mtgee., yet, as against all other persons he has a right to take possession & can enforce such right, if necessary, by obtaining the appointment of a receiver (LINDLEY, J.).—KEITH v. BURROWS (1876), 1 C. P. D. 722; 45 L. J. Q. B. 876; 35 L. T. 508; 25 W. R. 43; 3 Asp. M. L. C. 280; *on appeal* (1877), 2 App. Cas. 636, H. L.

*Annotations:—*Mentd. Simpson v. Thompson (1877), 3 App. Cas. 279; Anderson v. Butler's Wharf Co. (1879), 48 L. J. Ch. 824; Swan v. Barber (1879), 5 Ex. D. 130; Cory v. Stewart (1886), 2 T. L. R. 508; Japp v. Campbell (1887), 57 L. J. Q. B. 79; Nähmaschinen Fabrik (Late Frister & Rossmann) Act. v. Pickford & Lee & Harris (1888), 4 T. L. R. 617; The Benwell Tower (1895), 72 L. T. 664; The Red Sea, [1896] P. 20; The Heather Bell, [1901] P. 272; Shillito v. Biggart, [1903] 1 K. B. 683; Law Guarantee & Trust Soc. v. Russian Bank for Foreign Trade, [1905] 1 K. B. 815; The Manor, [1907] P. 339; Barque Robert S. Benard Co. v. Murton (1909), 101 L. T. 285; Coker v. Bolton (1912), 82 L. J. K. B. 91.

**572. —Machinery.]—**BRENAN v. PRESTON, No. 22, *ante*.

**573. Freight.]—**ROBERTS v. ROBERTS (1854), 1 Seton Judgments & Orders, 6th ed. 772.

**574. —.]—**The Ct. of Ch. appointed certain persons receivers of a freight, which, before they had obtained possession, was arrested in a suit in the Ct. of Admlty. Upon motion, in the latter ct., on behalf of the receivers, release decreed, but without costs.—THE BLOOMER (1864), 11 L. T. 46; 2 Mar. L. C. 147.

**575. Cargo—Guano.]—**In an action in the Ch. Div. pltf's. claimed delivery of cargoes of guano, an injunction to restrain defts. from

charged with costs.—BRENAN v. MORRISSEY (1890), 26 L. R. Ir. 618.—IR.

**PART II. SECT. 7, SUB-SECT. 16.**

**1. Ship—Equity of redemption of share.]—**A receiver will be appointed, at the instance of execution creditors, of the equity of redemption of the shares in a ship.—WILSON BROTHERS v. DONALD (1899), 7 B. C. R. 33.—OAN.

**PART II. SECT. 7, SUB-SECT. 15.—A.**  
**a. Schoolmaster.]—**TRUST & LOAN CO. v. GORSLINE (1888), 12 P. R. 654.—OAN.

**PART II. SECT. 7, SUB-SECT. 15.—B.**  
**f. Prison officers.]—**WALDRON v. CROGHAN (1881), 7 L. R. Ir. 320.—IR.

**g. Royal Irish Constabulary.]—**MURPHY v. GREEN (1890), 26 L. R. Ir.

610.—IR.

**h. —.]—**The ct. has power to appoint a receiver over the pension of a retired officer of the Royal Irish Constabulary.—MANNING v. MULLINS, [1898] 2 I. R. 34.—IR.

**k. Town clerk.]—**The pension payable to a retired town clerk, under 32 & 33 Vict. c. 79, is not assignable or chargeable with debts, & an order for a receiver over same will be dis-

delivering otherwise than to pltf's., & the appointment of a receiver. Defts., who claimed the right to the cargoes, after the issue of the writ took possession of them under a consent order by which it was agreed that the receipt of the cargoes by defts. should be "without prejudice to any question between the parties, & that they would keep separate accounts of their expenditure & receipts in respect of the cargoes, & abide by any order the ct. should make with respect to the cargoes." An order for the appointment of a receiver was afterwards made, & to the receiver when appointed defts. delivered the unsold cargoes & the proceeds of the cargoes they had sold. The action was defended on the ground that the cargoes were not the property of pltf's. At the hearing the judge made a decree declaring that pltf's. were entitled to the cargoes, & that defts. were not entitled to reimbursement of any expenses, & directing an inquiry "what damages had been sustained by pltf's. by reason of the detention of the cargoes by defts." On appeal this House having regard to the terms of the consent order varied the decree by declaring that defts. were entitled to receive out of the proceeds of the cargoes payment of all sums properly disbursed by them on account of freight & landing charges, & otherwise affirmed the decree. Upon the inquiry as to damages the chief clerk found that the detention began on the arrival of the cargoes respectively at their ports of discharge, & computing the damages on the principle that the illegal detention continued until the decree of the judge allowed interest at 5 per cent. upon the proceeds of the cargoes until the decree, less the interest gained in ct., & paid in by the receiver. Upon a summons to vary the chief clerk's certi-

ficate:—*Held*: (1) the consent order did not convert an unlawful into lawful detention, but after the order for the appointment of a receiver the cargoes were in the possession of the ct. & any damages suffered by pltf's. were due to the law's delay & not to any wrongful act of defts.; (2) interest at 5 per cent. ought therefore to be allowed until the order for the appointment of a receiver but not after.—*PERUVIAN GUANO CO., LTD. v. DREYFUS BROTHERS & CO.*, [1892] A. C. 166; 61 L. J. Ch. 749; *sub nom.* *DREYFUS BROTHERS v. PERUVIAN GUANO CO.*, *PERUVIAN GUANO CO. v. DREYFUS BROTHERS*, 66 L. T. 536; 7 Asp. M. L. C. 225; 8 T. L. R. 327, H. L.; *varying*, 43 Ch. D. 316, C. A.

*Annotations*:—*As to* (1) *Apld. Re A. B.* (No. 2), [1900] 2 Q. B. 429. *Reid. Cowper v. Laidler*, [1903] 2 Ch. 337. *As to* (2) *Distd. Phillips v. Homfray* (1890), 44 Ch. D. 694. *Generally, Mentd. Dakshina Mohun Roy v. Saroda Mohun Roy* (1893), 9 T. L. R. 582; *Martin v. Price*, [1894] 1 Ch. 276; *Shelfer v. City of London Electric Lighting Co.*, *Meux's Brewery Co. v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287; *Leeds Industrial Co-op. Soc. v. Slack*, [1924] A. C. 851.

## SUB-SECT. 17.—TOLLS.

*Canal tolls.*—*See COMPANIES*, Vol. X., pp. 1188, 1189, Nos. 8429, 8430.

*Dock or harbour tolls.*—*See SHIPPING; WATERS & WATERCOURSES.*

*Market tolls.*—*See MARKETS*, Vol. XXXIII., pp. 530, 531, No. 78.

*Pier tolls.*—*See WATERS & WATERCOURSES.*

*Railway tolls.*—*See COMPANIES*, Vol. X., p. 1189, No. 8433.

*Receiver of mortgaged tolls.*—*See MORTGAGE*, Vol. XXXV., p. 526, Nos. 2565-2567.

## Part III.—Effect of Appointment.

## SECT. 1.—IN GENERAL.

576. *Appointment operates on behalf of all parties.*—*DAVIS v. MARLBOROUGH (DUKE)*, No. 678, *post*.

577. —[—]—Where a receiver or manager of an estate is appointed by the ct., in a suit properly constituted, such manager or receiver is to be considered as appointed on behalf of all persons interested in the property, & he is entitled to his ordinary commission & allowances, & also to a lien on the estate, as against all persons interested in it, for the balance, whatever it may be, that may be found to be due to him on taking his accounts.—*BERTRAND v. DAVIES* (1862), 31 Beav. 429; 54 E. R. 1204; *sub nom.* *BERNARD v. DAVIES*, 32 L. J. Ch. 41; 11 W. R. 48; 9 Jur. N. S. 34; *sub nom.* *BERNARD v. DAVIES*, *Ex p. BERTRAND, BOSVILE & LEE*, 7 L. T. 372.

578. — *Legal rights & equitable priorities unaffected.*—The cts. of equity in appointing a receiver at the instance of an equitable incumbrancer, take possession in fact on behalf of all, & so as not to disturb any legal right or interfere with equitable priorities (*JAMES, L.J.*).—*LIVERPOOL MARINE CREDIT CO. v. WILSON* (1872), 7

Ch. App. 507; 41 L. J. Ch. 798; 26 L. T. 717; 20 W. R. 665; 1 Asp. M. L. C. 323, L. JJ.

*Annotations*:—*Mentd. Keith v. Burrows* (1876), 1 C. P. D. 722; *Anderson v. Butler's Wharf Co.* (1879), 43 L. J. Ch. 824; *The Benwell Tower* (1895), 72 L. T. 664; *Shillito v. Biggart*, [1903] 1 K. B. 683.

579. *Appointment of party to cause—Whether privilege as party lost.*—(1) Upon the master's certificate that a receiver is in default, the four day order upon him is of course, & therefore, a motion to discharge such order on the ground of error or irregularity in the certificate, but not directly impeaching the certificate itself, will be refused.

(2) A party, by being appointed receiver, does not thereby lose his privileges as a party to the cause (*LORD COTTENHAM, O.*).—*SCOTT v. PLATEL* (1847), 2 Ph. 229; 41 E. R. 930, L. C.

580. *In suit for specific performance for contract of sale—Receiver on behalf of purchaser.*—Where a receiver is appointed in a suit for specific performance, if the purchaser is compelled to take the title the receiver is to be considered as his receiver.—*BOEHM v. WOOD* (1823), Turn. & R. 332; 37 E. R. 1128.

*Annotation*:—*Mentd. Cooch v. Walden* (1877), 46 L. J. Ch. 639.

*m. Whether operating as transfer of assets—Receiver appointed in court of foreign country.*—The appointment by a ct. of a foreign State of a receiver of the assets of an insolvent corp'n. domiciled in such State does not necessarily effect a transfer to such

## PART III. SECT. 1.

576 i. *Appointment operates on behalf of all parties.*—[The appointment of a receiver does not change the occupation of the estate, but by it a mode of management is directed by the ct.

through its officer as a common agent for all parties to the litigation.—*MCMECKAN v. AITKEN* (1895), 21 V. L. R. 65.—*AUS.*

576 ii. —[—]*Re BUTLER'S ESTATE* (1863), 13 I. Ch. R. 453.—*IR.*

*Sect. 1.—In general. Sect. 2.]*

**581. Whether operating as charge.]—**TYRRELL v. PANTON, No. 518, *ante*.

**582. —.]—**RIDOUT v. FOWLER, No. 802, *post*.

**583. Destruction of mutual credits—Bankruptcy.]—**In Oct. 1908, debtor holding debenture stock in petitioning creditor co. claimed to be entitled to set this off against petitioning creditor's debt. In Nov. following, but before the bkpcy. petition was disposed of, a receiver was appointed on behalf of another creditor of the debtor's interest in the debenture stock:—*Held*: an essential change was effected by the appointment of the receiver; thenceforward there were no mutual credits between petitioning creditor & debtor, & though the effect of an adjudication in bkpcy. would be to defeat the title of the receiver & give a title to the trustee that would not suffice to bring Bankruptcy Act, 1883 (c. 52), s. 38, into force, & petitioning creditor was entitled to a receiving order.—*Re A DEBTOR, Ex p. PEAK HILL GOLDFIELD, LTD.*, [1909] 1 K. B. 430; 78 L. J. K. B. 354; 100 L. T. 213; 16 Mans. 11, C. A.

*Annotation*:—*Consd. Giles v. Kruyer*, [1921] 3 K. B. 23.

**584. Effect on rights of parties.]—**PORTMAN v. MILL, No. 588, *post*.

**Effect on rights of third parties.]—**See Sect. 5, *post*.

**Effect of appointment by way of equitable execution.]—**See EXECUTION, Vol. XXI., pp. 672-673, Nos. 2515-2527.

**Effect of administrator's bond—Sureties dispensed with.]—**See EXECUTORS, Vol. XXIII., p. 221, No. 2656.

**Effect on executor's right of retainer.]—**See EXECUTORS, Vol. XXIII., p. 377, Nos. 4458-4462.

**Effect on Statute of Limitations.]—**See LIMITATION OF ACTIONS, Vol. XXXII., pp. 350, 465, Nos. 331, 1306.

**Effect of appointment over lunatic's estate.]—**See LUNATICS, Vol. XXXIII., p. 186, Nos. 828, 829.

**Issue of specially indorsed writ—By mortgagee.]—**See MORTGAGE, Vol. XXXV., pp. 539, 540, Nos. 2683, 2684.

**As regards servants.]—**See COMPANIES, Vol. X., pp. 799, 800, Nos. 5060-5062.

## SECT. 2.—STATUS OF RECEIVER.

**585. Position of receiver in bankruptcy—Whether different from that of receiver in Chancery.]**

—The status of a receiver appointed by the Ct. of Bkpcy. is not the same as that of a receiver appointed by the Ct. of Ch. Consequently, where a receiver had been appointed under a liquidation by arrangement to carry on the business of a trader, & the landlord distrained for rent, & the receiver obtained an injunction restraining the landlord from proceeding with his distress:—*Held*: the landlord was entitled to exercise the right reserved to him by Bkpcy. Act, 1869 (c. 71), s. 34, without first obtaining the leave

of the ct. for that purpose.—*Re MAYHEW, Ex p. TILL* (1873), L. R. 16 Eq. 97; 42 L. J. Bcy. 84; 37 J. P. 580; 21 W. R. 574.

*Annotation*:—*Expld. Re Mead, Ex p. Cochrane* (1875), L. R. 20 Eq. 282.

**586. —.]—***Semble*, the position of a receiver in bkpcy. does not differ from that of a receiver in Ch.—*Re MEAD, Ex p. COCHRANE* (1875), L. R. 20 Eq. 282; 44 L. J. Bcy. 87; 32 L. T. 508; 23 W. R. 726.

**587. Officer of the court.]—**A receiver is an officer appointed by the ct. (TINDAL, C.J.).—*WARD v. SHEW* (1833), 9 Bing. 608; 2 Moo. & S. 756; 2 L. J. C. P. 58; 131 E. R. 742.

*Annotations*:—*Reid. Woolston v. Ross*, [1900] 1 Ch. 788. *Mentd. Snell v. Finch* (1863), 13 C. B. N. S. 651.

**588. —.]—**(1) The rights of parties are not affected by the appointment of a receiver by the ct. (2) The receiver is an officer of the ct., holding the property for the party who may ultimately appear to be entitled to it.—*PORTMAN v. MILL* (1839), 8 L. J. Ch. 161; 3 Jur. 356, L. C.

**589. —.]—***Re BUSHELL, Ex p. IZARD* (No. 1), No. 1117, *post*.

**590. —.]—**BARTLETT v. NORTHUMBERLAND AVENUE HOTEL CO., LTD., No. 236, *ante*.

**591. —.]—**PURKISS v. HOLLAND (1887), 31 Sol. Jo. 702, C. A.

**592. —.]—**Some months after the usual order for foreclosure absolute had been made in favour of first mtgees. against the mtgor. & second mtgees., & after the first mtgees. acting upon that order had actually sold portions of the mtged. property, the mtgor. discovered that the receiver had omitted from his accounts certain rents which he had received. The mtgor. accordingly moved that the foreclosure might be reopened; & that the first mtgees. might be restrained from parting with the legal estate of the mtged. property:—*Held*: there was no evidence that the first mtgees. had received any of the rents for which the receiver had not accounted, & there was no reason why the foreclosure should be reopened merely because the receiver who was not the agent of the first mtgees. for all purposes, but was an officer of the ct., had made a mistake which the mtgor. had not discovered before it was too late.—*INGHAM v. SUTHERLAND* (1890), 63 L. T. 614.

**593. —.]—**The receiver is an officer of the ct., not the agent of the firm (ESHER, M.R.).—*Re FLOWERS & Co.*, [1897] 1 Q. B. 14; *sub nom. Re FLOWERS & Co., Ex p. WARE & SONS*, 65 L. J. Q. B. 679; 75 L. T. 306; 45 W. R. 118; 41 Sol. Jo. 30; 3 Mans. 294; *sub nom. Re FLOWERS & Co., Ex p. PETITIONING CREDITORS*, 13 T. L. R. 9, C. A.

—*See COMPANIES*, Vol. X., pp. 796, 800, Nos. 5027, 5028, 5066; *PARTNERSHIP*, Vol. XXXVI., pp. 488, 489, Nos. 1530, 1531.

**594. Whether agent or trustee.]—**A landlord's receiver allowed the tenant to make a deduction in respect of a payment for land tax every year for seventeen years, greater than the landlord was liable to pay, the landlord knowing, or having the means of knowing, all the facts:—*Held*: he could not distrain for the amount erroneously

receiver of assets of such corpn. in Manitoba.—*BANK OF NOVA SCOTIA v. BOOTH* (1909), 19 Man. L. R. 471.—*CAN.*

**n. Appointment by court—Whether whole rent payable by tenants attached.]—***HAYDEN v. SHEARMAN* (1852), 2 I. Ch. R. 137.—*IR.*

**o. Whether power of trustee under trust ceases.]—***MCDONNELL v. WHITE* (1865), 11 H. L. Cas. 570; 11 E. R.

1454.—*IR.*

## PART III. SECT. 2.

**587 i. Officer of the court.]—**The receiver in a suit is nothing more than the hand of the ct.—*WILKINSON v. GANGADHAR SIKKAR* (1871), 6 B. L. R. 486.—*IND.*

**587 ii. —.]—**A receiver is a servant of the ct. & has only such power & authority as the ct. may choose to give

him.—*MANICK LALL SEAL v. SURRUT COOMAREE DASSEE* (1895), 1 L. R. 22 Cal. 648.—*IND.*

**587 iii. —.]—***FORFAR v. SAGE, Ex p. WILKINS* (1902), 5 Terr. L. R. 255.—*CAN.*

**p. Position as "owner" or "occupier."]**—*HAWKES v. SMITH* (1837), Sau. & Sc. 712.—*IR.*

**q. Fiduciary position.]—**A receiver

allowed, though the receipt given every year showed the amount paid & the amount deducted.

The receiver was his agent, & the landlord was bound by the receiver's acts (PARK, J.).—**BRAMSTON v. ROBINS** (1826), 4 Bing. 11; 12 Moore, C. P. 68; 130 E. R. 671; *sub nom.* **BRANSTON v. ROBINS**, 5 L. J. O. S. C. P. 13.

*Annotations* :—**Mentd.** Waller v. Andrews (1838), 3 M. & W. 312; *Edinburgh Ry. v. Wauchope* (1842), 8 Cl. & Fin. 710; *De Cordora v. De Cordora* (1879), 4 App. Cas. 692; *Daniel v. Sinclair* (1881), 29 W. R. 569; *Beaufort v. I. R. Comrs.*, 1 I. R. Comrs. v. Anglesey, [1913] 3 K. B. 48; *Rosdale v. Fryer*, [1922] 2 K. B. 303.

**595.** —[.]—Sir G. B. granted to six persons annuities, payable out of his life interest in the R. estate. He then executed a deed, called a receivership deed, to which the six annuitants & B. & R. were parties, by which he appointed B. & R. receivers of the rents; & it was declared that they should hold the rents in trust to pay the annuities, & then to pay the surplus to Sir G. B. or his assigns. The receivers accepted the trust. By another deed Sir G. B. conveyed his life estate to a trustee on trusts for securing the six annuities, & subject thereto in trust for himself. He afterwards granted annuities to three other persons, & by a deed called a deed of direction, to which the three annuitants were parties, he directed the receivers & the trustee to pay the three annuitants out of the rents. Notice of this deed was immediately served on the receivers & the trustee :—**Held** : the deed of direction made the receivers & the trustee express trustees for the three annuitants, subject to the rights of the six annuitants.—**KNIGHT v. BOWYER** (1858), 2 De G. & J. 421; 27 L. J. Ch. 520; 31 L. T. O. S. 287; 4 Jur. N. S. 569; 6 W. R. 565; 44 E. R. 1053, L. J.

*Annotations* :—**Mentd.** *Radeliffe v. Anderson* (1860), E. B. & E. 819; *Dickinson v. Burrell*, *Dickinson v. Burrell*, *Stourton v. Burrell* (1866), L. R. 1 Eq. 337; *Ragnall v. Carlton* (1877), 6 Ch. D. 371; *East Stonehouse U. C. v. Willoughby*, [1902] 2 K. B. 318; *Hunt v. Luck*, [1902] 1 Ch. 428; *Re Jordison*, *Raine v. Jordison*, [1922] 1 Ch. 440.

**596.** —[.]—*Re SACKER, Ex p. SACKER*, No. 759, *post*.

**597.** —[.]—**INGHAM v. SUTHERLAND**, No. 592, *ante*.

**598.** —[.]—*Re FLOWERS & Co.*, No. 593, *ante*.

**599.** —[.]—**For court.**—*Re DICKINSON, Ex p. CHARRINGTON & Co.*, No. 9, *ante*.

—[.]—*See* **BANKRUPTCY**, Vol. IV., p. 204, Nos. 1882, 1883; **COMPANIES**, Vol. X., pp. 792, 793, 800, 1189, Nos. 4974–4980, 5067–5070, 8436; **LIMITATION OF ACTIONS**, Vol. XXXII., pp. 398, 414, 501, 517, Nos. 775, 920, 1623, 1624, 1755.

**600. Position as "landlord"**—**Receiver of rents & profits of land**—**R. S. C., Ord. 3, r. 6.**—A receiver appointed by the ct. to receive the rents & profits of land is not a "landlord" within R. S. C., Ord. 3, r. 6 (F), & cannot proceed under that rule by specially indorsed writ in an action for the recovery of the land.—**CASEY v. HELLYER** (1886), 17 Q. B. D. 97; 55 L. J. Q. B. 207; 54 L. T. 103; 34 W. R. 337; 3 T. L. R. 98, C. A.

*Annotation* :—**Mentd.** *Hopkins v. Collier* (1913), 29 T. L. R.

**601. Receiver & manager of licensed premises—Landlord & Tenant Act, 1709 (c. 18), s. 1.**—In 1896 a brewery co. who were lessees of a public-house granted an underlease of the same to I., who mortgaged his interest to pltf., & gave

a second mtge. to the co. In 1901 I. became bkpt., & deft. was appointed his trustee in bkpcy. In 1902 the co. went into possession as second mtgees. & let the public-house to a tenant who agreed to pay a rent of £150 a year for the premises & an additional yearly sum of £1,250 in lieu of premium for goodwill. On Mar. 8, 1909, the co. obtained judgment against their tenant for £960, & gave him a month's notice to determine his tenancy. On Mar. 9, 1909, before the tenancy expired, pltf. commenced a foreclosure action against deft. & the co., & on Mar. 12 a receiver & manager was appointed, to whom the co. was directed to give up possession. Later on the same day the sheriff levied execution in respect of the co.'s judgment debt :—**Held** : the receiver was "landlord" of the premises within above sect., & as such was entitled to be paid by the execution creditor one year's arrears of the rent.—**COX v. HARPER**, [1910] 1 Ch. 480; 79 L. J. Ch. 307; 102 L. T. 438; 26 T. L. R. 264; 54 Sol. Jo. 305, C. A.

*Annotation* :—**Mentd.** *Wood v. Wallace* (1920), 90 L. J. K. B. 319.

**602. Position as "owner" or "occupier"**—**Receiver of rents—As agent for landlord.**—An order by justices was made against applt. under 18 & 19 Vict. c. 121, s. 12, as the owner of premises upon which a foul & offensive privy existed so as to be a nuisance. Applt. was receiver of the rent of the house, as agent of the ground landlord, from H., who held a lease of the whole house for twenty-one years; this lessee had underlet a part of the house to K. as yearly tenant. The privy was within the part of the house let to K., & was used exclusively by her, H. having no access to it :—**Held** : applt. was not the owner of the premises on which the nuisance arose, within 18 & 19 Vict. c. 121, s. 2.—**COOK v. MONTAGUE** (1872), L. R. 7 Q. B. 418; 41 L. J. M. C. 149; 26 L. T. 471; 37 J. P. 53.

**603.** —[.]—**As receiver for persons interested in premises—Waterworks Clauses Act, 1847 (c. 17), s. 72.**—A water co.'s special Act provided, in terms substantially identical with Waterworks Clauses Act, 1847 (c. 17), s. 72, that, in the case of houses or tenements not exceeding a given annual value, the owner instead of the occupier should be liable for the water rate, & that "the person receiving the rent of any such house or tenement from the occupier thereof on his own account or as agent or receiver for any person interested therein" should for that purpose be deemed the owner of such house or tenement. The water co. supplied water to a block of flats which were respectively within the statutory limit as to value. The premises were mortgaged & a receiver was appointed under a receivership deed. The mtgor. appointed another person collector of the rents, who handed over the rents intact, at first to the mtgor., & subsequently to the receiver :—**Held** : the collector & not the receiver was the person liable under the special Act to pay the water rate.—**METROPOLITAN WATER BOARD v. BROOKS**, [1911] 1 K. B. 289; 80 L. J. K. B. 495; 103 L. T. 739; 75 J. P. 41; 9 L. G. R. 442, C. A.

**604.** —[.]—**Receiver appointed by court—Public Health Act, 1875 (c. 55), s. 4.**—The definition of "owner" in above Act, s. 4. does not include a receiver appointed by the ct.; & so service of notices under above Act, s. 150, on such receiver is not a good service.—**BACUP CORPN. v. SMITH**

appointed by the ct. is within the general rule of the Cts. of Equity, by which persons who stand in a confidential relation with regard to property are precluded from becoming

the purchasers of it without the special leave of the ct.; or of the parties interested.—**ALVEN v. BOND** (1841), 11 L. & K. 196; 3 I. Eq. R. 365.—**IR.**  
r. Whether receiver of inheritor.]—

A receiver appointed by the Ct. of Ch. in an adverse suit is not the receiver of the inheritor within 4 & 5 Will. 4, c. 82.—**ANON.** (1842), 3 I. Eq. R. 501.—**IR.**



**Sect. 2.—Status of receiver. Sects. 3, 4 & 5: Sub-sect. 1.]**

(1890), 44 Ch. D. 395; 59 L. J. Ch. 518; 63 L. T. 195; 38 W. R. 697, C. A.

**Annotation:—***Consd. De Greille, Houdret v. Bull* (1894), 1 Mans. 118.

**Recovery of gas rents or charges.]—***See* GAS, Vol. XXV., pp. 476, 477, Nos. 39–41.

**Supply of electric lighting.]—***See* ELECTRIC LIGHTING, Vol. XX., p. 205, No. 34.

**Poor rate.]—***See* COMPANIES, Vol. X., p. 800, Nos. 5063–5064.

**Mortgage.]—***See* MORTGAGE, Vol. XXXV., p. 527, Nos. 2585–2587.

**SECT. 3.—OPERATION AS INJUNCTION.**

**605. Whether appointment operates as injunction.]—**The appointment of a receiver operates as an injunction.—*BAXTER v. WEST* (1858), 28 L. J. Ch. 169; 32 L. T. O. S. 155.

**606. —.]—**What is the effect of appointing a receiver in the Ch. Div? It operates as an injunction (*LINDLEY, L.J.*).—*Re SARTORIS'S ESTATE, SARTORIS v. SARTORIS*, [1892] 1 Ch. 11; 61 L. J. Ch. 1; 65 L. T. 544; 40 W. R. 82; 8 T. L. R. 51; 36 Sol. Jo. 41, C. A.

**Annotation:—***Refd. Re Laye, Turnbull v. Laye*, [1913] 1 Ch. 298.

**607. —.]—***TYRRELL v. PAINTON*, No. 518, ante.

**608. —.]—**The appointment of a receiver operates as an injunction against the execution debtor receiving anything from his co-partners, & if his co-partners pay over to him anything with knowledge of the appointment of the receiver they may get into trouble (*LINDLEY, L.J.*).—*BROWN, JANSON & Co. v. HUTCHINSON & Co.*, [1895] 1 Q. B. 737; 64 L. J. Q. B. 359; 73 L. T. 8; 43 W. R. 533; 11 T. L. R. 291; 14 R. 304, C. A.; *subsequent proceedings*, [1895] 2 Q. B. 126, C. A.

**609. —.]—***Re HARRISON & BOTTOMLEY*, No. 684, post.

**610. —.]—**An order obtained by a judgment creditor appointing a receiver by way of equitable execution operates as an injunction to restrain judgment debtor from himself receiving moneys over which the receiver is appointed, & prevents him from dealing with the moneys to the prejudice of execution creditor.—*Re ANGLESEY (MARQUIS), DE GALVE (COUNTESS) v. GARDNER*, [1903] 2 Ch. 727; 72 L. J. Ch. 782; 89 L. T. 584; 52 W. R. 124; 19 T. L. R. 719.

**Annotations:—***Apld. Ideal Bedding Co. v. Holland*, [1907] 2 Ch. 157; *Singer v. Fry* (1915), 84 L. J. K. B. 2025.

**611. —.]—***RIDOUT v. FOWLER*, No. 802, post.

**612. —.]—***IDEAL BEDDING CO., LTD. v. HOLLAND*, No. 730, post.

**SECT. 4.—IN REGARD TO FORFEITURE CLAUSES.**

**613. Whether appointment operates as forfeiture.]—**Upon the marriage of D. in 1881, a certain fund was settled by him upon trusts, under which he took the income for life, or until he should become bkpt., or should assign, charge, or incur the same, or do or suffer something whereby the same, or some part thereof, would, through his act, default, or by operation of law if belonging absolutely to him, become vested in or payable to some other person or persons, & after the determination of the trust in favour of D. the trustees were to pay the income to the wife during her life. On July 19, 1888, a judgment creditor

of D. obtained the appointment of a receiver of the income of the trust fund. On Sept. 25, a receiving order was made against D., & he was subsequently adjudicated bkpt.:—*Held*: a gift over of property of a settlor upon voluntary alienation or involuntary alienation by process of law in favour of a particular creditor is not void; the appointment of a receiver was such an involuntary alienation, & D.'s life interest in the fund had determined, & the income was payable to his wife.—*Re DETMOLD, DETMOLD v. DETMOLD* (1889), 40 Ch. D. 585; 58 L. J. Ch. 495; 61 L. T. 21; 37 W. R. 442.

**Annotations:—***Consd. Re Tetley, Ex p. Jeffrey* (1896), 66 L. J. Q. B. 111. *Refd. Mackintosh v. Pogose*, [1895] 1 Ch. 506; *Re Spearman, Spearman v. Lowndes* (1900), 82 L. T. 302; *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360; *Re Johnson Johnson, Ex p. Matthews & Wilkinson*, [1904] 1 K. B. 134; *Re Perkin's Settltm. Trusts, Leicester, Warren v. Perkins* (1912), 56 Sol. Jo. 412.

**614. —.]—**Testator devised a freehold estate to his son for life, & after his death among all the children of the son born or to be born who should live to attain twenty-one, in equal shares as tenants in common in fee. By a subsequent clause he directed that if the son should attempt to dispose of his life interest, or should become bankrupt or insolvent, or the estate devised to him "should be taken in execution by any process of law for the benefit of any creditor or creditors," then the gift to him should become void & cease as if he were dead, & the estate devised to him should "thenceforth absolutely vest in & belong to the person or persons who under the devises & limitations hereinbefore contained would be next entitled thereto." A judgment for debt having been recovered against the son who was in possession, the judgment creditor obtained the appointment of a receiver of the rents. At this time the son had two children, one of age & one under age, & he afterwards had other children:—*Held*: the appointment of a receiver was a taking in execution within the meaning of the clause, & the son's life estate determined.—*BLACKMAN v. FYSH*, [1892] 3 Ch. 209; 67 L. T. 802; 2 R. 1, C. A.

**Annotations:—***Consd. Thompson v. Gill*, [1903] 1 K. B. 760. *Mentd. Re Canney's Trusts, Mayers v. Strovor* (1910), 101 L. T. 905.

**615. —.]—***CAMPBELL v. CAMPBELL & DAVIS*, No. 487, ante.

**616. —.]—**Does the receivership order make any difference in the rights of the parties, & does the existence of that receivership order make that to be a forfeiture . . . which would not have been a forfeiture if the receivership order had not been made? In my opinion the receivership order has no such effect (*JOYCE, J.*).—*DURRAN v. DURRAN* (1904), 91 L. T. 187; *affd.*, 91 L. T. 819, C. A.

**617. —.]—**A forfeiture clause in a will, to take effect when a life interest should belong to or become vested in any person other than the life tenant, does not take effect merely because a receiver of that interest is appointed with a direction to pay the income in or towards satisfaction of a judgment debt & costs. *Semble*: if creditor, being appointed receiver in person, had collected & retained money under the order, the forfeiture clause might have taken effect.—*Re BEAUMONT, WOODS v. BEAUMONT* (1910), 79 L. J. Ch. 744; 103 L. T. 124.

**618. —.]—**By his will dated Feb. 14, 1912, testator, who died in 1913, gave his residuary real & personal estate to trustees upon trust to raise a fund of £6,000 & to hold the same upon trust to pay the income to his son during his life or until he . . . shall assign or charge or affect to assign or charge the said income or some part thereof or until any other event shall happen whereby if the income belonged absolutely to him he would be

... deprived of the personal enjoyment thereof. On Dec. 12, 1916, an order was made in lunacy appointing a receiver of the son's estate under Lunacy Act, 1890 (c. 5), s. 116, ss. 1 (d), the whole of his income being allowed for his maintenance. On May 15, 1919, the son executed an equitable charge on his income under testator's will:—*Held*: the order in lunacy appointing a receiver did not operate as a forfeiture because the receiver was the statutory agent of the son to receive the income of the trust fund; & as the document of May 15, 1919, was executed after the appointment of the receiver in lunacy, it was null & void, & could not therefore work a forfeiture.—*Re MARSHALL, MARSHALL v. WHATELEY*, [1920] 1 Ch. 284; 89 L. J. Ch. 204; 122 L. T. 673; 64 Sol. Jo. 241.

### SECT. 5.—RIGHTS OF THIRD PARTIES.

#### SUB-SECT. 1.—LEAVE OF COURT TO EXERCISE RIGHTS.

**619. Necessity for leave.]**—Where a receiver is in possession, an ejectment cannot be brought without leave of the ct.—*ANGEL v. SMITH* (1804), 9 Ves. 335; 32 E. R. 632, L. C.

*Annotations*:—*Fold*, *Brooks v. Greathed* (1820), 1 Jac. & W. 178. *Apld.* *Musadee Mahomed Cazum Sherazee v. Meerza Ally Mahomed Shoostry* (1854), 6 Moo. Ind. App. 27. *Reid*, *Johnes v. Claughton* (1822), Jac. 573; *Johnson v. Chippindall* (1828), 2 Sim. 55; *Empringham v. Short* (1844), 3 Hare, 461; *Lane v. Capsey*, [1891] 3 Ch. 411; *Whadcoat v. Shropshire Ry.* (1893), 37 Sol. Jo. 650.

**620.** —]—Where a receiver is in possession, other persons not permitted, without the leave of the ct., to enter, under a claim of a right of common not previously exercised.—*JOHNES v. CLAUGHTON* (1822), Jac. 573; 37 E. R. 966.

*Annotation*:—*Reid*, *Empringham v. Short* (1844), 3 Hare, 461.

**621.** —]—*Re FRANKS*, No. 874, *post*.

**622.** —]—*SEARLE v. CHOAT*, No. 726, *post*.

**623.** — **Legal title appearing.]**—Where the property is in the custody of the ct., as when in the possession of a receiver, the course pursued in our cts., if it appears there is a legal title, has been to permit an action of ejectment to be brought, to put the matter in the most convenient course of determination (*per Cur.*).—*MUSADEE MAHOMED CAZUM SHERAZEE v. MEERZA ALLY MAHOMED SHOOSTRY* (1854), 6 Moo. Ind. App. 27; 8 Moo. P. C. C. 90; 19 E. R. 11, P. C.

**624. When leave granted.—Clear question to be tried.]**—It is not according to the course of the ct. to refuse liberty to try a right which is claimed against its receiver, unless it is clear that there is no foundation for the claim.—*RANDFIELD v. RANDFIELD* (1861), 3 De G. F. & J. 766; 31

L. J. Ch. 118; 5 L. T. 698; 8 Jur. N. S. 161; 45 E. R. 1075, L. J.J.

*Annotations*:—*Conad*, *Walmesley v. Mundy* (1884), 13 Q. B. D. 807. *Apld.* *Lane v. Capsey*, [1891] 3 Ch. 411.

**625.** — —]—It is not the course of the ct. to refuse liberty to try a right claimed against its receiver unless it is perfectly clear that there is no foundation for the claim.—*LANE v. CAPSEY*, [1891] 3 Ch. 411; 61 L. J. Ch. 55; 65 L. T. 375; 40 W. R. 87.

*Annotation*:—*Reid*, *Whadcoat v. Shropshire Ry.* (1893), 37 Sol. Jo. 650.

**626.** — **No substantial interest.]**—*AMES v. RICHARDS, DENT v. RICHARDS* (1905), 40 L. Jo. 66.

**627. Time for application.—When receiver appointed.]**—The priorities of incumbrancers upon an estate were declared, & a receiver appointed, with directions to keep down the incumbrances, in a suit to which the first incumbrancer was not a party. The first incumbrancer filed a bill against the receiver & the several parties to the former suit, to establish his priority, & praying that if necessary the second bill might be taken as supplemental to the first. Pltf. in the second suit moved for an injunction to restrain the receiver from making any further payments to the other incumbrancers:—*Held*: irregular, & he ought to have applied in the first suit for leave to enforce his legal remedies.—*SMITH v. EFFINGHAM (EARL)* (1839), 2 Beav. 232; 48 E. R. 1169; *subsequent proceedings* (1844), 7 Beav. 357.

**628.** — —]—*SEARLE v. CHOAT*, No. 726, *post*.

**629.** — **Before receiver passes accounts.—Alleged misapplication of money.]**—*DE WINTON v. BRECON CORPN.* (No. 2), No. 693, *post*.

**630. Mode of application.—Petition.—Where all parties consent.]**—A. being entitled under a decree to an annuity, which she was to receive from the receiver in the cause, borrowed £100 from B., & signed a memorandum of agreement to the effect that her annuity should be a security for that sum & interest, & also gave an order upon the receiver for payment to B. of £100. Upon B. presenting the order to the receiver, the receiver stated that he would not pay it, because A. had desired him to pay to no person but her agent. Upon the petition of B., praying an order upon the receiver for payment:—*Held*: as A. appeared & opposed the petition, the ct. had no jurisdiction to make the order upon petition, but B. should have come by bill.—*WASTELL v. LESLIE* (1846), 8 L. T. O. S. 133; *sub nom.* *WASTELL v. LESLIE, Ex p. CARTER*, 11 Jur. 29.

**631.** — **Action.]**—Although a ct. of equity will not permit strangers to disturb the possession of its receiver, but will itself examine any claim they may have to the property over which the

(1840), 3 I. Eq. R. 230.—*IR.*

**619 x.** —]—When tenants have, without leave of the ct., replevied distresses for rent made by the receiver, the ct. will restrain them from proceeding in the replevin suits, & direct a reference as to the rent due.—*Re PERSE, Re JOYCE* (1845), 8 I. Eq. R. 111.—*IR.*

**619 xi.** —]—*PARR v. BELL* (1846), 9 I. Eq. R. 35.—*IR.*

**619 xii.** —]—Where a receiver has been appointed over lands held at a rent, the landlord must obtain leave of the ct. before he can commence an action to recover possession for non-payment of rent; in granting such application, the ct. has jurisdiction to improve terms, such as that the proceedings shall not be commenced for a specified time.—*Re BATTERSBY'S ESTATE* (1892), 31 L. R. Ir. 73.—*IR.*

### PART III. SECT. 5, SUB-SECT. 1.

**619 i. Necessity for leave.]**—A receiver being an officer of the ct. cannot be sued without leave in a separate action in respect of acts done in discharge of his office.—*STEPHENS v. ROYAL TRUST CO.* (1917), 25 B. C. R. 77.—*CAN.*

**619 ii.** —]—When a party feels aggrieved at the conduct of a receiver he should seek redress against the receiver in the proceeding in which he was appointed. If separate proceedings be taken against him, either in that ct. or elsewhere, they should be with the leave of the ct. under whose authority the receiver was acting.—*KAMATOH AMMAL v. SUNDARAM ANNAR* (1902), 1 L. R. 26 Mad. 492.—*IND.*

**619 iii.** —]—*KAROOH PARAKOTE ANNURUTTY v. MANAVIKRAMAN* (1920), 1 L. R. 43 Mad. 793.—*IND.*

**619 iv.** —]—A party who had commenced proceedings by ejectment before he got notice of the appointment of a receiver over the land, need not make any application to the ct. until he is ready to execute his *habere*.—*TOWNSEND v. SOMERVILLE* (1824), 1 Hog. 99.—*IR.*

**619 v.** —]—*BACHELOR v. BLAKE* (1824), 1 Hog. 98.—*IR.*

**619 vi.** —]—A third person claiming an interest in lands over which a receiver has been appointed, should, if he is injured by the appointment, apply to the ct. not to interfere with the tenants.—*WARDLE v. LLOYD* (1827), 2 Mol. 388.—*IR.*

**619 vii.** —]—*HAWKES v. SMITH* (1837), San. & Sc. 326.—*IR.*

**619 viii.** —]—*ETRE v. BLAKE* (1838), 1 Crawford & D. 252.—*IR.*

**619 ix.** —]—*CRAMER v. GRIFFITH*



**Sect. 5.—Rights of third parties: Sub-sects. 1, 2**

receiver is appointed, that rule does not prevent parties from filing a bill, & so asserting a title to property over which a receiver may have been appointed in another cause (LORD COTTENHAM, C.).—*HOULDITCH v. WALLACE* (1838), 5 Cl. & Fin. 629; 7 E. R. 543, H. L.

**632.** ———.]—*WASTELL v. LESLIE*, No. 630, ante.

**633.** ——— **Summons.**]—*GENERAL SHARE & TRUST CO. v. WETLEY BRICK & POTTERY CO.*, No. 658, post.

**634.** ———.]—*O'HAGAN v. NORTH WING-FIELD COLLIERY CO.* (1882), 26 Sol. Jo. 671.

**SUB-SECT. 2.—PARTY CLAIMING POSSESSION.**

**635. General rule—Necessity for leave.**—(1) A second incumbrancer having obtained the appointment of a receiver & a decree for a sale, without making the first incumbrancer a party, a petition by the latter to ascertain priorities, & for the receiver to keep down the interest, refused on the ground that petitioner had commenced a suit for the same purpose, & had delayed it; but leave was given to bring an ejectment.

(2) The possession of a receiver or sequestrator is not to be disturbed without leave of the ct.—*BROOKS v. GREATHED* (1820), 1 Jac. & W. 176; 37 E. R. 342.

*Annotations:*—*As to (2)* *Consd. Empringham v. Short* (1844), 3 Hare, 461. *As to (2)* *Apld. Musadee M. C. Sherazee v. Meerza Shoostry* (1854), 8 Moo. P. C. C. 90.

**636.** ———.]—*JOHNS v. CLAUGHTON*, No. 620, ante.

**637.** ———.]—(1) When this ct. has appointed a receiver, it will not allow the possession of that receiver to be disturbed by anybody, however good his right may be; but the party thinking he has a right paramount to that of the receiver, or rather to that of the person who has got the appointment of the receiver, must before he can presume to take any steps of his own motion, apply to this ct. for leave to assert his right against the receiver (*KINDERSELEY, V.-C.*).

(2) The ct. will not allow the first step in an action of ejectment against the receiver to be taken by any party without an application having been made to this ct. for permission to do it (*KINDERSELEY, V.-C.*)—*HAWKINS v. GATHERCOLE* (1852), 1 Drew. 12; 21 L. J. Ch. 617; 16 Jur. 650; 61 E. R. 355; *subsequent proceedings* (1855), 6 De G. M. & G. 1, L. JJ.

**638.** ———.]—In a suit by mtgees. of a dock against the trustees & judgment creditor, the chairman was appointed receiver of the tolls, with direction to pay into ct. the balance, after paying the expenses of carrying on the concern & the interest on the mtges. Judgment creditor having afterwards proceeded to attach the tolls under C. L. P. Act, 1854 (c. 113), was restrained injunction.

The ct. will not permit its receiver to be interfered with or dispossessed of the property, nor will it allow payment to him to be intercepted, although the order appointing him may be perfectly erroneous. An application must first be made to the ct. for leave.—*AMES v. BIRKENHEAD DOCKS TRUSTEES* (1855), 20 Beav. 332; 24 L. J. Ch. 540; 25 L. T. O. S. 121; 1 Jur. N. S. 529; 3 W. R. 381; 52 E. R. 630.

*Annotations:*—*Consd. Davies v. Thomas*, [1900] 2 Ch. 462. *Refd. G. S. & W. Ry. v. Corry & Turquand* (1867), 15 W. R. 650; *Re Manchester & Milford Ry., Ex p. Cambrian Ry.* (1880), 14 Ch. D. 645.

**639.** ———.]—The ct. will not allow the possession of a receiver appointed by the ct. to be disturbed without the leave of the ct.—*RANDFIELD v. RANDFIELD* (1860), 1 Drew. & Sm. 310; 30 L. J. Ch. 18; 3 L. T. 284; 6 Jur. N. S. 1090; 9 W. R. 10; 62 E. R. 398; *on appeal* (1861), 3 De G. F. & J. 766, L. C. & L. JJ.

*Annotations:*—*Apld. Walmley v. Mundy* (1884), 13 Q. B. D. 807. *Consd. Lane v. Capsey*, [1891] 3 Ch. 411.

**640.** ———.]—*SEARLE v. CHOAT*, No. 726, post.

**641.** ———.]—Where property is in possession of an officer of the ct. & there are legal or equitable rights in that property not vested in the parties to the action or the persons who are before the ct. which legal or equitable rights are not the subject of the administration then going on, then the ct. requires that the person who claims to enforce those rights shall apply for leave to enforce them (*FRY, L.J.*)—*Re HENRY POUND, SON & HUTCHINS* (1889), 42 Ch. D. 402; 58 L. J. Ch. 792; 62 L. T. 137; 1 Meg. 363; *sub nom. Re POUND, SON & HUTCHINS, Ex p. DEBENTURE CORPN.*, 38 W. R. 18; 5 T. L. R. 720, C. A.

*Annotations:*—*Consd. Re Stubbs, Barney v. Stubbs*, [1891] 1 Ch. 475; *Strong v. Carlyle Press*, [1893] 1 Ch. 268. *Refd. British Linen Co. v. South American & Mexican Co.*, [1894] 1 Ch. 108; *Davies v. Thomas*, [1900] 2 Ch. 462.

**642. Exception to rule—Order preserving rights of third parties.**—*DAVIS v. MARLBOROUGH (DUKE)* (1819), 2 Swan. 108; 2 Wils. Ch. 130; 36 E. R. 555, L. C.; *previous proceedings* (1818), 1 Swan. 74, L. C.

*Annotations:*—*Refd. Cooper v. Reilly* (1829), 2 Sim. 560; *Paynter v. Carew* (1854), Kay, App. 36. *Mentd. Portmore v. Taylor* (1831), 4 Sim. 182; *King v. Hamlet* (1835), 9 Bl. N. S. 575; *Pelly v. Wathen* (1849), 7 Hare, 351; *Mansfield v. Ogle* (1855), 24 L. J. Ch. 450; *Bromley v. Smith, Boustead v. Bromley, Smith v. Bromley* (1859), 26 Beav. 644; *Webster v. Cooke* (1867), 36 L. J. Ch. 753; *O'Torke v. Bolingbroke* (1877), 2 App. Cas. 814; *Fry v. Lane, Re Fry, Whittet v. Bush* (1888), 40 Ch. D. 312.

**643.** ———.]—A mtgor. let the mortgaged premises subsequently to the mtgo. During the quarter ending at Michaelmas the mtgees. gave a notice to the tenant informing him of the existence of the mtge., & that the principal sum was still due & owing together with an arrear of interest, & requiring him to pay the rent thereafter to accrue to them. The rent which became due at Michaelmas being still unpaid, an order was made in an action against the mtgor. appointing pltf., who had recovered judgment, receiver of the rents of the premises, "without prejudice to the rights of any prior incumbrancers who may think proper to take possession of the same by virtue of their respective securities." Subsequently the mtgees. threatened the tenant with legal proceedings unless he paid the rent to them, & the tenant thereupon paid them the quarter's rent due at Michaelmas. The receiver claimed payment of such rent from the tenant:—*Held*: the tenant had not been guilty of any disobedience of the receivership order in paying rent to the mtgees., they being prior incumbrancers whose rights were reserved by the order; the tenant, having paid the rent to the mtgees. under compulsion of law & in consequence of his lessor's default, could set up such payment in answer to the claim for the rent by the receiver, who claimed through his lessor; & consequently the claim of the receiver could not be maintained.—*UNDERHAY v. READ* (1887), 20 Q. B. D. 209; 57 L. J. Q. B. 129; 58 L. T. 457; 36 W. R. 298; 4 T. L. R. 188, C. A. *Annotation:*—*Refd. Towerson v. Jackson*, [1891] 2 Q. B. 484.

**644.** ———.]—A co. issued debentures which were a charge on the whole of the co.'s property & assets, including the uncalled capital.

In an action by the holder of the debentures a receiver & manager was appointed. An order was afterwards made for the winding up of the company. The co. had ceased to be carried on as a going concern :—*Held* : the official liquidator was entitled to the custody of such of the books & documents of the co. as related to its management & business & were not necessary to support the title of the holder of the debentures.—*ENGEL v. SOUTH METROPOLITAN BREWING & BOTTLING CO.* [1892] 1 Ch. 442 ; 61 L. J. Ch. 369 ; 66 L. T. 155 ; 40 W. R. 282 ; 8 T. L. R. 267 ; 36 Sol. Jo. 217.

**645. Application of rule—Proceedings in ejectment.**—When a mtgee. is not in possession the ct. will, upon application of creditors, appoint a receiver of the mtged. premises, but without prejudice to the right of the mtgee. to obtain possession.

Where a receiver has been appointed of mtged. estate the mtgee. not being before the ct., the mtgee. must apply to the ct. for liberty to bring an ejectment (*LORD THURLOW, C.*)—*BRYAN v. CORMICK* (1788), 1 Cox, Eq. Cas. 422 ; 29 E. R. 1231, L. C.

**646.** ———.—*ANGEL v. SMITH*, No. 619, *ante*.

**647.** ———.—*BROOKS v. GREATHED*, No. 635, *ante*.

**648.** ———.—*Case in which the appointment of a receiver in a suit for the administration of a testator's property, plffs. were allowed to commence & prosecute an action of ejectment on the ground of permissive waste, notwithstanding the leave of the ct. had not in the first instance been applied for in reference to the action.*—*GOWAR v. BENNETT* (1847), 9 L. T. O. S. 310.

**649.** ———.—*HAWKINS v. GATHERCOLE*, No. 637, *ante*.

**650. Enforcement of judgment for recovery of land.**—Where a mtgee. of leaseholds has obtained the appointment by the ct. of a receiver, the lessor who by leave of the ct. brings an action for recovery of the land against the lessee, & recovers judgment, cannot proceed to enforce the judgment as against the receiver in possession by writ of possession without the leave of the ct.—*MORRIS v. BAKER* (1903), 73 L. J. Ch. 143 ; 52 W. R. 207 ; 48 Sol. Jo. 101.

**651. Seizure of copyholds quousque.**—In suits by creditors & legatees a receiver was appointed of the rents & profits of real estate, part of which was copyhold. The death of the last tenant having been duly presented at the ct. baron of the manor, proclamations were made for the next tenant to come in & be admitted, & no person appearing, the bailiff of the manor was ordered to seize the lands *quousque*. Declaration in ejectment at the suit of the lord was afterwards served on the terre-tenant ; but, on the motion of the receiver, the lord was restrained by injunction from prosecuting the action.—*EVELYN v. LEWIS* (1844), 3 Hare, 472 ; 67 E. R. 467.  
*Annotation* :—*Reid. Russell v. East Anglian Ry.* (1850), 3 Mac. & G. 104.

**Application for leave of court.**—*See* sub-sect. 1, *ante*.

#### SUB-SECT. 3.—LANDLORD.

**652. Distress—Necessity for leave of court.**—*ANON.* (undated), cited in 3 Mac. & G. at p. 118.  
*Annotation* :—*Reid. Russell v. East Anglian Ry.* (1850), 3 Mac. & G. 104.

**653.** ———.—(1) A receiver, having been appointed to realise testator's estate, advertised the furniture for sale. The day before the sale the landlord gave him notice of his claim for rent, but took no further steps :—*Held* : the landlord [not having distrained] had no lien on the proceeds of the sale in priority to the other creditors.

(2) The appointment of a receiver does not affect the rights of a landlord ; but he cannot exercise them without first obtaining leave of the ct.—*Re SUTTON'S ESTATE, SUTTON v. REES* (1863), 1 New Rep. 464 ; 32 L. J. Ch. 437 ; 8 L. T. 343 ; 27 J. P. 388 ; 9 Jur. N. S. 456 ; 11 W. R. 413.  
*Annotation* :—*As to* (1) *Reid. Re Mayhew, Ex p. TILL* (1873), L. R. 16 Eq. 97.

**654.** ———.—*O'HAGAN v. NORTH WING-FIELD COLLIERY CO.* (1882), 26 Sol. Jo. 671.

**655.** ———.—*The appointment of the receiver would prevent the landlord from levying a distress without the leave of the ct. (COTTON, L.J.).—Re NEW CITY CONSTITUTIONAL CLUB CO., Ex p. PURSELL.* (1887), 34 Ch. D. 646 ; 56 L. J. Ch. 332 ; 56 L. T. 792 ; 35 W. R. 421 ; 3 T. L. R. 331, C. A.

*Annotation* :—*Consd. Re Harpur's Cycle Fittings Co.*, [1900] 2 Ch. 731.

**656.** ———.—*JACOBS v. VAN BOOLEN, Ex p. ROBERTS* (1889), 34 Sol. Jo. 97, D. C.  
*Annotation* :—*Consd. Ifand v. Blow*, [1901] 2 Ch. 721.

**657.** ———.—(1) Where the landlord, by reason of his not being paid or of his covenants not being complied with, has a right to complain & to re-enter, he can apply, notwithstanding the appointment of a receiver, & obtain leave from the ct. to re-enter & so take away from the receiver his right of occupation ; & he can, also, in a proper case, get leave to distrain ; but the mere appointment of a receiver does not of itself, in my opinion, give the landlord any special rights, & has never, so far as I know, been held to do so (*ROMER, L.J.*).

(2) If you have a co. or person whose estate is being dealt with or administered by the ct., & a liquidator or receiver appointed by the ct. has occupied or used premises that are part of the estate, then, as to rent & other outgoings payable to the landlord or other parties in respect of the premises for that occupation or user & for which the co. or person whose estate is being dealt with or administered is liable, the ct. will see that such rent & other outgoings are paid out of the assets got in by the liquidator or receiver (*ROMER, L.J.*).

(3) The agency of the receiver on behalf of the co. came to an end Aug. 29 when he was appointed receiver & manager by an order in the action (*ROMER, L.J.*)—*HAND v. BLOW*, [1901] 2 Ch. 721 ; 70 L. J. Ch. 687 ; 85 L. T. 156 ; 50 W. R. 5 ; 17 T. L. R. 635 ; 45 Sol. Jo. 639 ; 9 Mans. 156, C. A.

*Annotations* :—*As to* (1) *Reid. Re British Fullers' Earth Co., Gibbs v. Same Co.* (1901), 17 T. L. R. 232. *As to* (2) *Consd. Re Levi*, [1919] 1 Ch. 416. *Reid. Re Abbott, Abbott v. Abbott* (1913), 30 T. L. R. 13 ; *Re Westminster Motor Garage Co., Boyers v. The Co.* (1914), 84 L. J. Ch. 753. *Generally, Reid. Re Griffiths Cycle Corp., Dunlop Pneumatic Tyre Co. v. Griffiths Cycle Corp.* (1901), 85 L. T. 675.

**658. When leave refused—Landlord creditor of company over which receiver appointed.**—*Mines were demised to a co. by a lease which contained a power of re-entry if the rents or royalties, or any part thereof, should be in arrear for thirty days, or if the co. should be wound up voluntarily or by compulsion or otherwise under the provisions of any Act or Acts of Parliament. An action was brought against the co. by debenture*

#### PART III. SECT. 5, SUB-SECT. 3.

————— *for leave of court.*—No person can distrain on the lands over which a receiver is appointed without the previous leave of the ct.—*NUGENT v. MAHON, Smith on Receivers*, 88.—*IR.*

**Sect. 5.—Rights of third parties: Sub-sects. 3 & 4.]**

holders & a receiver was appointed. Rent being in arrear, the landlord took out a summons for leave to distrain or re-enter. After the summons had been returnable, but before it was heard, an order was made for winding up the co. The summons was then amended by intitling it in the winding-up as well as in the action. The judge held that as the landlord was a creditor of the co., leave could not be given him to distrain, & that the claim to re-enter ought to be left to be tried in an action. On appeal:—*Held*: according to the true construction of the proviso for re-entry, a right to re-enter accrued on the making of a winding-up order, & the title of the landlord to re-enter being clear, the ct. ought to order possession to be given to him, & ought not to put him to the useless expense of bringing an action to which there was no defence.

As to the costs of the receiver, it was irregular to make him a party. He ought not to have been served unless a case of personal misconduct was made against him, & no such case is alleged. . . . Applt. must pay the receiver's costs below & here (JESSEL, M.R.).—*GENERAL SHARE & TRUST CO. v. WETLEY BRICK & POTTERY CO.* (1882), 20 Ch. D. 260; *sub nom. Re WETLEY BRICK & POTTERY CO.*, 30 W. R. 445, C. A.

*Annotation*:—*Reid*. *Horsey Estate v. Steiger*, [1898] 2 Q. B. 259.

**659. —** Except where appointment of receiver not complete.]—A mining co., now in liquidation, were lessees, from separate lessors, at certain rents & royalties, of two adjoining coal mines A. & B. There was no shaft on mine B., & the co. worked both mines by means of a shaft on mine A. On each of the leases the lessor reserved to himself express power to distrain for rent in arrear, not only upon chattels belonging to the lessees on the demised premises, but also upon chattels belonging to the lessees in or about any adjoining or neighbouring collieries. In Oct. 1896, the lessors of mine B. levied a distress upon chattels belonging to the lessees on mine A.:—*Held*: the distress, having been levied before the commencement of the winding up of the co., & before a receiver was effectively appointed on behalf of the debenture-holders of the co., was valid against the debenture-holders.

The order of [for a receiver] was never really effective. It was never drawn up, the lessor had no notice of it, & before the receiver could take possession he had to give security. The distress, having been made before the commencement of the winding-up of the co. & before a receiver was effectively appointed, was, in my opinion, valid as against the debenture-holders (LINDLEY, L.J.).—*Re ROUNDWOOD COLLIERY CO.*, *LEE v. ROUNDWOOD COLLIERY CO.*, [1897] 1 Ch. 373; 66 L. J. Ch. 186; 75 L. T. 641; 45 W. R. 324; 13 T. L. R. 175; 41 Sol. Jo. 240, C. A.

*Annotation*:—*Reid*. *Venner's Electrical Cooking & Heating Appliances v. Thorpe*, [1915] 2 Ch. 404.

**660. —** Attornment of mortgagor to mortgagee.]—A mtge. deed contained an attornment clause whereby A., the mtgor., attorned & became tenant from year to year to B., the mtgee., for & in respect of the mtgd. premises, at the yearly rent of £800, to be paid by equal quarterly payments; & it was thereby agreed that it should be lawful for B. at any time after three months from the date of the mtge., without giving previous

notice of his intention so to do, to enter upon & take possession of the premises whereof A. had attorned tenant, & to determine the tenancy created by the aforesaid attornment. A. filed a liquidation petition, & on the same day a receiver was appointed, who entered into possession of A.'s estate & effects.

Notice of the petition & of the appointment of a receiver was sent to B., who two days later, by virtue of the attornment clause, distrained upon the goods & chattels on the mortgaged premises for half-year's rent then due:—*Held*: a tenancy from year to year & not a tenancy at will was created by the attornment clause, & B. was entitled under Bkpcy. Act, 1869 (c. 71), s. 34, to distrain for the rent due to him from A. at the time of filing the liquidation petition.—*Re THRETFALL, Ex p. QUEEN'S BENEFIT BUILDING SOCIETY* (1880), 16 Ch. D. 274; 44 L. T. 74; 29 W. R. 128; *sub nom. Re THRETFALL, Ex p. BLAKEY*, 50 L. J. Ch. 318, C. A.

*Annotations*:—*Mentl. Re Knight, Ex p. Voisey* (1882), 21 Ch. D. 442; *King v. Eversfield*, [1897] 2 Q. B. 475.

—*See, also, DISTRESS*, Vol. XVIII., pp. 277, 278, Nos. 141–148.

**661. Order for payment of rent by receiver.]**—The trustee & exor. of A., the owner of one moiety of a plantation in Jamaica, took a lease of the other moiety from E. & F., the owners of it, at a certain rent, & with covenants to keep in repair, etc., a suit was subsequently instituted in England, by the parties interested under the will of A., for parties in Jamaica were appointed receivers & managers of the estates of A. These parties entered into possession of the entire plantation, & remitted the proceeds to the consignees in England appointed in the suit, who paid the sums received into ct. No rent having, for many years, been received by E. & F., in respect of their moiety of the plantation, a petition was presented by them for payment out of the funds in ct. of the arrears of rent due, & also of a sum which they claimed in respect of dilapidations during the receivers' occupation. E. & F. were not parties to the suit:—*Held*: notwithstanding that some of the parties interested under the will of A. were under disability, yet they were bound by the occupation of the receivers, & E. & F. were entitled to an order for payment of the arrears of rent, & to a reference in respect of the dilapidations.—*NEATE v. PINK* (1851), 3 Mac. & G. 476; 42 E. R. 344; *sub nom. NEATE v. PINK, Ex p. FLETCHER*, 21 L. J. Ch. 574; 16 Jur. 69; *sub nom. PINK v. NEATE*, 18 L. T. O. S. 57, L. C.

*Annotations*:—*Expld. Brocklebank v. East London Ry.* (1879), 12 Ch. D. 839; *Hand v. Blow*, [1901] 2 Ch. 721.

**662. —**—*ANON.* (undated), cited in 3 Mac. & G. at p. 118.

*Annotation*:—*Reid. Russell v. East Anglian Ry.* (1850), 3 Mac. & G. 104.

**663. —**—*O'HAGAN v. NORTH WINGFIELD COLLIERY CO.* (1882), 26 Sol. Jo. 671.

**664. —**—*JACOBS v. VAN BOOLEN, Ex p. ROBERTS* (1889), 34 Sol. Jo. 97, D. C.

*Annotation*:—*Consd. Hand v. Blow*, [1901] 2 Ch. 721.

**665. —**—*HAND v. BLOW*, No. 657, *ante*.

**666. —** When order refused—Judgment recovered by lessor against lessee—Judgment stayed on terms.]—An underlease was granted to E. as trustee for a co. The co. issued debentures to B. to secure money advanced, & gave him an equitable mtge. of the property. B. brought a

**661.1. Order for payment of rent by receiver.]**—*DONOVAN v. SWEENEY* (1849), 1 I. Jur. 165.—*IR.*

*t. Whether changed by appointment*

*of receiver.]*—The appointment by the ct. of a receiver over the estate of deft. does not change the correlative rights of landlord & tenant previously

subsisting between deft. & his tenants, though the ct. thereby acquires additional powers of enforcing the landlord's rights. — *CHURCH TEM-*

debenture holders' action, in which a receiver was appointed, who took possession. The lessor brought an action against the lessee for possession & rent, & obtained judgment. The judgment was stayed upon terms which were not complied with, & the receiver remained in possession for some time. The lessor applied in the debenture holders' action for an order that the receiver should pay the rent for the period during which he was in possession, either out of assets in his hands or personally as a trespasser:—*Held*: the effect of the judgment while subsisting was to prevent the lessor from ascertaining any rights against the persons in possession, & the receiver was not liable for the rent.—*Re WESTMINSTER MOTOR GARAGE CO., BOYERS v. THE CO.* (1914), 84 L. J. Ch. 753; 112 L. T. 393.

**667. Re-entry—Necessity for leave of court.]**—*GENERAL SHARE & TRUST CO. v. WETLEY BRICK & POTTERY CO.*, No. 658, *ante*.

**668. ———.]**—*HAND v. BLOW*, No. 657, *ante*.

**669. Right to proceeds of sale—Where no distress levied.]**—*Re SUTTON'S ESTATE, SUTTON v. REES*, No. 653, *ante*.

**Proceedings in ejectment.]**—*See* Nos. 645–649, *ante*.

**Application for leave of court.]**—*See* Sub-sect. 1, *ante*.

#### SUB-SECT. 4.—PARTIES HAVING PARAMOUNT INTERESTS.

**670. Distress—Owner of rentcharge.]**—Where land conveyed to a railway co. in consideration of a rentcharge, & the deed gave the person entitled to the rentcharge a power to distrain on the land for arrears of the rentcharge, the ct. gave the owner of the rentcharge leave to distrain on the land, notwithstanding the appointment of a receiver of the tolls, profits, & income of the undertaking of the co., in a suit instituted by the owner of a similar rentcharge on behalf of himself & all the other owners of similar rentcharges who should come in & contribute to the expenses of the suit.—*BYTON v. DENBIGH RUTHIN & CORWEN RY. CO.* (1868), L. R. 6 Eq. 14; 37 L. J. Ch. 669; 16 W. R. 1005.

**671. ——— Debenture-holders—Recovery of penalties—Non-repair of tramway.]**—In Feb. 1895, an order was made by justices giving a county council leave to distrain on the goods of a tramway co. for the sum of £435, the amount of penalties incurred by the co. for not keeping their rails in good repair. In Oct. 1894, an order had been made in an action brought by the debenture-holders of the co. against the co. to enforce their security, appointing a receiver of the undertaking & property of the co.:—*Held*: the county council were entitled to distrain for the amount of such penalties on the goods of the co. without interference by the debenture-holders; & leave to distrain given accordingly.—*PEGGE v. NEATH DISTRICT TRAMWAYS CO.*, [1895] 2 Ch. 508; 64 L. J. Ch. 737; 73 L. T. 25; 44 W. R. 72; 11 T. L. R. 470; 39 Sol. Jo. 622; 2 Mans. 474; 13 R. 762; *on appeal*, [1896] 1 Ch. 684, C. A.

*Annotations*:—*Distd. Reeve v. Medway (Upper) Navigation Co.* (1905), 21 T. L. R. 400. *Refd. Re Crosbie, Johnson & Hughes v. Crosbie* (1909), 74 J. P. 25.

**672. ——— Rating authority.]**—The existence of

an equitable charge on goods does not protect them from distress for poor rate. Where an order is made appointing a receiver & manager of a co.'s business, but not directing delivery up of possession to him, & thereupon the receiver & manager enters upon the co.'s premises for the purpose of managing & carrying on the business there is no change of occupation within Poor Rate Assessment & Collection Act, 1869 (c. 41), s. 16, & accordingly under Poor Relief Act, 1601 (c. 2), s. 2, & Metropolis Management Act, 1855 (c. 120), s. 161, the co.'s goods are liable to distress for the whole of the parish rates made for the half year in which the order has been made; & this right of distress vested in the churchwardens & overseers of the parish prevails as against the equitable charge created by debentures charging, in the usual form, all the property of the co. where there is no assignment of chattels in the covering deed.—*Re MARRIAGE, NEAVE & CO., NORTH OF ENGLAND TRUSTEE, DEBENTURE & ASSETS CORPN. v. MARRIAGE, NEAVE & CO.*, [1896] 2 Ch. 663; 65 L. J. Ch. 839; 75 L. T. 169; 60 J. P. 805; 45 W. R. 42; 12 T. L. R. 603; 40 Sol. Jo. 701, C. A.

*Annotations*:—*Fold. Re Crosbie, Johnson & Hughes v. Crosbie* (1909), 74 J. P. 25. *Appld. National Provincial Bank v. United Electric Theatres* (1915), 85 L. J. Ch. 106. *Refd. Whinney v. Moss S.S. Co.*, [1910] 2 K. B. 813.

**673. ——— Local authority—Non-payment of sum for repair of highway.]**—*REEVE v. MEDWAY (UPPER) NAVIGATION CO.* (1905), 21 T. L. R. 400.

**674. ——— Gas company.]**—At the date when a receiver was appointed in a debenture-holders' action against a co., the co. owed a sum of money to a gas co. for gas supplied which the receiver refused to pay. The debentures were not secured by a trust deed & operated only as an equitable charge on the co.'s property & assets. The gas co. obtained, under Gasworks Clauses Act, 1871 (c. 41), s. 23, & their special Act, s. 74, which provided that sums payable to the co. might be recovered summarily or by action, an order & warrant from justices empowering them to levy a distress on the co.'s goods & chattels for the amount of the debt, & then applied in the debenture holders' action for leave to proceed with the distress:—*Held*: the statutory rights of the gas co. overrode the equitable rights of the debenture-holders, & leave was granted them to proceed with the distress.—*Re CROSBIE (ADOLPHE), LTD., JOHNSON & HUGHES v. CROSBIE (ADOLPHE), LTD.* (1909), 74 J. P. 25; 8 L. G. R. 50.

**675. Re-entry—By owner of rentcharge.]**—When lands are sold to a railway co. in consideration of a rentcharge, the parties may agree for its being secured by a power of entry; & a conveyance made upon such an agreement, whereby the land was conveyed to uses that the grantor should take the rentcharge, & if it fell into arrear should enter until satisfaction, was held to entitle him to leave to enter against a receiver of the undertaking appointed by the ct.—*FORSTER v. MANCHESTER & MILFORD RY. CO., Re MANCHESTER & MILFORD RY. CO.* (1880), 49 L. J. Ch. 454.

**676. Lien.]**—A trader opened with a railway co. a credit account for freight, by which it was agreed that the co. should have a general lien for all moneys due by him to them on any account on all goods belonging to him in their hands. He afterwards filed a liquidation petition, under which a receiver of his property & manager of his business

*FORALITIES COMRS. OF IRELAND v. HARRINGTON* (1883), 11 L. R. Ir. 127, 136.—*IR.*

#### PART III. SECT. 5, SUB-SECT. 4.

a. Attachment—Puisne incum-

*brancer.*]—When a puisne incumbrancer obtains the appointment of a receiver, any prior creditor may file a bill & attach the rents in his hands.—*DELANY v. MANSFIELD* (1825), 1 Hog. 234.—*IR.*

b. ——— Owner of rentcharge.]—*BROWN v. BROWN, Ex p. HORE* (1840), 2 J. Eq. R. 409.—*IR.*

c. Fund in court—In custodia legis for persons entitled in priority.]—

**Sect. 5.—Rights of third parties: Sub-sects. 4 & 5, A., B. & C.]**

was appointed. In order to carry on the business the receiver bought some goods, which he paid for with his own money, & sent them to the co. consigned to the trader. The co. claimed the benefit of the agreement, & refused to deliver the goods until they were paid the amount which the trader owed them for freight due at the time of the filing of the petition. The receiver in order to obtain the goods paid the co. £50 under protest, & then applied to the ct. of Bkpcy. to order the co. to repay him the £50, & an order was made accordingly:—*Held*: the Ct. of Bkpcy. had no jurisdiction to make the order.—*Re BUSHELL, Ex p. GREAT WESTERN RY. Co.* (1882), 22 Ch. D. 470; 52 L. J. Ch. 734; 48 L. T. 196; 31 W. R. 419, C. A.

**677. — Receiver acting beyond powers.]**—By an order made in a debenture holders' action pltf., W., was appointed receiver & manager of the business of Ind, Coope & co., a brewery co., & he carried on the business of the co. as before. By a letter signed Ind, Coope & co., by W., receiver & manager, defts. were instructed to carry to Malta a quantity of beer consigned to the co. c/o the co.'s agents at Malta. Defts. carried the beer to Malta under a bill of lading which named the co. as the consignees & provided that the shipowner should have a lien on the goods shipped not only for the freight due thereon but also for any previously unsatisfied freight due either from shippers or consignees to the shipowner. Defts. for many years had carried beer for the co. to Malta under bills of lading in this form, & they claimed a lien on the beer in question for certain unsatisfied freight due to them from the co. before pltf.'s appointment:—*Held*: defts. were not entitled to a lien for arrears of freight, because in truth pltf. & not the co. was both shipper & consignee, & notice of this fact was conveyed to defts. by the form of the shipping instructions; & pltf. had no power, without the leave of the ct., to create such a lien.—*Moss S.S. Co., LTD. v. WHINNEY*, [1912] A. C. 254; 81 L. J. K. B. 674; 105 L. T. 305; 27 T. L. R. 513; 55 Sol. Jo. 631; 12 Asp. M. L. C. 25; 16 Com. Cas. 247, H. L.; *affg. S. C. sub nom. WHINNEY v. Moss S.S. Co., LTD.*, [1910] 2 K. B. 813, C. A.  
*Annotation*:—*Reid. Parsons v. Sovereign Bank of Canada*, [1913] A. C. 160.

**Application for leave of court.]**—See Sub-sect. 1, ante.

**Mortgagee.]**—See MORTGAGE, Vol. XXXV., pp. 400, 401, Nos. 1417-1423.

**SUB-SECT. 5.—JUDGMENT CREDITORS.**

**A. In General.**

**678. Judgment creditor in possession—No liability to attorn to receiver.]**—(1) I cannot order a judgment creditor in possession to attorn [to receiver] (LORD ELDON, C.).

(2) A receiver appointed by the ct., is appointed on behalf of all parties (LORD ELDON, C.).—*DAVIS v. MARLBOROUGH (DUKE)* (1819), as reported in 2 Swan. 108; 36 E. R. 555, L. C.

*Annotations*:—*Generally, Mentd. Cooper v. Reilly* (1829), 2 Sim. 560; *Portmore v. Taylor* (1831), 4 Sim. 182; *King v. Hamlet* (1835), 9 Bl. N. S. 575; *Pelly v. Wathen* (1849), 7 Hare. 351; *Paynter v. Carew* (1854), Kay, App. xxxvi; *Mansfield v. Ogle* (1855), 24 L. J. Ch. 450; *Bromley v. Smith*, *Boustead v. Bromley*, *Smith v. Bromley*

*MURTAGH v. TISDALL*, *WHITE v. TISDALL*, *CUFFE v. TISDALL*, *LEWNBURGH v. TISDALL*, *TISDALL v. TISDALL* (1839), 2 I. Eq. R. 41.—*IR.*

**PART III. SECT. 5, SUB-SECT. 5.—A.**

**d. Money in hands of receiver—**

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**679. Right to sue receiver—Payment of debt out of surplus funds.]**—A receiver appointed in a suit instituted by incumbancers was ordered to keep down the incumbrances out of the rents & to pay the residue to the owner of the estate. A judgment creditor may file a bill against the owner & receiver, without making the other incumbancers parties, to have his debt satisfied out of the surplus rents.—*LEWIS v. ZOUCHÉ (LORD)* (1828), 2 Sim. 388; 57 E. R. 834.

*Annotation*:—*Consd. Smith v. Effingham* (1844), 7 Beav. 357.

**680. Right to rent—As against mortgagee—No notice to pay by receiver for mortgagee.]**—Land in the occupation of a tenant at a rent was in 1908 with other properties mortgaged by the owner thereof to a second mtgee., subject to a first mtge. In Mar. 1911, the first mtge. became vested in the tenant, who at the same time received notice of the second mtge. In Apr. 1911, the second mtgee., under Conveyancing & Law of Property Act, 1881 (c. 41), appointed a receiver of the properties comprised in his mtge., & notice of the appointment was given to the mtgor. The second mtgee. instructed the receiver to take no steps without further instructions. The receiver accordingly took no further steps & no further instructions were ever in fact given to him. No notice of the appointment was either then or at any subsequent time given to the tenant. In July, 1911, pltf's. recovered judgment against the mtgor. in the county ct. for a sum of money & on Mar. 25, 1912, the judgment being unsatisfied, pltf's. served a garnishee summons in the county ct. on the tenant to show cause why he should not pay to them the half year's rent due from him on that date. On Mar. 28, 1912, the second mtgee. served notice on the tenant to pay the rent to him. The receiver did not demand payment of the rent from the tenant, nor was he a party to the garnishee proceedings. The tenant, after deducting the interest due to him upon his mtge., paid the balance of the rent into ct.:—*Held*: the notice by the second mtgee. to the tenant to pay the rent to him was inoperative, & pltf's. were entitled as against the second mtgee. to the balance of the rent due from the tenant.—*VACUUM OIL CO., LTD. v. ELLIS*, [1914] 1 K. B. 693; 83 L. J. K. B. 479; 110 L. T. 181, C. A.

**681. — Payment in advance by tenant to judgment debtor—Without notice of judgment creditor's claim.]**—Where land is subject to a mtge. & incapable of being delivered in execution under writ of *elegit* the registration by a judgment creditor of a writ of *elegit*, is a registration of a writ or order for the purpose of enforcing the judgment within Land Charges Act, 1900 (c. 26), s. 2, & operates to create a charge on the land under Judgments Act, 1838 (c. 110), s. 13. A judgment creditor issued & duly registered writs of *elegit* against judgment debtor & subsequently obtained & duly registered an order appointing a receiver of the rents & profits of judgment debtor's land which was subject to a mtge. & incapable of being delivered in execution under a writ of *elegit*. After the registration of the writs of *elegit* but before the appointment of the receiver the tenant of the land, having no notice of judgment creditor's claim, paid rent in advance

*Estate administered by court—Pressing claims against estate, or part owners thereof—Power of court to order receiver to pay.*—*MOTIVAHU v. PREMVAHU* (1892), 1 L. R. 16 Bom. 511.—*IND.*

*e. Right to recover possession—Necessity for leave of court.*—A judg-

ment creditor who has notice of the possession of lands by a receiver will not be allowed to continue proceedings by ejectment, to recover the possession of them, if they were taken without the leave of the ct., & after he had notice that the receiver was in



to judgment debtor:—*Held*: the payment was not a good payment of rent as between the tenant & judgment creditor.—*ASHBURTON (LORD) v. NOCTON*, [1915] 1 Ch. 274; 84 L. J. Ch. 193; 111 L. T. 895; 31 T. L. R. 122; 59 Sol. Jo. 145, C. A.

**682. Right to serve bankruptcy notice.**—A judgment creditor obtained, by way of equitable execution, the appointment of a receiver of certain property of judgment debtor. There was no evidence that there was any money of judgment debtor in the hands of the receiver, nor was he in possession of any interest of judgment debtor which could be sold:—*Held*: as the appointment of the receiver did not prevent debtor from paying the judgment debt it did not operate as a stay of execution within the meaning of Bankruptcy Act, 1883 (c. 52), s. 4 (1) (g), & the judgment creditor was therefore entitled to serve a bkpcy. notice on judgment debtor in respect of the judgment.—*Re BOND, Ex p. CAPITAL & COUNTIES BANK, LTD.*, [1911] 2 K. B. 988; 81 L. J. K. B. 112; 19 Mans. 22, D. C.

*Annotations*:—*Apld. Re Renison, Ex p. Greaves*, [1913] 2 K. B. 300. *Mentd. Chetwynd's Trustee v. Boltons Library* (1912), 82 L. J. K. B. 217.

**683. Not secured creditors—Under Companies Acts.**—A judgment creditor of a co. obtained an order appointing a receiver of the moneys receivable in respect of debtor's interest in a ship & her freight without prejudice to the rights of prior incumbrancers. Before the order was acted upon an order was made to wind up the co.:—*Held*: the order appointing a receiver did not confer on judgment creditor any charge on debtor's property so as to make him a secured creditor, & was not equivalent to a seizure of the property in execution.—*CROSHAW v. LYNTHURST SHIP CO.*, [1897] 2 Ch. 154; 66 L. J. Ch. 576; 76 L. T. 553; 45 W. R. 570; *sub nom. CROSHAW v. LYNTHURST SHIP CO.*, 41 Sol. Jo. 508.

*Annotations*:—*Apld. Giles v. Kruger*, [1921] 3 K. B. 23. *Refd. Re Anglessey, De Galvo v. Gardner*, [1903] 2 Ch. 727.

— **Under Bankruptcy Acts.**—*See BANKRUPTCY*, Vol. IV., pp. 360, 361, Nos. 3360–3365.

**684. Not entitled to sale under Judgments Act, 1864 (c. 112), s. 1.**—A judgment debt is not enforceable as a charge against judgment debtor's legal remainder in real estate; nor does an order obtained by the judgment creditor appointing a receiver constitute an actual delivery in execution within above sect. entitling the creditor to a sale of the remainder under above Act, s. 4.

[Applt.] has obtained . . . an order appointing a receiver. . . I take it that if these ladies were to sell or attempt to sell their reversionary estates & [applt.] were to know of that he could stop it, for that order would operate as an injunction against their obtaining the money (*LINDLEY, M.R.*).—*Re HARRISON & BOTTOMLEY*, [1899] 1 Ch. 465; 68 L. J. Ch. 208; 80 L. T. 29; 47 W. R. 307; *sub nom. WOODS v. HARRISON* (No. 2), 43 Sol. Jo. 242, C. A.

*Annotations*:—*Refd. Re Badger, Badger v. Badger*, [1913] 1 Ch. 385; *Ashburton v. Nocton*, [1915] 1 Ch. 274. *Mentd. Ex p. Tweed* (1899), 68 L. J. Q. B. 794; *Johns v. Pink*, [1900] 1 Ch. 296.

— *LEES v. WARING* (1825), 1 Hog. 216.—*IR.*

**f. Sequestrator in possession.**—*Whether right of judgment creditor to appoint receiver affected thereby.*—*REEVES v. COX* (1849), 13 I. Eq. R. 247.—*IR.*

**PART III. SECT. 5, SUB-SECT. 5.—B.**

**685 i. Whether priority conferred by order for receiver.**—*STANDARD BANK OF CANADA v. WADE*, [1924] 3 D. L. R. 251; [1924] 2 W. W. R. 497; 33 B. C. R. 493.—*CAN.*

**Judgment creditors of partnership.**—*See PARTNERSHIP*, Vol. XXXVI., p. 489, Nos. 1540–1545.

**Equitable execution.**—*See EXECUTION*, Vol. XXI., pp. 672–673, Nos. 2515–2527.

### B. Priorities.

**685. Whether priority conferred by order for receiver.**—The obtaining the appointment of a receiver & the taking possession by such receiver did not displace the priority which H. & Co. had in equity to the mtgcs. of the freight (*CHITTY, J.*).—*WARD v. ROYAL EXCHANGE SHIPPING CO., LTD.*, *Ex p. HARRISON* (1887), 58 L. T. 174; 6 Asp. M. L. C. 239.

*Annotation*:—*Consd. Re Ind Coope, Fisher v. Ind Coope, Knox v. Ind Coope, Arnold v. Ind Coope*, [1911] 2 Ch. 223.

**686. —.**—*Railway Companies Act, 1867* (c. 127), s. 23, does not give to creditors of a railway co. in respect of mtgcs., bonds, or debenture stock, any lien or charge which they did not possess before *Railway Companies Act, 1867* (c. 127), so as to entitle them to payment in priority out of the proceeds of surplus lands of the co., which have been sold on the application of judgment creditors of the co.

The appointment of a receiver & manager of the undertaking of the railway co. under *Railway Companies Act, 1867* (c. 127) made no difference (*CHITTY, J.*).—*Re HULL, BARNESLEY & WEST RIDING JUNCTION RY. CO.* (1888), 40 Ch. D. 119; 58 L. J. Ch. 205; 59 L. T. 877; 37 W. R. 145; 5 T. L. R. 84, C. A.

*Annotations*:—*Refd. Re East & West India Dock Co.* (1890), 62 L. T. 239; *Re Liskeard & Caradon Rys.*, [1903] 2 Ch. 681. *Mentd. Profit v. Wye Valley Ry.* (1891), 64 L. T. 669.

**687. —.**—Judgment creditor of a railway co. obtained an order for a receiver & manager under *Railway Companies Act, 1867* (c. 127), s. 4. After this, another judgment creditor applied for a similar order, which was made without prejudice to the former order:—*Held*: judgment creditor gained no priority by obtaining a receivership order; when a receivership order had been made & was in force another judgment creditor gained no benefit whatever by obtaining a similar order, & such subsequent order ought not to be made. The second order was therefore discharged.—*Re MERSEY RY. CO.* (1888), 37 Ch. D. 610; 57 L. J. Ch. 283; 58 L. T. 745; 36 W. R. 372; 4 T. L. R. 305, C. A.

*Annotation*:—*Refd. Re East & West India Dock Co.* (1888), 38 Ch. D. 576.

**Appointment of receiver by way of equitable execution.**—*See EXECUTION*, Vol. XXI., pp. 673, 674, Nos. 2528–2535.

**Between receiver for debenture-holders & judgment creditors.**—*See COMPANIES*, Vol. X., pp. 705, 762, 763, 1189 Nos. 4716, 4767, 4770, 4771, 8437–8439; Supp. II., p. 282, No. 4716 a.

### C. Execution.

**688. Whether entitled to levy.**—(1) Property, in the possession of a receiver appointed by the

belong to the judgment creditor.—*ABBOTT v. STRATTON* (1846), 9 I. Eq. R. 233, 243.—*IR.*

**685 vii. —.**—*O'GRADY v. GLOVER* (1849), 1 Ir. Jur. 153.—*IR.*

**g. Whether costs first charge.**—*On fund in receiver's hands.*—*MURPHY v. COOTE* (1820), 2 Mol. 462.—*IR.*

**PART III. SECT. 5, SUB-SECT. 5.—C.**

**688 i. Whether entitled to levy.**—*LEAMING v. WOON* (1882), 7 A. R. 42.—*CAN.*

**685 ii. —.**—*RULE v. HENRY* (1840), Fl. & K. 97.—*IR.*

**685 iii. —.**—*SLIGO (MARQUIS) v. O'MALLEY* (1841), 3 I. Eq. R. 527; Fl. & K. 300.—*IR.*

**685 iv. —.**—*SIMPSON v. TAYLOR* (1844), 7 I. Eq. R. 182.—*IR.*

**685 v. —.**—*CORBET v. MAHON* (1845), 8 I. Eq. R. 635; 2 Jo. & Lat. 671.—*IR.*

**685 vi. —.**—*Arrears of rent due at the time a receiver is appointed under Judgment Acts, but received after,*

**Sect. 5.—Rights of third parties: Sub-sect. 5, C.; sub-sects. 6 & 7.]**

ct. in a suit, was in two instances seized by the sheriff under writs of *fi. fa.* issued by judgment creditors of deft.:—*Held*: the sheriff was not warranted in making the seizures.

(2) On motions in the suit to commit the sheriff:—*Held*: the sheriff could not justify the seizures by questioning the propriety of the order under which the receiver was appointed; & on the submission of the sheriff an order was made in each case for him to withdraw from possession & to pay the costs, the ct. considering this order as sufficient under the circumstances for the maintenance of its jurisdiction.—*RUSSELL v. EAST ANGLIAN RY. CO.* (1850), 3 Mac. & G. 104; 6 Ry. & Can. Cas. 501; 20 L. J. Ch. 257; 16 L. T. O. S. 317; 14 Jur. 1033; 42 E. R. 201, L. C.

*Annotations*:—*As to* (1) *Distd. Re Mayhew, Ex p. Tell* (1873), L. R. 16 Eq. 97; *Consd. Edwards v. Edwards* (1875), 1 Ch. D. 454. *Generally, Reid. Frupp v. Chard Ry., Frupp v. Bridgewater & Taunton Canal, etc. Co.* (1853), 11 Hare, 241; *Potts v. Warwick & Birmingham Canal Navigation Co.* (1853), Kay, 142; *Ames v. Birkenhead Docks Trustees* (1855), 20 Beav. 332; *De Winton v. Brecon Corp.* (No. 2) (1860), 28 Beav. 200; *G. S. & W. Ily. v. Corry, Turquand, etc.* (1867), 15 W. R. 650; *Re Mead, Ex p. Cochrane* (1875), L. R. 20 Eq. 282; *Jarmain v. Chatterton* (1882), 20 Ch. D. 493; *Re London Dry Docks Corp.* (1888), 39 Ch. D. 306. *Mentd. Re Burry Port & Gwendreath Valley Ry.* (1885), 54 L. J. Ch. 710; *Re Hull, Barnsley, & West Riding Junction Ry.* (1888), 40 Ch. D. 119.

689. —[An action was brought by debenture holders to realise their security. On Jan. 10, 1883, A. was appointed *interim* receiver, with power to take possession of the property of the co. On Jan. 12, 1883, he was continued as receiver. In neither order was there any direction as to his giving security. The receiver entered into possession & remained & was in possession on Mar. 18, 1888, when a judgment creditor of the co. levied execution on the goods & chattels of the co., then in the possession of the receiver. The receiver gave notice of his claim on behalf of the debenture holders, & an interpleader issue was directed. On Apr. 21, 1888, the ordinary judgment in a debenture holders' action was taken, & the receiver was continued & was directed to give security:—*Held*: the receiver had been duly appointed with directions to take possession; he was therefore validly in possession; & judgment creditor was not entitled to the goods.—*MORRISON v. SKEIRNE IRONWORKS CO., LTD.* (1889), 60 L. T. 588.

690. —[Injunction to restrain.]—*AMES v. BIRKENHEAD DOCKS TRUSTEES*, No. 638, *ante*.

691. Leave of court to levy—When granted—Order for receiver obtained in false circumstances.]—The co. having raised large sums of money by bond & on mtge., & being also considerably indebted on simple contract, agreed with one of their simple contract creditors to suffer judgment to be entered up against the co. at a future day. After this agreement, various negotiations took place between the bond & other creditors of the co. & the co., with the view of postponing on certain terms the enforcement of all claims, as well by specialty as simple contract against the co. for seven years; these terms were accepted by the great majority of the creditors, but rejected by the simple contract creditor. After such rejection, but before the period for issuing execution had arrived, a bill was filed by one of the bond creditors against the co. & its other specialty creditors for the enforcement of his alleged equitable lien, & for the appointment of a receiver. The receiver was appointed by the consent of all parties to the suit, & entered into the possession of all the chattels of the co. The simple contract creditor then sued

out execution against the co. On the petition of the simple contract creditor:—*Held*: inasmuch as the order appointing a receiver was obtained by a surprise on the ct., & did not rest on an equity which could be maintained, & would not have been made if all the circumstances of the case had been brought before the ct., the simple contract creditor ought to be allowed to levy upon the goods & chattels of the co. notwithstanding the order.—*RUSSELL v. EAST ANGLIAN RY. CO.* (1850), 3 Mac. & G. 125; 6 Ry. & Can. Cas. 532; 20 L. J. Ch. p. 264; 17 L. T. O. S. 298; 42 E. R. 208; *sub nom. RUSSELL v. EAST ANGLIAN RY. CO., Ex p. BOWES*, 15 Jur. 035, L. C.

*Annotations*:—*Distd. Bowen v. Brecon Ry., Ex p. Howell* (1867), L. R. 3 Eq. 541. *Reid. Gardner v. L. C. & D. Ry.* (No. 1), *Drawbridge v. Same, Gardner v. Same* (No. 2), *Imperial Mercantile Credit Asscn. v. Same* (1867), 2 Ch. App. 201; *Re Dry Docks Corp.* of London (1888), 58 L. J. Ch. 33.

692. —[Subject to rights of prior incumbrancers.]—A canal co. was incorporated by a special Act of Parliament, which authorised them to purchase lands for the purposes of the Act, & for no other purpose, & empowered them to levy rates, tolls, & dues, & to borrow money on mtge. thereof; & contained a provision, that all persons whatsoever might navigate upon the canal, upon payment of the rates & dues thereby authorised to be taken. The co. made several mtges. of the rates, tolls, & dues under the Act; one of the mtgees., on behalf of himself & all others, obtained the appointment of a receiver of the co.'s rates, tolls, & dues, who was ordered to pay thereout the expenses of carrying on the co.'s business, & then the interest on the said mtges., & to pay the balance into ct. in the cause. A judgment creditor of the co. presented a petition in the cause before the hearing, praying that he might be at liberty to sue out & execute a *fi. fa.* & *elegit* against the goods & lands respectively of the co.:—*Held*: he might execute a *fi. fa.*, but that all he could take under the *elegit* would be such right in the lands as the co. had, namely, subject to the mtges. & to the right of user of the canal by the public, & subject also to the powers of management of the co.—*POTTS v. WARWICK & BIRMINGHAM CANAL NAVIGATION CO.* (1853), Kay, 142; 69 E. R. 61.

*Annotations*:—*Apld. Ames v. Birkenhead Docks Trustees* (1855), 20 Beav. 332. *Reid. Gardner v. L. C. & D. Ry.* (No. 1), *Drawbridge v. Same, Gardner v. Same* (No. 2), *Imperial Mercantile Credit Asscn. v. Same* (1867), 2 Ch. App. 201; *Imperial Mercantile Credit Asscn. v. Newry & Armagh Ry. & Joint Stock Discount Co.* (1868), 16 W. R. 1070; *Re Manchester & Milford Rly., Ex p. Cambrian Ry.* (1880), 14 Ch. D. 645; *Blaker v. Herts & Essex Waterworks Co.* (1889), 41 Ch. D. 399.

693. Attachment of money in hands of receiver—Without leave of court—Order for recovery—Costs.]—(1) Judgment creditor cannot, without leave of this ct., attach money in the hands of its receiver, which have been directed to be paid by him to judgment debtor.

(2) Judgment creditor, who had recovered moneys of judgment debtor in the hands of a receiver, under an order of a ct. of law, was ordered to repay it, & he was directed, together with the receiver, who had not resisted the payment to him, to pay the costs of the application.

(3) A party interested may apply at once to prevent a receiver applying the moneys in his hands in a manner contrary to the directions of the ct., & need not wait until he passes his account.—*DE WINTON v. BRECON CORPN.* (No. 2) (1860), 28 Beav. 200; 6 Jur. N. S. 1046; 8 W. R. 385; 54 E. R. 342.

*Annotation*:—*As to* (1) *Reid. Re Greensill* (1872), L. R. 8 C. P. 24.

694. — Rents payable to tenant for life—Judgment debt of beneficiary.]—A. had obtained



an order in the Exch. for payment of costs, against a party to a suit in this ct., who was tenant for life of certain property over which a receiver had been appointed, with directions to pay her the rents. The ct. gave leave to A., notwithstanding the appointment of receiver, to sue out & execute such writs as he might be advised.—*GOOCH v. HAWORTH* (1841), 3 Beav. 428; 49 E. R. 168.

*Annotation*:—*Apld.* *Russell v. East Anglian Ry.* (1850), 3 Mac. & G. 104.

**695.** ————.]—A receiver appointed by the ct. of an estate under an administration was ordered to pay the rents & an annuity to a person entitled for life:—*Held*: the sums so payable, including sums payable hereafter & not yet in the receiver's hands, were subject to attachment to answer a judgment debt of the beneficiary.—*Re COWANS' ESTATE, RAPIER v. WRIGHT* (1880), 14 Ch. D. 638; 49 L. J. Ch. 402; 42 L. T. 866; 28 W. R. 827.

*Annotations*:—*Reid.* *Re Slade, Slade v. Hulme* (1881), 30 W. R. 28; *Webb v. Stenton* (1883), 11 Q. B. D. 518.

**696. Attachment of money not yet in hands of receiver.**—*Re COWANS' ESTATE, RAPIER v. WRIGHT*, No. 695, *ante*.

**697. Order for possession of receiver made in error—Right of creditor to discharge of order—For purpose of levying execution.**—Where an order of the ct. has, by mistake, put a receiver in possession of goods, the proper course for a judgment creditor, seeking to levy execution against them, is, to move to discharge the order, or to apply to be examined *pro interesse suo*.—*FOWLER v. HAYNES* (1863), 2 New Rep. 156.

**698. Receiver appointed after delivery of warrant but before seizure.**—A creditor obtained judgment against his debtor in a county ct., & warrant of *fi. fa.* was delivered to the bailiff to be executed. Later on the same day a petition for liquidation was presented, & a receiver appointed, who immediately entered into possession of debtor's goods, before the warrant of *fi. fa.* was executed:—*Held*: the receiver was entitled to the goods as against execution creditor.—*Re DAVIES, Ex p. WILLIAMS* (1872), 7 Ch. App. 314; 41 L. J. Bcy. 38; 26 L. T. 303; 36 J. P. 484; 20 W. R. 430, L. J.J.

*Annotations*:—*Consd.* *Re Watt, Ex p. Joselyne* (1878), 8 Ch. D. 327. *Reid.* *Emanuel v. Bridger* (1874), L. R. 9 Q. B. 286; *Re Jones, Ex p. Jones* (1875), 33 L. T. 61; *Lowe v. Blokemore* (1875), L. R. 10 Q. B. 485; *Re Balbirnie, Ex p. Jameson* (1876), 3 Ch. D. 488; *Re Hoare, Ex p. Nelson* (1880), 14 Ch. D. 41; *Lee v. Dangar, Grant*, [1892] 1 Q. B. 231; *Re Clarke*, [1898] 1 Ch. 336; *Davies v. Thomas*, [1900] 2 Ch. 462; *Re Debtor, Ex p. Smith*, [1902] 2 K. B. 260; *The James W. Elwell*, [1921] P. 351.

**Rights against receiver of company.**—*See COMPANIES*, Vol. X., p. 1189, Nos. 8437, 8438.

#### SUB-SECT. 6.—SOLICITOR'S LIEN FOR COSTS.

**699. Whether solicitor entitled.**—A., as administratrix of B., employed C. as her solr. In a suit against A., for the administration of the estate of B., A. was restrained from receiving the moneys due to the estate, & a receiver was appointed. The receiver brought an action on a policy belonging to the estate of B. C., the solr., being in possession of the policy, & claiming a lien on it, for costs due to him as solr. to the administratrix, filed a bill, & obtained an injunc-

tion *ex parte*, restraining the receiver from proceeding in the action:—*Held*: the effect of the injunction being to prevent any of the parties from receiving the money due on the policy, the same should be dissolved; & if the solr. had any claim with reference to the policy, that claim should be made by application in the administration suit, not by filing a bill.—*STEDMAN v. WEBB* (1839), 1 My. & Cr. 346; 3 Jur. 213; 41 E. R. 135; *sub nom.* *STEADMAN v. WEBB*, 8 L. J. Ch. 193, L. C.

**700.** ————.]—In a partnership action where a receiver had been appointed, a judgment creditor of the partnership firm obtained an order, giving him a charge for his debt & costs upon the assets in or to come into the hands of the receiver, creditor undertaking to deal with the charge according to the order of the ct. Upon an application by the solr. of pltf. in the action for a charging order for his costs under Solicitors Act, 1860 (c. 127), s. 28, in priority to judgment creditor:—*Held*: the solr. was entitled to succeed.—*RIDD v. THORNE*, [1902] 2 Ch. 344; 71 L. J. Ch. 624; 86 L. T. 655; 50 W. R. 542; 46 Sol. Jo. 514.

**701.** ————.]—A co. paid to their solr. the sum of £80 for costs incurred, & a further sum of £500 to meet the expenses of a threatened action in bkpcy., certain conveyancing expenses in connection with the co.'s premises, & to secure the solr.'s own remuneration. A month later a receiver was appointed on behalf of the co.'s debenture holders, & the amount of £580 was claimed from the solr. as part of the co.'s assets. It was subsequently agreed that the solr. should have his costs up to the date of the bkpcy.:—*Held*: the solr. was entitled to all his costs incurred up to the appointment of a receiver, & from that date the sum remaining in his hands unexhausted could be claimed on behalf of the debenture holders; but, pltf. not objecting, a fair remuneration should be paid to the solr., out of the fund, for his work in connection with the conveyancing matters undertaken for the co. since the date of the receiving order, & such remuneration should be fixed by the taxing master.—*Re BRITISH TEA TABLE CO., LTD., PEARCE v. THE CO.* (1909), 101 L. T. 707.

#### SUB-SECT. 7.—OTHER CASES.

**702. Person claiming examination pro interesse suo.**—*GOMME v. WEST* (1772), 2 Dick. 472; 21 E. R. 353, L. C.

**703. Claim of right of common.**—*JOHNES v. CLAUGHTON*, No. 620, *ante*.

**704. Construction of railway—Acquisition of lands in hands of receiver.**—A railway co., without the leave of the ct. took proceedings under Lands Clauses Consolidation Act, 1845 (c. 18), to take possession of lands in the possession of the receiver under the ct. On an *ex parte* motion they were restrained.—*TINK v. RUNDLE* (1847), 10 Beav. 318; 50 E. R. 604.

**705.** ————.]—Proceedings to be taken by persons seeking to avail themselves of such powers [powers under a local Canal Act] where the lands to be traversed are in the possession of a receiver appointed by the ct.—*RICHARDS v. RICHARDS* (1859), John. 255; 23 J. P. 726; 70 E. R. 419.

**706.** ———— **Rights of contractor.**—*WHADCOAT v. SHROPSHIRE RYS. CO.* (1893), 9 T. L. R. 589; 37 Sol. Jo. 650.

**PART III. SECT. 5, SUB-SECT. 7.**  
**h. Management of business by receiver—Right of servant to preferential claim—For arrears of wages.**—A servant of a firm, the business of which

is being managed by a receiver appointed under Code of Civil Procedure, 1877, s. 503, has no preferential claim over the attaching creditor on the assets of the firm for wages due

before the appointment of the receiver.—*SHORT v. PICKERING* (1882), 1 L. R. 6 Mad. 138.—*IND.*

**k. Attachment of tenant—Payment of rent to annuitant instead of receiver.**—

**Sect. 5.—Rights of third parties: Sub-sect. 7. Part IV. Sect. 1.]**

**707. Sheriff.]—**WILMER v. KIDD (1853), 1 Seton's Judgments & Orders, 7th ed. 729.

**708. Party interested in application of money.]—**DE WINTON v. BRECON CORPN. (No. 2), No. 693, ante.

**709. Stranger to action—Claim in respect of debt—Right to apply for payment.]—**A person who is not a party to an action is not entitled to apply by motion for payment of money to him by a receiver appointed in the action, even though his claim is made in respect of a debt properly payable out of the funds in the receiver's hands.—BROCKLEBANK v. EAST LONDON RY. CO. (1879), 12 Ch. D. 839; 48 L. J. Ch. 729; 41 L. T. 205; 28 W. R. 30.

**Annotations:—**Reid, G. E. Ry. v. East London Ry. (1881), 44 L. T. 903; Hand v. Blow, [1901] 2 Ch. 721.

**710. Vendor of goods—Under hire-purchase agreement—Fixtures.]—**A limited co., who were lessees of a colliery, on Dec. 29, 1883, mortgaged it to their bankers, "together with all fixed engines, boilers, shafting, gearing, machinery, machines, & other fixtures . . . now standing & being, or hereafter to stand or be," upon the mtgd. premises. On July 2, 1889, the co. entered into an agreement with some engine makers for the erection by them at the colliery of a machine. The purchase-money was to be paid by monthly instalments, commencing at a specified date, & it was provided that, if the payments were not made regularly, the vendors should have the right at once to call upon the co. for immediate payment in full of the whole of the balance of the purchase-money then remaining due. It was also stipulated that, immediately on the vendors receiving payment of the balance, the machine should become the property of the co., but that until fully paid for it should remain the property of the vendors. The machine was erected accordingly, & it commenced working in Aug. 1890. It was of the nature of a trade fixture. Two instalments of the purchase-money were paid by the co., but they failed to make any further payments.

In Feb. 1891, the bankers brought an action to enforce their security, & a receiver was appointed, who took possession of the colliery. In Mar. 1891, the co. resolved on a voluntary winding up, & a supervision order was made in May:—*Held*: the stipulation that the machine should remain the property of the vendors until it was fully paid for was valid, & notwithstanding the inclusion in the mtge. deed of machinery to be after erected, the co. could not confer on their mtgees. a better title to the machine than they had themselves. Consequently the receiver desiring to give up possession of the colliery, the vendors were entitled to remove the machine.—CUMBERLAND UNION BANKING CO. v. MARYPORT HEMATITE IRON & STEEL CO., *Re* MARYPORT HEMATITE IRON & STEEL CO., [1892] 1 Ch. 415; 61 L. J. Ch. 227; 66 L. T. 108; 40 W. R. 280.

**Annotations:—***Apld.* Gough v. Wood, [1894] 1 Q. B. 713. *Distd.* Huddersfield Banking Co. v. Lister, [1895] 2 Ch. 273. *Consd.* Hobson v. Gorringe, [1897] 1 Ch. 182. *Reid.* Lyon v. London City & Midland Bank, [1903] 2 K. B. 135; *Re* Glasdir Copper Works, English Electro Metallurgical Co. v. Glasdir Copper Works, [1904] 1 Ch. 819; Ellis v. Glover & Hobson, [1908] 1 K. B. 388. *Mentd.* Thomas v. Jennings (1896), 66 L. J. Q. B. 5; Pritchett Co. v. Currie, [1916] 2 Ch. 515.

If annuitant not a party in the cause was in receipt of the rent of a tenant before the receiver was appointed, the tenant will not be attached for continuing to pay annuitant instead of the receiver.—NASON v. BLENNER-

HASSET (1827), 1 Hog. 402.—IR.

1. *Appointment by deed—Subsequent appointment of another by court—Right of puisne incumbrancers to further affidavits of amount collected.]—*Re DELLA ROCELLA'S ESTATE (1892), 29

**711. — — —.]—**By an agreement in writing, dated Nov. 11, 1910, G. M. & co., agreed to supply & erect upon the works owned by the firm of M., J. & co., the predecessors of deft. co., a complete installation of a patent automatic sprinkler for the protection of the premises from fire, at the price of £237, payable by annual instalments. In the event of default being made in any annual instalment, or of any breach of the agreement by the purchasers, the whole unpaid balance of principal & interest was immediately to become due. The agreement further provided that the basis of the contract was that the sprinkler installation remained the sole & exclusive property of the contractors until the whole sum of £237 had been paid, & in the event of default the contractors might enter upon the premises & remove the installation. Deft., co., was incorporated in 1911 & took over the assets & liabilities of the firm of M., J. & co., including their interest under the agreement. In Dec. 1911, deft., co. issued a series of first mtge. debentures containing a charge in the usual form on the undertaking, such charge to be a floating security. On Oct. 18, 1912, a receiver & manager was appointed in an action brought by the debenture holders to enforce their security. On Oct. 21 the last instalment under the agreement fell due & was not paid. The debenture holders had no notice of the agreement. On an application by G. M. & co., for liberty to enter upon deft. co.'s premises & remove therefrom the sprinkler installation:—*Held*: the effect of the hire-purchase agreement was to confer upon appets. an interest in the land to which the sprinkler installation was affixed & to authorise them, in the events which had happened, to enter & remove it; the interest of the debenture-holders being also equitable the ordinary principles of priorities applied; & the interest being subsequent in date was therefore postponed to the interest of appets.—*Re* MORRISON, JONES & TAYLOR, LTD., COOKES v. MORRISON, JONES & TAYLOR, LTD., [1914] 1 Ch. 50; 83 L. J. Ch. 129; 109 L. T. 722; 30 T. L. R. 59; 58 Sol. Jo. 80, C. A.

**Annotation:—***Apld.* Hamer v. London, City & Midland Bank (1918), 87 L. J. K. B. 973.

**712. Purchaser of goods—Goods left on company's premises.]—**On Aug. 27, 1903, deft. co. issued first mtge. debentures, secured by a deed of which the co.'s two managing directors were trustees. The deed provided that the co. should not sell its machinery without the concurrence of the trustees, but gave the trustees an unfettered discretion to concur in any sale which in their opinion did not prejudice the interests of the debenture-holders. In 1912 the co. issued a number of debentures to deft. bank. The co. having got into difficulties, the two managing directors made further advances to the co. from time to time. In Oct. & Nov. 1916, the co., with the concurrence of the two managing directors as trustees of the deed of 1903, sold certain machinery to pltf. & the proceeds of the sale were applied in discharging the debt due from the company to the two managing directors. Under the agreement of sale the machinery was to become the property of pltf. immediately, but he had the right to leave it on the premises as long as he liked. On Dec. 18, deft. bank appointed a receiver under their debentures & on the same day another debenture-holder obtained an injunction restraining the co.

L. R. Ir. 464.—IR.

m. *Whether executors prevented from making profit out of estate—After appointment of receiver.]—*MINFORD v. CARSE & HUNTER, [1912] 2 L. R. 245.—IR.

from dealing with the property. The receiver appointed by the bank on going into possession declined to allow pltf. to remove such of the machinery as was attached to the freehold. On Jan. 29, 1917, the co. went into liquidation:—*Held*: by Sale of Goods Act, 1893 (c. 71), ss. 17, 62, the property in the fixed machinery or, at any rate, the right to take possession of it, passed to pltf.

as from the date of the purchase; the sale of the machinery was not outside the ordinary business of the co.; & that the concurrence of the trustees in the sale was reasonable, therefore, pltf. was entitled to the machinery as against the debenture-holders.—*HAMER v. LONDON CITY & MIDLAND BANK, LTD.* (1918), 87 L. J. K. B. 973; 118 L. T. 571.

## Part IV.—Rights, Powers and Duties.

### SECT. 1.—IN GENERAL.

**713. Receiver must act according to terms of deed.**—(1) A receiver under [a] deed, must act according to the terms of the deed (*LORD ELDON, C.*).

(2) Receiver of rents of estates conveyed to secure an annuity, discharged on acceptance of the price of the annuity with interest, deducting the past payments.—*DAVIS v. MARLBOROUGH (DUKE)* (1819), 2 Swan. 108; 2 Wils. Ch. 130; 36 E. R. 555, L. C.

*Annotations*:—*Generally*, *Reid*, *Cooper v. Reilly* (1829), 2 Sim. 560; *Paynter v. Carew* (1854), Kay, App. XXXVI. *Mentd.* *Portmore v. Taylor* (1831), 4 Sim. 182; *King v. Hamlet* (1835), 9 Bl. N. S. 575; *Pelly v. Wathon* (1849), 7 Hare, 351; *Mansfield v. Ogle* (1855), 24 L. J. Ch. 450; *Bromley v. Smith, Boustead v. Bromley, Smith v. Bromley* (1859), 26 Beav. 644; *Webster v. Cooke* (1867), 36 L. J. Ch. 753; *O'Rorke v. Bolingbroke* (1877), 2 App. Cas. 814; *Fry v. Lane*, *Re Fry*, *Whittet v. Bush* (1888), 40 Ch. D. 312.

**714. Powers distinguished from those of manager.**—*Re MANCHESTER & MILFORD RY. CO., Ex p. CAMBRIAN RY. CO.*, No. 784, *post*.

**715. Duty to take care of property.**—The ct. does not expect them [receivers] to take more care of the property entrusted to them than they would do of their own (*LORD ELDON, C.*).—*MASSEY v. BANNER* (1820), 1 Jac. & W. 241; 37 E. R. 367, L. C.

*Annotations*:—*Consd.* *Owen v. Cronk* (1894), 2 Mans. 115. *Reid*, *Macdonnell v. Harding* (1834), 7 Sim. 178; *Pennell v. Deffell* (1853), 4 De G. M. & G. 372; *Cocks v. Gray* (1857), 5 W. R. 749.

**716.** —[A receiver appointed in an action, is to take care of, & receive the property which is put under his charge. He is not at liberty, & is not entitled, to bring an action in his own name; the reason being that he has no property vested in him (*CHITTY, J.*).—*Re SARTORIS'S ESTATE, SARTORIS v. SARTORIS*, [1892] 1 Ch. 11; 60 L. J. Ch. 634; 64 L. T. 730; *on appeal*, [1892] 1 Ch. 19, C. A. *Annotation*:—*Reid*, *Re Laye, Turnbull v. Laye*, [1913] 1 Ch. 298.

**717. Duty to receive.**—As receiver his [pltf.'s] business was to receive. He could not sue for the debt as a contracting party without the other contracting parties & infer that nothing was vested in the receiver (*LORD SUMNER*).—*RODRIGUEZ v. SPEYER BROTHERS*, [1919] A. C. 59; 88 L. J. K. B. 147; 119 L. T. 409; 34 T. L. R. 628; 62 Sol. Jo. 765, H. L.; *affy*, *S. C. sub nom. SPEYER BROTHERS v. RODRIGUEZ* (1917), 87 L. J. K. B. 171, C. A. *Annotation*:—*Mentd.* *Valentine v. Hyde*, [1919] 2 Ch. 129.

### PART IV. SECT. 1.

*n. Liability of receiver-general—For money placed in his hands by the executive.*—The receiver-general for this Province is not liable to actions, at the suit of individuals, for money placed in his hands by the executive to be distributed among them.—*BUTLER v. DUNN* (1827), Tay. 415.—*CAN.*

*o. Assessment of amounts due on premium notes.*—*HILL v. MERCHANTS*

& MANUFACTURERS INSURANCE CO. (1881), 28 Gr. 560.—*CAN.*

*p. Sale of property—To satisfy judgment.*—*GREY v. ANDERSON* (1917), 50 N. S. R. 399.—*CAN.*

*q. Whether amounting to sale by court.*—A sale of property under an order of ct. by a person appointed receiver in a suit is not a sale by the ct.—*CHANDRA-NATH BISWAS v. BISWANATH BISWAS* (1870), 6 B. L. R. 492, n.—*IND.*

*r. Insurance policy.*—*WEEKES v. FRAWLEY* (1893), 23 O. R. 235.—*CAN.*

*t. Recovery of tithes—Duty to give notice to debtors.*—Previous to filing a bill for the recovery of tithes, the receiver should serve notice upon all the parties, requiring payment within a certain time to be fixed by the notice.—*GRAVES v. GRAVES, Smith on Receivers*, 186.—*IR.*

*s. Right to bailiff—To assist in collecting rents.*—A receiver will not

**718.** —[*Re SARTORIS'S ESTATE, SARTORIS v. SARTORIS*, No. 716, *ante*.]

**719. Power to cut timber.**—A. seised in fee of land demised the premises to trustees B. C. & D. for five hundred years in trust to pay debts & for a charity; B. one of the trustees being in possession, & as a receiver appointed by the ct., cuts down £1,000 worth of timber. D. one of the other trustees consenting; B. the trustee for the charity or as receiver, ought not to take advantage of his having possession, without which he could not cut down the timber, yet the timber must be valued according to what it would be worth at the end of the term of five hundred years.—*BAYS v. BIRD* (1726), 2 P. Wms. 397; 24 E. R. 784, L. C.

**720.** —[*A-G. v. BOOTHBY* (1860), 1 Seton's Judgments & Orders, 6th ed. 799.]

**721. Collection of debts—Power to give time—Security obtained.**—Declaration, that K. was indebted to the firm of B. & S.; that pltf. had been appointed by the Ct. of ch. receiver of the debts of the firm, whereby K. became liable to pay pltf. when requested; that in consideration of the premises, & that pltf. as such receiver would give K. two months' time to pay, debt. promised to pay in case K. omitted to do so within that time. Breach, that K. omitted, & that debt. never paid:—*Held*: sufficient authority appeared for pltf. to contract & sue, & sufficient consideration for debt.'s promise.—*WILLATTS v. KENNEDY* (1831), 8 Bing. 5; 1 Moo. & S. 35; 1 L. J. C. P. 4; 131 E. R. 301.

*Annotation*:—*Reid*, *Ward v. Shew* (1833), 2 Moo. & S. 756.

—*Receiver of partnership.*—*See PARTNERSHIP*, Vol. XXXVI., pp. 485, 489, Nos. 1491, 1533.

**722. Retention of money as set-off—To private debt.**—A solr. who gets money into his possession in character of a receiver is not entitled to retain it as a set-off to a sum owed to him on a private account between him & the assignee.—*Re CANNINGS, Ex p. WALSH* (1832), 2 L. J. Bcy. 39.

**723. On death of party entitled to payment.**—*WHITE v. BAUGH*, No. 1065, *post*.

**724. Payment of costs.**—Real estate consisting of agricultural property in Norfolk, the ct. refused to order the estate to be sold under R. S. C., 1883, Ord. 51, r. 1, for the purpose of paying the costs of the action, in which a declaration of the rights of the persons entitled had been obtained, & a receiver appointed against their father, who

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had previously been in possession & refused to account, but directed the receiver to apply any funds in his hands, after keeping down incumbrances, in payment of the costs.—*MILES v. JARVIS* (No. 2) (1883), 50 L. T. 48.

*Annotations:—***Refd.** *Blackman v. Fysh*, [1892] 3 Ch. 209. **Mentd.** *Re Robinson, Pickards v. Wheeler* (1885), 55 L. J. Ch. 307; *Re Whiting's Settlement*, *Whiting v. De Rutzen*, [1905] 1 Ch. 96.

**725. Collection of rents—Action declaring rights to realty.]—***Re MANCHESTER & MILFORD RY. CO., Ex p. CAMBRIAN RY. CO.* (1880), 14 Ch. D. 645; 49 L. J. Ch. 365; 42 L. T. 714, C. A.

*Annotations:—***Consd.** *Re Knott End Railway Act, 1898*, [1901] 2 Ch. 8. **Refd.** *Taylor v. Neate* (1888), 57 L. J. Ch. 1044; *Re Manchester & Milford Ry.* (1896), 75 L. T. 416.

**726. — Without prejudice to right of incumbrancer—Right to serve notice on tenants.]—**A receiver was appointed in an action in the Q. B. Div. under an order directing him to collect the rents of certain specified property, including property of which S. was in possession as mtgee., such order to be without prejudice to the rights of any incumbrancer who might be in or enter into possession. The receiver gave notice to the tenants of the mtgd. property to pay the rents to him, who informed him that they had already been served with a notice from S. The receiver not withdrawing the notice, S. brought an action in the Ch. Div. asking for an injunction to restrain the receiver from receiving the rents.—**Held:** although the receiver's conduct was improper & a violation of the rights of S., S. was not justified in instituting a fresh action in the Ch. Div.; & whatever might have been the course previous to Jud. Act, 1873 (c. 66), such a proceeding since that Act was irregular, the proper course being to apply in the action & to the ct. in & by which the receiver was appointed.—*SEARLE v. CHOAT* (1884), 25 Ch. D. 723; 53 L. J. Ch. 506; 50 L. T. 470; 32 W. R. 397, C. A.

**727. Duty to give notice or take possession—Effect of omission—Bankruptcy.]—**By an order dated May 14, 1887, by which pltf. obtained final judgment in an action, a receiver was appointed to carry on the business of deft., & to collect & get in outstanding debts. By a further order dated Dec. 20, 1887, the order of May 14, 1887, was rescinded except as regarded the book debts mentioned in the four parts of the first schedule as to which the receiver was to continue to act for pltf. with power to issue to any of such book debtors a circular in prescribed form; & it was further ordered that the whole of the book debts mentioned in the four parts of the first schedule should be allocated to & accepted by pltf. in satisfaction of his judgment debt interest & costs; & after giving deft. power to redeem any of the book debts in the schedule by payment thereof, it was further ordered that in case any of the book debts mentioned in the first part of the first schedule should not have been paid by the respective debtors or redeemed by deft. on or before Mar. 31, 1888, pltf. should be at liberty to give notice of the order of May 14, 1887, & of that

order in the form prescribed in the second schedule, to each of the debtors mentioned in the said first part & to collect & recover such debts in his own name. On Feb. 13, 1888, the receiver sent to debtors mentioned in the first schedule of the order of Dec. 20, 1887, a notice requiring payment, & stating that deft.'s firm were closing up accounts with a former member, & that it was necessary to collect all outstanding debts. On Feb. 23, 1888, deft. in the action committed an act of bkpcy. upon which a petition was presented against him. On Apr. 4, 1888, pltf. without knowledge of the act of bkpcy. or of the petition, sent to debtors whose names were mentioned in the first part of the first schedule, a notice as prescribed of the appointment of the receiver & the assignment. In May, 1888, debtor was adjudicated bkpt. & the trustee claimed the scheduled debts.—**Held:** the order appointing the receiver did not constitute pltf. a secured creditor; the order of Dec. 20, 1887, transferred the book debts to pltf. but left them in the order & disposition of the bkpt. without notice; & although the debts in the first part of the schedule were taken out of the order & disposition clause by the notice of Apr. 4, 1888, those contained in the other three parts of the schedule were in the order & disposition of bkpt. at the time of the bkpcy., the notice sent out by the receiver on Feb. 13, 1888, being insufficient.—*Re TILLET, Ex p. KINGSCOTE* (1889), 60 L. T. 575; 5 T. L. R. 269; 6 Morr. 70.

*Annotations:—***Refd.** *Re Potts, Ex p. Taylor*, [1893] 1 Q. B. 648; *Re Neal, Ex p. Trustee* (1914), 83 L. J. K. B. 1118.

**728. — — —.]—**In 1891 a trader assigned (*inter alia*), his business premises & book debts by way of mtge. On May 9, 1893, the mtgees., under the powers of Conveyancing & Law of Property Act, 1881 (c. 41), appointed A. B. receiver of the income of the mtgd. property, & he entered into possession of the premises & carried on the business. On May 16 the trader committed an act of bkpcy., & on May 17 the mtgees., without notice of this act, commenced an action in which A. B. was on May 19 appointed receiver of the book debts by the ct. Neither the mtgees. nor A. B. ever gave notice of the assignment to the debtors; & A. B. received certain moneys paid in respect of the book debts. On June 16 a receiving order was made against the trader, & he was subsequently adjudicated bkpt.—**Held:** (1) neither the appointment of a receiver by the mtgees. nor that by the ct. was sufficient to take the book debts out of the order & disposition of the bkpt. with the consent of the true owners, unless followed by notice to the debtors within a reasonable time; (2) as by the default of the mtgees. no such notice was given, the trustee in bkpcy., was entitled to the book debts & the moneys received in respect thereof.—*RUTTER v. EVERETT*, [1895] 2 Ch. 872; 64 L. J. Ch. 845; 73 L. T. 82; 44 W. R. 104; 39 Sol. Jo. 689; 2 Mans. 371; 13 R. 719.

*Annotations:—***As to** (1) **Consd.** *Re Neal, Ex p. Trustee*, [1914] 2 K. B. 910. **Refd.** *Re Collins*, [1925] Ch. 556. **Generally, Refd.** *Re Crouch, Ex p. Smith* (1902), 83 L. T. 746.

be allowed a bailiff, at the expense of the estate, to assist him in collecting the rents, except in special circumstances.—*Re JACKSON, Smith on Receivers*, 45.—**IR.**

**b. To pay over money—Necessity for leave of master.]—**Deft., the owner of an estate may, by consent of the parties in the cause, obtain money from the receiver without any reference being made to the master to inquire whether there are any creditors not

parties who have a right to it.—*RAY v. BUTLER* (1826), 1 Hog. 381.—**IR.**

**c. Collection of rents.]—**It is the receiver's duty to collect the rents, but not to assume the management of the cause.—*COLLAGHAN v. REARDON* (1837), Sau. & Sc. 682.—**IR.**

**d. Duty not to meddle with rights of parties.]—**A receiver should not meddle with the rights of parties in the cause.—*O'CONNOR v. MANNING*

**e. Whether receiver may become tenant of lands.]—**Where a receiver of property was appointed, the ct. held that he could not become tenant to any part of the estate, either in his own name, or through the medium of a trustee.—*MEAGHER v. O'SHAUGHNESSY*, cited in Fl. & K. 196.—**IR.**

**f. —.]—**Upon consent of the parties in a cause claiming substantial interests in the lands in litigation, the receiver over these lands was permitted

**729.** Subsequent incumbrancer taking without notice.]—*WIGRAM v. BUCKLEY*, No. 501, ante.

**730.** — Notice to trustees of settlement.]—A voluntary settlement in favour of his wife & child by an insolvent settlor of his equitable reversionary interest in personal estate comprising stocks & shares not subject to an imperative trust for sale:—*Held*: void under Prevention of Fraudulent Alienations Act, 1571 (c. 5), as against creditors of the settlor, on the ground that it delayed hindered or defrauded plffs. who were judgment creditors suing on behalf of themselves & all other creditors, from obtaining the advantage of the appointment of a receiver by way of equitable execution of debtor's reversionary interest which would have operated as an injunction to restrain the debtor from himself receiving the property.

Notice of appointment to the trustees in possession is, of course, necessary to perfect the title of the receiver, but this it would be his first duty to give (*KEKEWICH, J.*).—*IDEAL BEDDING CO., LTD. v. HOLLAND*, [1907] 2 Ch. 157; 76 L. J. Ch. 441; 96 L. T. 774; 23 T. L. R. 467; 14 Mans. 113.

**731.** Sale of property.—Power to send abroad for sale.]—*ASHBURY v. BIERSTADT* (1894), 10 T. L. R. 600.

**732.** — Misfeasance claims.]—*WOOD v. WOODHOUSE & RAWSON UNITED*, [1896] W. N. 4.

**733.** Duty to insure.]—A surety for a receiver is answerable to the extent of the amount of the recognisance for whatever sum of money, whether principal, interest, or costs, the receiver has become liable for, including the costs of his removal & of the appointment of a new receiver in his place.

In many cases when receivers are appointed there is an insurance already on foot, & then he takes over the policy, pays the premiums, & is allowed them on passing his accounts. It appears to me that it is consistent with his duty as receiver & that the ct. has itself sanctioned it, that he should make & keep this insurance on foot. . . .

Proper repairs of real estate appear to . . . be a matter which falls within the functions of a receiver, where the receiver is appointed to receive the rents & profits (*CHITTY, J.*).

The sureties for a receiver of rents & profits of real estate upon a recognisance drawn in the usual form are, notwithstanding the limited wording of the security, answerable up to the amount of their bond for all moneys for which the receiver himself is liable to account.—*Re GRAHAM, GRAHAM v. NOAKES*, [1895] 1 Ch. 66; 64 L. J. Ch. 98; 71 L. T. 623; 43 W. R. 103; 39 Sol. Jo. 58; 13 R. 81.

**Power to charge assets.**]—*See COMPANIES*, Vol. X., p. 797, No. 5033; *PARTNERSHIP*, Vol. XXXVI., p. 400, No. 714.

**On behalf of debenture-holders.**]—*See COM-*

*PANIES*, Vol. X., pp. 796, 797, 800, 801, Nos. 5029–5036, 5061, 5071–5078.

**Partnership property.**]—*See PARTNERSHIP*, Vol. XXXVI., pp. 488–489, Nos. 1530–1545.

## SECT. 2.—CUSTODY OF BOOKS AND DOCUMENTS.

**734.** Duty to produce for inspection.]—A plff., although appointed receiver in the cause, cannot, before decree, be ordered, as plff., to produce books or accounts in his possession for the inspection of a deft.—*MAUND v. ALLIES* (1839), 4 My. & Cr. 503; 41 E. R. 194, L. C.

**735.** —.]—A receiver & manager appointed by holders of a debenture secured on the undertaking, property & assets of the co., & having in his possession as receiver all the books of account, records & documents of the co. of which he was formerly managing director:—*Held*: not to be entitled to refuse production of documents material to an action involving a claim based on an alleged fraudulent conspiracy between him & the co. as co-defts., on the ground that the books & documents are held by him on behalf of the debenture holders, & no longer on behalf of the co. as managing director.—*FENTON TEXTILE ASSOCN. v. LODGE*, [1928] 1 K. B. 1; 96 L. J. K. B. 1016; 137 L. T. 241, C. A.

**736.** Right to production or delivery.—Receiver for debenture holders.—Securities deposited at Land Registry.]—The ct. has no power to order securities, which have been deposited with the Registrar of the Land Registry Office by a land securities co., to be delivered up to a receiver appointed in a debenture-holders' action, or to a liquidator in the winding up of the co., unless such securities have been redeemed or sold.—*SOMERSET v. LAND SECURITIES CO., LTD.*, [1894] 3 Ch. 464; 63 L. J. Ch. 880; 71 L. T. 512; 43 W. R. 132; 10 T. L. R. 670; 38 Sol. Jo. 733; 7 R. 564, C. A.

—.]—*Sec. also, COMPANIES*, Vol. X., pp. 796, 797, Nos. 5029, 5030.

**737.** — As against trustee.]—Order on trustee to deliver up to receiver & manager possession of the premises & all books, papers & licences relating to the business, & necessary for the purposes aforesaid. Order held wrong in so far as it directed the trustee to deliver up the books & papers.—*CAPITAL & COUNTIES BANK v. STEVENS' TRUSTEE* (1901), 17 T. L. R. 260, C. A.

— Court rolls.]—*See COPYHOLDS*, Vol. XIII., p. 37, Nos. 399, 403.

— Documents subject to lien.]—*See DISCOVERY*, Vol. XVIII., pp. 114, 116, Nos. 657, 658, 666.

— Partnership books & documents.]—*See PARTNERSHIP*, Vol. XXXVI., pp. 400, 455, Nos. 714, 1205.

to become a tenant of part of them, the adoption of such a course appearing to be for the benefit of the estate.—*STANNUS v. FRENCH* (1849), 13 I. Eq. R. 161.—*IR.*

**g.** Duty to get in outstanding estate.—Jurisdiction of court to order debtor.—To pay sum due to receiver.]—*KIRK v. HOUSTON* (1843), 5 I. Eq. R. 498.—*IR.*

**h.** Right to bid for lands for which appointed receiver.]—It is contrary to the practice & policy of this ct. to permit the receiver in the cause to bid at the sale of the lands over which he had been appointed.—*ANDERSON v.*

*ANDERSON* (1846), 9 I. Eq. R. 23.—*IR.*

**k.** Power to increase rates of tolls.]—Applt., as judicial factor of the Greenock Harbour Trust, claimed to be entitled to demand for sugar shipped into or unshipped from vessels (foreign) at the port & harbour of Greenock the rate of 1s. 3d. per ton, being the maximum rate authorised by Greenock Harbour Act, 1880. This rate was fixed by applt. in opposition to the wishes of resps., the Greenock Harbour trustees, who insisted that the rate should be only 10d. per ton, the rate fixed by resps. prior to the appointment of applt.:—*Held*: the judicial factor was merely a receiver of

the tolls & income of the undertaking & not its manager, & he had no implied authority to increase or destroy the different sources of revenue.—*CARMICHAEL v. GREENOCK HARBOUR TRUSTEES*, [1910] A. C. 274.—*SCOT.*

## PART IV. SECT. 2.

**734 i.** Duty to produce for inspection.]—*MAXWELL v. MANITOBA & NORTH WESTERN RY. CO.* (1896), 11 Man. L. R. 149.—*CAN.*

**1.** Right to production or delivery.—Deed of conveyance.]—*ASHWORTH v. VANCOUVER TRUST CO. (B. C.)* (1922), 68 D. L. R. 746.—*CAN.*



## RECEIVERS.

### SECT. 3.—DISTRESS.

See DISTRESS, Vol. XVIII., pp. 286, 287, Nos. 211-224.

**738. Leave of court—Distress for rent.]—**Tenants directed to pay their rents, in a given time, on the first application, or to stand committed; & the receiver to be at liberty to distrain on one tenant; the like as to paying rent.—*MITCHEL v. MANCHESTER (DUKE) (1750), 2 Dick. 787; 21 E. R. 477, L. C.*

**739. ——— Occupation rent found due by certificate—Leave not granted until certificate binding.]—**The chief clerk, by his certificate, found that a certain sum was due from defts. as occupation rent. Before the certificate had become binding on defts. pltf's. moved for leave for the receiver in the action to distrain for the rent, or that defts. should give some security:—*Held*: the motion must stand over until the certificate had become binding.—*CRAVEN v. INGHAM (1888), 58 L. T. 486.*

**740. ——— Undertaking to proceed no further at law—Plaintiff suing for equitable relief.]—**After order to elect to proceed at law or in equity, a receiver appointed by this ct. cannot distrain for rent, without undertaking to proceed in equity only.—*MILLS v. FRY (1815), Coop. G. 107; 19 Ves. 277; 35 E. R. 495, L. C.*

*Annotation:—Mentd. Fennings v. Humphery (1841), 4 Beav. 1.*

**Right to rent.]—**See Sect. 10, *post*.

### SECT. 4.—LEGAL PROCEEDINGS.

**741. Institution of proceedings—General rule.]—**As a general rule, a receiver in a cause ought not to present a petition to the ct.; but where he has incurred heavy costs in acting under the directions of the ct., & the parties to the suit, after repeated applications to them, neglect to apply to the ct. for an order directing payment of such costs, the ct., where great delay has arisen, will entertain the receiver's petition, & order payment of such costs to him.—*IRELAND v. EADE (1844), 7 Beav. 55; 13 L. J. Ch. 129; 49 E. R. 983.*

#### PART IV. SECT. 3.

**738 i. Leave of court—Distress for rent.]—**An order had been made giving a receiver liberty to distrain for arrears of rent. Upon the application of a tenant distrained upon for discharge of this order, it appeared that the tenancy had determined more than six months before the order to distrain was made, so that distress could not be made under 8 Anne, c. 14, ss. 6 & 7. The order to distrain was therefore discharged. No notice need be given to a tenant of an application for an order giving a receiver leave to distrain.—*PAXTON v. DRYDEN (1873), 6 P. L. 127.—CAN.*

**738 ii. ———.]—**ANON., Smith on Receivers, 148.—*IR.*

**738 iii. ———.]—**A receiver will be allowed to distrain land under ejectment for non-payment of rent, provided he leaves a sufficient arrear to sustain the ejectment.—*Re CORNWALLS (1824), 1 Hog. 146.—IR.*

**738 iv. ———.]—**NUGENT v. NUGENT (1824), 1 Hog. 169.—*IR.*

**738 v. ———.]—**EYRE v. EYRE (1825), 1 Hog. 252.—*IR.*

**738 vi. ———.]—**NEWMAN v. MILLS (1825), 1 Hog. 291.—*IR.*

**738 vii. ———.]—**A receiver who has obtained an order for liberty to distrain, may exercise his own discretion, as to the time of enforcing the

rent, but he must not act oppressively.—*LUCAS v. MAYNE (1826), 1 Hog. 394.—IR.*

**738 viii. ———.]—**STURGEON v. DOUGLAS (1826), 1 Hog. 400.—*IR.*

**738 ix. ———.]—**Liberty for a receiver to distrain, is not confined to any particular act or time.—*ANON. (1826), 1 Hog. 335.—IR.*

**738 x. ———.]—**The ct. does not in general allow undertenants to be distrained by the receiver, but when the representative of the immediate tenant cannot be discovered, in order that an attachment might be applied for against him, the ct. will permit it.—*ANON. (1829), 3 Ir. L. Rec. 1st ser. 35.—IR.*

**738 xi. ———.]—**RYDER v. DICKSON (1830), Hayes, 36.—*IR.*

**738 xii. ———.]—**ANON. (1836), 1 Jo. Ex. Ir. 613.—*IR.*

**738 xiii. ———.]—**When the premises were sold & the purchaser was about to get into possession, the receiver on swearing that one-half year's rent was due, & that if he did not distrain the rents would be lost, was allowed to distrain.—*ANON. (1836), 1 Jo. Ex. Ir. 613.—IR.*

**738 xiv. ———.]—**A distraining order will not be granted unless it appear by affidavit that the receiver personally demanded the rent to be distrained for, from the tenants. It is not necessary that the affidavit should

**742. ———.]—**Generally, the receiver in a cause ought not to make any application to the ct.: if he finds himself in circumstances of difficulty, he should apply to pltf. to make the necessary application, & on his default the receiver may then properly apply to the ct.—*PARKER v. DUNN (1845), 8 Beav. 497; 50 E. R. 195.*

**743. ———.]—**RODRIGUEZ v. SPEYER BROTHERS, No. 717, *ante*.

**744. ——— Ejectment.]—**A receiver cannot proceed in ejectment.—*WYNN v. NEWBOROUGH (LORD) (1790), 3 Bro. C. C. 88; 1 Ves. 164; 29 E. R. 423, L. C.*

*Annotation:—Reid. Viola v. Anglo-American Cold Storage Co., [1912] 2 Ch. 305.*

**745. ——— Improbability of benefit resulting.]—**The ct. will not empower a receiver to sue for debts due to the estate, where the proceeding would be oppressive to creditors, or it is unlikely that any fruits would be derived from it.—*DACIE v. JOHN (1824), M'Cle. 575; 148 E. R. 240.*

**746. ——— Proceedings oppressive to creditors.]—**DACIE v. JOHN, No. 745, *ante*.

**747. ——— In own name.]—**A receiver, who is a solr., will not be permitted to bring actions against tenants, for arrears of rent, with the approbation of the master, in the name of a trustee of the estate, but in opposition to his wishes. Nor, in such circumstances, will the ct. refer it to the master to see, whether it would be proper for the receiver to proceed in his own name.—*DELLA CAINEA v. HAYWARD (1825), M'Cle. & Yo. 272; 148 E. R. 415.*

**748. ———.]—**Re SARTORIS'S ESTATE, SARTORIS v. SARTORIS, No. 716, *ante*

**749. ——— On behalf of persons beneficially interested.]—**It is the duty of the persons beneficially interested, & not of the receiver, to make such applications to the ct. as may be requisite for protecting the possession. If the possession of tenants under the receiver is disturbed, & no application is made to the ct. to prevent that disturbance, the tenant is entitled to the costs of protecting his own possession.—*MILLER v. ELKINS (1825), 3 L. J. O. S. Ch. 128.*

**750. ——— Actions against tenants for arrears—In name of trustee of estate—Trustee not con-**

state in terms, that he personally demanded the rent, if it states facts from which it appears to the ct. that the demand was personally made.—*LANGLEY v. AYLMER, SPILLER v. MELLIFONT (1841), 3 I. Eq. R. 492.—IR.*

**m. Writ of assistance—Whether awarded in aid of receiver.]—**A writ of assistance will not be awarded in aid of a receiver when acting under a general order for liberty to distrain.—*ANON. (1824), 1 Hog. 207.—IR.*

**n. Right of receiver to enforce payment of rent—By attachment.]—**CANE v. BLOOMFIELD (1826), 1 Hog. 345.—*IR.*

#### PART IV. SECT. 4.

**747 i. Institution of proceedings—In own name.]—**The receiver of a trust estate cannot sue in his own name to recover funds belonging to the estate.—*SHALLOROSS v. GARESCHE (1897), 5 B. C. R. 320.—CAN.*

**747 ii. ———.]—**A ct. may authorise a receiver to sue in his own name.—*JAGAT TARINI DASI v. NABA GOPAL CHAKI (1907), I. L. R. 34 Calc. 305.—IND.*

**o. ——— Necessity for leave of court—Debt recovery.]—**Where a receiver appointed to manage an estate finds it necessary to sue for debts due to it, an application for permission to do so must be made, supported by

senting.]—*DELLA CAINEA v. HAYWARD*, No. 747, ante.

751. — **Receiver appointed to collect debts.**]—*WILLATTS v. KENNEDY*, No. 721, ante.

752. — **Parties to action refusing—Recovery of costs incurred.**]—*IRELAND v. EADE*, No. 741, ante.

753. — —.]—*PARKER v. DUNN*, No. 742, ante.

754. — **Bankruptcy proceedings—Right to prove.**]—When a receiver in the cause, without obtaining leave from the ct., proved against the estate of a bkpt. legatee, who was a debtor to the estate:—*Held*: the receiver must be treated for this purpose as having authority.—*ARMSTRONG v. ARMSTRONG* (1871), L. R. 12 Eq. 614; 25 L. T. 199; 19 W. R. 971.

*Annotations*:—*Reid*, *Re Watson, Turner v. Watson*, [1896] 1 Ch. 925; *Re Sewell, White v. Sewell*, [1909] 1 Ch. 806. *Mentid*, *Joseph v. Goode, Joseph v. Goode, Fisher v. Goode* (1875), 23 W. R. 225.

755. — —.]—**Right to present bankruptcy petition.**]—[A receiver] could not apply the money to his own use, but would be bound to bring it within the power of the ct. in order that the ct. might exercise its functions with respect to it. That being so, it appears to me that this is not a good petitioning creditor's debt. It certainly is not at law a good petitioning creditor's debt, nor, so far as I understand the matter is it a good debt in equity (*COCKBURN, C.J.*).—*Re MUIRHEAD, Ex p. MUIRHEAD* (1876), 2 Ch. D. 22; 45 L. J. Bcy. 65; 34 L. T. 303; 24 W. R. 351, C. A.

*Annotations*:—*Distd. Re Lewis, Ex p. Harris* (1876), 2 Ch. D. 423. *Follid. Re Sacker, Ex p. Sacker* (1888), 22 Q. B. D. 179. *Mentid. Re Rayner, Ex p. Rayner* (1877), 37 L. T. 38; *Re Fryer, Ex p. Fryer* (1886), 17 Q. B. D. 718; *Re O'Gorman, Ex p. Bale*, [1899] 2 Q. B. 62; *Re Debtors*, [1927] 1 Ch. 19.

756. — —.]—*Re SACKER, Ex p. SACKER*, No. 759, post.

757. — —.]—On the dissolution of a firm of stockbrokers by the death of one of the partners the partnership assets, including a debt due to the late firm in respect of certain Stock Exchange transactions, were assigned by the surviving partners to L. for the purpose of winding up the partnership, & notice of the assignment was served on debtor. L. then recovered judgment for the amount of the debt. Subsequently an action was commenced in the Ch. Div. for the winding up of the partnership, & in that action a receiver was appointed of the partnership assets. The receiver took an assignment of the judgment debt from L., & obtained leave to issue execution. He then served a bkpcy. notice on debtor, & on the failure of debtor to comply with the notice a bkpcy. petition was presented against him by the receiver, the surviving partners,

& the personal representatives of the deceased partner:—*Held*: inasmuch as the receiver had obtained an assignment of the judgment debt he was a creditor entitled to present a bkpcy. petition.—*Re MACOUN*, [1904] 2 K. B. 700; 73 L. J. K. B. 892; 91 L. T. 276; 53 W. R. 197; 48 Sol. Jo. 672; 11 Mans. 264, C. A.

758. — **In name of bankrupt executor or administrator.**]—An action was commenced in the ct. of one of the Vice-Chancellors for the administration of the estate of testator, against the administrator with the will annexed. The administrator, being interested in the capacity in the estate of another testator, commenced an action for the administration of his estate in the ct. of a different Vice-Chancellor, & then became bkpt. Pltf. in the first suit moved in that suit that a receiver of the estate might be appointed, & that pltf. might be permitted to prosecute the second action in the name of the administrator:—*Held*: pltf. was entitled to the order asked for, & it was properly made in that ct. to which the first action was attached.

In such a case it is not the modern practice to permit the receiver to carry on an action in the name of a bkpt. executor or administrator.—*Re HOPKINS, Dowd v. HAWTIN* (1881), 19 Ch. D. 61; 30 W. R. 601, C. A.

759. — **Action for chattels unlawfully detained.**]—In an action in the Ch. Div. a receiver was appointed to collect & receive goods comprised in a charge given to pltf. by one of defts., including therein any balance of the proceeds of the goods so charged in the hands of the other deft. An order was subsequently made for the payment by the last-mentioned deft. to the receiver of a specific sum, being money received by him in respect of the proceeds of the goods, & comprised in the charge:—*Held*: (1) the receiver was not a creditor entitled to present a bkpcy. petition against such deft. within Bkpcy. Act, 1883 (c. 52), s. 6.

If he is possessed of chattels as receiver, & those chattels are unlawfully detained from him, he may well be able to maintain an action to recover them as being the person in possession of them, quite independently of the fact that he is a receiver. . . . But in such cases he does not sue in his character of receiver (*FRY, L.J.*).

(2) The petitioner is a receiver. . . . He could not sue for this sum of money in his own name either at law or in equity. Even if he could by the authority of the ct. sue for it in his own name, is the money due to him personally either at law or in equity? At law it is certainly not. The debt was due to another person for whom he is not a trustee (*LORD ESHER, M.R.*).—*Re SACKER*,

affidavits showing the expediency of instituting such proceedings.—*THOMAS v. TORRANCE*, 1 Ch. Ch. 9.—*CAN.*

p. — —.]—*O'BRIEN v. CHRISTIE* (1897), 30 N. S. R. 145.—*CAN.*

q. — —.]—*Ejectment.*—*HURI DASS KUNDU v. MACGREGOR* (1891), 1 L. R. 18 Cal. 477.—*IND.*

r. — —.]—*Cooke v. CUNNINGHAM, Smith on Receivers*, 170.—*IR.*

t. — —.]—*JAMESON v. FARRER* (1838), 6 Ir. L. Rec. N. S. 161.—*IR.*

a. — —.]—In a suit instituted by a receiver who did not first obtain leave of ct. but who subsequently obtained leave to continue the proceedings:—*Held*: the failure to obtain leave prior to the institution of suit was cured by subsequent leave.—*RUSTOMJEE DHANJIBHAI SETHNA v. J.*—VOL. XXXIX.

*FREDERIC GAEBELE* (1918), 1 L. R. 46 Cal. 352.—*IND.*

b. — —.]—*Injunction.*—*NANGLE v. FINGALL (LORD)* (1824), 1 Hog. 142.—*IR.*

c. — —.]—*MASON v. MASON* (1841), Fl. & K. 429.—*IR.*

d. — —.]—*Attachment.*—*MAHONY v. AYLWARD* (1827), 2 Mol. 401.—*IR.*

e. — —.]—*Appointment of another receiver—Necessity for second receiver to be made party.*]—When a receiver appointed under Code of Civil Procedure, s. 503, institutes civil proceedings & is then replaced by another receiver, it is necessary that the new receiver should be made a party to those proceedings.—*AKULA PARADESI v. DHELI JAGANNADHA ROW* (1905), 1 L. R. 28 Mad. 157.—*IND.*

f. — —.]—*Application for reference as to renewal fines.*]—The receiver is the

proper person to apply to the ct. for a reference as to renewal fines & the execution of a renewal by the parties, but it will be made on the application of the tenant on his offering to pay up the fines.—*MORGELL v. ROYCE* (1831), 2 Hog. 235.—*IR.*

g. — —.]—*Right of receiver to authorise bailiff to make distress.*]—*BIRCH v. OLDIS* (1837), Sau. & Sc. 146.—*IR.*

h. — —.]—*Motion to invest balance.*]—A receiver should not move that his balance may be invested, as such is not properly his motion.—*Re COOPER, COOPER v. COOPER* (1839), 2 I. Eq. R. 155.—*IR.*

k. — —.]—*Motion to let lands—In defendant's actual occupation.*]—*WRIXON v. VIZE* (1843), 5 I. Eq. R. 276.—*IR.*

l. — —.]—*Motion to set aside letting.*]—A motion to set aside a letting made in a cause or matter should not be made



**Sect. 4.—Legal proceedings. Sects. 5 & 6.]**

*Ex p. SACKER* (1888), 22 Q. B. D. 179; 58 L. J. Q. B. 4; 60 L. T. 344; 37 W. R. 204; 5 T. L. R. 112, C. A.

**Annotations:—***As to (1) Consd. Re Macoun*, [1904] 2 K. B. 700. *Reid. Re O'Gorman, Ex p. Bale*, [1899] 2 Q. B. 62; *Rodriguez v. Speyer*, [1919] A. C. 59.

**760.****Appeal against receiving order.]—**

After the death of one of two partners in a firm the surviving partner ordered certain goods in the firm name to be sent to the place of business of the firm. An action was subsequently brought against the firm in respect of the goods, the writ being served on the surviving partner. Judgment was obtained in this action against the firm, & a bkpcy. notice issued & served on the surviving partner on failure to comply with the requirements of which a receiving order was made against the firm. An appeal was brought against the receiving order by the receiver appointed in a partnership action which had been commenced in the C. Div., & by the widow of deceased partner as his extrix. —*Held*: the receiver had no *locus standi* to appeal against the receiving order. —*Re JAMESON & SANDYS, Ex p. CRESSWELL & JAMESON* (1891), 8 Morr. 278, C. A.

**Annotation:—***Mentd. Re Wenham, Ex p. Battams* (1900), 69 L. J. Q. B. 803.

**761. — Debtor's summons.]—**

A receiver in Chancery can issue a debtor's summons in respect of a sum due to him in that character. —*Re LEWIS, Ex p. HARRIS* (1876), 2 Ch. D. 423; 45 L. J. Bcy. 71; 34 L. T. 261; 24 W. R. 851.

**Annotation:—***Expld. Re Sacker, Ex p. Sacker* (1888), 22 Q. B. D. 179. Our attention has been called to three cases. The first was *Ex p. Harris*, upon the headnote of which the registrar appears to have acted. But I think the judgment does not bear out the headnote. The receiver in that case was not merely a receiver, he was the holder of a bill of exchange & therefore, a creditor (LOPES, L.J.).

**— Debenture-holder's action.]—***See COMPANIES, Vol. X.*, pp. 735, 797, 1189, Nos. 4597–4599, 5034, 5035, 8437, 8438.

**— Receiver claimant in interpleader proceedings.]—***See INTERPLEADER, Vol. XXIX.*, p. 474, Nos. 233, 234.

**762. Defence by receiver—Inquiry as to benefit to parties.]—**Upon a motion, that a receiver may be at liberty to defend an ejectment, the parties interested being adult & consenting, a reference was made, whether it was for their benefit. —*ANON.* (1801), 6 Ves. 287; 31 E. R. 1055, L. C.

**Annotations:—***Consd. Aston v. Heron* (1834), 2 My. & K. 390. *Reid. Angel v. Smith* (1804), 9 Ves. 335.

**763. — By foreign creditor in foreign court.]—**

C. was a merchant in London, who had accepted bills of exchange drawn on him by American houses, payable & dishonoured in London. C. took proceedings in liquidation with the consent of his English creditors, & with notice thereof to his American creditors, but without the consent

of these latter, who commenced independent actions against him in the cts. of New York, to recover the amounts due on the bills. The bkpt. had property in America available for the payment of the bills:—*Held*: the Ct. of Bkpcy. would not grant an injunction to restrain the actions in the foreign country, but permission would be given to apply to the registrar for an order that the receiver appointed in the liquidation might defend the actions. —*Re CHAPMAN* (1872), L. R. 15 Eq. 75; 42 L. J. Bcy. 38; 27 L. T. 628; 21 W. R. 104.

**764. Joinder of receiver as party.]—**A receiver has no interest in a suit, & there is no right to join a receiver with another person as co-pltf. in a suit. —*SALTER v. GORDON* (LORD) (undated), cited in 25 L. T. at p. 364, L. C.

**Annotation:—***Reid. Betts v. Thompson* (1871), 25 L. T. 363.

**765. —.]—***LEWIS v. ZOUCHE* (LORD), No. 679, ante.

**766. — Paid receiver appointed by testator—Administration of estate.]—**A person appointed by the will of testator receiver of his real estate, with a salary, is a proper party to a suit for the administration of that estate. —*CONSETT v. BELL* (1842), 1 Y. & C. Ch. Cas. 569; 11 L. J. Ch. 401; 6 Jur. 869; 62 E. R. 1020.

**Annotations:—***Reid. Finden v. Stephens* (1846), 1 Coop. temp. Cott. 318; *Stainton v. Carron Co.* (1854), 18 Beav. 146. *Mentd. Alexander v. Brame* (1855), 25 L. T. O. S. 298.

**767. — Receiver appointed in suit to establish priorities—Subsequent proceedings by incumbrancer not party.]—**In a suit in which the priorities of different incumbrancers on an estate were determined, a receiver had been appointed. A. B., who claimed to be first incumbrancer, not having been made a party to that suit, filed a bill of his own to establish his right:—*Held*: the receiver was not a necessary party, & but for the decision in *Lewis v. Zouche* (LORD), No. 679, ante, he would have been considered an improper party. —*SMITH v. EFFINGHAM* (EARL) (1844), 7 Beav. 357; 3 L. T. O. S. 119; 8 Jur. 479; 49 E. R. 1103.

**768. — Motion against partners of defaulting solicitor—To bring in moneys misapplied—Money paid by receiver.]—**A receiver, who had been appointed for pltf. in a cause, paid large sums of money to the solrs. of pltf., who were also the solrs. of the receiver. Some of these moneys were misappropriated by one of the firm, who absconded:—*Held*: the receiver was a necessary party to a motion that the other partners in the firm should bring the moneys so misapplied into ct. —*CHATER v. MACLEAN, Re LAWRENCE, CROWDY & BOWLBY* (1855), 3 Eq. Rep. 375; 25 L. T. O. S. 77; 1 Jur. N. S. 175; 3 W. R. 261.

**769. Costs of proceedings.]—***IRELAND v. EADE*, No. 741, ante.

by the receiver & the ct. will refuse such motion by the receiver with costs.

—*RICHARDS v. GOOLD* (1844), 7 I. Eq. R. 209.—*IR.*

**m. — To make verifying affidavit.]—**The receiver in the cause is the proper person to present the petition & to make the verifying affidavit for a receiver under 4 & 5 Will. 4, c. 65, upon a tenant's recognisance. —*DALY v. LYNCH* (1846), 9 I. Eq. R. 2.—*IR.*

**n. — Action to recover rent.]—***LLOYD v. BRYNE* (1888), 22 L. R. Ir. 269, 274.—*IR.*

**o. — Compromise of claims.]—**A receiver appointed to wind up a loan society constituted under Loan

Societies Act, compromised claims on promissory notes due to the society by taking a note & an I.O.U. from debtors to the society. The claims compromised were on foot of renewal notes, though validated by Loan Fund Act, 1900, s. 1, were irrecoverable at the time of giving the compromise note & the I.O.U.:—*Held*: the compromises were valid under Charitable Loan Societies Act, 1900, s. 4, & the receiver could recover on the note & I.O.U. in the county ct. —*O'REILLY v. CONNOR, O'REILLY v. ALLEN*, [1904] 2 I. R. 601.—*IR.*

**p. — Motion to court—In matters of difficulty.]—**Where a receiver is appointed by the ct. in an action, &

a difficulty arises in the execution of his duties, he ought, as a general rule, to submit the matter to the party having carriage, who is the proper person to bring it before the ct. The receiver should not himself bring the matter before the ct. except in special circumstances. —*WINDSCHUEGL v. IRISH POLISHES, LTD.*, [1914] 1 I. R. 33.—*IR.*

**q. Defence of proceedings—Receiver should act on his own responsibility.]—**The ct. will not direct the receiver what course he ought to pursue, as to taking defence to ejectments brought against the lands over which he is appointed, but will leave him to act on his own responsibility. —*ANON.* (1830), Hayes, 16.—*IR.*

## SECT. 5.—LEASING OR PURCHASING LAND.

**770. Power to let or lease—Without leave of court.]—**ANON. (undated), cited 2 Maddock's Chancery Practice, 3rd ed. 303.

**771. ———.]—**DURNFORD v. LANE (1806), 2 Maddock's Chancery Practice, 3rd ed., 302.

**772. ——— Receiver of foreclosed estate.]—**A receiver was appointed over testator's real property, & afterwards, by foreclosure, another estate became comprised in the property, & an order was made, that the receiver should include the rents in his future accounts:—*Held*: the receiver, with the approbation of the master, had power, without a special order of ct., to set & let the foreclosed estate under Ord. 64, 1828.—DUFFIELD v. ELWES (1849), 11 Beav. 590; 50 E. R. 945.

**773. ——— Receiver of property abroad—Inquiry as to term allowed.]—**v. LINDSEY, No. 195, ante.

**774. ——— Sub-lease with excepted covenants.]—**B. being in possession of a manufactory held under a college lease for twenty-one years, with general covenants, died; & a suit being instituted, a receiver was appointed, who provisionally agreed with I. to let the premises to him for twenty-one years subject to certain covenants with special exceptions as to repairs & damage by fire. After this agreement the old lease was renewed & in the renewed lease certain new buildings erected by I., & excepted in his covenant to repair, were inserted as part of the parcels. I., wishing to give up possession, proceeded to remove his new buildings, was enjoined from so doing, & eventually a reference was directed to chambers, & the chief clerk certified that a lease could be granted to I. On an appeal from such certificate:—*Held*: the receiver was not in a condition to grant such lease, & the certificate is not correct.—WHITEHEAD v. BENNETT (1857), 5 W. R. 419.

**775. ——— For term of three years—Reference to registrar.]—**An application being made by a receiver of real estate appointed by order of the ct. for general directions as to letting & management of the estate of deceased, & particularly for leave to grant a lease for the term of three years, the ct. ordered the matter to be referred to the registrar for his report.—NEALE v. BAILY, *In the*

*Goods of NEALE* (1875), 39 J. P. 568; 23 W. R. 418.

——.]—*See, also*, LANDLORD & TENANT, Vol. XXX., p. 436, Nos. 965-969.

**Notice to quit.]—***See* LANDLORD & TENANT, Vol. XXXI., pp. 451, 452, 543, Nos. 5982-5984, 6883, 6884.

**776. Purchase by receiver—Without leave of court—Purchasing receiver a trustee.]—**A receiver appointed by the ct. cannot purchase the property of which he is receiver without the sanction of the ct., even where the sale is made, not under a decree in the action, but by a mtgee. selling with leave outside the action.

Deflt. must therefore be treated as having purchased the house on behalf of the beneficiaries. She is entitled to a charge for the purchase-money & 4 per cent. interest, but, subject to that charge, she must hold the house on trust "for pltf's. & herself in equal fourths" (SWINFEN EADY, J.).—NUGENT v. NUGENT, [1907] 2 Ch. 292; 76 L. J. Ch. 614; 97 L. T. 279; 23 T. L. R. 600; *affd.*, [1908] 1 Ch. 546, C. A.

## SECT. 6.—EXPENDITURE ON REPAIRS, ETC.

**777. Whether leave of court necessary.]—**Receiver must pay in his money yearly, & must pay nothing out without an order. He shall pay interest for money kept in his hands even a quarter of a year after it ought to have been paid in. Inquiry directed as to that, though he had passed his accounts, & all parties declared themselves satisfied.—FLETCHER v. DODD (1789), 1 Ves. 85; 30 E. R. 242.

**778. ——— Expenditure incurred without leave—After caution against expenditure.]—**GARLAND v. GARLAND (undated), cited in 6 Ves. at p. 800.

**779. ——— Inquiry whether for benefit of estate.]—**A receiver is not to lay out money in repairs at his own discretion; but under circumstances an inquiry was directed; & the report stating, that the expenditure was for the lasting benefit of the estate, & by the direction of the trustees, the order for the allowance was made.—BLUNT v. CLITHEROW (1802), 6 Ves. 799; 31 E. R. 1315.

**780. ———.]—**Formerly a receiver was not entitled to any allowance for sums of

## PART IV. SECT. 5.

**770 i. Power to let or lease—Without leave of court.]—**BROCK v. McPHAIL (1861), 1 W. & W. (Eq.) 12.—AUS.

**770 ii. ———.]—**COLEMAN v. GLANVILLE (1871), 18 Gr. 42.—CAN.

**770 iii. ———.]—**WILKINS v. LYNCH (1823), 2 Mol. 499.—IR.

**770 iv. ———.]—**A receiver need not apply to the ct. for leave to let, for six months subject to redemption, lands which have been recovered in an ejectment for non-payment of rent.—VINCENT v. GUBBINS (1830), Hayes, 29.—IR.

**770 v. ———.]—**When the premises are of small value, the receiver will be permitted to let, & to distrain from time to time as may be necessary.—DEAN v. DONOVAN (1833), Hayes & Jo. 218.—IR.

**770 vi. ———.]—**SEALY v. MUNN (1839), 1 I. Eq. R. 332.—IR.

**r. Purchase of hotel furniture—Direction of master to bring purchase-money into court.]—**WHITE v. TOMMY (1836), cited in Fl. & K. 196, 224.—IR.

**t. Power to accept renewal of lease.]—**Upon an affidavit by the receiver, stating an application to the head landlord, & disclosing the other

necessary facts: the ct. will, without any reference, make an order for the receiver to obtain a renewal of the lease.—MULHALL v. O'BRIEN (1837), Sau. & Sc. 150.—IR.

**a. Surrender of lease.]—**Upon the affidavit of the receiver setting out the facts fully, & notice to all the parties in the cause, & no objection raised, an order will be made for the receiver to accept a surrender from an insolvent tenant, without putting the parties to the expense of a reference.—DAVIDSON v. ARMSTRONG (1837), Sau. & Sc. 135.—IR.

**b. Impeachment of lease.]—**A motion on the part of the receiver, for a reference as to whether it would be for the benefit of the parties, that proceedings should be taken to impeach certain leases, was refused, it being no part of the receiver's duty to bring forward such a motion.—CLARKE v. FISHER (1839), Sau. & Sc. 684.—IR.

**c. Purchase by receiver of jointure.]—**BODDINGTON v. LANGFORD (1845), 15 I. Ch. R. 558, n.—IR.

**d. Right of receiver—To purchase lands of reversioner—Reversioner owning lands in another right.]—**KING v. O'BRIEN (1866), 15 L. T. 23.—IR.

## PART IV. SECT. 6.

**777 i. Whether leave of court necessary.]—**MAGARTNEY v. WALSH (1830), Hayes, 29, n.—IR.

**777 ii. ———.]—**In a time of general scarcity & distress, the receiver of a minor's estate will be authorised to lay out a sum of money in relieving & employing the poor tenantry.—*Re* JACKSON, JACKSON v. JACKSON (1831), 2 Hog. 238.—IR.

**777 iii. ———.]—**A reference as to whether any sum should be laid out in repairs of certain premises held under the ct. was refused because *prima facie*, a tenant is bound to repair the demised premises & the motion was a voluntary application on the part of the receiver in the cause.—DORSET v. CROSBIE (1837), Sau. & Sc. 683.—IR.

**777 iv. ———.]—**CRAIG v. A.-G., [1926] N. I. 218.—IR.

**e. Sale of trees blown down by storm.]—**CROFTS v. POE (1839), Jo. & Car. 193.—IR.

**f. Receiver appointed over tithe rent-charge—Funds received first applicable in repairs to church.]—**Where a receiver is appointed over tithe rent-charge, the funds realised by him are applicable in the first instance to the

## RECEIVERS.

**Sect. 6.—Expenditure on repairs, etc. Sects. 7, 8 & 9: Sub-sect. 1.]**

money laid out by him on the estate without a previous order. But, according to the present practice, a reference is directed to the master to inquire whether the transaction is for the benefit of the parties interested.—*TEMPEST v. ORD* (1816), 2 Mer. 55; 35 E. R. 861, L. C.

**781. — Inquiry whether repairs reasonable.**—[Receivers & committees not to apply the trust fund in repairs to any considerable extent without a previous application. Upon a receiver's application to be allowed for repairs done, an inquiry was directed, whether the repairs were reasonable.—*A.-G. v. VIGOR* (1805), 11 Ves. 563; 32 E. R. 1207, L. C.

**782. — Authority to propose repairs—Order directing management.**—[The direction in an order appointing a receiver that he shall manage as well as set & let the estate, authorises him to propose to the master, from time to time, to make ordinary repairs to the buildings on the estate.—*THORNHILL v. THORNHILL* (1845), 14 Sim. 600; 60 E. R. 491.

**783. Receiver of rents & profits of real estate—Duty to effect proper repairs.**—[*Re GRAHAM. GRAHAM v. NOAKES*, No. 733, *ante*.

### SECT. 7.—DISCHARGE OF OUTGOINGS.

**784. General rule.**—[A receiver is a term . . . meaning a person who receives rents or other income paying ascertained outgoings, but who does not . . . manage the property in the sense of buying or selling or anything of that kind. . . . The receiver merely took the income, & paid necessary outgoings, & the manager carried on the trade or business in the way I have mentioned (*JESSEL, M.R.*).—*Re MANCHESTER & MILFORD RY. CO., Ex p. CAMBRIAN RY. CO.* (1880), 14 Ch. D. 645; 49 L. J. Ch. 365; 42 L. T. 714, C. A. *Annotations:—Consd. Taylor v. Neate* (1888), 57 L. J. Ch. 1044. *Refid. Re Manchester & Milford Ry.* (1896), 75 L. T. 416; *Re Knott End Railway Act, 1898*, [1901] 2 Ch. 8.

**785. Receiver of mortgaged estate—Interest—Rents not appropriated—Receiver to keep down interest.**—[On a bill by infant tenant in tail, a receiver was appointed, with an order to keep down the interest of incumbrances out of the rents. He kept down accordingly the interest of all but one mtge., the interest of which, belonging to infants, was never applied for, except a small portion for maintenance, the residue of the rents being paid into ct. to the credit of the cause. Tenant in tail, coming of age, suffers a recovery, & resettles the estate, & afterwards dies. The master, by his report, having certified that deceased was not bound, while tenant in tail, to keep down the interest of the incumbrances, & consequently that the rents paid into ct., during that time, belonged to his personal representatives; the party claiming to be entitled to the estate under the settlement petitioned for leave to except to the report, on the following grounds: (a) that in

the case of an infant tenant in tail, the interest of incumbrances ought to be kept down out of the rents; (b) that the direction to the receiver to keep down the interest, amounted to an appropriation of so much of the rents to that purpose; & (c) that deceased by not claiming the fund when of age, showed an intention that it should be so appropriated:—*Held*: (1) the general question could only arise in favour of a remainderman or reversioner, & all such rights were in this case barred by the recovery; (2) the order was not meant to vary the rights of the real & personal representatives, but to prevent the incumbrancers from being prejudiced by the ct. taking the estate into its custody, & also to protect the estate from hostile proceedings on the part of creditors; & did not amount to an appropriation; (3) there was nothing in the circumstances to alter the character of the property, which, consisting of rents paid into ct., & neither applied in payment of interest, nor appropriated for such payment, was personal estate, & to be dealt with as such.—*BERTIE v. ABINGDON (EARL)* (1817), 3 Mer. 560; 36 E. R. 215.

*Annotations:—As to (2) Consd. Re Hoare, Hoare v. Owen*, [1892] 3 Ch. 94. *Generally, Refid. Clarendon v. Barham* (1842), 1 Y. & C. Ch. Cas. 688; *Penney v. Todd* (1878), 26 W. R. 502. *Mentd. Burges v. Mawbey* (1823), Turn. & R. 167.

**786. — Mortgagee's right to account after expiration of term.**—[A mtgee. of a term created for raising portions, & expired, is not entitled to an account of rents & profits in the hands of a receiver, accrued before the expiration of the term.—*GRESLEY v. ADDERLEY, GRESLEY v. HEATHCOTE* (1818), 1 Swan. 573; 36 E. R. 510, L. C.

*Annotations:—Consd. Re Hoare, Hoare v. Owen*, [1892] 3 Ch. 94. *Refid. Clarendon v. Barham* (1842), 1 Y. & C. Ch. Cas. 688; *Hele v. Bexley, Whitfield v. Bowyer, Whitfield v. Knight* (1855), 20 Beav. 127.

**787. —**—[The mtgee. of a life estate, over which a receiver had been appointed, having taken no steps to recover his debt & interest during the lifetime of the tenant for life, was held not to be entitled after his decease to a fund in ct., which had been paid in by the receiver from time to time, after keeping down the interest on a prior mtge. affecting the fee; but the same was held to form part of the personal estate of the tenant for life, the mtgor.—*FLIGHT v. CAMAC* (1856), 25 L. J. Ch. 654; 4 W. R. 661, L. C.

*Annotation:—Refid. Re Hoare, Hoare v. Owen* (1892), 67 L. T. 45.

**788. — Payment not ordered out of infant's estate—Unless master reports due.**—[Ct. will not order the receiver of an infant's estate to keep down the interest of a mtge. debt, unless the master reports it is due.—*ANON.* (1821), 6 Madd. 9; 56 E. R. 991.

**789. Duty to pay head rents.**—[*JACOBS v. VAN BOULEN, Ex p. ROBERTS* (1889), 34 Sol. Jo. 97, D. C.

*Annotation:—Distd. Hand v. Blow*, [1901] 2 Ch. 721.

**790. Insurance premiums.**—[*Re GRAHAM, GRAHAM v. NOAKES*, No. 733, *ante*.

repairs of the church.—*CULLEN v. KILLALOE (DEAN & CHAPTER)* (1852), 2 I. Ch. R. 133.—*IR.*

### PART IV. SECT. 7.

**789 i. Duty to pay head rents.**—[*WALSH v. WALSH* (1839), 1 I. Eq. R. 209.—*IR.*

**g. Application for leave to settle claims, law costs, etc.**—[*Re AMERICAN BRAKE SHOE & FOUNDRY CO. & FINE*

*MARQUETTE RAILROAD CO.* (1912), 11 E. L. R. 455; 14 Exch. C. R. 105.—*CAN.*

**h. Payment of tithe rentcharge.**—[A receiver appointed under 1 & 2 Vict. c. 109, s. 30, to pay the tithe rentcharge, is bound to apply the sums received in the first instance in discharge of the rentcharge & costs, & has nothing to do with the payment of the head rent on which the land may be liable.—*SAUNDERSON v. STONEY*

(1839), 2 I. Eq. R. 153.—*IR.*

**k. Receiver of mortgaged estate—Duty to keep down interest.**—[*HUTCHINS v. HUTCHINS* (1854), 4 I. Ch. R. 221.—*IR.*

**l. Payment of principal.**—[In the absence of special circumstances the ct. will not order payment by a receiver of principal money due on foot of an incumbrance.—*Re KEARNEY'S ESTATE* (1890), 25 L. R. 1r. 89.—*IR.*

## SECT. 8.—RAISING OF MONEY.

**Borrowing in priority to debentures.]**—See COMPANIES, Vol. X., p. 797, Nos. 5031, 5322.

**Defraying commission in mortgage of estate of lunatic.]**—See LUNATICS, Vol. XXXIII., p. 221, No. 1306.

## SECT. 9.—POSSESSION.

## SUB-SECT. 1.—IN GENERAL.

**791. Nature of possession—Receivership of infant's estate.]**—SHARP v. CARTER (1735), 3 P. Wms. 375; 24 E. R. 1108, L. C.

**792. — Receivership in action.]**—SHARP v. CARTER (1735), 3 P. Wms. 375; 24 E. R. 1108, L. C.

**793. — Whether property in custodia legis.]**—Money in the hands of a receiver is not in *custodia legis* in the same way as if it were in the hands of a sequestrator.—*Re HOARE, HOARE v. OWEN*, [1892] 3 Ch. 94; 61 L. J. Ch. 541; 67 L. T. 45; 41 W. R. 105; 36 Sol. Jo. 523.

*Annotations:—*Consd. *Preston v. Tumbridge Wells Opera House*, [1903] 2 Ch. 323; *Re Metropolitan Amalgamated Estate, Fairweather v. The Co.*, [1912] 2 Ch. 497.

**794. Possession preventing operation of Statute of Limitations.]**—The possession of a receiver in a suit is *prima facie* the possession of the parties who obtained his appointment; but the solrs. of the parties who had obtained the appointment of a receiver having written a letter to the solr. of an outside incumbrancer stating that the balances of the rents would be paid to him:—*Held*: the possession of the receiver thereby became the possession of the outside incumbrancer also, for the purpose of preventing the Stat. Limitations from running against him.—*PENNEY v. TODD* (1878), 23 W. R. 502.

**795. Notwithstanding appointment of liquidator.]**—A co. issued debentures constituting a first charge on the whole of their undertaking & property, & empowering the holders, in the event of proceedings for the winding up of the co., to appoint a receiver invested with very ample powers of carrying on the co.'s business, & managing & disposing of their undertaking & property. An order was made for the winding up of the company, & an official liquidator was appointed. The debenture holders, under their powers, appointed a receiver & applied to the ct. that, notwithstanding the appointment of the liquidator, the receiver might be at liberty forthwith to take possession of all the co.'s undertaking & property:—*Held*: the ct. ought not to interfere with the right of the debenture holders to a receiver under their deed; & leave was given to the receiver appointed by them to take possession, notwithstanding the appointment of an official liquidator, but without prejudice to any question as to the powers of the receiver, other than the power to take possession & to sell the property.—*Re HENRY POUND SON & HUTCHINS* (1889), 42 Ch. D. 402; 58 L. J. Ch. 792; 62 L. T. 137; 1 Meg. 363; *sub nom. Re POUND, SON & HUTCHINS, Ex p. DEBENTURE CORPN.*, 38 W. R. 18; 5 T. L. R. 720, C. A.

*Annotations:—*Distd. *Re Stubbs, Barney v. Stubbs*, [1891] 1 Ch. 475. Consd. *Strong v. Carlyle Press*, [1893] 1 Ch. 268. Refd. *British Linen Co. v. South American & Mexican Co.*, [1894] 1 Ch. 108; *Davies v. Thomas*, [1900] 2 Ch. 462.

**796. From when possession dates—Order for appointment.]**—*MORRISON v. SKERNE IRONWORKS CO., LTD.*, No. 689, *ante*.

**797. — — — — —.]**—*PERUVIAN GUANO CO., LTD. v. DREYFUS BROTHERS & CO.*, No. 575, *ante*.

**798. — — — — —.]**—*DEFRIES v. CREED*, No. 881,

**799. From completion of security.]**—An order was made at the suit of an equitable mtgee. "that C., upon his giving security, be appointed receiver," of certain chattels comprised in the security. After this order, but before security had been given, an execution creditor of the mtgor. took the chattels in execution:—*Held*: the receiver was not constituted receiver till he had given security, & the taking the chattels in execution was not a contempt of ct.—*EDWARDS v. EDWARDS* (1876), 2 Ch. D. 291; 45 L. J. Ch. 391; 34 L. T. 472; 24 W. R. 713, C. A.

*Annotations:—*Expd. *Re Watkins, Ex p. Evans* (1879), 13 Ch. D. 252. Distd. *Smart v. Flood* (1883), 49 L. T. 467. Mentd. *Re Walden, Ex p. Odell* (1878), 39 L. T. 333; *Re Roberts, Evans v. Roberts* (1887), 36 Ch. D. 196; *Re Standard Manufacturing Co., Ex p. Lowe* (1891), 39 W. R. 369; *Re Monolithic Building Co., Tacon v. The Co.*, [1915] 1 Ch. 613; *Shears v. Jones*, [1922] 2 Ch. 802.

**800. — — — — —.]**—A receiver was appointed, in an action in the Q. B. Div., to receive the profits & other moneys receivable from the pawnbroker's business carried on by deft. Subsequently to the appointment of the receiver, but before he perfected his security, a writ of *fi. fa.* was issued to the sheriff to recover a sum of money ordered to be paid by deft. in an action in the Ch. Div., in pursuance whereof the sheriff took possession of certain goods & chattels in the possession of deft. including various articles pawned with her & not yet redeemed. The receiver perfected his security, & claimed the redeemable pledges in deft.'s house:—*Held*: deft., as pawnbroker, had a qualified property in the articles pawned with her & not yet redeemed, which was not intercepted by the appointment of a receiver; & therefore the sheriff was entitled to hold such articles on behalf of execution creditor, & to receive money paid to redeem the same.—*Re ROLLASON, ROLLASON v. ROLLASON, HALSE'S CLAIM* (1887), 34 Ch. D. 495; 56 L. J. Ch. 768; 56 L. T. 303; 35 W. R. 607; 3 T. L. R. 326.

**801. — — — — —.]**—*Re ROUNDWOOD COLLIERY CO., LEE v. ROUNDWOOD COLLIERY CO.*, No. 659, *ante*.

**802. — — — — —.]**—(1) In June, 1901, the purchaser under a contract for the sale of land paid a deposit, & was let into possession. The purchaser did not complete, & litigation ensued between him & the vendor. In Aug. 1902, judgment creditor of the purchaser obtained by way of equitable execution, an order appointing himself, upon giving security, receiver of the purchaser's interest in the land under the contract for sale, & at once gave notice of this order to the vendor, but did not perfect his security as receiver until May, 1903. In the meantime in Jan. 1903, the purchaser being unable to complete, the litigation between him & the vendor was, without notice to judgment creditor, compromised by the contract for sale being rescinded, & the vendor paying the purchaser £110, not in part repayment of the deposit, but to give up possession of the property:—*Held*: as judgment creditor did not perfect his security as receiver until after the compromise, he had no claim against the vendor in respect of the £110.

(2) It is rightly conceded that an order appointing a receiver by way of equitable execution creates no charge on personal estate (*FARWELL, J.*).

## PART IV.—SECT. 9, SUB-SECT. 1.

**m. When made—Misappropriation of assets by partner—Right of receiver to follow assets.]**—1 Gr. 484.—*CAN.*

*v. BRENNAN* (1850),

**Sect. 9.—Possession: Sub-sects. 1, 2, 3 & 4.**  
**10: Sub-sects. 1 & 2.]**

(3) The order [for a receiver] operates no doubt as an injunction (FARWELL, J.).—RIDOUT v. FOWLER, [1904] 1 Ch. 658; 73 L. J. Ch. 325; 90 L. T. 147; *affd.*, [1904] 2 Ch. 93, C. A.

**803. — Rents collected by plaintiff's solicitor pending security.]**—A solr. who receives rents in a cause without the authority of the ct. will be ordered to pay them over to the receiver, & cannot retain them on the ground of lien, or set them off against costs alleged to be due to him from pltf.

It was the solr.'s duty to receive the rents only with a view to hand them to the officer of the ct. appointed for the purpose, as soon as the latter had completed his recognisances (LORD LYNDEHURST, C.).—WICKENS v. TOWNSHEND (1830), 1 Russ. & M. 361; 39 E. R. 140, L. C.

**Annotations:—***Apld.* *Re Birt, Birt v. Burt* (1883), 22 Ch. D. 604. **Mentd.** *Mackenzie v. Mackintosh* (1891), 64 L. T. 318.

**804. — — — —.]**—In creditor's administration action, brought against the administrator of an intestate deft. being a solr., & a member of the firm of solrs. who were acting for pltf., after judgment for administration had been pronounced, an order was made on the application of pltf. by his solrs. for the appointment of a specified person, "upon his giving security," to receive the rents of the intestate's real estate, & to collect & get in his outstanding personal estate. On the application for this order deft. made an affidavit stating his approval of the person proposed. Before the receiver had perfected his security some money arising from the sale of furniture belonging to the intestate was received by deft.'s firm, & appropriated by him, & he claimed to retain out of it a debt due to him by the intestate:—*Held*: by reason of the relation in which deft. stood to pltf. as a member of the firm of solrs. who were acting for him, deft. stood in no better position than he would have stood after the receiver had perfected his security, & deft. could not under the circumstances exercise his right of retainer.—*Re BIRT, BIRT v. BURT* (1883), 22 Ch. D. 604; 52 L. J. Ch. 397; 48 L. T. 67; 31 W. R. 334.

**Mortgaged property.]—***See* MORTGAGE, Vol. XXXV., pp. 526-527, Nos. 2577-2584.

**805. Interference with possession—Contempt of court.]**—*DEERIES v. CREED*, No. 881, *post*.

**SUB-SECT. 2.—ORDER FOR POSSESSION.**

**806. Necessity for.]**—*FERGUSON v. TADMAN* (1819), cited in 2 Sim. at p. 401; 57 E. R. 838.

**807. —.]**—Course of proceeding to compel a deft. to deliver possession of estates to a receiver.

First, there must be an order to deliver possession (SHADWELL, V.-C.).—*GREEN v. GREEN* (1829), 2 Sim. 430; 1 Coop. temp. Cott. 206; 57 E. R. 849.

**808. —.]**—The notice required by Ord. 88, May, 1845, does not apply to proceedings for appointing a receiver, but only to his taking possession of the estates when appointed.

The Order is not, that no proceeding shall be taken to appoint a receiver, but that no receiver appointed shall take possession. It assumes that the receiver may be appointed under the decree. If not, why provide that he shall not take possession without notice. That is almost equivalent to an enactment that he may be appointed without notice (LORD COTTENHAM, C.).—*DRESSER v. MORTON* (1847), 2 Ph. 285; 41 E. R. 952.

**809. —.]**—Where an order appointing a receiver does not contain a direction that possession of the property shall be delivered up to the receiver, a party in possession is justified in refusing to deliver it up, & may retain it, paying an occupation rent.—*RANDFIELD v. RANDFIELD* (1859), 7 W. R. 651.

**Annotation:—***Apld.* *Yorkshire Banking Co. v. Mullan* (1887), 35 Ch. D. 125.

**810. When made—In order for appointment.]**—*CROW v. WOOD*, No. 484, *ante*.

**811. — — —.]**—*IND, COOPE & CO. v. MEE*, [1895] W. N. 8.

**Annotation:—***Consd.* *Pratchett v. Drew*, [1924] 1 Ch. 280.

**812. Service of.]**—*FERGUSON v. TADMAN* (1819), cited in 2 Sim. at p. 401; 57 E. R. 838.

**813. Enforcement of—Writ of possession.]**—In Oct. 1899, receivers were appointed in debenture-holder's actions of the undertaking & of the property whatsoever & wheresoever both present & future of an English co., the order following the wording of the debentures. Among the assets of the co. was a debt due to them from a French firm. In Nov. 1899, P. & co., English creditors of the co., took proceedings in France for the purpose of attaching the debt due to the co. from the French firm. Pltfs. in the debenture-holder's actions moved to restrain P. & co. from intercepting, attaching, or taking in execution, or attempting to obtain payment of moneys due to the co. from the French firm, or from otherwise interfering with the receivers:—*Held*: (1) the appointment of the receivers made no difference; for though the ct. can appoint receivers over property out of the jurisdiction, the receiver is not put in possession of foreign property by the mere order of the ct.; something else has to be done, & until what is necessary has been done in accordance with foreign law, any person, not a party to the suit, who takes proceedings in a foreign country is not guilty of contempt either on the ground of interfering with the receivers' possession or otherwise, & for this purpose no distinction can be drawn between a foreigner & a British subject.

(2) The ct. will grant a receiver a writ of possession or a writ of assistance to enable him to recover possession & it will order tenants to attorn to the receiver (COZENS-HARDY, J.).—*Re MAUDSLAY, SONS & FIELD, MAUDSLAY v. MAUDSLAY, SONS & FIELD*, [1900] 1 Ch. 602; 69 L. J. Ch. 347; 82 L. T. 378; 48 W. R. 568; 16 T. L. R. 228; 8 Mans. 38.

**Annotations:—***As to* (1) *Consd.* *Re Derwent Rolling Mills Co., York City & County Banking Co. v. Derwent Rolling Mills Co.* (1904), 21 T. L. R. 81. **Refd.** *New York Life Insce. v. Public Trustee*, [1924] 1 Ch. 15. **Generally, Mentd.** *Bank of Africa v. Cohen*, [1909] 2 Ch. 129; *The Kronprinz Olav*, [1921] P. 52; *Guatemala de Republica v. Nunez*, [1927] 1 K. B. 669.

**814. — — — Time for delivery of possession must be specified in order—R. S. C., Ord. 41, r. 5.]**—

Where an order was made directing delivery of certain premises into the possession of a receiver appointed by the order, but no time within which delivery of possession was to be made was specified in the order, it was held that a writ of possession could not issue because above rule had not been complied with.—*SAVAGE v. BENTLEY* (1904), 90 L. T. 641; 48 Sol. Jo. 507.

**R. S. C., Ord. 47, & g.**  
**EXECUTION, Vol. XXI., pp. 585-590, Nos. 1632-1700.**

**815. — Writ of assistance.]**—*Re MAUDSLAY, SONS & FIELD, MAUDSLAY v. MAUDSLAY, SONS & FIELD*, No. 813, *ante*.

— — —.]—*See, generally, EXECUTION, Vol. XXI., pp. 584, 585, Nos. 1619-1631.*



**816. — Attachment.]**—An auctioneer, acting on the instructions of the personal representatives of testator, sold & received the purchase-money of certain property forming part of the estate. Afterwards, not having paid the money to the representatives, he also failed to obey an order of the ct. to pay it to a receiver appointed in an action to administer the estate:—*Held*: he was a person acting in a fiduciary capacity, within Debtors Act, 1869 (c. 62), s. 4 (3), & was liable to attachment for disobedience to the order.—(*ROWTHER v. ELGOOD* (1887), 34 Ch. D. 691; 56 L. J. Ch. 416; 56 L. T. 415; 35 W. R. 369; 3 T. L. R. 355, C. A.)

*Annotations*:—*Refd.* *Preston v. Etherington* (1887), 57 L. J. Ch. 176; *Re Gent, Gent-Davis v. Harris* (1888), 40 Ch. D. 190; *Re Smith, Hands v. Andrews*, [1893] 2 Ch. 1; *Re Cotton, Ex p. Cooke* (1913), 108 L. T. 310. *Mentd.* *Piddock v. Burt*, [1894] 1 Ch. 343.

—*See* R. S. C., Ord. 42, rr. 7, 24, & generally, *CONTEMPT OF COURT*, Vol. XVI., pp. 6 *et seq.*

#### SUB-SECT. 3.—RIGHTS OF PARTIES INTER SE.

**817. Not affected.]**—*SKIP v. HARWOOD*, No. 882, *post.*

**818. —.]**—A receiver may be granted on motion, notwithstanding the reservation of all matters under the decree, for this is a mere provisional order.

This would have been a mere provisional order & would not have affected the question between the parties (*LORD HARDWICKE, C.*).—*COOKE v. GWYN & WIGHT* (1748), 3 Atk. 689; 26 E. R. 1196, L. C.

**819. Property held for party ultimately entitled.]**—*PORTMAN v. MILL*, No. 588, *ante.*

**820. Property held for parties obtaining appointment.]**—*PENNEY v. TODD*, No. 794, *ante.*

**821. Exercise of statutory powers.—By trustees of settled estates.]**—Where the legal estate in realty was vested in trustees during the life of R., during which period the trustees were to pay R. an annuity & accumulate the surplus rents, & a receiver of the rents & profits of such real estate had been appointed by the ct.:—*Held*: the trustees were persons who could apply to the ct. by petition under the Settled Estates Act, 1877 (c. 18), s. 23, to exercise the powers conferred by that Act as being persons entitled to the possession or to the receipt of the rents & profits of settled estates for an estate for life. *Semble*: the appointment of a receiver does not take away the power of a tenant for life to grant leases under Settled Estates Act, 1877 (c. 18), s. 56.—*VINE v. RALEIGH* (1883), 24 Ch. D. 238; 49 L. T. 440; 31 W. R. 855.

**822. — By tenant for life.]**—*VINE v. RALEIGH*, No. 821, *ante.*

#### SUB-SECT. 4.—RIGHTS OF THIRD PARTIES.

*See* Part III., Sect. 5, sub-sect. 2, *ante.*

#### SECT. 10.—RIGHT TO RENT.

##### SUB-SECT. 1.—OCCUPATION RENT.

**823. Liability of occupier to pay.]**—Deft., who is the owner & occupier of an estate subject to a charge which this suit seeks to enforce, will be compelled to attorn to a receiver, & a reference

will be directed to the master to fix an occupation rent.—*EVERETT v. BELDING* (1852), 22 L. J. Ch. 75; 20 L. T. O. S. 136; 1 W. R. 44.

**824. —.]**—*RANDFIELD v. RANDFIELD*, No. 809, *ante.*

**825. —.]**—Pltf. in an ejectment action which was set down for trial, but had been stayed until another action affecting the same property & brought by deft. in ejectment against pltf. & others, should be ready for trial, moved for a receiver & for attornment to him. Deft. in ejectment set up a defence that in equity pltf. was only a sub-mtgee. The evidence in support of the motion showed that the property was wasting, & that, even if pltf. was only sub-mtgee., it was insufficient for the original mtge. upon it; & this evidence was not met to the satisfaction of the ct.:—*Held*: under the circumstances it was just & convenient within Jud. Act, 1873 (c. 66), s. 25 (8), now to appoint a receiver; & an order was made accordingly, unless deft. elected within four days to pay an occupation rent into ct., the amount to be settled in chambers.—*REAL & PERSONAL ADVANCE CO. v. M'CARTHY & SMITH* (1879), 40 L. T. 878; 27 W. R. 706.

**826. —.]**—*Re BURCHNALL, WALKER v. LACEY* (1893), 38 Sol. Jo. 59.

**827. — From date of order for receiver.]**—The ct. will not, by an interlocutory order before the hearing, charge a party who is in possession of an estate, & who has been ordered to pay an occupation rent to the receiver, with the amount of such rent for any period antecedent to the date of the order for fixing the rent & appointing the receiver.—*LLOYD v. MASON* (1837), 2 My. & Cr. 487; 40 E. R. 725, L. C.

**828. — —.]**—*Re BURCHNALL, WALKER v. LACEY* (1893), 38 Sol. Jo. 59.

**829. — From demand.—Mortgagor in rightful possession.]**—In a foreclosure action against mtgor. in possession an order having been made for the appointment of a receiver & for the tenants to attorn & pay their rents in arrear & growing rents to such receiver:—*Held*: the possession of the mtgor. being rightful he was liable to pay an occupation rent from the date of demand by the receiver only & not from the date of the order appointing the receiver.—*YORKSHIRE BANKING CO. v. MULLAN* (1887), 35 Ch. D. 125; 56 L. J. Ch. 562; 56 L. T. 399; 35 W. R. 593.

**830. Amount of rent.—By whom settled.—Master in chambers.]**—*EVERETT v. BELDING*, No. 823, *ante.*

**831. — — —.]**—*REAL & PERSONAL ADVANCE CO. v. M'CARTHY & SMITH*, No. 825, *ante.*

**832. — — —.]**—*Re BURCHNALL, WALKER v. LACEY* (1893), 38 Sol. Jo. 59.

**833. Attornment to receiver.]**—*EVERETT v. BELDING*, No. 823, *ante.*

**834. —.]**—*Re BURCHNALL, WALKER v. LACEY* (1893), 38 Sol. Jo. 59.

**835. —.]**—*Re MAUDSLAY, SONS & FIELD, MAUDSLAY v. MAUDSLAY, SONS & FIELD*, No. 813, *ante.*

— Of tenant of parties.]—*See* Sub-sect. 2, *post.*

##### SUB-SECT. 2.—AS AGAINST TENANTS OF PARTIES.

**836. Attornment.—Order to attorn to receiver.]**—*A.-G. v. TANCRED* (undated), 2 Dick. 798; 21 E. R. 481.

#### PART IV. SECT. 10, SUB-SECT. 2.

**836 i. Attornment.—Order to attorn to receiver.]**—*MULLARKEY v. DONOHUE* (1885), 16 L. R. Ir. 365.—*IR.*

*Sect. 10.—Right to rent: Sub-sects. 2 & 3. Part V.*  
*Sect. 1: Sub-sects. 1 & 2. Sect. 2.]*

**837.** ———.]—*Crow v. Wood*, No. 484, ante.

**838.** ———.]—*Re MAUDSLAY, SONS & Co.*, *1883*, No. 813, ante.

**839.** ——— **Motion to compel—Whether tenant necessary party.**—Where a receiver is appointed, & the person in possession refused to attorn, or to deliver up possession, it not appearing in what right the possession is held, the proper course is to move that the person may attorn. It is not necessary, in the first instance, to make such person a party to the suit.—*REID v. MIDDLETON* (1823), *Turn. & R.* 455; 37 *E. R.* 1176, *L. C.*

**840.** ——— **Costs.**—On a motion that tenants may attorn & pay their arrears of rent to a receiver, it is not the course of the ct. to order the tenants to pay the costs of the motion.—*HOBHOUSE v. HOLLCOMBE* (1848), 2 *De G. & Sm.* 208; 64 *E. R.* 92.

**841.** ———.]—A motion is made that a tenant may attorn to the receiver or stand committed, & notice being only served on the tenant's solr. at his request, stands over, & he does not subsequently appear, but personal service is effected.—*Held*: the receiver is not entitled to his costs.—*WILLIAMS v. WILLIAMS* (1863), 11 *W. R.* 635.

— **Effect of attornment—Not attornment to owner.**—*See* *DISTRESS*, Vol. XVIII., p. 278, No. 148.

**842. Arrears of rent.**—The ct. will not make an order upon a tenant to pay rent in arrear, though a receiver of the estate has been appointed.—*SAMUEL v.* ——— (1823), 1 *L. J. O. S. Ch.* 90.

**843.** ———.]—(1) A party, who is appointed by the ct. as consignee of the produce of a plantation in the West Indies, is not entitled to claim the proceeds arising from the sale of produce from that plantation, which was severed from it, & shipped for this country before the time of his appointment as consignee.

(2) A receiver, when appointed by the ct., is entitled to receive rents then in arrear.—*CODRINGTON v. JOHNSTONE* (1838), 1 *Beav.* 520; 8 *L. J. Ch.* 282; 48 *E. R.* 1042.

**844.** ———.]—A tenant who had not attorned to the receiver ordered to pay him the arrears of rent in fourteen days & the costs of the application.—*HOBSON v. SHERWOOD* (1854), 19 *Beav.* 575; 52 *E. R.* 474.

**845.** ——— **Rights of garnishor.**—*PENNINGTON v. CAVE* (1917), 144 *L. T. Jo.* 112, *D. C.*

**Right of receiver to distrain.**—*See* Part IV., Sect. 3, *post*.

**846. Pending execution of deeds of sale.**—*QUIN v. HOLLAND*, No. 473, ante.

SUB-SECT. 3.—RIGHTS OF THIRD PARTIES.  
*See* Part III., Sect. 5, sub-sect. 3, ante.

## Part V.—Liabilities.

### SECT. 1.—LOSSES AND IMPROPER PAYMENTS.

#### SUB-SECT. 1.—IN GENERAL.

##### **847. Default of receiver.—Improper payments.]**

—(1) A receiver appointed by this ct. shall not make good a loss which was not owing to any default of his, for where the rents he has in his hands are large, it is a necessary precaution to remit it by bills to London rather than in specie. Where a receiver pays money to a tradesman, & takes bills for the sum, if he was in credit at the time, though he fails soon after, it shall not affect the receiver.

(2) If the money had been lost by his wilful default, & placing it in what he knew at the time

to be an improper hand, the ct. will oblige a receiver to answer the loss out of his own pocket.—*KNIGHT v. PLIMMOUTH (LORD)* (1747), 3 *Atk.* 480; 1 *Dick.* 120; 26 *E. R.* 1076, *L. C.*

*Annotations:—As to (1) Consd. Re Parsons, Ex p. Belchier, Ex p. Parsons* (1754), *Amb.* 218. *Apld. Rowth v. Howell* (1797), 3 *Ves.* 563. *Distd. Wren v. Kirton* (1805), 11 *Ves.* 377. *Consd. The Prima Vera* (1808), *Edw.* 23. *Distd. Salway v. Salway* (1831), 2 *Russ. & M.* 215. *Refd. Raw v. Cutton* (1832), 9 *Bing.* 96. *As to (2) Refd. Raw v. Cutton* (1832), 9 *Bing.* 96.

**848.** ———.]—A receiver held liable for money which he had paid to pltf.'s solr., directing him to pay it into ct., which was never done.—*DELFOSSE v. CRAWSLAY* (1834), 4 *L. J. Ch.* 32, *L. C.*

**842 i. Arrears of rent.**—A reference as to the propriety of abating the rents of the tenants, & forgiving their arrears, etc., was refused on the motion of the receiver alone, but afterwards granted upon the concurrence of the parties.—*EVANS v. TAYLOR* (1837), *Sau. & Sc.* 681.—*IR.*

**842 ii.** ———.]—*MOORE v. DONEGAL (MARQUIS)* (1847), 11 *L. Eq. R.* 364; *affd.*, 11 *L. Eq. R.* 412.—*IR.*

**842 iii.** ———.]—A receiver is entitled to all arrears of rent unpaid, when the order of reference for the appointment of a receiver is made.—*HOLLIER v. HEDGES* (1853), 1 *L. Ch. R.* 370.—*IR.*

**842 iv.** ———.]—*RUSSELL v. RUSSELL* (1853), 2 *L. Ch. R.* 574.—*IR.*

**842 v.** ———.]—*Re ANNALY*, (*CRAWFORD v. ANNALY* (1891), 27 *L. R. Ir.* 323.—*IR.*

**n. Attachment.**—Rent which fell due to a receiver, before the purchaser was put into possession, can only be

recovered by attachment.—*PONSONBY v. PONSONBY* (1825), 1 *Hog.* 321.—*IR.*

**o.** ———.]—*BRENNAN v. KENNY* (1852), 2 *L. Ch. R.* 579.—*IR.*

**p. Necessity for personal demand for rent.**—If a tenant has once paid rent to a receiver, a personal demand of rent subsequently accrued due is unnecessary, & a demand by letter or by a third person is sufficient.—*BROWN v. O'CONNOR* (1828), 2 *Hog.* 77.—*IR.*

**q. Whether rights of lessee interfered with—On appointment of receiver.**—*MOIR v. BLACKER* (1890), 26 *L. R. Ir.* 375.—*IR.*

#### PART V. SECT. 1, SUB-SECT. 1.

**r. General rule.**—There are several ways in which a receiver may be charged: one is where he has actually received money; another where he might have received it, if he had used due diligence.—*BEYTAGH v. CON-CANNON* (1847), 10 *L. Eq. R.* 351.—*IR.*

**847 i. Default of receiver.—Improper payments.**—A receiver is only justified in paying the person named in the order for payment, or on a power of attorney duly executed by him. Express authority for payment in any other mode must be shown by the receiver, on peril of being disallowed credit therefore in vouching his accounts.—*Re BROWN'S ESTATE, Ex p. STERLING* (1886), 19 *L. R. Ir.* 132.—*IR.*

**t. Liability to attachment.**—An attachment lies against a receiver as an officer of the ct. for default in compliance with an order to pay into ct. money found to be in his hands as receiver.—*FAWKES v. GRIFFIN* (1898), 18 *P. R.* 48.—*CAN.*

**a. Liability of receiver for loss of interest—By non-deposit in bank of moneys collected.**—The receiver of a town municipality will be responsible to the corp'n. for loss of interest occasioned by his neglect to deposit



**849. — Payment to solicitor of creditors.]**

—The appointment of a receiver by way of equitable execution set out the names of creditors, the sums due to each, & the order in which they were to be paid. Instead of paying creditors personally, the receiver handed the sums which from time to time came into his hands to the solr., who had conducted the action for pltf., & who had obtained the receiving order on behalf of pltf. & the rest of creditors. These sums did not reach the hands of creditors:—*Held*: the receiver could not take credit for the sums so paid to the solr. His duty was to pay creditors himself. Having failed to do so, he must recoup them by bringing the whole amount received into ct.—*IND, COOPE & Co. v. KIDD* (1894), 63 L. J. Q. B. 726; 10 T. L. R. 603; 38 Sol. Jo. 651; 10 R. 528; *sub nom. IND, COOPE & Co., LTD. v. KIDD, LITCHESON & Co. v. SAME*, 71 L. T. 203, D. C.

**850. — Loss through avoidance of duties—Duties delegated to solicitor in cause.]—A.**

was appointed receiver, but the solr., in the cause alone acted & paid over the rents to the tenant for life. An incumbrancer compelled the receiver to pay the same amount into ct., & after payment of his claim, there remained a surplus, which was paid to the tenant for life:—*Held*: A. could not, on petition, obtain repayment by the tenant for life or out of the estates.—*GURDEN v. BADCOCK* (1842), 6 Beav. 157; 12 L. J. Ch. 62; 49 E. R. 785.

**851. — Loss through failure to invest as ordered.]—A** receiver during the infancy of pltf., who had no guardian, was directed to place out the surplus of the rents, when the same should amount to a competent sum, on govt. or other securities, having never placed it out at interest, according to the decree, the ct. directed that he should pay interest at 4 per cent. from the time of the decree, till the infant came of age.—*HICKS v. HICKS* (1744), 3 Atk. 274; 26 E. R. 960, J. C.

**852. — Rents lost through neglect—Receivership improperly assumed.]—A** solr. in a cause, who improperly assumes the character of receiver, is responsible for rents lost by his neglect.—*WOOD v. WOOD* (1828), 4 Russ. 558; 38 E. R. 916, J. C.

**Receivers on behalf of debenture-holders.]—See COMPANIES, Vol. X., pp. 792-793. 797-798, 802-803, Nos. 4974-1975, 4980, 4982, 4983, 5037-5042, 5085-5091.**

**SUB-SECT. 2.—LOSS THROUGH FAILURE OF BANK.**

**853. Whether liable.]—A.** is appointed receiver of an estate, out of which he is to pay B. an annuity quarterly. A. acquaints B. who his banker was, & that the money should be deposited in his hands for his use. B. names another, being a person he used to deal with, & orders him to pay it into his hands, which A. did several times; but

the money payable on Michaelmas being paid on July before, on Michaelmas Day the banker stopped payment, & became a bkpt.:—*Held*: the loss should fall wholly on the receiver, B. having no right to the money before that day.—*SHAFTS-BURY'S (LADY) CASE* (1720), Prec. Ch. 558; 2 Eq. Cas. Abr. 691, pl. 2; 24 E. R. 250, L. C.

**854. —.]—Receiver** not liable by the failure of testator's banker at Bristol, with whom the receiver, when going to London to pass his accounts, deposited the money, intending to draw for it.—*ROWTH v. HOWELL* (1797), 3 Ves. 565; 30 E. R. 1157, L. C.

**855. —.]—Ordinarily,** a receiver depositing moneys with a banker is not liable to make good any loss which may be occasioned by the banker's insolvency; *scus*, if he be in default for not passing his accounts, & paying the balance within the proper time; or if, not being in default, he derive a profit by the acceptance of interest on the balances which are from time to time in the hands of the banker.—*DREVER v. MAUDESLEY* (1844), 13 L. J. Ch. 433; 3 L. T. O. S. 157; 8 Jur. 547, L. C.

**856. Money paid to own account.]—Receiver** charged with a loss by the failure of the banker; having made the remittances to his own credit & use; & not to a separate account for the trust.—*WREN v. KIRTON* (1805), 11 Ves. 377; 32 E. R. 1133, L. C.

*Annotations:—Consd. Massey v. Banner* (1820), 1 Jac. & W. 241. *Apld. White v. Baugh* (1835), 3 Cl. & Fin. 41. *Refd. Macdonnell v. Harding* (1834), 7 Sim. 178.

**857. Money paid to surety's account—Control relinquished.]—A** receiver paid into a banking house the sums he received, to the joint account of his sureties, under an arrangement with them, that all drafts upon the sums so paid in should be written by one of the sureties, & signed by himself. The bankers having subsequently failed:—*Held*: the receiver was liable for the loss.—*SALWAY v. SATWAY* (1831), 2 Russ. & M. 215; 9 L. J. O. S. Ch. 152; 39 E. R. 376, L. C.; *affd. sub nom. WHITE v. BAUGH* (1835), 3 Cl. & Fin. 11, H. L.

*Annotation:—Mentd. Macdaggart v. Watson* (1835), 3 Cl. & Fin. 525.

**858. Interest drawn on deposits.]—DREVER v. MAUDESLEY, No. 855, ante.**

**859. Default in passing accounts—Payment of balance within proper time.]—DREVER v. MAUDESLEY, No. 855, ante.**

**SECT. 2.—RENT, RATES, AND TAXES.**

**860. Liability for rent—To purchaser—Sale by order of court.]—An** order was made in an administration action directing the freehold property of testator to be put up for sale by auction. The conditions of sale provided that each purchaser should pay the balance of his purchase-money,

in the bank moneys collected by him for the town.—*EMERSON TOWN v. WRIGHT* (1907), 5 W. L. R. 365.—**CAN.**

**b. Position of receiver.]—Is compare with executor or trustee.]—A** receiver occupies a position towards an estate in his hands different from that of an exor. or trustee; the latter, not acting through or under directions of the ct., do not & cannot, in ordinary circumstances, create obligations binding on the estate in favour of creditors.—*MOHARI BIBI v. SHYAMA BIBI* (1903), 1 L. R. 30 Calc. 937; 7 C. W. N. 799.—**IND.**

**c. On whom loss falls.]—When** a loss arises from the default of a receiver, appointed by the ct., the estate must

bear it.—*HUTCHINSON v. MASSARENE (LORD)* (1811), 2 Ball & B. 49, 55.—**IR.**

**d. —.]—The purchaser** under a decree must bear any loss that accrued after the sale was confirmed & before he entered into possession, if it would have fallen on him had he been in possession; but the funds in the cause must make good to him any loss occasioned by the misconduct or mismanagement of the parties or the receiver.—*D'ESPAIRD v. HEAD* (1827), 1 Hog. 486.—**IR.**

**e. Default of receiver—License for hotel & restaurant not obtained.]—Re HOY'S ESTATE** (1892), 31 L. R. Ir. 66.—**IR.**

**PART V. SECT. 1, SUB-SECT. 2.**

**8531. Whether liable.]—BROWNING v. RYAN** (1902), 8 Nfld. L. R. 553.—**NFLD.**

**PART V. SECT. 2.**

**f. Liability for rent.]—HAMILTON v. LIGHTON** (1810), 2 Mol. 499.—**IR.**

**g. —.]—A** receiver must make good to the estate any rents which have been lost by his neglect.—*Re SKERRETS* (1829), 2 Hog. 192.—**IR.**

**h. —.]—A** receiver only accounts for the rent which fell due before the sale day immediately preceding the time of his accounting.—*BETAGH v. CONCANNON* (1830), 2 Hog. 205.—**IR.**

**k. —.]—The** primary duty of a

**Sect. 2.—Rent, rates, and taxes. Sects. 3, 4 & 5.**  
**Part VI. Sects. 1 & 2.]**

after deducting the amount paid as deposit, into ct. to the credit of the action, on or before July 21, 1885, or, in default should be charged interest at the rate of 5 per cent. *per annum* until payment of the purchase-money; & that upon such payment the purchaser should be entitled to possession, or to the rents & profits, as from July 21, 1885. The purchaser of one of the lots having refused to comply with this condition, a summons was taken out, upon which an order was made that, on or before Apr. 7, 1886, or subsequently within seven days after service of the order, the purchaser should lodge in ct. the balance of the purchase-money, after deducting the deposit, with interest thereon from July 21, 1885. The purchaser then asked that after the direction for the payment of the money less the deposit, there should be inserted in the order the words "less the rents & profits of the premises from July 21, 1885." He contended that there ought to be no difference made between a completion of a purchase, where the property was being sold under the direction of the ct., & when it was being sold outside the ct. in the usual way, the course then adopted invariably being to allow the rents & profits to be set off against the interest, the balance being either paid or received by the purchaser:—*Held*: a receiver being in possession of the rents, a direction must be inserted in the order that the receiver should pay the rents to the purchaser.—*Re SMITH, DAY v. BONAINI* (1886), 55 L. T. 329, C. A.

**861. — 'House occupied by receiver.]—D.** by will devised certain real estate to S. for life, with remainders over, & bequeathed his household furniture & farming stock to her absolutely.

Before his death testator had entered into contracts, binding on him at his death, for the erection of cottages on the land given to S. for life, & on certain other land which he had bought in his lifetime, & which had by his directions been conveyed as a gift to the use of S. for life, with remainder to her daughter. His exors. stopped the completion of the contracts making terms with the builders. An action having been brought for the administration of D.'s estate, a receiver & manager of his estate & farm was appointed, & he resided for some time in the house devised to S. for life, & used the furniture given to her & also used the farming stock in carrying on testator's farm:—*Held*: S. was entitled to an inquiry what compensation ought to be paid her for the use & occupation of the house, & the injury done by user to the furniture & stock.—*Re DAY, SPRAKE v. DAY*, [1898] 2 Ch. 510; 79 L. T. 436; 47 W. R. 238; *sub nom. Re DAY, DAY v. SPRAKE*, 67 L. J. Ch. 619.

receiver over a leasehold is out of the sub-rents to discharge the head rent, & this he is bound to do without an order of the ct. for the purpose.—*BALFE v. BLAKE* (1850), 1 L. Ch. R. 365.—**IR.**

**1. —.]—SAUNDERSON v. STONEY** (1839), 2 L. Eq. R. 153.—**IR.**

**m. —.]—ELLIOTT v. ELLIOTT** (1849), 1 Ir. Jur. 165.—**IR.**

**n. —.]—A receiver appointed over a renewable leasehold, subject to a heavy head rent, & to the payment of the rentcharge, will be required to pay the rentcharge in priority to the head rent.—MADDEN v. WILSON** (1854), 6 Ir. Jur. 129.—**IR.**

**PART V. SECT. 3.**

**863 i. Proceedings caused by default**

*of receiver.]—The receiver ought not to interfere in any litigation between the parties, & if he does so he will not be allowed the costs of a motion for such a purpose.—COMYN v. SMITH* (1823), 1 Hog. 81.—**IR.**

**o. Right of plaintiff to costs.—Out of moneys in hands of receiver.—When restraining order applied for.]—CROKER v. CORLEY** (1824), 2 Mol. 469.—**IR.**

**p. —.]—Re MONTGOMERY** (1828), 1 Mol. 419.—**IR.**

**q. —.]—A receiver will be ordered to pay the costs of an attachment which he issued erroneously, though acting *bona fide*, & only in mistake.—ROWAN v. DAWSON** (1831), 4 Ir. L. Rec. 1st ser. 126.—**IR.**

**r. Order for costs made against receiver.—Death of plaintiff.—Right of**

*—.]—See, also, COMPANIES, Vol. X., pp. 797, 798, Nos. 5037–5039; LANDLORD & TENANT, Vol. XXXI., pp. 241, 270, Nos. 3802, 4147.*

**862. Liability for rates.—Water rate.]—METROPOLITAN WATER BOARD v. BROOKS, No. 603, ante.**

*—.]—See, also, COMPANIES, Vol. X., p. 798, 800, 803, Nos. 5040, 5041, 5063, 5064, 5094.*

**Liability for taxes.]—See COMPANIES, Vol. X., p. 798, No. 5042.**

**SECT. 3.—COSTS IN LEGAL PROCEEDINGS.**

**863. Proceedings caused by default of receiver.]—BETTIE v. ABINGDON (LORD), No. 1030, post**

**864. —.]—GENERAL SHARE & TRUST CO. v. WETLEY BRICK & POTTERY CO., No. 658, ante.**

**865. — Libel published in conduct of business.]—Re STUBBS, STUBBS v. MARSH, No. 871, post.**

**866. — Appointment irregularly procured.]—Re LLOYD, ALLEN v. LLOYD, No. 159, ante.**

**867. — Withholding information.]—On** Apr. 6, 1887, an order was made directing the receiver appointed in an action for dissolution of partnership, which had been transferred to the Bkpy. Ct., to pay over the balance of moneys in his hands to the solr. in the action in respect of his costs. At this time the ct. was not informed that a claim had been previously made to the receiver by the landlord of bkpt.'s premises for rent due which had not been paid. The order of Apr. 6 had not been complied with, & the receiver now applied to the ct. for directions:—*Held*: the order of Apr. 6 must be modified to the extent that the amount due to the landlord should be paid to him, & the remainder to the solr., & the receiver, being the person responsible for the difficulty which had arisen, must be personally liable for costs.—*Re SUFFIELD & WATTS, Ex p. BROWN* (1888), 36 W. R. 303; *reversd.* on other grounds, 20 Q. B. D. 693, C. A.

*Annotations:—Refd. Re Humphreys, Ex p. Lloyd-George* (1898), 67 L. J. Q. B. 412. *Mentd. Re Crown Bank* (1890), 44 Ch. D. 634; *Cole v. Eley* (1894), 38 Sol. Jo. 533; *Preston Banking Co. v. Allsup*, [1895] 1 Ch. 141; *Re Wood, Ex p. Fanshawe*, [1897] 1 Q. B. 314; *Re Deakin, Ex p. Daniell*, [1900] 2 Q. B. 489.

**868. — Right to appeal.]—An appeal will lie against an order on an official receiver or liquidator to pay costs personally for such an order is equivalent to a declaration that such official has been guilty of misconduct.—Re RAYNES PARK GOLF CLUB, LTD., Ex p. OFFICIAL RECEIVER, [1899] 1 Q. B. 961; 68 L. J. Q. B. 529; 80 L. T. 388; 47 W. R. 496; 43 Sol. Jo. 383; 6 Mans. 316.**

*Annotations:—Consd. Re Tweddle*, [1910] 2 K. B. 67; *Re Williams, Ex p. Official Receiver* (1913), 82 L. J. K. B. 459.

**Deposit of security for costs.—Returned to receiver on termination of proceedings.—Receiver for de-**

*executor to costs.]—BETAGH v. CONCANON, HUGHES v. CONCANON* (1836), L. & G. temp. Plunk. 355.—**IR.**

**t. —.]—A defaulting receiver cannot have the costs of his proceedings, until the sum found to be due from him, with interest, shall have been paid in.—M'BRIDE'S EXECUTORS v. CLARKE (1839), 1 L. Eq. R. 203.—**IR.****

**a. —.]—Re DOOLAN (1843), 2 Con. & Law. 232.—**IR.****

**b. —.]—CONYERS v. CROSBIE (1844), 6 L. Eq. R. 657.—**IR.****

**c. —.]—If receiver suffer costs to accrue, which ought to have been prevented, he will be made to pay them.—COOK v. SHARMAN (1844), 8 L. Eq. R. 515.—**IR.****

**d. — Costs of judgment obtained**

benture holders.]—See COMPANIES, Vol. IX., p. 683, No. 4562.

869. Recovery of costs.]—IRELAND v. EADE, No. 741, *ante*.

#### SECT. 4.—CONTRACTS.

Receiver for debenture-holders.]—See COMPANIES, Vol. X., pp. 792, 793, 800, 802, 803, Nos. 4974-4980, 5067-5070, 5085-5093.

Receiver acting as executor.]—See EXECUTOR, Vol. XXIV., p. 740, No. 7682.

#### SECT. 5.—TORTS.

870. Trespass—In execution of duties.]—Plea, that the close was the close & freehold of P. & that

deft. as her servant & by her command committed the trespasses, etc. Replication, traversing the command of P. P. was a minor & a ward in Ch.:—*Held*: the plea was supported by proof that deft. was the general agent of P. & receiver of her rents, appointed by the Ct. of Ch., & he did the acts complained of in the execution of his authority as such general agent.—EWER v. JONES (1846), 9 Q. B. 623; 16 L. J. Q. B. 42; 10 Jur. 965; 115 E. R. 1412; *sub nom.* URE v. JONES, 8 L. T. O. S. 135.

871. Libel—Publication in gazette managed by receivers.]—The receivers in an administration suit, in conducting a gazette belonging to testator, published a libel, & the chief clerk, acting under the direction of the judge, certified the amount of damages payable for the injury.—*Re* STUBBS, STUBBS v. MARSH (1866), 15 L. T. 312.

## Part VI.—Interference with Receiver.

#### SECT. 1.—IN GENERAL.

872. Whether allowed.]—HOULDITCH v. WALLACE, No. 631, *ante*.

873. ———.]—An interference with the receivers in possession by a person claiming to be entitled to the property, will not be permitted after such person has been warned of the position in which the property is placed, nor will the intention of taking ulterior proceedings to assert his title to the property prevent him from paying the costs of an application to commit him for contempt.—FRIPP v. BRIDGWATER & TAUNTON CANAL CO. (1855), 3 W. R. 356.

874. ——— Without leave of court.]—A receiver had been appointed of the lunatic's estate, but that would not have prevented the mtgee. from asserting his legal right, if any, on a proper application made to the ct. for that purpose.

When property is in or under the control of this ct., an application must be made to the ct. by a party claiming right to it. The ct. will not allow an entry, or an ejectment, or any other act of interference, with its receiver; & there is no injustice in that, because the party might at any time come to ask leave of the ct. to pursue or establish his remedy against the property, & the ct. seldom refuses leave to do so by an ejectment, or other action (LORD TRURO, C.).—*Re* FRANKS (1851), 16 L. T. O. S. 529, L. C.

875. ———.]—DEFRIES v. CREED, No. 881, *post*.

876. ——— Interference by one receiver with another.]—WARD v. SWIFT, No. 902, *post*.

877. ——— Order appointing receiver improvidently made.]—RUSSELL v. EAST ANGLIAN RY. CO., No. 691, *ante*.

878. ———.]—AMES v. BIRKENHEAD DOCKS TRUSTEES, No. 638, *ante*.

879. Right of mortgagor to distrain.]—A mtgee. appointed a receiver of the income of the mtged. property under Conveyancing & Law Property Act, 1881 (c. 41), & gave notice of the appointment to the mtgor. The mtgor. nevertheless distrained for rent becoming due after the

appointment of the receiver. The mtgor. claimed to distrain for the protection of the property, alleging that the receiver had been negligent in collecting the rent:—*Held*: an injunction must be granted to restrain the mtgor. from interfering with the receiver, or receiving the rent.

*Seem*: even if the mtgor. had proved negligence on the part of the receiver, distraining for the rent was not the proper mode of protecting his interests.—BAYLY v. WENT (1881), 51 L. T. 764.

880. Liability for loss occasioned.]—A firm of merchants having filed a petition for liquidation, & a receiver having been appointed, the solr. of debtors induced the receiver not to interfere with the continuance of the business by debtors, & undertook to indemnify him:—*Held*: such interference with its officer was a contempt of the Ct. of Bkcy., & such ct. could declare the party who had interfered, for such interference, & not because he was the solr., liable for the loss sustained by the estate through the continuance of the business, & direct an account for the purpose of ascertaining such loss, but that the account ought to be taken against the receiver jointly with the solr.—*Re* PLANT, *Ex p.* HAYWARD (1881), 45 L. T. 326, C. A.

Right of landlord to distrain.]—See DISTRESS, Vol. XVIII., pp. 277, 278, Nos. 141-147.

Effect of bankruptcy.]—See BANKRUPTCY, Vol. V., pp. 956, 957, Nos. 7838, 7846.

Injunction against interference with receiver of partnership.]—See PARTNERSHIP, Vol. XXXVI., p. 490, No. 1550.

Rights of third parties—Leave of court to exercise.]—See Part III., Sect. 5, sub-sect. 1, *ante*.

#### SECT. 2.—CONTEMPT OF COURT.

881. General rule.]—In a suit for dissolution of a partnership a decree was taken by consent for such dissolution, with the usual reference to appoint some fit person receiver to get in the

against immediate lessor.]—DE MONTMORENCY v. PRATT (1849), 12 L. Eq. R. 411.—*IR*.

#### PART VI. SECT. 1.

874 i. Whether allowed—Without leave of court.]—DUNNE v. CHANDRA KISHORE

(1902), 1 L. R. 30 Calc. 593; 7 C. W. N. 390.—*IND*.

e. What amounts to—Whether attachment.]—*Seem*: a proceeding by way of attachment is an interference with the possession of the receiver.—JOGENDRA NATH GOSSAIN v. DEBENDRA

NATH GOSSAIN (1899), 1 L. R. 26 Calc. 127.—*IND*.

#### PART VI. SECT. 2.

881 i. General rule.]—The conditional order for the appointment of a receiver in chancery renders every party to the

**Sect. 2.—Contempt of court. Sect. 3: Sub-sects. 1 & 2.]**

assets, manage the business, & sell it as a going concern. Creditor brought an action before decree, & obtained judgment after; & before the receiver was actually appointed by order, sued out execution, & the sheriff seized under the *fi. fa.* On motion to commit the sheriff for interfering with the receiver:—*Held*: the seizure was not a contempt of ct.

Where the ct. has taken possession of property by its receiver, it defends that possession, & acts with a high hand, & with an assertion of authority somewhat strong & severe, & proceeds upon this footing: If any one, be he who he may, disturbs the possession of the receiver, it holds that person as guilty of contempt of ct., & liable to be imprisoned, upon the principle that the officer of the ct., being in possession, he has disturbed that possession without the leave of the ct. (*KINDERSLEY, V.-C.*).

Till the receiver was actually appointed he was not in possession as receiver, & it appears to me, therefore, that creditor had a full right to proceed to execution (*KINDERSLEY, V.-C.*).—*DEFRIES v. REED* (1865), 6 New Rep. 17; 31 L. J. Ch. 607; 12 L. T. 262; 11 Jur. N. S. 360; 13 W. R. 632.

*Annotation*:—*Reid, Edwards v. Edwards* (1876), 45 L. J. Ch. 391.

**882. Interference amounting to contempt—Interference before order drawn up—By person cognisant of order.]**—(1) A commission of bkpcy. cannot supersede a decree of this ct. for a receiver, which is a discretionary power exercised by this ct. with as great utility as any sort of authority that belongs to them, & is provisional only, & does not affect the right of parties.

(2) Where a person . . . attends a cause to which he is debt. the whole time of the hearing, & had notice of the decree by being present when it was pronounced in ct., if he does any act that is a contravention to the decree, he is guilty of a contempt, & punishable for it notwithstanding the decretal order is not drawn up (*LORD HARDWICKE, C.*).—*SKIP v. HARWOOD* (1747), 3 Atk. 564; 2 Swan. 586; 26 E. R. 1125, L. C.

*Annotations*:—*As to* (1) *Reid, Aitchison v. Lee, Re Royal British Bank* (1856), 3 Drew. 637. *As to* (2) *Consd. Pengree v. Jonas* (1787), 2 Bro. C. C. 141. *Generally, Reid, Johnson v. Evans* (1844), 7 Man. & G. 240; *Aspinall v. L. & N. W. Ry.* (1853), 11 Har. 325.

**883. — Interference with receiver of property abroad.]**—A ct. of equity in England will appoint a receiver over estates in Ireland; & although the ct. has no power of sending its officers to Ireland, to enforce its orders & decrees, yet if they be resisted by a party to the cause, such party will be guilty of contempt.—*LANGFORD v. LANGFORD* (1835), 5 L. J. Ch. 60.

**884. — Refusal to deliver property to receiver—Property held under conveyance—Persons conveying not parties to motion.]**—Motion by a receiver under the ct. to commit a party for

contempt, on the ground of an encroachment on the lands, & a refusal to deliver up the part encroached on, refused, the party absolutely denying the allegation of encroachment.

The comrs., having bought the property in 1809, sold, in 1812, to C. all he holds, as he says, but only a part, as is said by the other side. But, on looking to the map, there can be no reasonable doubt that all C. holds he obtained under the conveyance, whether there be an encroachment or not; he is not therefore guilty of any contempt of this ct. The receiver is no doubt to be protected, & his possession is not to be disturbed; but, the sale taking place in 1812, is it reasonable to come here now & that, too, against Mr. C. & not against the comrs.? I think not. Let the motion be dismissed with costs (*per CUR.*).—*HOPKINSON v. POWIS* (1844), 3 L. T. O. S. 319.

**885. — Bought from party undertaking to retain possession—For value & without notice.]**—*Re HUMPHREY, DENSHAM v. RAY* (1920), 55 L. Jo. 52; 149 L. T. Jo. 86.

**886. — Receiver improperly appointed.]**—*HAWKINS v. GATHERCOLE*, No. 508, *post*.

**887. — Interference before receiver's security perfected.]**—*EDWARDS v. EDWARDS*, No. 799, *ante*.

**888. — Interference before order made.]**—*DEFRIES v. CREED*, No. 881, *ante*.

**889. — Execution against unpaid capital—Companies Clauses Act, 1845 (c. 16), s. 36.]**—The appointment of a receiver of the undertaking of a railway co. under Railway Companies Act, 1867 (c. 127), s. 4, does not affect the right of a judgment creditor to issue execution against unpaid capital under above sect. Unpaid capital is not receivable by a receiver appointed under Railway Companies Act, 1867 (c. 127), s. 4. H. was appointed receiver & manager of the West Lancashire Railway Co. He held shares in the co., which purported to be fully paid up, but which had in fact been issued at a discount, & on which it was alleged that moneys still remained due. The Rock Life Assurance Co. held debenture stock of the railway co. on which interest was in arrear. The suing officer of the insurance co., having recovered judgment in respect of the arrears, gave notice of an application to the Q. B. Div., under above sect., for leave to issue execution against H., to the extent of the moneys remaining due in respect of his shares. The railway co. thereupon moved to commit him for contempt of ct. in instituting proceedings against the receiver without the leave of the ct. for the purpose of obtaining moneys alleged to be receivable by him in his capacity of receiver:—*Held*: resp. was within his rights, & the motion must be dismissed with costs.—*Re WEST LANCASHIRE RY. CO.* (1890), 63 L. T. 56; 6 T. L. R. 425.

**890. — Soliciting firm's customers—By person formerly trustee & receiver.]**—G. was trustee of the

cause or matter, who interferes with the rents payable to the receiver, guilty of a contempt.—*DELLACHEROUS v. —* (1850), 2 Ir. Jur. 89.—*IR.*

**1. Interference amounting to contempt—Violence offered or threatened.]**—Where violence has been offered or threatened to a receiver, the ct. will protect its officer by attachment.—*FITZPATRICK v. EYRE* (1824), 1 Hog. 171.—*IR.*

**g. — Remedy for—Whether attachment.]**—The ct. will not grant an attachment against persons who interfere with the possession of the receiver, where the record is in an imperfect

state.—*O'DONOVAN v. THOMSON* (1829), 2 Ir. L. Rec. 1st ser. 378.—*IR.*

**h. — — — — —.]**—When a receiver is impeded or threatened in the execution of his duty, it may be ground for an attachment, but the mere rescue of goods distrained by the receiver it seems is not sufficient, as the receiver may proceed at common law, or under the statutes for the rescue.—*COURTNEY v. COURTNEY* (1838), 6 Ir. L. Rec. N. S. 170.—*IR.*

**k. — — — — —.]**—*MAHON v. MAHON* (1840), Fl. & K. 18.—*IR.*

**l. — — — — —.]**—*Whether order absolute granted in first instance.]*—

When a resp. interferes with rents over which a receiver had been appointed, the ct. will, upon notice to the party, grant in the first instance an absolute order for an attachment.—*THOMAS v. THOMAS* (1842), Fl. & K. 621.—*IR.*

**m. — — — — —.]**—The ct. will not attach tenants who have rescued distresses for rent, but will leave the receiver to his remedy at law.—*FORD v. HEAD* (1845), 8 I. Eq. R. 371.—*IR.*

**n. — — — — —.]**—When a receiver has been appointed, an attachment will be granted against a party who, having had notice of that appointment, interferes with the rents before

business of S. & co. under the will of testator in the action. He was appointed receiver & manager of the business by the ct., & subsequently removed. His beneficial interest had passed to his trustee in bkpey. G. having entered the employment of another firm, solicited the customers of S. & co. Motion to commit G. for contempt of court & for an injunction:—*Held*: G. was acting within his legal rights in soliciting the customers of S. & co.—*Re GENT, GENT-Davis v. HARRIS* (1892), 40 W. R. 267; 8 T. L. R. 246; 36 Sol. Jo. 216.

**891. — Removal of parts of railway line—By contractor having claim for repairs.**—*WHADCOAT v. SHROPSHIRE RYS. Co.* (1893), 9 T. L. R. 589; 37 Sol. Jo. 650.

**892. — Distress by landlord.**—*BILSBOROUGH v. HARVEY* (1893), 37 Sol. Jo. 784.

**893. — Proceedings in foreign court—By person not party to action.**—*Re MAUDSLAY, SONS & FIELD, MAUDSLAY v. MAUDSLAY, SONS & FIELD*, No. 813, *ante*.

**894. — Disparaging remarks on receiver—In prospectus of new company—Formed to carry on business of old company.**—*BOWKER v. EMPRESS CLUB, LTD.* (1909), *Times*, Nov. 27.

**895. — Libel on business carried on by receiver—Before completion of terms of appointment.**—*Re BECHSTEIN'S BUSINESS TRUSTS, BERRIDGE v. BECHSTEIN, LONDON COUNTY & WESTMINSTER BANK v. BECHSTEIN*, No. 908, *post*.

—*See* BANKRUPTCY, Vol. IV., p. 16, Nos. 61, 62; PARTNERSHIP, Vol. XXXVI., pp. 489, 490, Nos. 1546–1557.

### SECT. 3.—REMEDIES FOR INTERFERENCE.

#### SUB-SECT. 1.—IN GENERAL.

**896. Whether injunction granted.**—Order made in a summary way to restrain a person not a party to the suit to whom the receiver had let a farm, part of the estates in the cause, from removing hay, straw, etc., therefrom.—*WALTON v. JOHNSON* (1848), 15 Sim. 352; 12 Jur. 299 60 E. R. 654.

**897. —**—*Charity property, over which a receiver had been appointed included a chapel where service had for a long time been performed by the nominee of the master of the charity. The churchwarden of the adjoining parish alleged that the chapel was the parish church, & an ecclesiastical benefice distinct from the charity, & in order to try the right, prevented the master's nominee, who had no licence from the bishop from performing the service. An injunction was granted to restrain him from further interference with liberty to take legal proceedings to establish his claim.*—*A-G. v. ST. CROSS HOSPITAL* (1854) 18 Beav. 601; 24 L. J. Ch. 148; 2 W. R. 512

the order has been served upon the tenants.—*M'ALPINE v. ST. GEORGE* (1819), 1 Ir. Jur. 129.—**IR.**

**o. — Expiration of estate over which receiver appointed.**—Where the estate expires over which a receiver has been appointed, the reversioner or remainderman may enter, notwithstanding the continuance of the receiver, & is not to be considered as committing any contempt by so doing.—*BRITTON v. M'DONNELL* (1843), 5 L. Eq. R. 275.—**IR.**

#### PART VI. SECT. 3, SUB-SECT. 1.

**896 i. Whether injunction granted.**—The ct. will, upon motion by the receiver, grant a conditional order to restrain tenants under the ct. from committing waste, without a bill being

2 E. R. 236; *subsequent proceedings* (1856), De G. M. & G. 38, L. JJ.

**898. —**—*Re DERWENT ROLLING MILLS CO., LTD., YORK CITY & COUNTY BANKING CO., LTD. v. DERWENT ROLLING MILLS CO., LTD.* (1905), 21 T. L. R. 701, C. A.

*Annotation*:—*Mentd.* *Cohen v. Rothfield*, [1919] 1 K. B. 410.

—**Restraint of proceedings against receiver.**—*See* Sect. 4, *post*.

#### SUB-SECT. 2.—COMMITTAL.

**899. General rule.**—*SKIP v. HARWOOD*, No. 882, *nte*.

**900. —**—*DEFRIES v. CREED*, No. 881, *ante*.

**901. Practice—Order absolute in first instance—Forcible possession from receiver.**—Where a person takes forcible possession of estates over which a receiver has been appointed, an order for his commitment will be made without an order nisi being previously obtained.—*BROAD v. WICKHAM* (1831), 4 Sim. 511; 58 E. R. 191.

**902. — Object merely to compel payment of costs—Order not made.**—(1) A receiver appointed to get in property, part of which he finds in the possession of another receiver, ought not to take proceedings to deprive the latter of such possession, without the authority of the ct.

(2) A motion ought not to be made for committal on the ground of a disturbance of the possession of a receiver, when the object of the motion is merely to compel the payment of costs, after the question with respect to the possession of the property has been settled.—*WARD v. SWIFT* (1848), 6 Hare, 309; 12 Jur. 173; 67 E. R. 1184.

**903. — Procedure by motion.**—The proper course to pursue, to obtain protection for a receiver, is not to file a separate bill for the purpose, but to apply to the ct. in the cause or matter in which the receiver has been appointed, to commit the persons who interfere with him. Moreover, in any such suit the receiver is neither a necessary nor a proper party.—*AITCHISON v. LEE, Re ROYAL BRITISH BANK* (1856), 3 Drew. 637; 28 L. T. O. S. 115; 3 Jur. N. S. 95; 5 W. R. 57; 61 E. R. 1016; *on appeal, sub nom. Re ROYAL BRITISH BANK, Ex p. MARCUS* (1857), 26 L. J. Bey. 15, L. JJ.

*Annotations*:—*Mentd.* *Re Royal British Bank, Ex p. Shore* (1857), 5 W. R. 191; *Re London & Eastern Banking Corp'n.* (1858), 2 De G. & J. 484.

**904. — Evidence in support—Affidavit founded on information & belief.**—Upon the application of the receiver in a cause supported by an affidavit founded on information & belief only, the ct. ordered deft., who had obtained payment of certain debts adversely to the receiver, within one week to make an affidavit of the amounts as received by him, &

filed for the purpose.—*CRONIN v. M'CARTHY* (1810), Fl. & K. 49.—**IR.**

**896 ii. —**—*Injunction granted, upon the application of the receiver, to restrain one tenant of the estate from quarrying upon a private road, part of the premises, which was common to all the tenants.*—*DORMAN v. DORMAN* (1841), 3 L. Eq. R. 385.—**IR.**

**896 iii. —**—*Re BRABAZON* (1852), 4 Ir. Jur. 100.—**IR.**

**p. Sale for taxes—Whether sale held void—Lack of knowledge of purchaser & bailiff—Of receiver's appointment.**—Chattels in the possession of a receiver were seized & sold by a bailiff for municipal taxes. Neither the bailiff nor the purchaser was aware until after the completion of the sale

that the property was in the receiver's possession, or was intended to be affected by the order appointing the receiver; & both had been informed to the contrary in good faith by the person in charge. The ct. refused to hold the sale void.—*GIBSON v. LOVELL* (1872), 19 Gr. 197.—**CAN.**

**q. Contents of prayer for injunction—Account & subpoena to answer—In order that costs fall on defaulting parties.**—*COOKE v. COOKE* (1826), 1 Hog. 182.—**IR.**

#### PART VI. SECT. 3, SUB-SECT. 2.

**903 i. Practice—Procedure by motion.**—*ANON.* (1824), 2 Mol. 499.—**IR.**

**903 ii. —**—*NIGHTEN v. KELLY* (1838), 1 Crav. & D. 234.—**IR.**

*Sect. 3.—Remedies for interference: Sub-sect. 2. Sect. 4. Part VII. Sect. 1: Sub-sects. 1 & 2, A. & B.]*

to pay same to the receiver, or in default to be committed.—*PARKER v. POCKOCK* (1874), 30 L. T. 458.

**905. Costs of motion—Articles removed from property in receiver's possession—Undertaking to restore.**—*WHADCOAT v. SHROPSHIRE RYS. CO.* (1893), 9 T. L. R. 589; 37 Sol. Jo. 650.

**906. — Distress by landlord—Landlord ordered to withdraw.**—*BILSBOROUGH v. HARVEY* (1893), 37 Sol. Jo. 784.

**907. — Application for committal not pressed.**—*BOWKER v. EMPRESS CLUB, LTD.* (1909), *Times*, Nov. 27.

**908. Undertaking to cease interference.**—The English assistant manager of alien enemies' business of manufacturing pianos, having been appointed receiver & manager of such business, on his undertaking (a) not to remit goods or money forming assets of the business to any hostile country, & (b) to endeavour to obtain a licence from the Crown for the continuance of deft.'s business, moved to commit the president of the Piano Manufacturers' Association for writing a letter describing it as an unpatriotic act to do business with such firm, before such receiver had in fact obtained such licence, which he subsequently obtained, but after he had petitioned to obtain it:—*Held*: the president must give an undertaking not to circulate in future any such letters during the continuance of the licence.—*Re BECHSTEIN'S BUSINESS TRUSTS, BERRIDGE v. BECHSTEIN, LONDON COUNTY & WESTMINSTER BANK v. BECHSTEIN* (1914), 58 Sol. Jo. 864.

**Interference with receiver of partnership.**—See *PARTNERSHIP*, Vol. XXXVI., pp. 489, 490, Nos. 1546, 1555-1557.

#### SECT. 4.—PROCEEDINGS AGAINST RECEIVER— RESTRAINT BY INJUNCTION.

**909. Proceedings by receiver appointed to get in property—Against receiver found in possession.**—*WARD v. SWIFT*, No. 902, *ante*.

**910. Proceedings in another court.**—The trustees of a party who had appointed deft. her receiver of rents & money, countermanded his authority, & brought an action for the money received by him. The ct. refused to stay the proceedings for a period of sixteen days, in order to enable deft. to apply to the Chancellor for an injunction to stop the action.—*VANDERSTEGEN v. WITHAM* (1840), 6 M. & W. 457; 9 L. J. Ex. 174; 1 Jur. 367; 151 E. R. 491.

**911. — — —**—Any proceeding against a receiver appointed by the Ct. of Bkpcy. in respect of acts done *virtute officii* must be taken in that ct. Where, therefore, a liquidating debtor had commenced an action in the High Ct. of Justice against the receiver in the liquidation, claiming damages done to his goods when in the possession of the receiver:—*Held*: debtor will be personally

restrained from instituting any proceedings against the receiver elsewhere than in bkpcy.—*Re POTTER, Ex p. DAY* (1883), 48 L. T. 912.

**912. — — —**—The M. co. were proprietors of a theatre & were supplied by the E. co. with certain electric plant under a hire-purchase agreement. The M. co. made default in payment of an instalment, & the E. co. brought an action in the K. B. Div. against the M. co. for the whole amount of the purchase-money. Pending this action a debenture-holders' action was brought in the Ch. Div. & a receiver appointed. He went into possession & for a time carried on the theatre, using for that purpose the electric plant. Subsequently the E. co. obtained judgment in their action. After this the receiver sold the theatre to a new co., who purchased part of the plant, & the rest was returned to the E. co. The E. co. claimed rent from the receiver for the use of their plant while he was carrying on the theatre, but refused to bring in a claim in the debenture-holders' action, & threatened proceedings in the K. B. Div. The receiver applied by summons for an order that the E. co. should bring in their claim in the debenture-holders' action within seven days & be restrained from taking any proceedings to enforce it:—*Held*: this was a dispute as to the conduct of an officer of the ct. in respect of which the ct. was entitled to claim exclusive jurisdiction, & it would not allow its own officer to be sued in another ct. in respect of acts done in discharge of his office.—*Re MAIDSTONE PALACE OF VARIETIES, LTD., BLAIR v. MAIDSTONE PALACE OF VARIETIES, LTD.*, [1909] 2 Ch. 283; 78 L. J. Ch. 739; 101 L. T. 458; 16 Mans. 261.

**913. — Founded on denial of receiver's authority—Or defect in order appointing him.**—If the misconduct of an officer of the ct., [here a receiver] in executing its orders, becomes the subject of civil proceedings before another tribunal, the ct., in its discretion, may either itself take cognisance of the complaint, or may leave the matter to be dealt with upon such proceedings; but wherever the title to redress against such officer is founded on a denial of his authority, or on an alleged defect in the order which he has executed, the ct., which alone is competent to decide upon the validity of its own orders is bound to interpose by injunction, & assume exclusive jurisdiction over the matter of complaint.—*ASTON v. HERON* (1834), 2 My. & K. 390; 3 L. J. Ch. 194; 39 E. R. 993, L. C.

*Annotations*:—*Apld.* *Walker v. Micklethwait* (1860), 1 Drew. & Sm. 43; *Re Maidstone Palace of Varieties, Blair v. Maidstone Palace of Varieties*, [1909] 2 Ch. 283. *Reid.* *Re Martin, Ex p. Turner* (1844), 3 L. T. O. S. 20, 127. *Mentd.* *Morison v. Morison* (1846), 15 L. J. Ch. 439.

**914. — Discretion of court in which receiver appointed.**—*ASTON v. HERON*, No. 913, *ante*.

**915. — Indictment against agents of receiver—Taking forcible possession under leave of court.**—The agents of the receiver in a cause, acting under leave of the ct., took forcible possession of a house occupied by a servant of one of defts. An order was made restraining that deft. from prosecuting an indictment against the agents.—*TURNER v. TURNER* (1851), 15 Jur. 218.

#### PART VI. SECT. 4.

**f. What actions restrained—Whether actions against property or funds—In hands of receiver.**—*MORASH v. WADE* (1892), 40 N. S. R. 622.—*CAN.*

**t. When granted—Contractor quarrying stones for public works.**—The ct. will not, upon a receiver's application, grant an injunction to restrain a contractor under 6 & 7 Will.

4, c. 116, s. 162, from quarrying, on the lands over which apppt. is receiver, stones for the public works.—*O'KELLY v. GREGG* (1838), Jo. & Car. 76.—*IR.*



## Part VII.—Remuneration, Allowances, and Indemnity.

### SECT. 1.—REMUNERATION.

#### SUB-SECT. 1.—IN GENERAL.

See R. S. C., Ord. 50, r. 16.

**Receiver of company.**—See COMPANIES, Vol. X., pp. 792, 803, Nos. 4978, 5095, 5096.

**Receiver of partnership.**—See PARTNERSHIP, Vol. XXXVI., p. 489, Nos. 1536-1539.

**916. Trustee acting as receiver—No remuneration allowed.**—*SYKES v. HASTINGS*, No. 162, *ante*.

**917. ————**—*SUTTON v. JONES, JONES v. SUTTON*, No. 163, *ante*.

**918. ————**—A trustee appointed upon his own undertaking in a suit to act as receiver of the trust property is not under ordinary circumstances entitled to a salary as receiver.—*PILKINGTON v. BAKER, BRITISH MUTUAL INVESTMENT CO. v. PILKINGTON* (1876), 24 W. R. 234.

*Annotation*:—*Refd. Itc Bignell, Bignell v. Chapman*, [1892] 1 Ch. 59.

**919. ———— Unless by order of court.**—*BRODIE v. BARRY* (1811), 3 Mer. 695; 36 E. R. 267, L. C.

*Annotation*:—*Refd. Browell v. Reid* (1842), 6 Jur. 530.

**920. ————**—*MORISON v. MORISON*, No. 210, *ante*.

**921. ————**—*NEWPORT v. BURY*, No. 165, *ante*.

**922. ————**—*There is no inflexible rule that a trustee can only be appointed receiver on the terms of his having no remuneration.*

Testator directed his trustees, of whom S. was one, to allow S. to manage his business during her own life, subject to a power in the co-trustees to stop the carrying on the business if carried on unsuccessfully for any period of eighteen months. S., while she managed the business was to have one-fourth of the net profits, but not to an amount exceeding £800 a year. Shortly after testator's death a judgment for administration was made, which directed inquiries as to the business, & appointed S. receiver & manager of it as from testator's death, without giving security, not saying anything as to remuneration. About fifteen months after testator's death S. resigned her office, having been in bad health for several months, & shortly afterwards died. The business had fallen off, & the profits for the whole period of her receivership were very trifling. Her exors. in passing her accounts asked for remuneration to be allowed her at the rate of £800 a year. The residuary legatee insisted that there ought to be no remuneration. The judge allowed £500, being at the rate of £400 a year. The residuary legatee appealed:—*Held*: although the ct. does not usually appoint a trustee to be receiver except on the terms of his having no remuneration, there is no inflexible rule that he shall not receive remuneration, & the fact of the judgment not mentioning remuneration did not amount to a decision that there should not be any, the judge therefore had a discretion, & no ground was shown to induce the Ct. of Appeal to interfere with his exercise of it.—*Re BIGNELL, BIGNELL v. CHAPMAN*, [1892] 1 Ch. 59; 61 L. J. Ch. 334; 66 L. T. 36; 40 W. R. 305, C. A.

**Executor acting as receiver.**—See EXECUTORS, Vol. XXIV., p. 601, No. 6323.

#### PART VII. SECT. 1, SUB-SECT. 1.

**a. Who determines fees or remuneration.**—A receiver being an officer of the ct., the ct. only is to determine his fees or remuneration; & the parties

cannot by any act of theirs add to, or derogate from, the functions of the ct. without its authority.—*PROKASH CHANDRA SARKAR v. ADLAM* (1903). 1 L. R. 30 Calc. 636.—**IND.**

**Receiver appointed by mortgagor & mortgagee.**—See MORTGAGE, Vol. XXXV., p. 529, No. 2607.

**Receiver handing assets to trustee in bankruptcy—Lien for charges.**—See BANKRUPTCY, Vol. IV., p. 230, No. 2159.

**Receiver succeeded by mortgagee in possession.**—See MORTGAGE, Vol. XXXV., p. 401, No. 1421.

#### SUB-SECT. 2.—PAYMENT OF REMUNERATION.

##### A. When Allowed.

**923. When receipts accounted for.**—(1) A receiver was appointed by the ct., upon the representation of pltf.'s solr. that the receiver had entered into the usual recognisances, which he had not in fact done. A loss occurred, in consequence of the receiver's liability being only in the nature of a simple contract debt. The solr. was, at the instance of a debt., made personally liable for the loss occasioned by his neglect:—*Held*: the country solr. was liable, though the representations were made by his London agents.

(2) Of course I cannot allow the receiver his salary until he has accounted for everything he has to pay & cannot allow him any costs incurred during his lifetime, but costs properly incurred by the exors. of the receiver since his death may properly be allowed (ROMILLY, M.R.).—*Re WARD* (1862), 31 Beav. 1; 54 E. R. 1037.

*Annotations*:—*Generally, Mentd. Itc Dangar's Trusts* (1889), 41 Ch. D. 178; *Marsh v. Joseph*, [1897] 1 Ch. 213; *Re Coolgardie Goldfields, Itc Cannon & Morten*, [1900] 1 Ch. 475.

—*See, also*, Nos. 932-931, *post*.

**924. On taxation of costs—By taxing master—If order for taxation so directs.**—Under an order directing the taxing master to tax pltf.'s costs of an action, including the remuneration of the receivers & managers appointed in the action, & to certify the balance after deducting certain costs of debts., the taxing master has no power to make a separate certificate for the costs alone.—*SILKSTONE & HAIGH MOOR COAL CO. v. EDEY*, [1901] 2 Ch. 652; 70 L. J. Ch. 771; 85 L. T. 300; 45 Sol. Jo. 705, C. A.

##### B. Method of Payment.

**925. Commission—How calculated.**—Where the sums received by a receiver of the personal estate of a testator, consisted partly of gross sums paid by legatees, & annuitants for principal money, & partly of interest & of dividends of stock, & of rents of leasehold houses, some difficult to be collected & others not:—*Held*: the master was wrong in allowing the receiver a commission of 5 per cent. on the gross amount of the various sums so received by him.

There is no general & universal rule that 5 per cent. should be allowed for the receipt of the rents & profits, the allowance in cases of extraordinary difficulty being increased; & in cases of extraordinary facility, diminished. Generally speaking, in the greater number of instances, they were allowed £2 10s. per cent. for receiving gross sums; but, on many occasions, that is reduced to £1 10s. per cent. It therefore appears, that the

#### PART VII. SECT. 1, SUB-SECT. 2.—B.

**b. Whether any fixed rate of remuneration allowed.**—There does not appear to be any fixed rate at which a receiver & manager should be paid.—



**Sect. 1.—Remuneration: Sub-sect. 2, B.; sub-sect. 3.**  
**Sect. 2: Sub-sects. 1 & 2.]**

masters, as indeed they ought, considered what was fit & proper to be allowed, having regard to the trouble & the degree of responsibility of the receiver.—*DAY v. CROFT* (1840), 2 Beav. 488; 9 L. J. Ch. 287; 4 Jur. 429; 48 E. R. 1271.

**Annotations:—***Consd. Re Ashlin, Ex p. Glyn* (1854), 23 L. T. O. S. 15. *Refd. Prior v. Bagster* (1887), 57 L. T. 760.

**926. — On net profits.]**—In the case of a receiver who was managing a business under the direction of the ct. a special order was made that, instead of the further fee payable under the Order of Jan. 30, 1857, in respect of his gross receipts, the fee should be payable in respect of the net profits; & a sum previously paid in respect of gross receipts was directed to be allowed in the payment of subsequent fees.—*BUCKMASTER v. BUCKMASTER* (1859), 28 L. J. Ch. 564; 34 L. T. O. S. 36; 7 W. R. 678, L. J. & L. J.J.

**927. Salary.]**—Receiver of the personal estate of testator, not passing his accounts & paying in the balances, deprived of his salary; & charged with interest, not upon each sum from the time it was received, according to the strict rule, applicable to a receiver of annual rents & profits, but as an exor. would be charged.

The claim of the salary ought not to exclude him from an allowance in respect of any actual trouble & expenditure which he can make out (LORD ELDON, C.).—*POTTS v. LEIGHTON* (1808), 15 Ves. 273; 33 E. R. 758, L. C.

**Annotation:—***Apld. Harris v. Sleep*, [1897] 2 Ch. 80.

**Quantum meruit.—Receiver winding up partnership business.]—**See PARTNERSHIP, Vol. XXXVI., p. 489, No. 1539.

**928. Allowances for extraordinary services.]—***POTTS v. LEIGHTON*, No. 927, *ante*.

**929. —.]—Held:** an item of £1 6s. 8d. for drawing out for the receiver a scheme of the property & the holding of the tenants, was properly disallowed, & it ought to have been struck out from the bill of costs. Such an item would even be disallowed to a receiver, who is remunerated by a percentage.—*Re CATLIN* (1854), 18 Beav. 508; 52 E. R. 200.

**Annotations:—***Refd. McIntosh v. G. W. Ry.* (1865), 13 L. T. 84. *Mentd. In the Estate of Ogilvie, Ogilvie v. Massey*, [1910] P. 243; *Re Morgan*, [1915] 1 Ch. 182; *Slingsby v. A.-G.*, [1918] P. 236.

**930. — Where properly undertaken.]**—A receiver is not entitled to be reimbursed the expenses of journeys to, & residence in, a foreign country, for the purpose of prosecuting proceedings for the recovery of property belonging to the estate, before the tribunals of that country, unless he hath the express sanction & authority of the ct. for such journeys & residence.—*MALCOLM v. O'CALLAGHAN* (1837), 3 My. & Cr. 52; 1 Jur. 838; 40 E. R. 844, L. C.

**931. —.]—***HARRIS v. SLEEP*, No. 287, *ante*.

**SUB-SECT. 3.—LOSS OF REMUNERATION.**

**932. Failure to pass accounts—& pay in balances.]—***POTTS v. LEIGHTON*, No. 927, *ante*.

*CAMPBELL v. ARNDT* (1915), 32 W. L. R. 349; 9 W. W. R. 57; 24 D. L. R. 699; 8 Sask. L. R. 320.—**CAN.**

**PART VII. SECT. 1, SUB-SECT. 3.**

**c. Failure to pass accounts—[With- in proper time.]—**Where a receiver has not accounted within the proper time, his fees may, nevertheless, be allowed to him upon the consent of the

parties, if they be competent to consent, but where some of them are minors this cannot be done.—*DEASE v. REILLY* (1853), 2 Con. & Law. 441.—**IR.**

**PART VII. SECT. 2, SUB-SECT. 1.**

**d. General rule.]**—A receiver is entitled to his costs, charges, & expenses properly incurred in the dis-

**933. —.]—**A receiver who had been discharged did not pay in his balance on the day fixed by the master. Ordered that he should pay in the same, & also the amount allowed for his salary with interest.—*HARRISON v. BOYDELL* (1833), 6 Sim. 211; 58 E. R. 573.

**934. —.]—**A receiver neglecting to pass his accounts & pay the balance was, under Consolidated Ords., Ord. 21, disallowed his poundage, & charged at the rate of 5 per cent. per annum interest on the balances that were in his hands.—*BRISTOWE v. NEEDHAM* (1863), 8 L. T. 652; 9 Jur. N. S. 1168; 11 W. R. 926.

**935. — Remuneration already paid— Without protest from beneficiaries.]—**The annual accounts of a receiver, which have been allowed & passed by the master, although those accounts have not been regularly brought into the Master's office for that purpose, according to the terms of the order appointing him receiver, & although his balances have not been paid into ct. according to the strict terms of that order, will not be referred back to the master to open the accounts for the purpose of charging the receiver with interest on his balances, disallowance of salary, & with the costs of the proceedings, where the party complaining has allowed orders of the ct. to be made with reference to those accounts & balances, & did not bring his complaint against the receiver before the master, nor attempt to charge interest & costs in the master's office.—*WARD v. SWIFT* (1848), 8 Hare, 139; 12 L. T. O. S. 190; 68 E. R. 306.

**936. Money paid directly into court.]—**The purchase money of timber belonging to a lunatic's estate, permitted to be paid to the receiver, in order to be by him paid into ct.—*Re STARKIE* (1826), 1 Russ. 476; 38 E. R. 184, L. C.

**937. —.]—**Where a receiver had been appointed to get in the outstanding estate of testator in the cause, but one of the principal debtors to the estate was willing to pay the money due from him into ct.; the ct. on the petition of some of debtors, ordered that the debtor should be at liberty so to do, in order that the receiver's poundage might be saved to the estate.—*HAIGH v. GRATAN* (1839), 1 Beav. 201; 8 L. J. Ch. 249; 48 E. R. 916.

**938. Fund too small.]—**(1) Receiver granted, at the instance of an exor. pending a suit in the Ecclesiastical Ct. to have the probate annulled; defn., who was the party impeaching the will & setting up an intestacy, having by her own acts prevented the exor. from getting in the assets.

(2) Upon these grounds, I cannot, if it is pressed, refuse to appoint a receiver; but the fund is so small that I am not disposed to give him a percentage (LORD COTTENHAM, C.).—*MARR v. LITTLEWOOD* (1837), 2 My. & Cr. 454; 40 E. R. 713, L. C.

**Annotation:—***As to* (1) *Apld. Rendall v. Rendall* (1841), 1 Hare, 152.

**SECT. 2.—ALLOWANCES.**

**SUB-SECT. 1.—CHARGES AND EXPENSES.**

**939. Expenditure sanctioned by court—In excess of receipts.]—**A receiver cannot disburse . . . more money than he has received, without special

charge of his duties.—*BALAJI NARAYAN PATVARDHAN v. RAMCHANDRA GOVIND KANADE* (1894), 1 L. R. 19 Bom. 660.—**IND.**

**e. Right of receiver to lien—For claims & allowances.]—***PREMIALL MULICK v. SUMBHONATH ROY* (1895), 1 L. R. 22 Cal. 960.—**IND.**

**f. Survey of minor's estate—No order for receiver's attendance.]—**A

command so to do (COKE, C.J.).—SUFFOLKE (EARL) v. FLOYDE (1614), 2 Bulst. 277; 80 E. R. 1120.

940. — Repairs to property—Allowed after inquiry as to benefits.]—BLUNT v. CLITHEROW, No. 779, *ante*.

941. — — —.]—A.-G. v. VIGOR, No. 781, *ante*.

942. — — —.]—TEMPEST v. ORD, No. 780, *ante*.

943. — Payment after sanction refused—Inquiry directed.]—CROSS v. ORMEROD (1801), cited 6 Ves. at p. 800; 31 E. R. 1315.

944. — Journeys abroad to recover debts.]—MALCOLM v. O'CALLAGHAN, No. 930, *ante*.

945. Whether deductible from rents due to purchaser.]—Expenses of a receiver are not to be deducted from rents & profits decreed to the purchaser from time of agreement.—MCLEOD v. PHELPS (1838), 2 Jur. 992.

946. Expenses incurred in carrying on business—Salary of manager.]—Re GOMERSALL, *Ex p.* GORDON, No. 1105, *post*.

— Beyond limit fixed by court.]—See COMPANIES, Vol. X., p. 801, Nos. 5075, 5076.

Receiver appointed in administration action.]—See EXECUTORS, Vol. XXIV., p. 609, No. 6406.

Charges for necessary additional work.]—See Nos. 930, 931, *ante*.

947. Receiver not having entered into recognisances.]—Re WARD, No. 923, *ante*.

948. Charges for work outside scope of receivership.]—TERRY v. DUBOIS, No. 973, *post*.

949. Expenses of valuation of assets.]—Re GOMERSALL, *Ex p.* GORDON, No. 1105, *post*.

Expenditure after company wound up.]—See COMPANIES, Vol. X., p. 803, No. 5096.

950. Cost of repairs—Mortgaged property.]—A receiver appointed by a mtgee. under the powers of Conveyancing & Law of Property Act, 1881 (c. 41), cannot, on the account taken in a foreclosure action of what is due to the mtgee., be allowed any costs of repairs to the mtged. property, except costs of necessary or proper repairs directed in writing by the mtgee. as provided by Conveyancing & Law of Property Act, 1881 (c. 41), s. 24 (8), clause 3. It is immaterial in such a case that the receiver be the manager of a society which has guaranteed the mtgee. against loss in respect of his security, & that the costs of repairs in question have been paid out of moneys supplied by the society. Where the mtgee. by whom such money spent on repairs is to be taken to have been expended is a first mtgee., he has no right or authority to charge it against the second mtgee.—WHITE v. METCALF, [1903] 2 Ch. 567; 72 L. J. Ch. 712; 89 L. T. 164; 52 W. R. 280.

receiver is not entitled to any compensation for his trouble in attending a survey of the minor's estate; there being no order for his attendance.—Re ORMSBY (1809), 1 Ball & B. 189, *IR*.

g. Commission or rents collected.]—HOPKINS v. HEAD (1832), 2 Hoar. 267, *IR*.

h. Stamping accepted proposal.]—When a tenant held lands under an unstamped accepted proposal, which rendered him liable to the payment of tithe composition, the ct. on motion directed the receiver over the landlord's estate to stamp the same, & that the expenses thereof should be allowed to him in passing his account.—Re LANGLEY, LANGLEY v. LANGLEY (1838), 1 Dr. & Wal. 252, *IR*.

k. Failure to lodge balance due—Subsequent passing of another account—

Repayment limited to amount of assets.]—See PARTNERSHIP, Vol. XXXVI., p. 489, No. 1534.

Lien on assets against possible future claims.]—See COMPANIES, Vol. X., p. 802, No. 5084.

#### SUB-SECT. 2.—COSTS OF PROCEEDINGS.

951. Costs of application for discharge.]—Receiver allowed the costs of his application to be discharged.—RICHARDSON v. WARD (1822), 6 Madd. 266; 56 E. R. 1092.

952. —.]—A receiver ought not to present a petition to be discharged, to come on with the cause on further directions, as the ct. would make the order on further directions without any such petition.

As to the costs of the receiver's petition, I understand the registrar to be of opinion that the petition ought not to have been presented; the costs will therefore be refused (CRANWORTH, V.-C.).—STILWELL v. MELLERSH (1851), 20 L. J. Ch. 356. Annotation:—Mentd. *Re* Park, Bott v. Chester, [1910] 2 Ch. 322.

953. —.]—Upon a petition to discharge a receiver & pay over the money in ct. & the balance:—*Held*: the receiver, though served, ought not to appear, & his costs were not allowed.—HERMAN v. DUNBAR (1857), 23 Beav. 312; 53 E. R. 122.

954. Receiver pendente lite—Costs from appointment—To dismissal of appeal.]—(1) The duties of an administrator & receiver pending suit commence from the date of the order of appointment, & if the decree in the action is appealed from, do not cease until the appeal has been disposed of.

(2) Costs of the administrator & receiver pending suit & of his solr. allowed from the date of the appointment until the dismissal of the appeal.—TAYLOR v. TAYLOR (1881), 6 P. D. 29; 50 L. J. P. 45; 45 J. P. 457.

Annotation:—As to (1) *Re*fd. Wicland v. Bird, [1894] P. 262.

955. Costs of passing accounts—Allowed to receiver in default—Where no protest from beneficiaries.]—WARD v. SWIFT, No. 935, *ante*.

956. Costs of application to court—Failure of parties to apply.]—IRELAND v. EADE, No. 741, *ante*.

957. Costs of defending action—Unsuccessful applicant failing to pay—Right of receiver to indemnity.]—An adverse application was made against a receiver, by a party to the cause, which was refused with costs. Applt. being wholly unable to pay the costs:—*Held*: the receiver was entitled to be indemnified, & have his costs as between solr. & client, out of the fund in hand

Commission payable on former account.]—MAXWELL v. BOATE (1815), 7 L. Eq. R. 281, *IR*.

l. Delay in passing account—Whether any commission payable.]—Where a receiver by delaying to pass his account for a short time beyond the year, was enabled to collect & bring into ct. an additional gale of rent, the ct. allowed him his poundage & costs.—FLOOD v. ALDBOROUGH (LORD) (1815), 5 L. Eq. R. 103, *IR*.

m. — — —.]—PURCELL v. WOODLEY (1817), 10 L. Eq. R. 422, *IR*.

#### PART VII. SECT. 2, SUB-SECT. 2.

951 i. Costs of application for discharge.]—HUNTER v. PRING (1845), 8 L. Eq. R. 102, *IR*.

951 ii. —.]—A receiver who has passed his final account & paid in the

balance found against him, & who has been acting for thirty years, discharged without paying the costs of his removal or of the appointment of a new receiver.—COX v. M'NAMARA (1847), 11 L. Eq. R. 356, *IR*.

951 iii. —.]—Where one of a receiver's sureties dies, or goes abroad, & the receiver is unable to procure another surety, it is not the practice to charge the receiver with the expense of his discharge, or the appointment of a new receiver.—LANE v. TOWNSEND (1852), 2 L. Ch. R. 120, *IR*.

n. Costs of collecting rents.]—WESTERN CANADA, ETC. CO. v. INCE (1879), 8 P. R. 262, *CAN*.

o. Costs of successful suit.]—A receiver is entitled, as against defts., to the costs of a suit in which he succeeds, though the action has been brought without the sanction of the

*Sect. 2.—Allowances: Sub-sect. 2. Sects. 3 & 4.*  
*Part VIII. Sects. 1, 2 & 3.]*

belonging to incumbancers.—*COURAND v. HANMER* (1840), 9 Beav. 3; 50 E. R. 242.

*Annotations:—Apld.* *Batten v. Wedgewood Coal & Iron Co.* (1884), 28 Ch. D. 317. *Distd.* *Re Dunn, Brinklow v. Singleton*, [1904] 1 Ch. 648. *Mentd.* *Hawkins v. Gathercole* (1855), 6 De G. M. & G. 1.

**958. — Without sanction of court.]—**A receiver having, without the sanction of the ct., defended actions arising out of a distress for rent made by him on a tenant of the estate, the ct. refused to allow him his costs of the actions.—*SWABY v. DICKON* (1833), 5 Sim. 629; 58 E. R. 475.

**959. — Costs properly incurred.]—**Though a receiver, who has defended an action without having first obtained leave of the ct. so to do, will not usually be allowed his costs, the ct., under particular circumstances, allowed the receiver the costs of defending an action of trover in which he had been successful, as the costs of the defence had not exceeded such as would have been authorised by the ct.

If the possession which the receiver holds of any description of property under the order of the ct. is assailed by any other party by acts of violence or litigation, it is the duty of the receiver to come to the ct. & to take the direction of the ct. as to what course he should take in the case of any such hostile proceedings. . . . In every case the ct. will inquire whether any unnecessary costs have been incurred by the receiver in adopting a course he ought not to have pursued; & if the ct. finds no additional costs have been incurred, it would not be very just against the receiver to punish him by making him pay those costs which, if he had taken the right course, must have fallen on the estate. . . . If he can show that no additional costs had been incurred by the course he pursued, then the estate is not prejudiced, although he had done that which was irregular to the prejudice of himself; & it is no reason why he should not be indemnified out of the estate those costs which must necessarily have come out of the estate whatever course he might have taken. . . . The ct. is not to lay down a rule that, if an action is brought against the receiver, the receiver must take his chance of defeating plff., or if he comes to the ct. to ask the

direction of the ct. that he, the receiver, is to bear the expense of coming here (*LORD COTTENHAM, C.*).—*BRISTOWE v. NEEDHAM* (1847), 2 Ph. 190; 9 L. T. O. S. 69; 47 E. R. 860, L. C.

*Annotations:—Expld.* *Re Dunn, Brinklow v. Singleton*, [1904] 1 Ch. 648. *Refd.* *Viola v. Anglo-American Cold Storage Co.*, [1912] 2 Ch. 305.

**960. — Defence beneficial to estate.]—**Though a receiver while acting in the discharge of his duty is entitled to be indemnified against all loss, including the costs of actions brought against him as receiver, still the guiding principle laid down by *Walters v. Woodbridge* (1878), 7 Ch. D. 504, is that the defence to the action was for the benefit of the trust estate.

When an action had been brought against a receiver & administrator *pendente lite* charging him with personal fraud & misconduct while acting as administrator & receiver, but otherwise having no relation to the estate except so far that the acts complained of were acts done by him while acting as an officer of the ct.:—*Held*: the receiver was not entitled to be indemnified against the costs incurred in successfully defending this action.—*Re DUNN, BRINKLOW v. SINGLETON*, [1904] 1 Ch. 648; 73 L. J. Ch. 425; 91 L. T. 135; 52 W. R. 345; 48 Sol. Jo. 261.

**961. Costs of protecting property—Employment of sheriff & police.]—***HILLIER v. HAWKINS* (1846), 8 L. T. O. S. 185.

### SECT. 3.—INDEMNITY.

**962. After final accounts—Before distribution of assets.]—***LEVY v. DAVIS* (1900), 44 Sol. Jo. 675.

**Receiver for debenture-holders.]—***See COMPANIES*, Vol. X., pp. 801–802, Nos. 5079–5084.

**Receiver in partnership.]—***See PARTNERSHIP* Vol. XXXVI., p. 489, No. 1534.

**Managers.]—***See* Part XI., Sect. 5, *post*.

### SECT. 4.—ORDER OF PAYMENT.

**Priority.]—***See BANKRUPTCY*, Vol. V., p. 1108, No. 9030; *COMPANIES*, Vol. X., pp. 801, 802, 803, 809, 810, Nos. 5079–5082, 5095, 5170.

## Part VIII.—Accounts.

### SECT. 1.—IN GENERAL.

*See* R. S. C., Ord. 50, r. 18.

**963. Duty to keep accounts.]—**Owners of a privateer acting for themselves & the crew, in the sale of the prizes, having neglected to render accounts & delayed the distribution of the proceeds, charged with interest on the balances, & costs. The first duty of an agent, receiver,

trustee, or exor., is to be constantly ready with his accounts, & neglect in this is a ground for charging him with interest.—*PEARSE v. GREEN* (1819), 1 Jac. & W. 135; 37 E. R. 327.

*Annotations:—Apld.* *Springett v. Dashwood* (1860), 2 Giff. 521; *Harsant v. Blaine, Macdonald* (1887), 56 L. J. Q. B. 511. *Mentd.* *Fry v. Fry* (1864), 10 Jur. N. S. 983; *Blogg v. Johnson* (1867), 2 Ch. App. 225; *Turner v. Burkinshaw* (1867), 2 Ch. App. 488.

ct.—*Re NEILL, DICKEY v. NEILL* (1881), 9 P. R. 176.—**CAN.**

p. —.]—*FITZGERALD v. FITZGERALD* (1843), 5 I. Eq. R. 525.—**IR.**

g. *Costs of passing accounts—Receiver accounting under attachment order.]—**TRAPAUD v. CORMICK* (1825), 1 Hog. 245.—**IR.**

r. —.]—*ERSKINE v. BAKER* (1854), 7 Ir. Jur. 25.—**IR.**

t. *Right to taxed costs—Whether*

*motion necessary.]—**PAYNE v. LAMB* (1844), 8 I. Eq. R. 517.—**IR.**

a. *Costs of petition making conditional order absolute.]—**DELACHEROIS v. WRIXON* (1850), 2 Ir. Jur. 67.—**IR.**

b. *Costs of taking out order appointing receiver.]—*A receiver is not entitled to the costs of taking out the order appointing him, it being the duty of the party at whose instance the party is appointed to do so.—*WOODROFFE v.*

*GREENE* (1852), 2 I. Ch. R. 330.—**IR.**

### PART VII. SECT. 3.

c. *Out of what funds indemnity given—Assets under control of court.]—*A receiver is the servant or officer of the ct. & not the agent of any party to the action, & should look for indemnity to the assets which are under the control of the ct.—*JOHNSTON v. COURTNEY* (B. C.), [1920] 2 W. W. R. 459.—**CAN.**

**964.** & produce regularly.]—*BERTIE v. ABINGDON (LORD)*, No. 1030, *post*.

**965.** — Separate accounts—Real & personal property.]—A receiver will be ordered to keep separate accounts of the real & personal estates where necessary.—*HILL v. HIBBIT* (1868), 18 L. T. 553.

**966.** — Of all moneys received—Before & after security perfected.]—*SMART v. FLOOD & Co.*, No. 254, *ante*.

**967.** Copies of accounts—Number allowed.]—When a receiver, appointed in a suit, passes his accounts in chambers, & the same solr. appears both for the receiver & one of the parties to the suit, only one copy of the account can be allowed between them on taxation.—*SHARP v. WRIGHT* (1866), L. R. 1 Eq. 634; 14 L. T. 246; 14 W. R. 552.

*Annotation:—Refid. Re Metropolitan Coal Consumers' Assn., Grieb's Case* (1890), 45 Ch. D. 606.

## SECT. 2.—PASSING ACCOUNTS.

*See R. S. C., Ord. 50, r. 20.*

**968.** Master's certificate—Whether conclusive.]—Not usual to have reports of receivers' accounts confirmed.—*COWPER v. COWPER (EARL)* (1734), 2 P. Wms. 720; 24 E. R. 930; *on appeal* (1736), 2 P. Wms. 755, H. L.

*Annotations:—Mentd. Bagshaw v. Spence* (1743), 2 Atk. 570; *Burgess v. Wheate* (1759), 1 Eden, 177; *Farr v. Newman* (1792), 4 Term Rep. 621; *Craufurd v. Hunter* (1798), 8 Term Rep. 13; *Haywood v. Cope* (1858), 25 Beav. 140; *Buchanan v. Harrison* (1861), 1 John. & H. 662; *Dean v. Brown*, [1909] 2 K. B. 573.

**969.** — — —.]—A master's report of a receiver's account, like his report on taxation of costs, does not require confirmation, & cannot be excepted to. But the ct. will enter into the consideration of objections to the general principle on which the master has proceeded in taking a receiver's account, but not of objections to particular items of it.—*SHEWELL v. JONES* (1824), 2 Sim. & St. 170; 57 E. R. 309; *on appeal* (1827), 3 Russ. 522, L. C.

*Annotations:—Mentd. Russel v. Buchanan* (1838), 9 Sim. 107; *McIntosh v. G. W. Hy.* (1865), 13 L. T. 84.

**970.** Interest on balances—Where not passed.] — — — *JOLLAND*, No. 161, *ante*.

**971.** Receiver ordered to pass accounts—Though action dismissed.]—*PITT v. BONNER*, No. 975, *post*.

**972.** — — —.]—*HUTTON v. BEETON & M'MURRAY*, *BEETON v. M'MURRAY & HUTTON*, No. 976, *post*.

**973.** Time for objection to items.]—Where items have been included in a receiver's bill of costs, which are charges for work done outside the scope of the receivership, objection must be made to their being included in the taxation at the time;

& no action will lie for the subsequent recovery of the money due on such items.—*TERRY v. DUBOIS* (1884), 32 W. R. 415, D. C.

**Accounts in foreclosure actions.]—See MORTGAGE**, Vol. XXXV., pp. 574, 589, 590, Nos. 3069, 3070, 3277–3291.

**Costs of parties attending.]—See EXECUTORS**, Vol. XXIV., p. 704, No. 7296; *LUNATICS*, Vol. XXXIII., p. 242, No. 1616.

**Re-opening accounts—Grounds for.]—See EXECUTORS**, Vol. XXIV., p. 705, Nos. 7310, 7311; *MORTGAGE*, Vol. XXXV., pp. 589, 590, Nos. 3277–3291.

## SECT. 3.—PAYMENT OF BALANCES.

**974.** Payment in ordered—Though arbitration pending.]—Where one of the parties in a cause is appointed receiver, & afterwards, by a consent order, all the matters in dispute in the cause are referred to arbn., this order & the pending reference will not be any objection to making such application to the ct., as may be necessary, in order to compel the party who is receiver, to pay in, to the credit of the cause such sums as the master shall have reported due from him, in his character of receiver.— *v. JARMAN* (1824), 3 L. J. O. S. Ch. 12.

**975.** — Though action dismissed.]—Order made in a cause after the bill had been dismissed, that the receiver should pass his accounts & pay the balance to deft.—*PITT v. BONNER* (1833), 5 Sim. 577; 58 E. R. 456.

**976.** — — —.]—B., in Oct. 1862, was appointed receiver in a cause in which he was a deft. The bill, which alleged a partnership, between H. & B., was in Nov. 1863, dismissed with costs. The minutes proposed that the receiver should pass his accounts, & pay into ct. the balance which should be certified to be due from him. An application to vary, on the ground that passing the accounts had become unnecessary, was refused, with costs.—*HUTTON v. BEETON & M'MURRAY*, *BEETON v. M'MURRAY & HUTTON* (1863), 9 Jur. N. S. 1339.

**977.** Compliance with order for payment—What amounts to.]—When an action is commenced in a district registry & money is ordered to be paid by a receiver into ct. to the credit of the action, it is not a compliance with that order to pay the money into a bank "to the credit of the district registrar." That mode of payment is irregular, & the money will be ordered to be brought into ct. under Court of Chancery Funds Act, 1872 (c. 44), & Rules.—*FINLAY v. DAVIS* (1879), 12 Ch. D. 735; 39 L. T. 662; 27 W. R. 334.

**978.** — How enforced.]—(1) Where a person seeks for damages, on the ground of the improper

his account, & appet. having liberty to attend in the office on the passing of it, refused, no special ground for such application having been shown.—*COTRUEN v. COOPER* (1841), 8 L. Eq. R. 510.—**IR.**

## PART VIII. SECT. 3.

**1. Unauthorised investment—Liability to account for profit.]—Where a receiver had made an investment unauthorised by the ct., by which a profit had been made:—Held: the amount realised must be added to the principal.—*BALDWIN v. CRAWFORD* (1866), 2 Ch. Ch. 9.—**CAN.****

**m. Improper retention of balance—Liability for interest.]—A receiver who improperly retains a balance in his hands, must pay interest on the amount when he passes his next account.—**

## PART VIII. SECT. 1.

**964. i. Duty to keep accounts—& produce regularly.]—Re BURKE (1809), 1 Ball & B. 74.—**IR.****

**d. Review of accounts—Application of minor on attaining majority.]—Receiver's accounts which had been passed, ordered to be reviewed on application of the person, late a minor, who had attained his age.—*WILDRIDGE v. M'KANE* (1827), 2 Mol. 543.—**IR.****

**e. Duty to file accounts—Upon order of court.]—ARMITAGE v. FORBES (1831), Hayes, 222, 229.—**IR.****

**f. Power of court to surcharge accounts—After receiver's discharge.]—Notwithstanding the discharge of a receiver, the ct. has jurisdiction to surcharge his accounts.—*Re EDWARDS* (1892), 31 L. R. Ir. 242.—**IR.****

**g. Power of court to order receiver to account.]—A ct. having appointed a receiver in a suit has authority incidental to its jurisdiction, to order him to account, although the suit may be no longer pending.—*Re PREM LALL MULLICK, ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK* (1895), L. L. R. 22 Cal. 1011; 22 L. R. Ind. App. 203.—**IND.****

## PART VIII. SECT. 2.

**h. Who may appear.]—TRUSTS & GUARANTEE CO., LTD. v. GRAND VALLEY RY. CO. (1915), 8 O. W. N. 416; 24 D. L. R. 171; 34 O. L. R. 87.—**CAN.****

**k. Application for receiver to pass accounts—Necessity for special ground for application.]—Application of a third person, that a receiver should pass**

**Sect. 3.—Payment of balances. Sect. 4: Sub-sects. 1, 2 & 3. Part IX. Sect. 1 & 2: Sub-sect. 1.]**

use of the process of this ct., & the person against whom the complaint is made requires the matter to be tried at law, this ct. will permit it to be tried at law, instead of itself assessing the damages.

(2) A four days' order seems still to be the proper process for compelling a receiver to pay over his balances in accordance with an order of the ct.—*WHITEHEAD v. LYNES* (1864), 34 Beav. 161; 34 L. J. Ch. 201; 11 L. T. 615; 11 Jur. N. S. 74; 13 W. R. 306; 55 E. R. 596.

**SECT. 4.—DEFAULT.**

**SUB-SECT. 1.—PROCEEDINGS AGAINST RECEIVER.**

**979. Four day order.]—***SCOTT v. PLATEL*, No. 579, *ante*.

**980. —.]—***WHITEHEAD v. LYNES*, No. 978, *ante*.

**981. Execution.]—**A receiver need not be served with a writ of execution of a decretal order, but only with a copy, & if he disobeys, shall be committed.—*MACARTY v. GIBSON* (1728), Mos. 40; 25 E. R. 258, L. C.

**982. —.]—**A warrant of the Lord Chancellor for the commitment of a person, appointed a receiver by the Ct. of Ch., for the non-payment of a balance certified against him, is only in the nature of a civil execution.—*BRETT v. CLOSE* (1812), 16 East, 293; 104 E. R. 1100.

**983. Committal.]—**Receiver, not paying in a balance under an order, may be proceeded against personally by commitment. A previous order, in the alternative, that by a certain day he shall pay, or stand committed, is necessary; though he was under an order for payment by a certain day upon his appearance by counsel, praying time.—*DAVIES v. CRACRAFT* (1807), 14 Ves. 143; 33 E. R. 475.

*Annotation:—**Reid. Re Grey*, [1892] 2 Q. B. 440.

**984. —.]—**Where a receiver makes default in payment of a balance due from him payment may be enforced by committal.—*Re BELL'S ESTATE, FOSTER v. BELL* (1870), L. R. 9 Eq. 172; 21 L. T. 781; 18 W. R. 369.

*Annotation:—**Reid. Re Gent, Gent-Davis v. Harris* (1888), 40 Ch. D. 190.

**Sequestration.]—***See* EXECUTION, Vol. XXI., p. 595, No. 1774.

**985. Recognisances put in suit.]—***THURLOW v. THURLOW* (1840), 4 Jur. 982.

**Application of Statute of Limitations.]—***See* LIMITATION OF ACTIONS, Vol. XXXII., p. 501, Nos. 1623, 1624.

**SUB-SECT. 2.—PENALTIES.**

*See* R. S. C., Ord. 50, r. 18.

**Loss of remuneration.]—***See* Nos. 932-935, *ante*.

*HARMAN v. FORSTER* (1825), 1 Hog. 318.—*IR.*

*n. —.]—**FETNAM v. KIRBY* (1841), 4 L. Eq. R. 320.—*IR.*

*o. —.]—**Re St. GEORGE'S ESTATE* (1887), 19 L. R. 566.—*IR.*

**PART VIII. SECT. 4, SUB-SECT. 1.**

**983 i. Committal.]—**Where an order is made upon a receiver for payment of money, the ct. on default will commit for a contempt of such order, without requiring any further order to be served.—*MCINTOSH v. ELLIOTT* (1851), 2 Gr. 396.—*CAN.*

*p. Summons to account—Right of receiver.]—*A receiver is only entitled to one summons to account.—*LAWLOR v. LOWRY* (1824), 1 Hog. 140.—*IR.*

*q. —.]—**McBRIDE v. CLARKE* (1828), 1 Mol. 233.—*IR.*

*r. Discharge from attachment—On production of copy of account.]—*Where a receiver has been attached for not accounting, he will be discharged from the attachment on producing a copy of his account, & paying the costs of the attachment.—*MCARTHY v. MCARTHY*, Smith on Receivers, 197, 207.—*IR.*

**986. Payment of interest—On balance not paid in.]—***FLETCHER v. DODD*, No. 777, *ante*.

**987. —.]—***v. JOLLAND*, No. 161, *ante*.

**988. —.]—***POTTS v. LEIGHTON*, No. 927, *ante*.

**989. —.]—***PEARSE v. GREEN*, No. 963, *ante*.

**990. —.]—***DAWSON v. RAYNES*, No. 1053, *post*.

**991. —.]—***BRAHAM v. BOWES* (1836), Donnelly, 84; 47 E. R. 242.

**992. —.]—***BRISTOWE v. NEEDHAM*, No. 934, *ante*.

**SUB-SECT. 3.—LIABILITY OF PERSONAL REPRESENTATIVES OF RECEIVER.**

**993. General rule.]—***LIMON v. LIMON* (1782), cited in 16 L. T. O. S. 337.

*Annotation:—**Folld. Ludgate v. Channell* (1851), 16 L. T. O. S. 337.

**994. —.]—***Re BURT* (1780), cited in 16 L. T. O. S. 337.

*Annotation:—**Folld. Ludgate v. Channell* (1851), 16 L. T. O. S. 337.

**995. Recognisance enforced against representative.]—**Where in the lifetime of a receiver an unascertained balance was found by the master's report to be due from him, & he died without payment of such balance, the ct. ordered, upon petition, that his recognisance should be put in suit against his real & personal representatives & against his sureties.—*LUDGATER v. CHANNELL* (1851), 3 Mac. & G. 175; 16 L. T. O. S. 337; 42 E. R. 227, L. C.

—.]—*See, also*, EXECUTORS, Vol. XXIII., p. 354, No. 4217.

**Liability for payment of interest.]—***See* EXECUTORS, Vol. XXIV., p. 712, Nos. 7385, 7386.

**996. Summary order for account.]—***LITTLEBOY v. SPOONER* (1826), 1 Seton's Judgments & Orders, 6th ed. 815.

*Annotations:—**Expld. Ludgate v. Channell* (1847), 15 Sim. 479. *Reid. Hawkins v. Gathercole* (1855), 6 De G. M. & G. 1.

**997. —.]—**The ct. has no jurisdiction to order, in a summary way, the exor. of a deceased receiver to bring in & pass his testator's accounts, & pay the balance to be found due out of the assets.—*JENKINS v. BRIANT* (1834), 7 Sim. 171; 4 L. J. Ch. 2; 58 E. R. 802.

*Annotation:—**Distd. Ludgate v. Channell* (1851), 3 Mac. & G. 175.

**998. Leave granted to executor—To carry in accounts & lodge balance.]—***HOLMES v. HOLMES* (1843), 1 Seton's Judgments & Orders, 6th ed. 814.

**999. Right to attend taking of accounts.]—***SIMMONS v. ROSE* (1860), 2 Daniell's Chancery Practice, 7th ed. 1456.

*t. Power of receiver to plead in validity of recognisance—Estoppel.]—*A receiver who has gone into receipt of rent under the ct., will not be allowed to plead to a *scire facias*, upon his recognisance, that the same was taken by an unauthorised person.—*WELLESLEY v. MORNINGTON* (1863), 13 L. Ch. R. 559.—*IR.*

**PART VIII. SECT. 4, SUB-SECT. 3.**

**998 i. Leave granted to executor—To carry in accounts & lodge balance.]—***MAGAN v. FALLON* (1843), 5 L. Eq. R. 490.—*IR.*

## Part IX.—Discharge.

## SECT. 1.—IN GENERAL.

**1000. Judgment not providing for continuance of appointment—Whether absence operates as discharge—Appointment generally.]—***CRUSE v. SMITH* (1879), 24 Sol. Jo. 121, C. A.

**1001. ———.]—**Where, on an interlocutory order, a receiver & manager has been appointed as receiver generally & as manager until a fixed date, upon the motion for judgment in the action, the minutes of judgment should not continue the receiver, but merely extend the time during which the receiver may act as manager, as he is still in office as receiver, by reason of the former order.—*DAVIES v. VALE OF EVESHAM PRESERVES, LTD.* (1895), 73 L. T. 150; 43 W. R. 646.

**1002. ———.]—**Where a receiver has been appointed generally in an action it is unnecessary, when the action comes on upon further consideration, to insert in the minutes a direction to continue the receiver.—*Re UNDERWOOD, UNDERWOOD v. UNDERWOOD* (1889), 60 L. T. 381; 37 W. R. 428.

**1003. Appointment for limited time—"Until judgment or further order."—***BRINSLEY v. LYNTON & LYNMOUTH HOTEL & PROPERTY CO.*, as reported in [1895] W. N. 53.

**1004. Order for delivery up of documents—After discharge—Costs.]—**A decree made with costs against a land agent & receiver after his discharge, for the delivery up of all documents relating to the estate & its management.—*BERESFORD (LADY) v. DRIVER* (1852), 16 Beav. 134; 22 L. J. Ch. 407; 51 E. R. 728; *previous proceedings* (1851), 14 Beav. 387.

*Annotation:—Mentd.* *Sellar v. Griffin* (1863), 33 L. J. Ch. 6.

**Property of lunatics.]—***See* LUNATICS, Vol. XXXIII., p. 186, Nos. 830, 831.

**Debenture-holders' action.]—***See* COMPANIES, Vol. X., pp. 803, 804, Nos. 5097–5099.

## SECT. 2.—WHEN ORDER GRANTED.

## SUB-SECT. 1.—CONTINUANCE OF APPOINTMENT UNNECESSARY.

**1005. Object of appointment effected—Payment of arrears of annuity.]—***DAVIS v. MARLBOROUGH (DUKE)*, No. 713, *ante*.

**1006. ———.]—**A receiver had been appointed upon bill filed by an annuitant on the estate. All arrears having been paid off, under the circumstances, the order appointing the receiver was discharged.—*BRAHAM v. STRATMORE* (1844), 3 L. T. O. S. 466; 8 Jur. 567.

**1007. ——— Payment of incumbrances—Possession by tenant for life.]—**Testator who died in 1844, devised to trustees a moiety of his real estates upon trusts for his son for life, with remainder to his grandson for life & his sons in tail & to pay all his debts & sums of money as he should owe at the time of his decease, whether by way of mtge. bond, or otherwise, including a sum of £8,000

charged upon the estates; & he directed that the rents & profits of the estates should be received by the trustees & be applied in liquidation of the debts until the whole, including the £8,000, should be paid; that no person to whom any estate for life or in tail was limited should be entitled to the rents & profits until the estates were totally disincumbered & clear of debts; & that the trustees should invest the moneys which come to their hands upon good security at interest until the same should be applied in payments under the trusts. A receiver had been appointed. The whole of the debts had been paid excepting the £8,000 by sales of parts of the estates under orders of the ct., & there was an accumulation fund in ct. sufficient to pay the £8,000. On adjourned summons:—*Held*: the receiver must be discharged, & the tenant for life be let into possession of the estates.—*TEWART v. LAWSON* (1874), L. R. 18 Eq. 490; 43 L. J. Ch. 673; 22 W. R. 822.

*Annotations:—Mentd.* *Norton v. Johnstone* (1885), 30 Ch. D. 649; *Re Green, Baldock v. Green* (1888), 40 Ch. D. 610; *Honywood v. Honywood*, [1902] 1 Ch. 347; *Re Heathcote, Heathcote v. Trench*, [1904] 1 Ch. 826; *Re Webster, Thompson v. Thompson* (1910), 102 L. T. 905; *Re Cresswell, Lineham v. Cresswell* (1913), 57 Sol. Jo. 678; *Re Stamford & Warrington, Payne v. Grey* (1925), 94 L. J. Ch. 294.

*Compare* COMPANIES, Vol. IX., p. 556, No. 3680.

**1008. ——— Settlement of dispute as to title—Accounts not settled.]—**On motion by petition in the ct. below, for the discharge of a receiver, the ct. refused the motion, & dismissed the petition with costs, but engrafted on the order of dismissal certain directions asked for by defts., & supported by their affidavits, in opposition to the motion:—*Held*: such addition to the order was contrary to the practice of the ct., & ought not to have been made; & upon the facts disclosed, an order for the dismissal of the receiver ought to have been made pursuant to the prayer of the petition.

An order having been made, dismissing a motion for the settlement of accounts, & payment over of the balance, on the ground that the accounts had not been fully taken under the original decree, or the balance ascertained, affirmed on appeal, but without costs.—*PALMER v. BARRETT* (1837), 1 Moo. P. C. C. 415; 12 E. R. 872, P. C.

**1009. ——— Appointment following refusal of executors to act—Subsequent offer of executors to act.]—**A receiver who had been appointed by reason of the exors. having refused to act under testator's will, quitted his place of residence in the vicinity of the estates in respect of which he had been appointed receiver. The ct., on the consent of the other parties to the cause, & the exors. expressing their willingness to act, made an order to that effect, & that the receiver should pass his accounts.—*DAVY v. GRONOW* (1845), 14 L. J. Ch. 134.

**1010. ———.]—***POWYS v. BLAGRAVE* (1853), as reported in 2 Eq. Rep. 395; 18 Jur. 462; *on appeal* (1854), 4 De G. M. & G. 448, L. C.

*Annotations:—Mentd.* *Warren v. Rudall, Ex p. Godfrey* (1860), 1 John. & H. 1; *Barnes v. Dowling* (1881), 44 L. T. 809; *Re Williams, Andrew v. Williams* (1884), 52 L. T. 41; *Re Hotchkys, Freke v. Calmady* (1886), 32

(1839), 2 L. Eq. R. 416.—*IR.*

## PART IX. SECT. 2, SUB-SECT. 1.

**1005 i. Object of appointment effected—Payment of arrears of annuity.]—***SANKEY v. O'MALLEY* (1825), 2 Mol. 491.—*IR.*

**i. ——— Payment of incumbrances—**

## PART IX. SECT. 1.

**a. Necessity for order of discharge.]—***SHANKAR DAS v. BEHARI LAL* (1925), I. L. R. 6 Lah. 442.—*IND.*

**b. ———.]—***WHITE v. WESTMEATH (LORD)* (1828), Beat. 174.—*IR.*

**c. ———.]—***KENNY v. CLARKE* (1813),

5 I. Eq. R. 280.—*IR.*

**d. ———.]—***JOHNSTON v. HENDERSON* (1844), 8 I. Eq. R. 521.—*IR.*

**e. What amounts to discharge—Injunction to put purchaser in possession.]—**An injunction to put the purchaser into possession amounts to a discharge of the receiver.—*ANON.*



**Sect. 2.—When order granted: Sub-sects. 1, 2, 3, 4 & 5.]**

Ch. D. 408; *Re Cartwright, Avis v. Newman* (1889), 41 Ch. D. 532; *Re Freman, Dimond v. Newburn*, [1898] 1 Ch. 28; *Blackmore v. White*, [1899] 1 Q. B. 293.

**1011. Establishment of mortgagee's title.]—**BOWLES *v.* PARSONS (1749), 1 Dick. 142; 21 E. R. 222.

**1012. —.]—**LANGTON *v.* LANGTON, No. 1034, *post*.

**1013. Appointment in consequence of incapacity of trustees—Subsequent appointment of new trustees.]—**(1) A receiver who had been appointed in consequence of the misconduct & incapacity of trustees under a will, discharged, upon the appointment of new trustees by the ct.

(2) A receiver is appointed for the benefit of all parties interested, & will not therefore be discharged, merely on the application of the party at whose instance he was appointed.—*BAINBRIDGE v. BLAIR* (1841), 3 Beav. 421; 10 L. J. Ch. 193; 49 E. R. 165.

*Annotation:—Generally, Mentd.* Alsop *v.* Bell (1857), 24 Beav. 451.

**1014. Appointment pending probate—Grant of probate.]—**Where a suit is instituted merely for the protection of the assets pending a litigation for probate in the Ecclesiastical Ct., the practice of the ct. is, upon the grant of probate, to discharge the receiver, stay all proceedings in the suit, & dispose of the costs.—*BARTON v. ROCK* (1856), 22 Beav. 376; 52 E. R. 1153.

*Annotation:—Mentd.* Grimsdon *v.* Timms (1870), 22 L. T. 646.

**1015. Foreclosure order absolute.]—**The receiver & manager, appointed before judgment in a foreclosure action, received moneys that represented the gross takings in the business of the mtged. property, which was a leasehold public-house. The moneys were received from day to day partly before & partly after the date fixed for redemption. The ct. made a final order for foreclosure & directed that the receiver & manager should pass forthwith his final account, & be discharged, his recognisance & bond to be vacated.—*HOLT & Co. v. BEAGLE* (1886), 55 L. T. 592.

**1016. Dismissal of suit.]—**PITT *v.* BONNER, No. 975, *ante*.

#### SUB-SECT. 2.—BANKRUPTCY OF DEBTOR SUPERVENING.

**1017. Whether operating as discharge.]—**SKIP *v.* HARWOOD, No. 882, *ante*.

**1018. —.]—**A receiver & manager had been appointed on an *ex parte* application by pltf. in a foreclosure action under a mtge. of brewery premises. The mtgor., deft., afterwards became bkpt. on his own petition. The official receiver opposed a motion by pltf. for the continuance of the original receiver & manager, contending that he ought to be substituted:—*Held*: an order must be made confirming the previous appointment, & continuing the person then appointed as receiver of the rents & profits of the premises comprised in the mtge., & as manager of the business, he to be at liberty to use any of the vats, fixed motive machinery, & other property comprised in the mtge., but nothing else.—*DEACON v. ARDEN* (1884), 50 L. T. 584.

*All claims must be satisfied.]—*LARGAN *v.* BOWEN (1803), 1 Sch. & Lef. 296.—*IR*.

**g. —.]—**MURROUGH *v.* FRENCH (1827), 2 Mol. 497.—*IR*.

**PART IX. SECT. 2, SUB-SECT. 3.**  
**h. Property of stranger erroneously included in order.]—**A receiver who had been wrongly appointed over property belonging to a person not a party to the

**1019. Transfer of proceedings to Bankruptcy Court.]—**The beneficiaries under a will commenced an action in the Ch. Div. against the acting trustee & exor., who was a partner in deceased testator's business, claiming a declaration that the assets of the business formed part of the estate of the testator; that an account might be taken of the partnership dealings, & that the affairs of the partnership might be wound-up; that deft. might be removed from being a trustee, & that new trustees might be appointed; & administration of testator's estate. A receiver was then appointed to get in testator's estate, & the debts & assets of the partnership business. Shortly afterwards deft. was adjudicated a bkpt. Thereupon his trustee in bkpcy. applied to the Ch. Div. that the receiver might be discharged, & the action handed over to the Bkpcy. Ct. so far as related to the debts & assets of the partnership business. It was decided that the Ch. Div. having seisin of the action, it would not be proper to hand it over to the Bkpcy. Ct., nor to divide the administration into two parts:—*Held*: the application was wrongly made, the right procedure being to apply to the judge of the Bkpcy. Ct., under Bkpcy. Act, 1883 (c. 52), s. 102 (4), to order a transfer to himself of the action pending in the Ch. Div.—*Re SOMES, STEWART v. SOMES* (1895), 73 L. T. 359, C. A.

#### SUB-SECT. 3.—APPOINTMENT IRREGULAR.

**1020. Appointment of improper person—Son of next friend of infant.]—**TAYLOR *v.* OLDHAM, No. 150, *ante*.

**1021. — Plaintiff's solicitor—Without sanction of defendant.]—***Re LLOYD, ALLEN v. LLOYD*, No. 159, *ante*.

**1022. Appointment over property not chargeable—Settled property—Married woman.]—**By a post-nuptial settlement made before the Married Women's Property Act, 1882 (c. 75), property devised by will to a married woman for her separate use without restraint against anticipation was limited to her for life for her separate use, without power of anticipation, remainder to the husband for life, remainder to the children. The wife after the Act & during coverture made a promissory note in favour of plffs., & after the death of her husband plffs. obtained judgment upon the note against the widow & an order for the appointment of a receiver of the rents & profits of the property in settlement:—*Held*: upon the true construction of Married Women's Property Act, 1882 (c. 75), ss. 1, 5, & 19, the property in settlement was not liable to satisfy the judgment & the order appointing the receiver must be discharged.—*BECKETT v. TASKER* (1887), 19 Q. B. D. 7; 56 L. T. 636; 36 W. R. 158.

*Annotations:—*Consd. Pelton *v.* Harrison, [1891] 2 Q. B. 422. *Reid. Re Lunley, Hood Barrs v. Cathcart* (1894), 7 Ir. 400; *Softlaw v. Welch*, [1899] 2 Q. B. 419. *Mentd.* Braumstein *v.* Lewis (1891), 7 T. L. R. 246; *Re Hewett, Ex p. Levene*, [1895] 1 Q. B. 328.

**1023. — Judgment debtor's salary.]—**WALBROOK & Co. *v.* JONES & LEWIS (1887), 3 T. L. R. 609, C. A.

**1024. Appointment where trustee with power of entry & distress already in existence.]—**Receiver ought not to be appointed where there is a trustee with power of entry & distress.—*BUXTON v.*

cause discharged, notwithstanding the abatement of the suit by the death of the sole deft.—*LAVENDER v. LAVENDER* (1875), 9 I. R. Eq. 593.—*IR*.

**k. Receiver subsequently come under**



MONKHOUSE (1810), Coop. G. 41; 35 E. R. 470, L. C.

*Annotations*.—**Apld.** Sollory v. Leaver (1869), L. R. 9 Eq. 22. **Consd.** Kelsey v. Kelsey (1874), L. R. 17 Eq. 495.

**1025. Property of stranger erroneously included in order.**—**FOWLER v. HAYNES**, No. 697, *ante*.

**1026. Appointment enabling one partner to act in excess of partnership powers.**—The ct. has no jurisdiction in an action for winding up the partnership to confer on a receiver greater powers in this respect than a partner would have had.—**NIEMANN v. NIEMANN** (1889), 43 Ch. D. 198; 59 L. J. Ch. 220; 62 L. T. 339; 38 W. R. 258, C. A.

**1027. Appointment on misleading evidence.**—In a debenture-holder's action by plffs. S. had been by order of Nov. 27, 1916, appointed receiver & manager of the property & assets of defts. In an affidavit of W. described as a "director of public cos.," he stated that for five years past he had known S. of No. 1, R. Street, A., "accountant," the proposed receiver & manager, that the accountant had carried on business as such for upwards of five years at No. 1, R. Street, & elsewhere in the City of London, & that S. was a person of respectability & a fit & proper person to be appointed receiver & manager of defts.' property & assets. S. was, according to the evidence, secretary to a political league, & had an office at No. 1, R. Street, for two months past, & there was no evidence that he had carried on business as an accountant. On motion to discharge S. from the receivership:—*Held*: the appointment had been procured by means of a misleading affidavit, & the receiver must be discharged.—**Re CHURCH PRESS, LTD., VICTORIA HOUSE PRINTING CO., LTD. v. CHURCH PRESS, LTD.** (1917), 116 L. T. 247.

**Appointment prejudicing executor's right of retainer.**—*See* EXECUTORS, Vol. XXIII., p. 377, Nos. 4463, 4464.

#### SUB-SECT. 4.—MISCONDUCT OR DEFAULT OF RECEIVER.

*See* R. S. C., Ord. 50, r. 21.

**1028. Waste.**—Receiver commits waste & discharged by all parties concerned in interest.—**BELL v. SPEREMAN** (1726), Cas. temp. King, 59; E. R. 222, L. C.

**1029. Receiver absconding.**—**SHACKEL v. MARLBOROUGH (DUKE)** (1844), 1 Seton's Judgments & Orders, 6th ed. 805.

**1030. Irregular rendering of accounts.**—A receiver had been accustomed to bring in his accounts very irregularly in point of time, & thereby the actual balances in his hands never clearly appeared. He was specially ordered to bring in his accounts before a given day in every year, accompanied with an affidavit, showing the actual balance in hand, inquiries were also directed as to his former balances, & he was ordered to pay the costs of the application.

The conduct of the receiver has been very irregular; petitioner has great reason to complain of it; & for the protection of petitioners, it is necessary that the receiver should be discharged, or that some better security than has

hitherto been afforded should be provided. Petitioner must be indemnified from the costs of it. The receiver must pay them, & if he has not acted in concert with those who are entitled to the estate subject to the charges, he must personally bear them. If he has acted in concert with them, or been countenanced by them, it may not be improper to allow him to charge them in account, against any balance of the rents which may remain after payment of the charges (**LORD LANGDALE, M.R.**).—**BERTIE v. ABINGDON (LORD)** (1845), 8 Beav. 53; 50 E. R. 21.

**1031. Failure to pay rent of premises.**—**MITCHELL v. CONDY**, [1873] W. N. 232.

**1032. Attempt to remove partnership business—To injury of one partner.**—**MITCHELL v. CONDY**, [1873] W. N. 232.

**1033. Mismanagement—Not illiteracy.**—**CHAYTOR v. MACLEAN**, No. 147, *ante*.

#### SUB-SECT. 5.—ON BEHALF OF PRIOR INCUMBRANCER.

**1034. Establishment of prior title.**—*Cestuis que trust* under a will instituted a suit to have the trusts carried into effect & to set aside a mtge. of a part of the trust estate made by the trustees. By the terms of the mtge. the mtgees. were not entitled to take possession except upon a prescribed notice. Before this notice had been given pltf. had obtained an order for a receiver, & also an order to take proceedings with respect to a claim adverse to the interests of all the parties to the suit. Afterwards a decree was made in the suit, establishing the validity of the mtge. & directing a sale, in which all parties were ordered to join. The mtgees. neither consented to nor opposed the interlocutory orders being made, nor did they at the hearing ask for a dismissal of the bill as against themselves, or oppose the insertion of the direction for a sale. They afterwards applied to have the receiver discharged & to be let into possession, & gave the notice prescribed by the mtge. On their application being refused, they appealed from the refusal, & at the same time from so much of the decree as rendered it obligatory on them to concur in the sale:—*Held*: (1) they had not adopted the proceedings in the suit, but were entitled to priority over the costs of it & of the action, & also to have the receiver discharged & the decree varied so far as it bound them to join in the sale; (2) testator's estate in the subject of the security being equitable, the ct. might direct possession to be delivered to the mtgees.—**LANGTON v. LANGTON** (1855), 7 De G. M. & G. 30; 3 Eq. Rep. 391; 24 L. J. Ch. 625; 24 L. T. O. S. 294; 1 Jur. N. S. 1078; 3 W. R. 222; 44 E. R. 12, L. JJ.

*Annotation*.—*Generally*, **Reid. Re Pound & Hutchins** (1889), 42 Ch. D. 402.

**1035. —.**—Pltf., having obtained judgment, was by an order made at chambers appointed receiver of the rents of some houses belonging to deft.; the order was made without prejudice to prior incumbrances. G. having applied to discharge the order appointing the receiver on the ground that he was a second mtgee. under a deed

*disqualification.*—Where a receiver, by being appointed exor. of the former pltf., since deceased, became pltf., the ct. discharged him on that ground.—**BARCLAY v. O'BRIEN** (1825), unreported.—**IR.**

1. —.—**MEARA v. EGAN** (1846), 9 L. Eq. R. 259.—**IR.**

#### PART IX. SECT. 2, SUB-SECT. 4.

**m. Effect of bona fides.**—On motion to remove a receiver for misconduct:—*Held*: he had committed a breach of duty, but as he had acted *bona fide* & to the best of his judgment for the benefit of all parties, he should not be removed.—**OTTAWA & PRESCOTT**

Ry. Co., 1 Ch. Ch. 337.—**CAN.**

#### PART IX. SECT. 2, SUB-SECT. 5.

**n. General rule.**—A prior creditor who has obtained an order for the appointment of a receiver is entitled to discharge an order for a receiver over the same lands, obtained by a

**Sect. 2.—When order granted: Sub-sects. 5, 6 & 7.**

**Sect. 3. Part X. Sects. 1, 2 & 3.]**

executed by deflt. before the judgment in the action, the Q. B. Div. referred the question as to the validity of G.'s mtge. to a master, who after hearing evidence reported that the mtge. was a sham & had been executed in order to defeat deflt.'s creditors. The Q. B. Div. declined to review the evidence upon which the master had acted, accepted his report as conclusive, & refused G.'s application:—*Held*: inasmuch as the receiver was appointed under an equitable jurisdiction now vested in the Q. B. Div., the evidence before the master might have been reviewed; & the Ct. of Appeal being of opinion on the evidence that the mtge. had been executed in good faith, discharged the order made at chambers, whereby pltf. was appointed receiver.—**WALMSLEY v. MUNDY** (1884), 13 Q. B. D. 807; 32 W. R. 602; *sub nom.* **WALMSLEY v. MUNDY**, *Ex p.* GOODENOUGH, 53 L. J. Q. B. 304; 50 L. T. 317, C. A.

*Annotation*:—**Mentd.** *Chance & Hunt v. G. W. Ry., L. & N. W. Ry., Mid. Ry. & North Staffordshire Ry.* (1914), 15 Iry. & Can. Tr. Cas. 241.

**1036. Substitution of nominee of incumbrancer.]**—**STANLEY v. COULTHURST**, [1868] W. N. 305.

**1037. —.]**—B. debenture stock issued by the above co. was secured by a trust deed, called the B. security, on the general assets & on the site of a hotel, with a "primary trust for conversion" when the B. security became enforceable. Clause 18 provided that the B. trustees should hold the moneys to arise under the primary trust for conversion upon trust, that they should thereout in the first place pay or retain their costs & expenses "including the remuneration of the P. trustees" & should apply the residue in payment of the B. stockholders, & should pay the surplus, if any, to the co. Clause 34 provided that the co. should pay the B. trustees a fixed remuneration *per annum* to continue payable until the trusts of the B. security should be finally wound up & whether or not a receiver should be appointed or the trusts should be administered by the ct. The B. security became enforceable & a receiver was appointed in a B. stockholder's action. This receiver was superseded by a receiver appointed in an action by the trustees of a prior lien security, to which action the B. trustees were parties, & in which their security was established. The hotel was actually sold by the prior lien trustees, the entire purchase-money being received & paid by them into ct. in pursuance of an order in the prior lien action. The B. trustees joined in the conveyance. After discharging the prior lien a considerable surplus was left in ct. for the B. stockholders:—*Held*: the B. trustees were entitled to their fixed contractual remuneration under clause 34 until the trusts of the B. security were finally wound up, & under clause 18 to a lien on the surplus proceeds of sale in ct. in priority to the B. stockholders.—*Re PICCADILLY HOTEL, LTD., PAUL v. PICCADILLY HOTEL, LTD.*, [1911] 2 Ch. 534; 81 L. J. Ch. 89; 105 L. T. 775; 56 Sol. Jo. 52; 19 Mans. 85.

*Annotations*:—**Consd.** *Re Locke & Smith, Wigan v. The Co.*, [1914] 1 Ch. 687; *Re British Consolidated Oil Corp.*, *Howell v. The Co.*, [1919] 2 Ch. 81. **Refd.** *Re Anglo-*

*pulse creditor in a suit in which the prior creditor is not a party.*—**IRVING v. WALLER** (1825), 1 Hog. 258.—**IR.**

**o. —.]**—**MORGAN v. SMITH** (1830), 1 Mol. 541.—**IR.**

**p. —.]**—**BURKE v. BROWNE** (1843), 6 I. Eq. R. 213.—**IR.**

**q. —.]**—*Re SOUTHERN RY. CO.*,

*Canadian Lands* (1912), *Ltd., Park v. The Co.*, 2 Ch. 287.

*See, also.* **MORTGAGE**, Vol. XXXV., p. 524, Nos. 2539-2542.

**SUB-SECT. 6.—RECEIVER'S OWN APPLICATION.**

**1038. Necessity to show reasonable cause.]**—When a receiver is appointed, & has given security, he must show a reasonable cause to entitle himself to be discharged.—**SMITH v. VAUGHAN** (1744), *Ridg. temp. H.* 251; 27 E. R. 820.

**1039. — Ill-health—Costs.]**—**RICHARDSON v. WARD** (1822), 6 Madd. 266; 56 E. R. 1092.

**SUB-SECT. 7.—OTHER CASES.**

**1040. Application by one of several interested parties.]**—**BAINBRIDGE v. BLAIR**, No. 1013, *ante*.

**1041. — Infant tenants in common—One only attaining majority.]**—A receiver appointed for the benefit of two infant tenants in common, not discharged on one coming of age.—**SMITH v. LYSTER** (1841), 4 Beav. 227; 10 L. J. Ch. 344; 49 E. R. 326.

**1042. Trust estate—Outstanding question as to title—All trustees dead.]**—Where the trustees of a will are dead, & it appears that there is a question as to the party in whom the legal estate is vested, the ct. will appoint new trustees, notwithstanding that a receiver has been appointed in the suit, & continue the receiver.—**REEVES v. NEVILLE** (1862), 10 W. R. 335.

**1043. Receiver appointed on behalf of infant—Application for discharge by other beneficiaries.]**—**HOSKINS v. CAMPBELL, GIBBON v. CAMPBELL**, [1869] W. N. 59.

**SECT. 3.—HOW OBTAINED.**

**1044. Application to court—Necessity for.]**—For the purpose of divesting the possession of the receiver, an application to the ct. was necessary (**LEACH, M.R.**).—**THOMAS v. BRIGSTOCKE** (1827), 4 Russ. 64; 38 E. R. 729.

*Annotations*:—**Refd.** *Re Franks* (1851), 16 L. T. O. S. 529; *Paynter v. Carow* (1854), 23 L. J. Ch. 596; *Re Hoare, Hoare v. Owen*, [1892] 3 Ch. 94; *Preston v. Tunbridge Wells Opera House*, [1903] 2 Ch. 323; *Re Metropolitan Amalgamated Estates, Fairweather v. The Co.*, [1912] 2 Ch. 497. **Mentd.** *Clarendon v. Barham* (1842), 1 Y. & C. Ch. Cas. 688; *Hele v. Bexley, Whitfield v. Bowyer, Whitfield v. Knight* (1855), 20 Beav. 127.

**1045. — Notice—Necessity for personal service on receiver.]**—A receiver ought to be personally served with notice of an application to discharge him from his office.—**A.-G. v. HABERDASHERS' Co.** (1838), 2 Jur. 915.

**1046. — Form of application—Motion.]**—The next friend of an infant having been also appointed by the ct. general guardian & receiver, a motion was made by the infant to remove him from all those offices, the notice of motion being signed by a solr.:—*Held*: although a next friend

, 17 L. R. Ir. 121,

cause had abated by the death of deflt. against whom the process issued.—**WOODS v. CREAGHE** (1824), 1 Hog. 174.—**IR.**

**PART IX. SECT. 3.**

**t. Application by surety—Insanity of receiver.]**—**WEBB v. CASHEL** (1847), 11 L. Eq. R. 558.—**IR.**

**PART IX. SECT. 2, SUB-SECT. 7.**

**r. Death of one of interested parties.]**—An abatement by the death of a co-pltf. is not cause for the removal of a receiver who was appointed on process; but it would be otherwise, if the

may be removed by a notice of motion signed by the solr., a guardian & receiver cannot, & motion refused with leave to amend by putting the name of a next friend *pro hac*.—*Cox v. Wright* (1863), 2 New Rep. 436; 32 L. J. Ch. 770; 8 L. T. 631; 9 Jur. N. S. 981; 11 W. R. 870.

**1047.** ———.—[The official liquidator under a winding up is the receiver of the property of the co. appointed by the ct. for the benefit of all parties interested, & his right is paramount to that of receivers appointed on behalf of mtgees. of the co between the presentation of the petition & the winding-up order. Order made on motion by the official liquidator discharging two persons appointed before the winding-up order as receivers of the property of the co. in an action by mtgees. commenced after presentation of the winding-up petition.—*Re Compagnie Générale de Bellegarde, Campbell v. Compagnie Générale de*

*Bellegarde* (1876), 2 Ch. D. 181; 45 L. J. Ch. 386; 34 L. T. 54; 24 W. R. 573.

**Annotations.**—*Apld.* *Tottenham v. Swansea Zinc Ore Co.* (1884), 53 L. J. Ch. 776. *Refd.* *Boyle v. Bettws Llantwit Colliery Co.* (1876), 2 Ch. D. 726; *British Linen Co. v. South American & Mexican Co.*, [1894] 1 Ch. 108.

**1048.** ———.—**Petition—By receiver on summons for future directions.**—*Stilwell v. Mellersh*, No. 952, *post*.

**1049.** ———.—**Costs of appearance by receiver.**—*Herman v. Dunbar*, No. 953, *ante*.

**1050.** **The order—When order vacating recognisances included.**—Rules of practice upon applications to discharge receivers & vacate their recognisances. If the balance is to be paid into ct., the same order may direct the recognisances to be vacated; but, if the balance is to be paid in any other mode, a second application becomes necessary.—*Lawson v. Ricketts* (1849), 11 Beav. 627; 50 E. R. 959.

## Part X.—Position of Sureties.

### SECT. 1.—IN GENERAL.

**Who may be sureties.**—*See* Part II., Sect. 5, sub-sect. 8, A., *ante*.

**1051.** **Receiver may not entrust property to sureties—Or persons appointed by them.**—*White v. Baugh*, No. 1065, *post*.

**1052.** **Death of receiver—Possibility of liability—Presence at taking accounts.**—*Sharp v. Wright* (1878), 2 Daniell's Chancery Practice, 7th ed., p. 1450.

### SECT. 2.—EXTENT OF LIABILITY.

**1053.** **Principal.**—By a general order of the Ct. of Ch. the receiver under a trust estate, enters into a recognisance with two sureties, for the faithful discharge of his duties. A receiver is allowed a salary, but if he neglect his duty, then a master in Chancery has the power to deprive him of it, & also to order him to pay interest on the amount of money retained in his hands. A receiver, who was ordered to pay over a sum of money & interest, became a bkpt., & the Ct. of Ch. sent a case to the Ct. of K. B., to be informed whether the sureties were bound in law to pay that interest. This ct. held, that the recognisances being forfeited, the penalty was the debt, & consequently, that the ct. of equity might make them pay to that amount, & thus include the interest.—*Dawson v. Raynes* (1821), 2 L. J. O. S. K. B. 186; *subsequent proceedings* (1826), 2 Russ. 466.

#### PART X. SECT. 1.

**a.** **Death of surety—Appointment of new surety.**—Where the surety of a receiver dies pending the suit, the receiver may obtain *ex p.* an order referring it to the master to approve of a new one.—*Baldwin v. Crawford* (circa 1864), 1 Ch. Ch. 264.—**CAN.**

**b.** ———.—[Where one of the sureties of a receiver died, not leaving any property:—*Held*: a new surety should be appointed.—*Averall v. Wade* (1841), Fl. & K. 311.—**IR.**

#### PART X. SECT. 2.

**1055 i.** **Interest.**—[It is discretionary to charge a receiver's surety with

interest on his balances, & the surety having paid the entire of the balances, the ct. refused to do so.—*Re Henricks* (1833), 3 I. Ch. R. 183, 187.—**IR.**

**1058 i.** **Costs—Including costs of removal & replacement of receiver.**—[A surety in a receiver's recognisance is, to the extent of the amount of the recognisance, answerable for the costs of an attachment against the receiver for not accounting, the costs of appointing a new receiver, & the costs of the order on the tenants to pay their rents to such new receiver.—*Maunsell v. Egan* (1846), 3 Jo. & Lat. 251.—**IR.**

**1058 ii.** ———.—[*Watters v. Watters* (1847), 11 I. Eq. R. 335.—

**1054.** ———.—*Re Graham, Graham v. Noakes*, No. 733, *ante*.

**1055.** **Interest.**—*Dawson v. Raynes*, No. 1053, *ante*.

**1056.** ———.—**Default by executors of receiver.**—[Where the exors. of a receiver made default in payment of the sum found due from his estate, but no default has been made by the receiver in his lifetime, the ct. charged the receiver's surety with 4 per cent. interest only on the amount to be paid.—*Clements v. Beresford* (1846), 7 L. T. O. S. 450; 10 Jur. 771.

**1057.** ———.—*Re Graham, Graham v. Noakes*, No. 733, *ante*.

**1058.** **Costs—Including costs of removal & replacement of receiver.**—*Re Graham, Graham v. Noakes*, No. 733, *ante*.

**1059.** **What receiver "should receive & become liable to pay as such receiver."**—*Smart v. Flood & Co.*, No. 254, *ante*.

**1060.** **To limit of bond of security—Limiting words of security notwithstanding.**—*Re Graham, Graham v. Noakes*, No. 733, *ante*.

**Lunatics.**—*See* LUNATICS, Vol. XXXIII., p. 192, Nos. 908, 909.

**Debenture-holders.**—*See* COMPANIES, Vol. X., p. 802, No. 5083.

### SECT. 3.—ENFORCEMENT OF LIABILITY.

**1061.** **Former practice—Leave granted to put recognisances in suit.**—*Stewart v. Hoare* (1796), 1 Selon's Judgments & Orders, 6th ed. 805, L. C.

**1058 iii.** ———.—*Re Nugent's Estate*, [1897] 1 I. R. 461.—**IR.**

**c.** **To limit of bond of security.**—[Sureties in a recognisance contribute in proportion to the amounts for which they are respectively originally bound.—*Re McDonagh* (1876), 10 I. R. Eq. 269.—**IR.**

**d.** ———.—[*Kenney v. Employers' Liability Assurance Corpn.*, 1 I. R. 301.—**IR.**

#### PART X. SECT. 3.

**1061 i.** **Former practice—Leave granted to put recognisances in suit.**—*R. v. Bayly* (1841), 1 Dr. & War. 213.—**IR.**

**Sect. 3.—Enforcement of liability. Sects. 4 & 5.**  
**Part XI. Sect. 1.]**

**1062.** ———.]—**LUDGATER v. CHANNELL**, No. 995, *ante*.

See R. S. C., Appendix L, Nos. 21, 21A.

**1063. Present practice—Submission of surety to jurisdiction of court.]**—W. was appointed receiver & manager in a debenture-holders' action, & gave a bond with sureties conditioned to be void if he duly accounted for what he received or became liable to pay.

The registrar certified that W. was entitled to be indemnified against £900 due to trade creditors but subsequently certified that £400 was due from W. on passing his accounts. W. was ordered to pay this sum into ct., but became bkpt., & never did so. The sureties submitted to the jurisdiction of the ct. as fully as if the bond had been put in suit, & a summons was taken out on behalf of the trade creditors asking that a certificate should issue finding £100 due from W., that he had made default, & that the sureties were liable to make good that default:—*Held*: the trade creditors could only claim through W. to the extent of his right to indemnity against the estate. The loss incurred through W.'s default must fall on those who gave him credit, & the application failed.—*Re BRITISH POWER TRACTION & LIGHTING CO., LTD., HALIFAX JOINT STOCK BANKING CO., LTD. v. BRITISH POWER TRACTION & LIGHTING CO., LTD.*, [1910] 2 Ch. 470; 79 L. J. Ch. 666; 103 L. T. 451; 54 Sol. Jo. 749.

**1064. Order for payment by instalments.]**—The recognisance of a surety for a receiver being estreated, & an action brought against such surety, an application was made by him for a reference to see what was due, & an order for payment by instalments, & for an injunction to stay proceedings at law. An order, by consent, was made accordingly, on paying the costs of the application, & of proceedings consequent on the order.—*WALKER v. WILD* (1816), 1 Madd. 528; 56 E. R. 194.

**SECT. 4.—INDEMNITY.**

**1065. Agreement with receiver for indemnity—Against loss through default of receiver—Validity.]**

—A receiver cannot be permitted to enter into any agreement with his sureties by which he, in effect, indemnifies them against any loss that may accrue from his dealing with the receivership fund. The security for his good conduct must not be worked out of the estate itself.

Nor can he be permitted to put the fund entrusted to his care under their control or the control of any person appointed by them, but must retain the complete control over it in himself, so as to be liable to act with promptitude on any emergency.

It makes no difference in such a case that the arrangement between the receiver & his sureties has not been the direct cause of a loss, nor that neither of them has obtained any personal advantage from it.

Where an order has been made in a cause directing a receiver to pay the fund to a parti-

cular person, & that person dies, the receiver is not bound in the first instance to take out a representation to the deceased, nor to apply to have the order revised; it is sufficient for him to keep the money in the custody in which it was originally placed, until the state of the proceedings in the ct. enables him to pay it over.

It is clearly the duty of the receiver, as an officer of the ct., to keep in his own hands the control over the fund (*LORD BROUGHAM*).—*WHITE v. BAUGH* (1835), 3 Cl. & Fin. 44; 9 Bli. N. S. 181; 6 E. R. 1354, II. L.; *affg.* S. C. *sub nom.* *SALWAY v. SALWAY* (1831), 2 Russ. & M. 215, L. C.

*Annotation*:—*Mentd.* *Mactaggart v. Watson* (1835), 3 Cl. & Fin. 525.

**1066. Right against receiver—Subrogation.]**—A surety for a receiver is entitled to stand in the place of the receiver, to be paid sums ordered to the receiver out of funds in ct., in respect of disbursements made by him, the money for making such disbursements having been advanced by the surety, & the same giving him therefore a lien on the money ordered to be paid to the receiver.—*GLOSSOP v. HARRISON & HAWKES* (1814), Coop. G. 61; 3 Ves. & B. 134; 35 E. R. 478, J. C.

**1067. — Right to sue.]**—*SHACKEL v. MARLBOROUGH (DUKE)* (1844), 1 Seton's Judgments & Orders, 6th ed. 805.

**1068. — Against estate of bankrupt receiver.]**

—A person appointed in a cause to be receiver of the rents of testator's estate was entitled to some shares of that estate by descent, & had acquired others by purchase. By deed he gave to his sureties by way of indemnity a security on the descended shares, expressly excluding the purchased shares, but without any expression of an intention to exonerate them from such liability as they might by law be subject to. The receiver became bkpt., being considerably indebted to the estate; & the assignees sold his purchased shares. On further directions, it was declared that the descended & the purchased shares were liable to make good to the other part owners under the will so much of the balance due from the receiver as the sureties were not liable for, & from this declaration there was no appeal:—*Held*: the sureties had for the sums paid by them the same lien on the receiver's shares as the other part owners would have had, & they had not by taking the security on the descended shares lost this right as against the purchased shares.—*BRANDON v. BRANDON* (1859), 3 De G. & J. 524; 28 L. J. Ch. 147; 32 L. T. O. S. 363; 5 Jur. N. S. 256; 7 W. R. 250; 44 E. R. 1371, L. J.

**1069. Right against co-surety.]**—*SHACKEL v. MARLBOROUGH (DUKE)* (1844), 1 Seton's Judgments & Orders, 6th ed. 805.

**SECT. 5.—DISCHARGE.**

**1070. Discharge at own request.]**—Sureties for receiver not discharged at their request.—*GRIFFITH v. GRIFFITH* (1751), 2 Ves. Sen. 400; 28 E. R. 256, L. C.

**1071. — Acceptance of suretyship in breach of**

half of the sum so paid by him, but also interest thereon from the date of payment.—*Re SWAN'S ESTATE* (1869), 4 L. R. Eq. 209.—*IR.*

**PART X. SECT. 5.**

**g. Discharge at own request—Proof of underhand practice.]**—A person entering into a recognisance as a surety

**PART X. SECT. 4.**

**1067 i. Right against receiver Right to sue.]**—*HENDERSON v. SKERRETT* (1843), 5 L. R. Eq. 401.—*IR.*

**1069 i. Right against co-surety.]**—A surety who pays his principal's debt has the same rights against his co-surety that he has against the principal.—*WOODS v. CREAGUE* (1828), 2 Hog.

**50.—IR.**

**e. Right to interest.]**—*SALKERD v. ABBOTT* (1832), Hayes & Jo. 110.—*IR.*

**f. —.]**—Where one of two sureties had paid the full amount of a receiver's recognisance:—*Held*: he was entitled to use the recognisance for the purpose of recovering out of the estate of his co-surety, not only one-

partnership articles.]—*SWAIN v. SMITH* (1827), 1 Seton's Judgments & Orders, 7th ed. 775.

**1072. — On payment of balance found due.]—**Proceedings were commenced in the common law side of this ct., against the surety of a receiver, to compel the payment of the balance, ordered to be paid to pltf. The surety paid the amount to the solr. prosecuting the proceedings, & then applied to have his recognisance vacated. The petition was served on pltf. who did not appear. The ct. refused to make the order, but directed pltf. to be served with a notice, that the order would be made on a given day, unless pltf. showed cause to the contrary. Pltf. not then appearing, the order was made.—*MANN v. STENNETT* (1845), 8 Beav. 189; 9 Jur. 98, 1103; 50 E. R. 75.

**1073. — On settlement of accounts—Costs.]—***SHUFF v. HOLDAWAY* (1857), Daniell's Chancery Practice, Vol. II., 8th ed. 1500.

**1074. Necessity for fresh recognisance.]—**A receiver, on his being appointed, entered into the usual recognisance with A. & B. as his sureties. A. procured himself to be discharged, & the receiver entered into a fresh recognisance; but the time for enrolling being elapsed, it was ordered to be entered *nunc pro tunc*.—*VAUGHAN v. VAUGHAN* (1743), 1 Dick. 90; 21 E. R. 202.

**1075. —.]—**A surety for a receiver, having procured himself to be discharged, the receiver entered into a fresh recognisance, but the time for enrolling being elapsed, it was ordered to be entered *nunc pro tunc*; it was, however, added, that the same was not to take effect, if any intermediate purchaser, or incumbrances for a valuable consideration, of the lands of the cognisors, but from the time of the enrolment.—*BLOIS v. BETTS* (1760), 1 Dick. 336; 21 E. R. 298.

## Part XI.—Managers.

### SECT. 1.—IN GENERAL.

**1076. Distinguished from receiver.]—***Re MANCHESTER & MILFORD RY. CO., Ex p. CAMBRIAN RY. CO.*, No. 784, *ante*.

**1077. Purpose of appointment—Pending winding up or sale—Not permanent management.]—**The principle upon which a ct. of equity interferes between partners by appointing a manager, receiver, etc., is merely with a view to the relief, by winding up & disposing of the concern, & dividing the produce; not to carry it on.—*WATERS v. TAYLOR* (1808), 15 Ves. 10; 33 E. R. 658, L. C.; *subsequent proceedings* (1813), 2 Ves. & B. 299, L. C.

*Annotations:—***Refd.** *Roberts v. Eberhardt* (1853), Kay, 148; *Automatic Self-Cleaning Filter Syndicate Co. v. Cuninghame*, [1906] 2 Ch. 31. **Mentd.** *Gourlay v. Somerset* (1815), 19 Ves. 429; *De Berenger v. Hammel* (1829), cited in *Bythewood & Jarman's Precedents of Conveyancing*, 3rd ed., Vol. 7, p. 83; *Taylor v. Waters* (1836), 5 L. J. Ch. 210.

**1078. — — —.]—***GARDNER v. LONDON, CHATHAM & DOVER RY. CO.* (No. 1), *DRAWBRIDGE v. SAME*, *GARDNER v. SAME* (No. 2), *IMPERIAL MERCANTILE CREDIT ASSOCN. v. SAME*, No. 1103, *post*.

**1079. — — —.]—**I think it has been settled that the ct. will never appoint a person receiver & manager except with a view to a sale. The appointment is made by way of interlocutory order with a view to a sale; it is not a permanency (*COZENS-HARDY, M.R.*).—*Re NEWDIGATE COLLIERY, LTD., NEWDEGATE v. THE CO.*, [1912] 1 Ch. 468; 81 L. J. Ch. 235; 106 L. T. 133; 19 Mans. 155, G. A.

*Annotations:—***Consd.** *Re Great Colar, Beeson, v. The Co.*, [1915] 1 Ch. 682. **Refd.** *Re Thames Ironworks Shipbuilding & Engineering Co., Farrer v. The Co.* (1912), 106 L. T. 674.

**1080. Separate persons as receiver & manager.]—***TEMPEST v. ORD* (1816), 2 Mer. 55; 35 E. R. 861, L. C.

for a receiver cannot get it vacated during the continuance of the receivership, unless underhand practice is proved, & the person secured shown to be connected with such practice.—*HAMILTON v. BREWSTER* (1820), 2 Mol. 407.—**IR.**

**h. — Necessity for consent of all parties.]—**Where one of the sureties seeks to be discharged, a consent verified by affidavit & signed by the receiver & remaining surety must be

lodged with the registrar stating that they consent that the surety shall be discharged without prejudice to their liability & future acts of the receiver & a declaration that they will not rely on the vacating of the recognisance as one of the parties in any proceeding against them on the recognisance.—*O'KEEFE v. ARMSTRONG* (1852), 2 L. Ch. R. 115.—**IR.**

**k. Discharge receiver—Duty of**

**1081. —.]—**Arts. of partnership provided that the partnership should continue for fourteen years from Jan. 1, 1891; that if any partner should die or become bkpt., he should be deemed to have ceased to be a partner on the date of such death or bkpey., & his share in the capital should remain as a loan to the surviving or continuing partners or partner during the residue of the term of fourteen years, or during such shorter period as they should carry on the business, either alone or in partnership with others, bearing interest at 5 per cent., & the payment of the loan with interest should be secured by the joint & several bond, or the bond or covenant of the surviving or continuing partners or partner.

The partnership firm consisted of a father & his three sons, of whom deft. was the youngest. The whole of the capital was provided by the father. In June, 1892, the father & the two elder sons became bkpt., & the trustees in their bkpey. brought an action against deft. for a declaration that the provisions of the arts. under which deft. claimed to retain as a loan the respective shares of the bkpts. in the capital of the partnership were void as against the creditors of the bkpts., & moved for the appointment of a receiver & manager of the partnership business. Deft. claimed the right, as solvent partner, to be appointed receiver & manager:—**Held:** deft. was entitled to be appointed receiver & manager; but that he must give security, pass his accounts, furnish pltf. with proper accounts, allow them all reasonable access to the books, & pay the balances in his hands, as & when they reached a certain amount to be agreed upon, into ct., or into a joint banking account of pltf. & himself.

I do not think it desirable to appoint deft. manager & some one else receiver, as that course sometimes leads to difficulties (*STIRLING, J.*).—*COLLINS v. BARKER*, [1893] 1 Ch. 578; 62 L. J. Ch.

*receiver to give notice to all parties.]—*A receiver being appointed for the benefit of all parties to a cause, he should, on moving to vacate his recognisance, give notice to all parties.—*BROWN v. PERRY* (1861), 1 Ch. 253.—**CAN.**

**i. Application for discharge at same time as discharge of receiver—Whether granted.]—***FITZGERALD v. HILL* (1810), 2 L. Eq. R. 398.—**IR.**

*Sect. 1.—In general. Sect. 2: Sub-sects. 1, 2, 3, 4, 5, 6, 7, 8 & 9. Sects. 3 & 4: Sub-sects. 1 & 2.]* 316; 68 L. T. 572; 41 W. R. 442; 9 T. L. R. 167; 37 Sol. Jo. 193; 3 R. 237.

**1082. Appointment for limited period.]—**Upon default being made by a co. in the payment of interest on the debentures issued by it, a debenture-holder commenced an action on behalf of himself & all other debenture-holders against the co. for the enforcement of their security, & for the appointment of a receiver & manager. A receiver & manager was duly appointed, & on the co. subsequently going into voluntary liquidation, he was continued as liquidator. The action came on as a short cause upon motion for judgment. The minutes provided for an account to be taken of what was due under & by virtue of pl'tfs.' security & for a sale; also for the continuation of the receiver & manager until further order:—*Held*: the minutes ought to contain a provision, not only for the continuation of the receiver & manager but also for his discharge, & a direction should be inserted in the minutes that the business of the co. was not to be carried on by the receiver & manager for a longer period than six months without the leave of the judge in chambers; & if any further time should be required, an application for further time must be made before the expiration of the six months.—*DAY v. SYKES, WALKER & Co., LTD* (1886), 55 L. T. 763.

## SECT. 2.—WHEN APPOINTED.

### SUB-SECT. 1.—IN GENERAL.

**1083. Protection of property.]—**A case might arise where a party was so conducting himself that, unless a manager was appointed before the hearing, the partnership concern might in the meantime be destroyed (*LORD TRURO, C.*).—*HALL v. HALL* (1850), 3 Mac. & G. 79; 20 L. J. Ch. 585; 17 L. T. O. S. 11; 15 Jur. 363; 42 E. R. 191, L. C.  
*Annotation*:—*Reid, Medwin v. Ditcham* (1882), 47 L. T. 250.

**1084. Interpleader proceedings—Instead of order for sale.]—**An interpleader issue being ordered to try the right to goods seized in execution, the ct. or a judge may, under Jud. Act, 1873 (c. 66), s. 25 (8), & R. S. C., Ord. 57, r. 15, order that, instead of a sale by the sheriff, a receiver & manager of the property be appointed.—*HOWELL v. DAWSON* (1884), 13 Q. B. D. 67, D. C.

*Annotation*:—*Mentd. Paquin v. Robinson* (1901), 85 L. T. 5.

**1085. Pending proceedings in Probate Division—Jurisdiction of Chancery Division.]—***Re WRIGHT, MORRISON v. JONES* (1888), 32 Sol. Jo. 721.

*Compare* Part II., Sect. 6, sub-sect. 2, A. (a).

### SUB-SECT. 2.—BUSINESS OF DECEASED OWNER.

**1086. Pending grant of administration.]—***STEER v. STEER*, No. 365, *ante*.

**1087. —.]—***OVERINGTON v. WARD* (1865), 34 Beav. 175; 55 E. R. 601.

**1088. —.]—***BLACKETT v. BLACKETT*, No. 105, *ante*.

**1089. —.]—***SPENCER v. SHAW*, [1875] W. N. 115.

**1090. —.]—***Re BAKER, GIDDINGS v. BAKER* (1882), 26 Sol. Jo. 682.

**1091. Where property left in trust—Trustees not qualified as managers.]—***HART v. DENHAM*, [1871] W. N. 2.

**1092. Accounts of manager—Court fees—Percentage.]—**The percentage for the ct. fees on the passing & vouching in chambers of an account rendered periodically by managers of a business appointed in an administration action, which is payable under fee No. 72 in the schedule to the Order as to Supreme Court Fees, 1884, is to be calculated on the amounts received by the managers, & not on the amounts found due from them.

Where such an account has been lodged in chambers, but has not been vouched or passed, a fee proportionate to the work actually done in chambers is payable.—*Re CRAWSHAY, DENNIS v. CRAWSHAY* (1888), 39 Ch. D. 552; 57 L. J. Ch. 923; 59 L. T. 598; 37 W. R. 25.

### SUB-SECT. 3.—DEBENTURE-HOLDERS' ACTION.

*See COMPANIES*, Vol. X., pp. 793, 798–804, Nos. 4988, 5043–5099.

### SUB-SECT. 4.—FOREIGN PROPERTIES.

**1093. Colonial estate.]—***LOGAN v. COORG (PRINCESS)* (1860), 1 Seton's Judgments & Orders, 7th ed. 776.

**1094. — Appointment of agent in colony.]—**The ordinary rule of the ct. requires that the person appointed to manage a colonial estate should reside in the colony; but there may be exceptions under special circumstances.—*WILLINK v. BENTINCK* (1844), 2 L. T. O. S. 397.

**1095. Foreign mine.]—**An assocn. was formed in England to conduct mining operations abroad. The property was vested in two & became vested in one by survivorship. The shareholders had no evidence of their title excepting the holding of certificates, being entitled to the benefit of them. The surviving trustee made advances out of his own money to carry on the business of the assocn., & offered to sell the property, & after payment of the money due to him to divide the produce among the shareholders rateably, but he refused to make out a full & satisfactory account of his outlay. On a bill filed by a shareholder on behalf of himself & all other shareholders, except the trustee, the ct. granted an injunction to restrain all selling or dealing with the property by him, except in the ordinary course of business, & appointed a receiver & manager of the business in this country with directions to apply the money received in discharge of the liabilities in the ordinary course of business.—*SHEPPARD v. OXENFORD* (1855), 1 K. & J. 491; 25 L. T. O. S. 63; 3 W. R. 384; 69 E. R. 552; *on appeal*, 25 L. T. O. S. 90, L. J.J.

*Annotation*:—*Mentd. Re Great Cambrian Mining & Quarrying Co., Bowen's Case* (1856), 4 W. R. 800.

*See, also, MORTGAGE*, Vol. XXXV., p. 531, Nos. 2621–2623.

### SUB-SECT. 5.—AT INSTANCE OF LANDLORD.

*See LANDLORD & TENANT*, Vol. XXXI., pp. 107, 108, Nos. 2434–2436.

## PART XI. SECT. 2, SUB-SECT. 2.

m. *Pending sale in administration action.]—Re HODGES, HODGES v. HODGES*, [1899] 1 L. R. 480, 482.—*IR.*  
n. —.]—*RAMSAY v. SIMPSON*, [1899] 1 L. R. 194.—*IR.*



## PART XI.—MANAGERS.

### SUB-SECT. 6.—MINING PROPERTY.

See MINES, Vol. XXXIV., pp. 622, 623, 625, 665, Nos. 194, 195, 198–201, 221, 621.

**Right of mortgage of mining property—Appointment of receiver & manager.]—See MINES, MINERALS & QUARRIES, Vol. XXXIV., p. 669, Nos. 657–659.**

### SUB-SECT. 7.—AT INSTANCE OF MORTGAGEE.

See Law of Property Act, 1925 (c. 20), ss. 109, 110; MORTGAGE, Vol. XXXV., pp. 531–533.

### SUB-SECT. 8.—IN PARTNERSHIP.

See, generally, PARTNERSHIP, Vol. XXXVI., pp. 484–487.

**Who may be appointed.]—See PARTNERSHIP, Vol. XXXVI., p. 488.**

**Mining partnerships.]—See MINES, Vol. XXXIV., pp. 622, 623, 625, Nos. 194, 195, 198–201, 221.**

### SUB-SECT. 9.—PUBLIC UNDERTAKINGS.

**Railways.]—See RAILWAYS, Vol. XXXVIII., p. 384.**

**Tramways.]—See COMPANIES, Vol. X., p. 1190, Nos. 8444–8446; TRAMWAYS & LIGHT RAILWAYS.**

**Water company.]—See COMPANIES, Vol. X., p. 1190, No. 8447; WATER SUPPLY.**

## SECT. 3.—APPLICATION FOR APPOINTMENT—PROCEDURE.

**1096. Ex parte application.]—BLACKETT v. BLACKETT, No. 105, ante.**

**1097. —.]—Re BAKER, GIDDINGS v. BAKER (1882), 26 Sol. Jo. 682.**

Compare Part II., Sect. 2, sub-sect. 5, ante.

**1098. Choice of person to be appointed—Reference to master.]—On reference to appoint a manager of an estate, the master is to fix on the fittest person, without regard to who may propose him.—LESPINASSE v. BELL (1821), 2 Jac. & W. 436; 37 E. R. 691.**

**1099. — Reference to chambers.]—HART v. DENHAM, [1871] W. N. 2.**

**1100. —.]—Re WRIGHT, MORRISON v. JONES (1888), 32 Sol. Jo. 721.**

**1101. — Liberty to party to propose himself.]—HART v. DENHAM, [1871] W. N. 2.**

Compare Part II., Sect. 4, ante.

**Receiver for mortgagee.]—See MORTGAGE, Vol. XXXV., p. 532, Nos. 2636–2638.**

## SECT. 4.—EFFECT OF APPOINTMENT.

### SUB-SECT. 1.—IN GENERAL.

**1102. Operates as discharge of agency of receiver.]—HAND v. BLOW, No. 657, ante.**

**Appointment on behalf of debenture-holders—Whether operating as change of occupation.]—See COMPANIES, Vol. X., p. 800, Nos. 5063, 5064.**

**—Distress for rates.]—See DISTRESS, Vol. XVIII., p. 398, Nos. 1387, 1388.**

## PART XI. SECT. 3.

**o. Expiration of office—Application to set aside receiving order—Necessity for.]—Where a receiver has been**

**appointed for a stated period which has expired & an application for an order continuing the appointment was refused there is no necessity or reason**

**—Liability for arrears of gas, rents & charges.]—See GAS, Vol. XXV., p. 476, No. 40.**

**—Right to call for supply of electricity.]—See ELECTRIC LIGHTING, Vol. XX., p. 205, No. 31.**

**—Operation as discharge of servants.]—See COMPANIES, Vol. X., pp. 799, 800, Nos. 5060–5062.**

**—Appointment of director as receiver & manager—Whether remuneration payable as director.]—See COMPANIES, Vol. IX., p. 461, No. 2996.**

**—Termination of remuneration of trustees of trust deed.]—See COMPANIES, Vol. X., pp. 748, 749, Nos. 4681–4684.**

### SUB-SECT. 2.—STATUS OF MANAGER.

**1103. Officer of the court.]—(1) When the ct. appoints a manager of a business or undertaking, it in effect assumes the management into its own hands; for the manager is the servant or officer of the ct. (CAIRNS, L.J.).**

**(2) Nothing is better settled than that this ct. does not assume the management of a business or undertaking except with a view to the winding up & sale of the business or undertaking. The management is an interim management (CAIRNS, L.J.).—GARDNER v. LONDON, CHATHAM & DOVER RY. CO. (No. 1), DRAWBRIDGE v. SAME, GARDNER v. SAME (No. 2), IMPERIAL MERCANTILE CREDIT ASSOCN. v. SAME (1867), 2 Ch. App. 201; 36 L. J. Ch. 323; 15 L. T. 552; 31 J. P. 87; 15 W. R. 325, L. J.J.**

**Annotations:—As to (1) Consd. Reid v. Explosives Co. (1886), 56 L. J. Q. B. 68. Apud. Re Eastern & Midlands Ry. (2) (1891), 66 L. T. 153. Consd. De Grelle Houdret v. Bull (1894), 1 Mans. 118; Boehm v. Goodall, [1911] 1 Ch. 155. As to (2) Consd. Re Manchester & Milford Ry., Ex p. Cambrian Ry. (1880), 14 Ch. D. 645; Reid v. Explosives Co. (1886), 56 L. J. Q. B. 68. Apud. Blaker v. Herts & Essex Waterworks Co. (1889), 41 Ch. D. 399. Consd. Burtlett v. West Metropolitan Tram. Co., [1893] 3 Ch. 437. Reid, Griffin v. Bishop's Castle Ry. (1867), 15 W. R. 1058; Holdsworth v. Davenport (1876), 3 Ch. D. 185; Re Watts, Cornford v. Elliott (1885), 33 W. R. 885; Re Hutton, Robson v. Gibbs (1888), 4 T. L. R. 311; Re Barton-upon-Humber & District Water Co. (1889), 42 Ch. D. 585; Makins v. Ibbotson (1890), 60 L. J. Ch. 164; Marshall v. South Staffordshire Tram. Co., [1895] 2 Ch. 36. Generally, Mendt. Bowen v. Brecon Ry., Ex p. Howell (1867), L. R. 3 Eq. 541; Re Cambrian Rys., Scheme (1867), 3 Ch. App. 281, n.; Re New Clydach Sheet & Bar Iron Co. (1868), L. R. 6 Eq. 514; Re Panama New Zealand & Australian Royal Mail Co. (1870), 5 Ch. App. 318; Re Exmouth Docks Co. (1873), L. R. 17 Eq. 181; Chandler v. Howell (1876), 4 Ch. D. 651; Re Mitchell's Estate, Mitchell v. Moberley (1877), 6 Ch. D. 655; Attree v. Hawe (1878), 9 Ch. D. 337; Re Herne Bay Waterworks Co. (1878), 10 Ch. D. 42; Bourgoin v. Compagnie du Chemin de Fer de Montreal Ottawa et Occidental, etc. (1880), 5 App. Cas. 381; Re Cornwall Minerals Ry. (1882), 48 L. T. 41; Brocklehurst v. Ry. Printing & Publishing Co., Eldridge & Pearson, Claimants, [1884] W. N. 70; Re Christmas, Martin v. Lacon (1885), 30 Ch. D. 544; Re Hull, Barnsley & West Riding Junction Ry. (1888), 40 Ch. D. 119; Redfield v. Wickham Corpn. (1888), 13 App. Cas. 467; Re David, Buckley v. Royal National Life Boat Institution (1889), 43 Ch. D. 27; Re Hallett, Howarth v. Massey (1889), 5 T. L. R. 285; Re Yerbury's Estate, Ker v. Dent (1889), 62 L. T. 55; Re Eastern & Midlands Ry. (1890), 45 Ch. D. 367; Re Thompson, Bedford v. Teal (1890), 45 Ch. D. 161; Re East & West India Dock Co. (1891), 7 T. L. R. 623; Re Parker, Wignall v. Park, [1891] 1 Ch. 682; Proffitt v. Wye Valley Ry. (1891), 64 L. T. 669; Re Portsmouth Borough (Kingston, Fratton & Southsea) Tram. Co., [1892] 2 Ch. 362; Driver v. Broad, [1893] 1 Q. B. 744; Whadcoat v. Shropshire Ry. (1893), 9 T. L. R. 589; Re Pickard, Elmsley v. Mitchell, [1894] 3 Ch. 704; Sadler v. Worley, [1894] 2 Ch. 170; Re Mersey Ry., Gibbs v. Mersey Ry. (1895), 11 T. L. R. 390; Pegge v. Neath District Tram. Co., [1895] 2 Ch. 508; Re Crossley, Birrell v. Greenhaugh, [1897] 1 Ch. 928; Re Knott End Railway Act, 1898, [1901] 2 Ch. 8; Stagg v. Medway Upper Navigation Co., [1903] 1 Ch. 169; Central**

**for an application to set aside the receiving order.—KOFFMAN v. FILLER (Sask.), [1927] 4 D. L. R. 604; [1927] 2 W. W. R. 819.—CAN.**



*Sect. 4.—Effect of appointment: Sub-sect. 2. Sect. 5: Sub-sects. 1, 2 & 3. Sect. 6. Part XII.]*

Ontario Ry. & Trusts & Guarantee Co., [1905] A. C. 576  
*Re Crystal Palace Co.*, Fox v. Crystal Palace Co. (1911),  
 104 L. T. 898; *Re Woking U. C. (Basingstoke Canal)*  
 Act, 1911, [1914] 1 Ch. 300.

**1104.** —.]—*Re EASTERN & MIDLANDS RY. CO.* (1890), 7 T. L. R. 17.

*Compare Part III., Sect. 2, ante.*

**Where appointed by debenture-holders.]—See COMPANIES, Vol. X., pp. 800, 801, Nos. 5071–5078.**

**Partnership actions.]—See PARTNERSHIP, Vol. XXXVI., pp. 488–489, Nos. 1530–1532.**

## SECT. 5.—DUTIES, RIGHTS AND LIABILITIES.

### SUB-SECT. 1.—IN GENERAL.

**1105. Duties.—To investigate state of business—& inform creditors thereof.]—A receiver & manager of the property & business of traders who had filed a liquidation petition was appointed by the ct. under Bkcy. Rules, 1873, r. 260. Without obtaining any previous sanction from the ct., or the creditors, he expended a considerable sum in obtaining a valuation of the debtor's assets, & he also employed the debtors to assist in managing the business at a weekly salary:—*Held*: (1) the ct. had a discretion as to allowing the sums so expended, & under the circumstances they had been properly allowed; (2) the sanction of the ct. to the expenditure could be given after it had been made; (3) it is the duty of a receiver, whether appointed by the ct. or not, inducted by the creditors, to investigate the state of the debtor's affairs, & inform the creditors at their first meeting, what he believed to be the value of the debtor's assets.—*Re GOMERSALL, Ex p. GORDON* (1875), L. R. 20 Eq. 291; 44 L. J. Bcy. 97; 32 L. T. 644; 23 W. R. 728.**

**1106. —Conflict with personal interest—Avoidance.]—Re EASTERN & MIDLANDS RY. CO.** (1890), 7 T. L. R. 17.

**1107. Rights & powers—Expenditure—Subsequent sanction of court.]—Re GOMERSALL, Ex p. GORDON, No. 1105, ante.**

**1108. —Soliciting orders & customers—In respect of business conducted—Proposed purchase by third party.]—A business was carried on under the order of the ct. for ten years by a receiver & manager not previously engaged in business. On proposals for a purchase of the business under the order of the ct., the ct. refused to restrain the receiver & manager from soliciting orders from or doing business with the present customers.—*Re IRISH, IRISH v. IRISH* (1888), 40 Ch. D. 49; 58 L. J. Ch. 279; 60 L. T. 224; 37 W. R. 231; 5 T. L. R. 39.**

*Annotations:—Consd. Boorne v. Wicker, [1927] 1 Ch. 667. Reif. Robb v. Green, [1895] 2 Q. B. 1.*

**1109. —Appointment of sub-manager.]—PORTER v. CORBETT** (1899), 1 Seton's Judgments & Orders, 7th ed. 731.

**1110. —.]—TREBY v. TILLEY** (1900), 1 Seton's Judgments & Orders, 7th ed. 731.

**1111. —Authority to contract with servants—For protection of business—Restraint of trade.]—The receiver & manager of a restaurant business, appointed by the ct. in certain Ch. proceedings, required each of the waiters at the restaurant to sign an agreement that in consideration of the employer retaining the waiter's services at 4s. per week, the latter agreed not to enter into the service of a new restaurant, about to be opened**

in the vicinity, during the current year, & in case of breach to pay £1 a day for every day he might remain in the service of the new restaurant as liquidated damages:—*Held*: the receiver & manager had authority to enter into the agreement, & it was a reasonable agreement necessary for the protection of the business.—*HOWARD v. DANNER* (1901), 17 T. L. R. 548.

**—Manager for debenture holders.]—See COMPANIES, Vol. X., pp. 800, 801, Nos. 5071–5078.**

**—Partnership action.]—See PARTNERSHIP, Vol. XXXVI., pp. 488, 489, Nos. 1532, 1533, 1535, 1540–1545.**

**—Mortgages.]—See MORTGAGE, Vol. XXXV., p. 532, Nos. 2633–2635.**

**1112. Liabilities—Payment of debt by dishonoured bill—Whether personally liable.]—The manager of a colliery paying a creditor on the colliery with a bill, which was not paid, the colliery remains liable to the payment of the original debt.—*TEMPEST v. ORD* (1815), 1 Madd. 89; 56 E. R. 35.**

*Annotation:—Mentd. Nicholl v. Thomas* (1850), 2 Rob. Eccl. 157.

**1113. —Accounts—Amended accounts after discharge.]—LEVY v. DAVIS** (1900), 44 Sol. Jo. 675.

**—Receiver for debenture-holders.]—See COMPANIES, Vol. X., pp. 802, 803, Nos. 5085–5091.**

### SUB-SECT. 2.—INDEMNITY.

**1114. General rule.]—SCOTT v. NESBITT, No. 1122, post.**

**1115. —.]—FRASER v. BURGESS, No. 1132, post.**

**1116. —.]—The law as to the position of a manager appointed by the ct. where no special provision is made for meeting expenses & liabilities incurred by him is not disputed & is indeed beyond dispute. It is, on the one hand, his duty to carry on the business, & for that purpose to enter into proper contracts on his own responsibility, & it is, on the other hand, his right to be indemnified out of the assets against expenses & liabilities properly incurred in the execution of his duty (WARRINGTON, J.).—*Re BRITISH POWER TRACTION & LIGHTING CO., LTD., HALIFAX JOINT STOCK BANKING CO., LTD. v. BRITISH POWER TRACTION LIGHTING CO., LTD.*, [1906] 1 Ch. 497; 75 L. J. Ch. 248; 91 L. T. 479; 54 W. R. 387; 22 T. L. R. 268; 50 Sol. Jo. 257; 13 Mans. 74; *subsequent proceedings*, [1907] 1 Ch. 528.**

*Annotation:—Consd. Re Hawkins, Briebe v. Hawkins* (1915), 31 T. L. R. 247.

**1117. Advancement of own money by manager—Nature of indemnity—Dependent on whether leave of court obtained.]—(1) A receiver & manager of a business should not advance money out of his own pocket for the purposes of the business without first obtaining the authority of the ct. to do so. If he applies for such authority, the ct. will, as a rule, allow him interest at 5 per cent. on the amount authorised to be advanced, & give him a charge on the assets for the advance & interest.**

**(2) If he advances money without such authority, he can only look to the estate for indemnity.**

**(3) He [the receiver] is an officer of the ct. (JESSEL, M.R.).—Re BUSHELL, Ex p. IZARD No. 1** (1883), 23 Ch. D. 75; 52 L. J. Ch. 678; 48 L. T. 751; 31 W. R. 418, C. A.

*Annotation:—As to (1) Consd. Strapp v. Bull, Shaw v. London School Board, [1895] 2 Ch. 1.*

**1118. Indemnification after discharge.]—LEVY v. DAVIS** (1900), 44 Sol. Jo. 675

**Receiver for debenture-holders.]—***See* COMPANIES, Vol. X., pp. 801, 802, Nos. 5079–5081.

**Partnership action.]—***See* PARTNERSHIP, Vol. XXXVI., p. 489, No. 1531.

#### SUB-SECT. 3.—REMUNERATION.

**Receiver for debenture-holders.]—***See* COMPANIES, Vol. X., p. 803, Nos. 5095, 5096.

**Partnership action.]—***See* PARTNERSHIP, Vol. XXXVI., p. 489, Nos. 1536–1539.

#### SECT. 6.—DISCHARGE.

**Receiver for debenture-holders.]—***See* COMPANIES, Vol. X., pp. 803, 804, 808, Nos. 5097–5099, 5155, 5156.

**Partnership action.]—***See* PARTNERSHIP, Vol. XXXVI., p. 490, Nos. 1558, 1559.

## Part XII.—Consignees and Managers of West Indian Estates.

**1119. Appointment—Necessity for security—Liability to account.]—**Manager of estate in West Indies is not to give security faithfully to manage. Ordered to account for produce, & to consign so far as the management requires it; but must have a discretion as to what to be applied there.—*MORRIS v. ELME* (1790), 1 Ves. 139; 30 E. R. 269.

**1120. — Taking effect on termination of existing appointment.]—***RUTHERFORD v. WILKINSON* (1823), 1 Seton's Judgments & Orders, 7th ed. 780.

**1121. — Grounds for—Proceedings commenced to recover real estate.]—**An injunction granted, on terms, to restrain proceedings instituted in Demerara to recover real estate there, & an order made for a consignee & manager of the estate & produce; it appearing to the ct. that there were many other questions between the parties connected with the estate, which could be more conveniently determined together in this country.—*BUNBURY v. BUNBURY* (1839), 1 Beav. 318; 8 L. J. Ch. 297; 3 Jur. 611; 48 E. R. 963; *affd.*, 8 L. J. Ch. 302, L. C.

*Annotations:—***Consd.** *Jopson v. James* (1908), 77 L. J. Ch. 824. **Refd.** *Re Holmes* (1861), 2 John. & H. 527; *Hope v. Carnegie* (1866), 1 Ch. App. 320. **Mentd.** *Sichel v. Raphael* (1864), 3 New Rep. 662; *Oakeley v. Ramsay* (1872), 27 L. T. 745.

**1122. Right to lien.]—**Allowance in respect of advances for supplies to a West Indian estate by persons, acting as consignees, not under a regular appointment, but with permission of the owners, or by one tenant in common; if not upon the ground of lien by the colonial law or usage, upon the nature of the subject, requiring expenditure; as in the case of mines, alum works, etc., distinguished from a mere landed estate in this country.

Moral justice requires that for what in the fair discharge of their duty they became liable to in respect of the management of the estate they should be indemnified (*LORD ELDON, C.*).—*SCOTT v. NESBITT* (1808), 14 Ves. 438; 33 E. R. 589.

*Annotations:—***Consd.** *Sayers v. Whitfield* (1829), 1 Knapp, 133. **Distd.** *Farquharson v. Balfour* (1836), 8 Sim. 210. **Consd.** *Morrison v. Morrison* (1855), 2 Sm. & G. 564; *Fraser v. Burgess* (1860), 13 Moo. P. C. C. 314; *Twynnam v. Hudson* (1862), 31 L. J. Ch. 577. **Apld.** *Bertrand v. Davies* (1862), 31 Beav. 429. **Refd.** *Re Courtney, Ex p. Pollard* (1840), 4 Deac. 27; *Shaw v. Simpson* (1842), 1 Y. & C. Ch. Cas. 732; *Re Leith's Estate, Chambers v. Davidson* (1866), L. R. 1 P. C. 296; *Securities & Properties Corp'n. v. Brighton Alhambra* (1893), 62 L. J. Ch. 566; *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132. **Mentd.** *Mansfield v. Ogle* (1855), 24 L. J. Ch. 450.

**1123. —.]—***SCOTT v. SMITH* (1829), cited in 13 Moo. P. C. C. at p. 348; 15 E. R. 131, P. C. *Annotation:—***Apld.** *Fraser v. Burgess* (1860), 13 Moo. P. C. C. 314.

**1124. — Implied agreement.]—**Lien established against the produce of West Indian estates in respect of supplies furnished to the estates, upon an agreement implied from the course of dealing & conduct of the parties.—*SIMOND v. HIBBERT* (1830), 1 Russ. & M. 719; 39 E. R. 276, L. C.

*Annotations:—***Refd.** *Steele v. Murphy* (1841), 3 Moo. P. C. C. 445; *Morrison v. Morrison* (1855), 2 Sm. & G. 564; *Twynnam v. Hudson* (1862), 31 L. J. Ch. 577; *Daniel v. Trotman* (1863), 1 Moo. P. C. C. N. S. 123.

**1125. — On corpus of estate—In respect of balance due.]—**A continuing consignee has no lien on the corpus of the estate for the balance of his account.—*FARQUHARSON v. BALFOUR* (1836), 8 Sim. 210; *Donnelly*, 142; 47 E. R. 281.

*Annotations:—***Apld.** *Morrison v. Morrison* (1855), 2 Sm. & G. 564. **Consd.** *Fraser v. Burgess* (1860), 13 Moo. P. C. C. 314. **Apld.** *Bertrand v. Davies* (1862), 31 Beav. 429.

**1126. — — —.]—**The right of a consignee of a West Indian estate gives him a lien on the plantation in respect of the balance due to him, & is an exception to the general rule, which applies to principal & agent. Such lien not being the result of an express contract, but given by implication of law, if created by written contract, is excluded. Therefore, if a consignee takes an express security, such security being the stipulation & agreement of the parties, it excludes his general lien. So held by the Judicial Committee, where the party claiming a general lien as consignee, was also a mtgee. of certain estates, & had, by deed, stipulated for the consignment of their produce, as well as that of other plantations, subject to the rights & interests of existing mtges. then subsisting thereon.—*Re LEITH'S ESTATE, CHAMBERS v. DAVIDSON* (1866), L. R. 1 P. C. 296; 4 Moo. P. C. C. N. S. 158; 36 L. J. P. C. 17; 12 Jur. N. S. 967; 15 W. R. 534; 16 E. R. 276, P. C.

**1127. — Cultivation expenses.]—**The consignee of a West Indian estate, who had, out of his own moneys made payments on account of an annuity charged on the estate, was held entitled to be reimbursed such payments out of compensation money which had been awarded under the Act for the Abolition of Slavery.

*Qu.*: whether such a consignee has a lien on the corpus of the estate for moneys expended by him in its cultivation?—*SHAW v. SIMPSON* (1842), 1 Y. & C. Ch. Cas. 732; 62 E. R. 1092.

*Annotations:—***Apld.** *Bertrand v. Davies* (1862), 31 Beav. 429. **Refd.** *Fraser v. Burgess* (1860), 13 Moo. P. C. C. 314.

**1128. — Payments sanctioned by court.]—**West Indian estates were divided upon trust for sale & distribution of the proceeds among testator's

children absolutely. In a suit for the administration of the trusts consignees were appointed, & pending the suit settlements were made of the children's shares, by which interests for life & in reversion were limited. In making payments which had been sanctioned by the ct., the consignees became in advance to the trust estate:—*Held*: these advances were a charge upon the corpus of the trust estate.—*MORISON v. MORISON* (1855), 7 De G. M. & G. 214; 3 Eq. Rep. 557; 25 L. T. O. S. 110; 1 Jur. N. S. 1100; 3 W. R. 383; 44 E. R. 84, L. J.

*Annotations*:—*Consd.* *Fraser v. Burgess* (1860), 13 Moo. P. C. C. 314. *Refd.* *Twynam v. Hudson* (1862), 31 L. J. Ch. 577; *Re Oriental Hotels Co.*, *Perry v. Oriental Hotels Co.* (1871), L. R. 12 Eq. 126; *Re Glasdir Copper Mines*, *English Electro Metallurgic Co. v. Glasdir Copper Mines*, [1906] 1 Ch. 365.

**1129.** ———— *In priority to Incumbrancers.*—*Ex p. DAVIS & BODDINGTON, Ex p. CHAPMAN, Ex p. GREATHEAD* (1859), 3 Sol. Jo. 544.

**1130.** ———— *The rights of lien, of consignees in this country & of the resident managers of West Indian plantations on the estates, rest upon the same principle.*

The manager of a West Indian plantation has a lien for the costs of management on the interest of the person appointing him; but if appointed by a tenant for life, he has also a lien for the supplies which produced the first crop taken by the remainderman.

Where the appointment of a manager of a West Indian plantation is not express, yet if the persons interested in the estate know that he is performing the duties & do not interfere, they must be presumed to have acquiesced in his continuance in that office, & they cannot dispute his claim to a lien on the estate for the expenditure, which, by their tacit acquiescence, they have encouraged him to make.

Where a receiver or manager of a West Indian plantation is appointed by the ct. in a suit properly constituted, he is considered as appointed on behalf of all persons interested in the property, & he is entitled to his ordinary commission & allowances & also to a lien on the estate, as against all persons interested in it, for the balance due to him.—*BERTRAND v. DAVIES* (1862), 31 Beav. 429; 54 E. R. 1204; *sub nom.* *BERNARD v. DAVIES*, 32 L. J. Ch. 41; 9 Jur. N. S. 34; 11 W. R. 48; *sub nom.* *BERNARD v. DAVIES, Ex p. BERTRAND*, 7 L. T. 372.

**1131.** ———— *The consignee of a West Indian estate is entitled to a lien on the corpus of the estate for advances made by him for its cultivation, in priority to all other incumbrances.*—*Re HARRIOTT, Ex p. PENGELLEY* (1863), 8 L. T. 854.

**1132.** ———— *Against persons having prior title to owner.*—(1) An agent employed to manage a West Indian estate by the owner, subject to the charges upon it, is not as such entitled to a lien on the inheritance in respect of his advances for cultivation against those whose title is prior to that of the employer. If a trustee is in possession of a plantation managing it on behalf of all parties, & employs a manager, such manager has the same remedies as the trustee who employed him, for the expenses & advances.

(2) When the Ct. of Ch. is in possession by a manager & receiver, it acts for all persons interested, & its officer has at least as extensive remedies against the estate as a trustee.

(3) The security proposed to be given by [the receiver] was afterwards waived by the parties interested (LORD KINGSDOWN).—*FRASER v. BURGESS* (1860), 13 Moo. P. C. C. 314; 2 L. T. 446;

6 Jur. N. S. 327; 8 W. R. 376; 15 E. R. 118, P. C.

*Annotations*:—*As to* (1) *Appl.* *Bertrand v. Davies* (1862), 31 Beav. 429. *Consd.* *Re Harriott, Ex p. Pengelley* (1863), 8 L. T. 854.

**1133.** ———— *Re MACDOWALL, Ex p. NORMAND, Ex p. GRAHAM* (1864), 8 Sol. Jo. 851; *Cust on West Indian Incumbered Estates Acts*, 2nd ed., App. 300.

**1134.** ———— *On future profits.*—A West Indian plantation is a species of trade, & cannot in general be carried on without advances from a consignee in this country, to be reimbursed out of the future proceeds. This difference between West Indian estates & landed estates here, affects the mode in which ct.s. view the dealings & conduct of trustees & even the construction of wills & instruments relating to the former estates. *Semble*, a consignee advancing money to carry on a West Indian plantation has an implied lien on the future profits for such advances.—*DANIEL v. TROTMAN* (1863), 1 Moo. P. C. C. N. S. 123; 2 New Rep. 92; 8 L. T. 522; 9 Jur. N. S. 583; 11 W. R. 717; 15 E. R. 649, P. C.

*Annotation*:—*Consd.* *Re Harriott, Ex p. Pengelley* (1863), 8 L. T. 854.

**1135.** *Allowance for disbursements—Not acting under regular appointment.*—*SCOTT v. NESBITT*, No. 1122, *ante*.

**1136.** ———— *Duty to keep accounts—Showing how deficiencies arose.*—Manager of a West Indian estate, although not entitled during his absence from the island to charge commission, yet is entitled to be allowed all such sums as he has reasonably paid to others to whom he has entrusted the management.—*FORREST v. ELWES* (1816), 2 Mer. 68; 35 E. R. 866, L. C.

*Annotations*:—*Appl.* *Denton v. Davy* (1836), 1 Moo. P. C. C. 15. *Refd.* *Leith v. Irvine* (1833), 1 My. & K. 277.

**1137.** ———— *Testator devised seven different estates in the West Indies in trust for his grandson for life, with remainders over. Before the grandson attained the age of twenty-four when he was to come into possession, consignees of the estates were appointed. A suit was instituted in Jamaica for the purpose of having the manager's account passed in the island; but when the tenant for life attained twenty-four, in 1818, it ceased to have operation. One of the estates, viz. L., was charged by testator with an annuity which the consignees paid for many years until in 1852 they found that the proceeds of the L. estate had been quite insufficient to do so, & they were declared creditors in respect of the amount in excess which they had so paid, & a reference was directed to ascertain what the amount was:—Held: the consignees were bound to have kept a distinct account of the receipts & expenditure of the L. estate so as to be able to show from time to time how the deficiency arose.*—*THARP v. THARP* (1857), 29 L. T. O. S. 395, L. C.

**1138.** ———— *Payments on account of annuity.*—*SHAW v. SIMPSON*, No. 1127, *ante*.

**1139.** ———— *Re-imbursement out of English estates—In same ownership.*—*Re THARP* (1852), 2 Sm. & G. 578, n.; 65 E. R. 533, L. C.

*Annotations*:—*Refd.* *Morrison v. Morrison* (1855), 2 Sm. & G. 564. *Mentd.* *Twynam v. Hudson* (1862), 31 L. J. Ch. 577; *Re Leslie, Leslie v. French* (1883), 23 Ch. D. 552; *Falcke v. Scottish Imperial Insce.* (1886), 34 Ch. D. 234.

**1140.** ———— *Out of general assets—In priority to creditors.*—Testator's estate consisting partly of a West Indian plantation was administered under the ct., & a large balance was due to a deceased consignee, which was ordered to be paid by his successor. This failing:—*Held*: as against testator's creditors the representatives of deceased

consignee were entitled to be paid out of the general assets of testator.—*LYNE v. THOMPSON* (1862), 30 Beav. 542; 54 E. R. 999.

**1141. Right to goods shipped prior to appointment.**—*CODRINGTON v. JOHNSTONE*, No. 843, *ante*.

**1142. Payment of allowances to infants—Estate becoming insufficient.**—*PEARSE v. BROOKS* (1844), 3 L. T. O. S. 374, L. C.; *previous proceedings*, 2 L. T. O. S. 265, L. C.

**1143. Commission.**—*BERTRAND v. DAVIES*, No. 1130, *ante*.

**1144. Account by consignees — Priorities.**—*West India Relief Act*, 1832 (c. 125), gives, for moneys advanced by the comrs. on mtge. upon the application of a mere tenant for life, absolute priority over all existing charges.—*LAWRENCE v. WEST INDIA RELIEF COMRS.* (1864), 34 Beav. 234; 11 L. T. 295; 55 E. R. 625.

## RECEIVING ORDER.

*See* BANKRUPTCY AND INSOLVENCY.

## RECEIVING STOLEN GOODS.

*See* CRIMINAL LAW AND PROCEDURE.

## RECITALS.

*See* BONDS; DEEDS AND OTHER INSTRUMENTS; AND TITLES *passim*.

## RECOGNISANCES.

*See* CRIMINAL LAW AND PROCEDURE; MAGISTRATES.

## RECONVEYANCE.

*See* MORTGAGE.

## RECORDER.

*See* MAGISTRATES.

## RECOVERY OF POSSESSION OF LAND.

*See* LANDLORD AND TENANT; REAL PROPERTY AND CHATTELS REAL.

## RECREATION GROUNDS.

*See* COMMONS AND RIGHTS OF COMMON ; OPEN SPACES AND RECREATION GROUNDS.

## RECTIFICATION.

*See* EQUITY ; MISTAKE ; SETTLEMENTS.

## RECTOR AND RECTORY.

*See* ECCLESIASTICAL LAW.

## REDEMPTION.

*See* MORTGAGE ; PAWNS AND PLEDGES.

## REFEREES AND REFERENCES.

*See* ARBITRATION.

## REFORMATORIES.

*See* CRIMINAL LAW AND PROCEDURE ; EDUCATION ; PRISONS.

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## REFRESHERS.

*See* BARRISTERS ; SOLICITORS.

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## REFRESHMENT HOUSES.

*See* INNS AND INNKEEPERS ; INTOXICATING LIQUORS ; REVENUE ; SALE OF GOODS ;  
TRADE AND TRADE UNIONS.

# REGISTRATION OF BIRTHS, MARRIAGES AND DEATHS.

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<i>Banns</i> . . . . .	<i>See</i> HUSBAND AND WIFE.	<i>Inquest</i>	<i>See</i> CORONERS.
<i>Baptism</i> . . . . .	„ ECCLESIASTICAL LAW.	<i>Marriage</i>	„ ECCLESIASTICAL LAW ;
<i>Bastardy</i> . . . . .	„ BASTARDY.		HUSBAND AND WIFE.
<i>Birth, Concealment of</i>	„ CRIMINAL LAW.	<i>Midwives</i>	„ MEDICINE AND PHAR-
<i>Burial</i> . . . . .	„ BURIAL.		MACY.

NOTE.—The *Births & Deaths Registration Acts*, 1836 (c. 86) to 1926 (c. 48), are referred to in this Title as 1836 Act, 1837 Act, 1874 Act, 1901 Act, & 1926 Act respectively.

## Part I.—Central and Local Registration Authorities.

### SECT. 1.—THE GENERAL REGISTER.

1. General Register Office—What registers kept at—Under Non-parochial Registers Act, 1840 (c. 92)—Registers of Society of Friends.]—*Re* WOODWARD, KENWAY v. KIDD, [1913] 1 Ch. 392 ; 82 L. J. Ch. 230 ; 108 L. T. 635 ; 57 Sol. Jo. 426.

2. ——— Where registers of marriages in India deposited.]—*RATCLIFF v. RATCLIFF & ANDERSON* (1859), 1 Sw. & Tr. 467 ; 29 L. J. P. M. & A. 171 ; 33 L. T. O. S. 262 ; 5 Jur. N. S. 714 ; 7 W. R. 726 ; 164 E. R. 816.

*Annotations* :—*Re* *Regan v. Regan* (1892), 67 L. T. 720. *Mentid. Niboyet v. Niboyet* (1878), 4 P. D. 1 ; *Medley v. Medley* (1882), 51 L. J. P. 74.

3. ———.]—*REGAN v. REGAN* (1892), 67 L. T. 720 ; 1 R. 493.

4. ———.]—*WESTMACOTT v. WESTMACOTT*, [1899] P. 183 ; 68 L. J. P. 63 ; 80 L. T. 632.

5. Registrar-General—Powers—Cannot take away right of public to search registers.]—*1 v. BEST & MCKINLEY*, No. 17, *post*.

### SECT. 2.—REGISTRATION DISTRICTS.

SUB-SECT. 1.—BOUNDARIES AND ALTERATIONS OF DISTRICTS.

*See* 1836 Act, ss. 7, 10, 11 ; Marriage Act, 1836 (c. 85), s. 17 ; 1837 Act, ss. 9, 10, 11 ; Marriage & Registration Act, 1856 (c. 119), s. 15 ; 1874 Act, ss. 21, 22 ; 1901 Act.

**Sect. 2.—Registration districts: Sub-sect. 2. Part II. Sects. 1, 2, 3 & 4.]**

**SUB-SECT. 2.—REGISTRARS.**

**6. Appointment—By whom appointed.]—**Under 1836 Act, s. 7, the clerk to the board of guardians of a union created under Poor Law Amendment Act, 1834 (c. 76), has no right to be superintendent registrar except in the case of the first appointment after 1836 Act coming into operation; & on any subsequent vacancy the power of appointment is in the board of guardians.

A., who was clerk to the board of guardians of a union, created under Poor Law Amendment Act, 1834 (c. 76), & was also superintendent registrar appointed by the Registrar-General, under 1837 Act, died on Jan. 4, 1861. On Jan. 17, deft. was appointed superintendent registrar by the board of guardians. On Feb. 14, the relator was appointed clerk to the board of guardians. Upon information in the nature of *quo warranto*:—**Held**: deft. was duly appointed superintendent registrar.—*R. v. ACASON* (1862), 2 B. & S. 795; 31 L. J. Q. B. 227; 6 L. T. 535; 26 J. P. 436; 8 Jur. N. S. 841; 121 E. R. 1267; *sub nom.* *R. v. ALASON*, 10 W. R. 691.

**Annotation**:—*Reid*, *R. v. Burrows*, [1892] 1 Q. B. 399.

**7. — Evidence of—Acting in office.]—**The acting in the office is *prima facie* evidence of the appointment as registrar.—*R. v. PRICE* (1840), 11 Ad. & El. 727; 3 Per. & Dav. 421; 9 L. J. M. C. 49; 4 J. P. 58; 113 E. R. 590.

**Annotations**:—*Mentd.* *R. v. Nott* (1843), 7 J. P. 351; *Hutchinson v. Manchester, Bury & Rossendale Ry.* (1846), 15 L. J. Ex. 293; *R. v. Buchanan* (1846), 8 Q. B. 883; *R. v. James* (1850), 3 Car. & Kir. 167; *It. v. Hall*, [1891] 1 Q. B. 747.

**8. — Effect of—Whether vacation of other office.]—**A party who has been duly appointed overseer of the poor, does not by the subsequent acceptance of the office of registrar *ipso facto* vacate his former office.—*R. v. CHESHIRE JJ.* (1840), as reported in 4 J. P. 122; 4 Jur. 484.

**Annotation**:—*Reid*, *R. v. Derbyshire JJ.*, *Ex p.* New Mills U. D. C. (1909), 100 L. T. 453.

**9. Nature & tenure of office.]—**The writ of *quo warranto* is not applicable to the office of registrar of births & deaths, the office being held at the pleasure of the Registrar-General.—*Ex p.* PARRY (1887), 3 T. L. R. 649, D. C.

**Annotations**:—*Dbtd.* *R. v. Burrows*, [1892] 1 Q. B. 399. If the point there decided were to come again before me, I should reconsider my judgment in that case (*A. L. SMITH, J.*). *Reid*, *R. v. Speyer*, *R. v. Cassel*, [1916] 1 K. B. 595.

**10. —.]—**Appcts., a board of guardians, with the sanction of the Local Government Board, now the Ministry of Health, but apparently without statutory authority, granted to the registrar of births & deaths certain gratuities, subject to a deduction for superannuation allowance. On the registrar's retirement appcts. granted him a superannuation allowance based on his fees plus the gratuities, & the district auditor, acting under Poor Law Amendment Act, 1844 (c. 101), s. 32, disallowed & surcharged on certain of the guardians the difference between the amount due on the basis of fees alone & the amount due on the basis of fees plus gratuity, on the grounds that, though he was precluded by Local Authorities (Expenses) Act, 1887 (c. 72), s. 3, from disallowing the gratuities, their payment was unlawful, & they were not "emoluments" within Poor Law Officers' Superannuation Act, 1896 (c. 50), s. 3, for the purpose of calculating superannuation,

allowance. The guardians then obtained a rule *nisi* for a *certiorari* to quash the certificate of disallowance & discharge, on the grounds that the gratuities were "emoluments" within the Act of 1896, & that the sanction of the Ministry of Health legalised their payment. By sect. 19 of the Act of 1896 the expression "emoluments" includes "all fees, poundage, & other payments made to any officer or servant as such for his own use":—**Held**: the district auditor was not entitled to treat as illegal payments which had been authorised under the Local Authorities (Expenses) Act, 1887 (c. 72); they formed part of the "emoluments" of the person to whom they were paid within Poor Law Officers' Superannuation Act, 1896 (c. 50), s. 3, & were properly taken into account in computing his pension.

The registrar of births & deaths, who is not a servant of the board of guardians, & cannot be dismissed or controlled by them, is remunerated first of all by a scale of fees, depending on the number of births & deaths he registers, fixed by the Act of 1836 & paid by the guardians, & secondly, by a scale of fees contained in the Act of 1874 for services rendered in the way of supplying certificates, copies of certificates, & extraordinary work to persons who register (*SCRUTTON, L.J.*).—*R. v. GRAIN, Ex p. WANDSWORTH GUARDIANS*, [1927] 2 K. B. 205; 96 L. J. K. B. 563; 136 L. T. 776; 91 J. P. 71; 43 T. L. R. 342; 71 Sol. Jo. 308; 25 L. G. R. 231, C. A.

**11. Remuneration—Mode of.]—***R. v. GRAIN, Ex p. WANDSWORTH GUARDIANS*, No. 10, *ante*.

**12. — What guardians liable—Workhouse not belonging to parish in which situated.]—**By a local Act, the management of the poor of a parish was vested in trustees, who paid to the registrar of births & deaths for the district within which their parish was situate, fees for the registration of births & deaths occurring in a workhouse locally situate within their parish, but belonging to another parish, & built by the guardians of that parish for the reception of the poor thereof under a local Act:—**Held**: under Poor Law Amendment Act, 1844 (c. 101), s. 56, the last-mentioned guardians were bound to repay to the trustees the amount of fees so paid to the registrar & a peremptory writ of *mandamus* was issued to compel them to do so.—*R. v. ST. LUKE, MIDDLESEX GUARDIANS* (1856), 26 L. T. O. S. 214; 4 W. R. 230.

**13. — Liability to attachment.]—**Fees earned by a registrar in respect of births & deaths actually registered are debts accruing due so as to be attachable before the accounts have been vouched or time for payment has arrived.—*EDMUNDS v. EDMUNDS*, [1904] P. 362; 73 L. J. P. 97; 91 L. T. 568.

**Annotations**:—*Mentd.* *Glegg v. Bromley* (1911), 81 L. J. K. B. 334; *Wells v. Wells* (1914), 30 T. L. R. 437.

**14. Superannuation allowance—Basis of calculation.]—***R. v. GRAIN, Ex p. WANDSWORTH GUARDIANS*, No. 10, *ante*.

**Power & duties—Registrars of births.]—***See* Part III., *post*.

**Registrars of marriages.]—***See* HUSBAND & WIFE, Vol. XXVII., pp. 53, 54, 73, Nos. 333–336, 578.

**Civil marriages generally at registrar's office.]—***See* HUSBAND & WIFE, Vol. XXVII., pp. 54, 55, 63, Nos. 337–348, 445.

**Registrars of deaths.]—***See* Part V., *post*.



## Part II.—The Registers.

## SECT. 1.—CORRECTION OF ERRORS.

See 1874 Act, ss. 8, 36.

**15. Power of court to correct—Entry made for fraudulent purpose.]**—The ct. has no power to issue a *mandamus* to the registrar of births, etc., under 1836 Act, commanding him to erase the entry of a birth, on its appearing that the child was supposititious, & that the entry has been made for fraudulent purposes.—*Ex p. STANFORD* (1841), 1 Q. B. 886; 1 Gal. & Dav. 428; 113 E. R. 1371; *sub nom. R. v. STANFORD*, 10 L. J. Q. B. 265; *sub nom. Re BRIXTON REGISTRAR OF BIRTHS*, 9 Dowl. 927; 5 Jur. 988.

*Annotations* :—*Reid. Ex p. Nash* (1850), 19 L. J. Q. B. 296. *Mentd. Re Groaves, Ex p. Groaves* (1870), 5 Ch. App. 326.

## SECT. 2.—CUSTODY.

See 1836 Act, ss. 14, 15, 32, 33, 42; Marriage Act, 1836 (c. 85), s. 24; Marriage & Registration Act, 1856 (c. 119), s. 22; 1874 Act, ss. 35, 45; Marriage Act, 1898 (c. 58), ss. 11 (3), 12.

## SECT. 3.—SEARCHES.

**16. Right to search—Subject to proper control.]**—Pltf. applied to deftd., a parish clerk, who kept the parish registers under the direction of the rector, for permission to search them. He told deftd. he did not want certificates, but only to make extracts, & was informed that the charge would be the same whether he made extracts or had certificates. He accordingly searched the registers & made extracts. The evidence was, that no mention of the charge was made before the search, but that pltf. was told by deftd. that the charge was 3s. 6d. for each extract, the amount of which he paid :—*Held* : (1) the payment was not voluntary, & pltf. was entitled to recover the excess paid in an action for money had & received; (2) deftd., & not the rector, was the party to be sued.

(3) *Semble* : the fees if taken by the clerk after the examination of the book, would have been taken *colore officii*, & might have been recovered back.

(4) *Semble* : pltf. was entitled to take minutes in the course of his search, but not to occupy an unreasonable time for that purpose, nor to have the registers in his hands, it being the duty of the clerk to superintend the search, & to keep a control over the registers.

## PART II. SECT. 1.

**a. Mandamus to Registrar to amend register.]**—On an application under Births, Deaths & Marriages Act,

1894, s. 43 (3), to have the register amended, the Registrar refused to amend the register, being of opinion that by so doing he would bastardise the child :—*Held* : a writ of *mandamus*

Where the party searching takes extracts he is not bound to pay more than for a search. [Pltf.] had a perfect right to search (PARKE, B.).—*STEELE v. WILLIAMS* (1853), 8 Exch. 625; 1 C. L. R. 258; 22 L. J. Ex. 225; 21 L. T. O. S. 106; 17 J. P. 378; 17 Jur. 464; 156 E. R. 1502.

*Annotations* :—*As to* (3) *Reid. Brocklebank v. R.*, [1925] 1 K. B. 52. *As to* (4) *Appl. Best v. Best & McKinley*, [1920] P. 75. *Generally, Mentd. Hooper v. Exeter Corpn.* (1887), 56 L. J. Q. B. 457; *Marshal Shipping Co. v. Board of Trade*, [1923] 2 K. B. 343; *Glamorgan County Council v. Glasbrook*, [1924] 1 K. B. 879.

**17. — Cannot be cut down by Registrar-General—1874 Act, s. 44.]**—1836 Act, s. 35, gives the public an absolute right to search the register at reasonable times; & this right cannot be taken away by the power given to the Registrar-General to make regulations as to the search by 1874 Act, s. 44.—*BEST v. BEST & MCKINLEY*, [1902] P. 75; 89 L. J. P. 93; 122 L. T. 802; 36 T. L. R. 243; 64 Sol. Jo. 258.

**18. Right to make extracts—In reasonable time.]**—*STEELE v. WILLIAMS*, No. 16, *ante*.

**19. Fees for searching—Party searching making extracts.]**—*STEELE v. WILLIAMS*, No. 16, *ante*.

**20. — Improper charges—Right to recover excess over legal fees.]**—*STEELE v. WILLIAMS*, No. 16, *ante*.

## SECT. 4.—CERTIFICATES.

See 1836 Act, ss. 35, 36; 1874 Act, s. 32; Marriage Act, 1896 (c. 58), s. 7 (5).

**21. Requisites—Jewish marriage certificate.]**—*PRAGER v. PRAGER & GOODISON*, No. 22, *post*.

**As evidence—Birth certificates.]**—See EVIDENCE, Vol. XXII., p. 322, Nos. 3157–3168.

**— Marriage certificates.]**—See EVIDENCE, Vol. XXII., pp. 322, 323, Nos. 3169–3172; HUSBAND & WIFE, Vol. XXVII., p. 72, No. 565.

**— Death certificates.]**—See EVIDENCE, Vol. XXII., p. 323, Nos. 3173–3179.

**— Certificate of Secretary of State.]**—See EVIDENCE, Vol. XXII., p. 318, No. 3120.

**— Foreign & colonial registers & certificates.]**—See EVIDENCE, Vol. XXII., pp. 339–343, Nos. 3405–3419, 3421–3423, 3426–3442, 3444–3462, 3466.

**Registers as evidence—Parish registers.]**—See EVIDENCE, Vol. XXII., pp. 335, 336–338, Nos. 3334, 3355–3357, 3379–3388.

**— Miscellaneous registers.]**—See EVIDENCE, Vol. XXII., pp. 345, 347, Nos. 3488, 3493, 3513.

should issue to compel the Registrar to amend the register.—*Re M., M. v. REGISTRAR OF BIRTHS* (1924), 26 W. A. L. R. 115.—AUS.

## Part III.—Registration of Births.

**Making false statements & causing false entries to be made.]—***See* CRIMINAL LAW, Vol. XV., p. 694, Nos. 7478, 7479.

**Registration of still births.]—***See* 1926 Act, s. 7.  
**Registration of births of legitimated persons.]—**

*See* Legitimacy Act, 1926 (c. 60), s. 1 (4), & Schedule.

**—Proceedings generally under Legitimacy Act, 1926 (c. 60), s. 1 (4), & Schedule.]—***See* BASTARDY, SUPPLEMENT.

## Part IV.—Registration of Marriages.

**22. In England—Jewish marriage—Marriage certificate—Signature by secretary of synagogue—Necessity for signature as secretary & registrar.]—**Where the certificate of marriage in a Jewish synagogue had been signed by the secretary in that capacity alone, though he was also certified as registrar, it was held that he should have signed as secretary & registrar.—*PRAGER v. PRAGER* &

*GOODISON* (1913), 108 L. T. 734 ; 29 T. L. R. 556.

**—Making false statements & causing false entries to be made.]—***See* CRIMINAL LAW, Vol. XV., p. 694, Nos. 7476–7478, 7480–7482, 7484.

**At sea & abroad.]—***See* Registration of Births, Deaths & Marriages (Army) Act, 1879 (c. 8); Foreign Marriage Act, 1892 (c. 23); Merchant Shipping Act, 1894 (c. 60), ss. 240 (6), 253 (1) (viii).

## Part V.—Registration of Deaths.

*See* 1874 Act, ss. 10–15, 20 ; 1926 Act, s. 2.

**Making false statements & causing false entries to be made.]—***See* CRIMINAL LAW, Vol. XV., pp. 694, 695, Nos. 7478, 7485.

**Necessity for death certificate before burial of**

**body.]—***See* 1926 Act, ss. 1, 5.

**Necessity for notification before disposal of body.]—***See* 1926 Act, s. 3.

**—Burial without notice to registrar.]—***See* BURIAL, Vol. VII., p. 521, No. 9.

## Part VI.—Registration of Births and Deaths at Sea and Abroad.

*See* 1874 Act, s. 37 (6); Registration of Births, Deaths & Marriages (Army) Act, 1879 (c. 8); Merchant Shipping Act, 1894 (c. 60), s. 254.

### PART III.

**b. Registration of births of legitimated persons—(Child born out of province.)—***Vital Statistics Act, 1916, s. 19, is not limited in its operation to children born within the province.—**Re J.*, [1921] 3 W. W. R. 180.—**CAN.**

## REGISTRATION OF DEEDS AND WILLS.

*See* BILLS OF SALE ; LANDLORD AND TENANT ; REAL PROPERTY AND CHATTELS REAL ;  
 SALE OF LAND ; WILLS.

## REGISTRATION OF NEWSPAPERS.

*See* PRESS AND PRINTING.

## REGISTRATION OF PATENTS.

*See* PATENTS AND INVENTIONS.

## REGISTRATION OF TITLE.

*See* CHARITIES ; LANDLORD AND TENANT ; MINES, MINERALS, AND QUARRIES ; MORTGAGE ; REAL PROPERTY AND CHATTELS REAL ; SALE OF LAND.

## REGISTRATION OF TRADE MARKS AND DESIGNS.

*See* TRADE MARKS, TRADE NAMES, AND DESIGNS.

## REGISTRATION OF VOTERS.

*See* ELECTIONS.

## RELATOR.

*See* CHARITIES ; CORPORATIONS ; CROWN PRACTICE ; AND TITLES *passim*.

## RELEASE.

*See* BANKRUPTCY AND INSOLVENCY ; BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS ; BONDS ; CONTRACT ; DEEDS AND OTHER INSTRUMENTS ; EXECUTORS AND ADMINISTRATORS ; GUARANTEE AND INDEMNITY ; HUSBAND AND WIFE ; INFANTS AND CHILDREN ; LANDLORD AND TENANT ; PARTNERSHIP ; REAL PROPERTY AND CHATTELS REAL ; TRUSTS AND TRUSTEES ; AND TITLES *passim*.

## RELIEF.

*See* COPYHOLDS.

## RELIEVING OFFICER.

*See* POOR LAW.

## RELIGIOUS TRUSTS.

*See* CHARITIES ; ECCLESIASTICAL LAW.

## REMAINDERS.

*See* REAL PROPERTY AND CHATTELS REAL ; SETTLEMENTS ; WILLS.

## REMAND.

*See* CRIMINAL LAW AND PROCEDURE ; EXTRADITION AND FUGITIVE OFFENDERS ;  
MAGISTRATES.

## REMITTED ACTIONS.

*See* COUNTY COURTS.

## RENTS.

*See* DISTRESS ; LANDLORD AND TENANT ; MINES, MINERALS, AND QUARRIES  
REAL PROPERTY AND CHATTELS REAL ; SALE OF LAND.

# RENTCHARGES AND ANNUITIES.

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## Part I.—Nature.

### SECT. 1.—WHAT CONSTITUTES RENTCHARGE OR ANNUITY.

1. *Payment issuing out of land.*—WESTON v. BOWES, No. 291, *post*.

2. — *With power of distress.*—ANON. (undated), Plowd. Queries 12; 75 E. R. 873.

3. — — — — —]—ANON. (undated), Plowd. Queries 18; 75 E. R. 882.

4. — — — — —]—POOLE v. HERON, No. 674, *post*.

5. — — — — —]—Testator by codicil gave & bequeathed an annuity or yearly sum of £100 to E. during her life, & charged same on two specific real estates, with usual powers of distress & entry

in case the annuity should be in arrear :—*Held* : this was a legal limitation of a rentcharge, & the personal estate was not liable.—PATCHING v. BARNETT (1881), [1907] 2 Ch. 154, n.; 51 L. J. Ch. 74; 45 L. T. 292, C. A.; *revsg.* (1880), 49 L. J. Ch. 665.

*Annotations* :—**Consd.** *Re* Trenchard, Trenchard v. Trenchard, [1905] 1 Ch. 82. **Refd.** *Astley v. Micklethwait* (1880), 15 Ch. D. 59; *Re* Muffett, Jones v. Mason (1888), 39 Ch. D. 534; *Re* Betts, Doughty v. Walker, [1907] 2 Ch. 149. **Mentd.** *Re* Middleton, Thompson v. Harris (1882), 19 Ch. D. 552; *Re* Copland, Mitchell v. Bain (1895), 44 W. R. 94; *Re* Jones, Elgood v. Kinderley, Elgood v. Jones, [1902] 1 Ch. 92; *Bourne v. Swan & Edgar, Re* Bourne's Trade Marks, [1903] 1 Ch. 211.

#### PART I. SECT. 1.

2i. *Payment issuing out of land—With power of distress.*—McCASKILL v. McCASKILL (1886), 12 O. R. 783.—CAN.

2ii. — — — — —]—A grant to A. of liberty to distrain lands, if he be not paid an annual sum, is a good grant of

a rentcharge to that amount charged upon those lands.—LOCKE v. DARLEY (1842), 2 Dr. & War. 256; 1 Con. & Law. 406.—IR.

2iii. — — — — —]—RICHARDSON v. NIXON (1845), 2 Jo. & Lat. 250.—IR.

2iv. — — — — —]—A rent reserved on a grant in fee, if accompanied by a

power of distress, is a rentcharge.—BRADY v. FITZGERALD (1848), 11 I. Eq. R. 53.—IR.

2v. — — — — —]—DREW v. BARRY (1874), 8 I. R. Eq. 260, 279.—IR.

2vi. — — — — —]—GOGGINS v. TRENCH (1859), 10 I. C. L. R. 472.—IR.

6. ——— **On different estate.**—(1) If a man seised of Blackacre in fee, & also possessed of Whiteacre for years, by his deed grants a rent out of both to A. to have & perceive to him for the term of his life, with clause of distress in both, A. may distrain in Whiteacre, for rent arriere.

(2) If lessee for years of lands grants a rent out of said lands for the life of the grantee, such grant is good during the term, if the grantee live so long; but the grantee has but a chattel.

(3) Grant out of land in fee, & out of land for a term of years of a rent for the life of the grantee, the rent issues only out of the land in fee.

(4) In the principal case, Whiteacre during the term is subject to the distress, although the rent does not issue thereout.

(5) If a man grants a rent out of the manor of D., & further grants that, if the rent be behind, the grantee shall distrain for same rent in the manor of S., it is but a penalty in the manor of S., & not a rent issuing out of it.

(6) If the manor of D., out of which the rent is granted, be recovered by *eigne* title, all the rent is extinct; but if the manor of S., in which the distress is limited, be evicted, the whole rent remains.

(7) If the grantee purchases parcel of the manor of S., the rent is not extinct.—**BUTT'S CASE** (1600), 7 Co. Rep. 23 a; 77 E. R. 445.

*Annotations*:—As to (1) **Apld.** Saffery v. Elgood (1834), 1 Ad. & El. 191. **Refd.** Rodham v. Berry (1826), 4 L. J. O. S. K. B. 202. **Generally, Refd.** Hassell v. Gouthwaite (1744), Willes, 500. **Mentd.** Thomas v. Sorrel (1673), 3 Keb. 233; Hodgkins v. Thornbury (1675), 3 Keb. 500.

7 ——— **Conferred by statute.**—A perpetual rent reserved as the consideration upon the sale of land, even though no power of distress is contained in the conveyance to the purchaser, is, upon a subsequent sale of the rent, not improperly described by the then vendor as a "rentcharge" inasmuch as a power of distress is conferred by 4 Geo. 2, c. 28, s. 5.

In a contract for sale the subject-matter was described as "an aggregate yearly rentcharge of £215 9s. payable in perpetuity by the corp'n. of Liverpool in respect of a waterpipe rent, created under the authority of the corp'n. waterworks Act, 1855, & secured by covenants of the corp'n., & by a statutory charge on the rates leviable by the corp'n. under their Acts." The abstract of title showed, that in 1856 the vendor's predecessors in title, one of whom was an absolute owner, & the other a tenant for life under a settlement, had respectively granted lands & easements to the corp'n. in consideration of two rents of £1 5s. & £250, respectively, payable in perpetuity by the corp'n., & that the corp'n. had covenanted to pay those rents respectively. The rent comprised in the contract of sale consisted of the rent of £1 5s. & £214 4s. part of the rent of £250. The vendor was tenant for life under a settlement, & had sold under his statutory powers. The corp'n. waterworks Act of 1855, with which Lands Clauses Consolidation Act, 1845 (c. 18), was incorporated, empowered the corp'n. "to purchase, either absolutely for a sum in gross, or at an annual or other rent," certain lands "or any easement over same"; & the corp'n. waterworks Act, 1855, provided that "the persons empowered by Lands Clauses Consolidation Act, 1845 (c. 18), to convey lands shall have full power to convey or grant in perpetuity, at an annual or other rent, any lands, for the purposes of this Act or the Acts incorporated therewith, or any easements over such lands":—**Held**: the rent

sold was not improperly described as a "rentcharge."

[It is said] you cannot reserve a rent out of an easement. No doubt a subject could not do so at common law; but the King could, even at common law, & the subject may do it by statute (**DAVY, L.J.**).—**Re GERARD (LORD) & BEECHAM'S CONTRACT**, [1894] 3 Ch. 295; 63 L. J. Ch. 695; 71 L. T. 272; 42 W. R. 678; 7 R. 519, C. A.

8. ——— **Without power of distress—Rent seck.**—**ANON.** (undated), Plowd. Queries 12; 75 E. R. 873.

9. ——— ———.]—**WESTON v. BOWES**, No.

10. ——— ———.]—Lands in the counties of D. & N. were devised, by will, to trustees in fee, in trust to pay annually out of the rents & profits certain sums to certain persons, & £10 to each of the fellows of a college, the surplus rents after such payments to be applied as directed by the will. The annual sums were received by the bursar of the college for the trustees, pursuant to the directions in the will, & paid over by him. If all these annual payments were made out of the lands in county D. as far as the nett profits would go, the annual sums received by each fellow would be less than £10 & more than 40s. If the payments were made rateably out of the land in each county, in proportion to the profits received from each, a less sum than 40s. would be received by each fellow out of the lands in D.:—**Held**: the fellows had not a rentcharge, there being no power of distress.—**WEST v. ROBSON** (1858), 3 C. B. N. S. 422; K. & G. 141; 27 L. J. C. P. 262; 32 L. T. O. S. 75; 22 J. P. 498; 4 Jur. N. S. 666; 6 W. R. 659; 140 E. R. 805.

*Annotation*:—**Refd.** Cooper v. Ashfield (1858), 5 C. B. N. S. 16.

11. ——— **Devise of land subject to annuity.**—Real estate decreed to be charged with an annuity given by the will, though no express words to charge the land, the exor. being devisee of the land.—**ELLIOT v. HANCOCK** (1690), 2 Vern. 143; 23 E. R. 699.

*Annotation*:—**Refd.** Peacock v. Peacock (1865), 34 L. J. Ch. 315.

12. ——— ———.]—**GREEN v. MARYGOLD** (1727), 2 Eq. Cas. Abr. 64; 22 E. R. 56.

13. ——— ———.]—Devise of lands to A. for life, remainder to B. in fee, subject to & charged with the payment of £20 a year to C. during her life, to be paid by A. as long as she should live, & after her decease to be paid by B.:—**Held**: a charge on the land, for which O. might distrain.—**BUTTERY v. ROBINSON** (1826), 3 Bing. 392; 11 Moore, C. P. 262; 4 L. J. O. S. C. P. 108; 130 E. R. 564.

*Annotations*:—**Apld.** Sollory v. Leaver (1869), L. R. 9 Eq. 22. **Consd.** Roper v. Roper (1876), 3 Ch. D. 714; Payne v. Esdaille (1888), 13 App. Cas. 613.

14. ——— ———.]—**RAMSAY v. THORNGATE**, No. 238, *post*.

15. ——— ———.]—**ION v. ASHTON**, No. 668, *post*.

16. ——— ———.]—Bequest of an annuity to A. for life, followed by a general devise & bequest of real & personal estate, subject to testator's debts & legacies, & "the annuity therein before-mentioned":—**Held**: the annuity was a legal rentcharge on the real estate, & A. having his distress at law was not entitled to a receiver in this ct. for the recovery of arrears.—**SOLLORY v. LEAVER** (1869), L. R. 9 Eq. 22; 39 L. J. Ch. 72; 21 L. T. 453; 18 W. R. 59; *subsequent proceedings* (1871), 40 L. J. Ch. 398.

*Annotations*:—**Apld.** Kelsey v. Kelsey (1874), L. R. 17 Eq. 495. **Consd.** Roper v. Roper (1876), 3 Ch. D. 714.

*Sect. 1.—What constitutes rentcharge or annuity.*  
*Sect. 2: Sub-sects. 1 & 2.]*

**17. — Deeds deposited as security for annuity.]**—Where deeds respecting real property have been deposited as a security for an annuity, *e.g.* it implies an intention in the party depositing them to charge the real property, & gives the party with whom they are deposited a lien on them.—*RICHARDS v. BORRETT* (1800), 3 Esp. 102; 170 E. R. 553.

**18. — Land conveyed to trustees to raise tontine annuity.]**—Estates were conveyed to trustees upon trust to raise during the lives of the subscribers of the purchase-money & their nominees a certain tontine annuity, to be divided amongst them rateably; these annuities being payable to the holders of the debenture which certified the title of the subscriber or nominee to payment out of the rents of the estate:—*Held*: an interest in the land was created under the tontine deed, in favour of the subscribers & their nominees.—*Re O'HARA'S TONTINE* (1857), 30 L. T. O. S. 128; 3 Jur. N. S. 1145; 6 W. R. 45.

**19. Money payment not charged on land.]**—By a charter of incorporation & an Act of Parliament, the inmates of the "Hospital of King James at Gateshead" were to consist of a master, three ancient brethren, &, by additions from time to time made, twenty-three younger brethren, the latter forming no part of the corp'n. The brethren, whose appointments were for life, were subject to certain rules, & were removable, though none had ever been removed, for certain misconduct. The estates of the hospital, which were originally granted to the master & brethren & their successors in free, pure & perpetual frankalmoign for ever, were under the management of the master, who, after payment of land & income tax, tithes, repairs & other outgoings, was to appropriate to his own use one-third of the net proceeds, & pay £25 a year to each of the three ancient brethren & £40, afterwards increased to £70, a year to the chaplain, & to reserve in his hands a balance not exceeding £60 to meet current expenses, & to divide the residue among the younger brethren in equal shares, yet so nevertheless that no younger brother should take such division more than £25. The number of younger brethren had never been increased so as to reduce their respective shares below £24 *per annum*. None of the brethren actually occupied any part of the hospital property:—*Held*: the younger brethren had neither a legal nor equitable estate in the lands & tenements belonging to the hospital; nor a rentcharge thereon.

[It was contended] that this was a rentcharge. If, however, it is only a right to a money payment, it clearly is not a charge on land. Further, it is a fluctuating sum, for which there could be no power of distress (*BRETT, J.*).—*SIMEY v. MARSHALL* (1872), L. R. 8 C. P. 269; 2 Hop. & Colt. 1; 27 L. T. 581; 37 J. P. 119; 21 W. R. 123; *sub nom.* *SIMEY v. MARSHALL, Re BENNETT'S CLAIM*, 42 L. J. C. P. 49.

*Annotation:—Reid. Harper v. Hedges*, [1923] 2 K. B. 314.

**20. Fluctuating payment.]**—*SIMEY v. MARSHALL*, No. 19, *ante*.

**21. Bequest of annuity followed by charge on land.]**—*POOLE v. HERON*, No. 674, *post*.

**22. —.]**—*PATCHING v. BARNETT*, No. 5, *ante*.

**23. —.]**—By his will testator gave to his wife so long as she should remain his widow an annuity of £500, & he declared that this annuity

should be a first charge on all his freehold properties at Greenwich. He gave various legacies, & then devised & bequeathed all his real & personal estate not thereby otherwise disposed of upon trust for sale & conversion, & out of the proceeds to pay his funeral & testamentary expenses & debts & legacies, & to stand possessed of the residuary trust moneys upon certain trusts. The Greenwich property passed to the trustees under the residuary devise:—*Held*: upon the true construction of the will, the annuity was not a rentcharge, but was a personal annuity secured by a charge on the Greenwich property, & the estate duty on it must be paid by the exors. as testamentary expenses.—*Re TRENCHARD, TRENCHARD v. TRENCHARD*, [1905] 1 Ch. 82; 74 L. J. Ch. 135; 92 L. T. 265; 53 W. R. 235.

*Annotation:—Expld. Re Spencer Cooper, Poë v. Spencer Cooper*, [1908] 1 Ch. 130.

**Characteristics of rentcharge.]**—*See Sect. 2, post.*  
**Characteristics of annuity.]**—*See Sect. 3, post.*

## SECT. 2.—RENTCHARGES.

### SUB-SECT. 1.—IN GENERAL.

*See Law of Property Act, 1925 (c. 20), ss. 1 (2), 205 (xxiii); Settled Land Act, 1925 (c. 18), s. 117 (1) (ix); Administration of Estates Act, 1925 (c. 23), s. 55 (xxi).*

**24. Rentcharge an interest in land.]**—*CREED v. CREED*, No. 648, *post*.

**25. Rentcharge a hereditament—Whether land within Lands Clauses Acts.]**—This annuity being charged on lands, is a hereditament, & comes within the clause as to the purchase of lands, as the interpretation clause of Lands Clauses Act, 1845 (c. 18), provides that the word "lands" shall extend to hereditaments (*JAMES, L.J.*).—*Re BREWER* (1875), 1 Ch. D. 409; 34 L. T. 466; 24 W. R. 465, C. A.

**26. Rentcharge a tenement.]**—A rentcharge granted by a deed containing no power of distress, is within Landlord & Tenant Act, 1730 (c. 28), s. 5, & therefore a "tenement" within Qualification of Electors, 1429 (c. 7).—*DODDS v. THOMPSON* (1865), L. R. 1 C. P. 133; Hop. & Ph. 285; Har. & Ruth. 319; 35 L. J. C. P. 97; 12 Jur. N. S. 625; 14 W. R. 476.

*Annotations:—Reid. Nicholls v. Bulwer* (1870), L. R. 6 C. P. 281; *Dawson v. Robins* (1876), 2 C. P. D. 38; *Druitt v. Christchurch Overseers* (1883), 12 Q. B. D. 365.

**27. —.]**—By indenture of Sept. 1874, the reversion in fee in certain lands was conveyed to C., subject to certain terms of one thousand years created by indenture of demise of July, 1864, which reserved a ground rent & a power of re-entry in default. C. by indenture of Jan. 1875, granted to D. & to four other persons a rentcharge of £2 10s. each charged upon the lands, with a power of distress in default of payment, & the grantees were in the actual receipt of the same. The value of the reversion was sufficient to bear the charges:—*Held*: the grantees of the rentcharges had "free land or tenement to the value of 40s. by the year" within Qualification of Electors Act, 1429 (c. 7), although the power of distress was nugatory.—*DAWSON v. ROBINS* (1876), 2 C. P. D. 38; 2 Hop. & Colt. 317; 46 L. J. Q. B. 62; 35 L. T. 599; 41 J. P. 41; 25 W. R. 212.

**28. —.]**—By Reform Act, 1832 (c. 45), s. 18, no person shall be entitled to a county vote in respect of any freehold lands or tenements of which he may be seised for a life or lives, except he shall

### PART I. SECT. 2, SUB-SECT. 1.

*Rentcharge a hereditament.]—Re BECTIVE ESTATE* (1891), 27 L. R. Ir. 364.—I

be "in the actual & *bonâ fide* occupation of such lands or tenements," or except the same shall be of the clear yearly value of not less than £10, reduced to £5 by a subsequent Act:—*Held*: a rentcharge for life below the yearly value of £5, being incapable of occupation, was not within the exception in sect. 18, & therefore did not confer a county vote.—*DRUITT v. CHRISTCHURCH OVERSEERS* (1883), 12 Q. B. D. 365; *Colt*. 328; 53 L. J. Q. B. 177; 32 W. R. 371, D. C.

**29. Not subject of occupation.]**—*WILKINS v. DANRE* (1608), 1 Brownl. 169; 123 E. R. 734.

**30. — Incorporeal hereditament.]**—*DRUITT v. CHRISTCHURCH OVERSEERS*, No. 28, *ante*.

**31. Not incident of tenure.]**—Rentcharges are not incidents of tenure (*LEACH, V.-C.*)—*ESDAILE v. STEPHENSON* (1822), 1 Sim. & St. 122; 57 E. R. 49.

*Annotations*:—*Consd.* *De Visme v. De Visme* (1849), 1 H. & Tw. 408. *Refd.* *Jones v. Mudd* (1827), 4 Russ. 118; *Portman v. Mill* (1839), 3 Jur. 356; *Catling v. G. N. Ry.* (1869), 21 L. T. 17.

**32. Distinguished from mortgage.]**—Bargain & sale of lands in consideration of £5,000, & this was for 1,000 years, on condition to be void on repayment of £5,000 on any Aug. 10, during the term, & £400 *per annum* till it was paid:—*Held*: this was a mtge.—*DANBY v. READ* (1675), *Cas. temp. Finch*, 226; 23 E. R. 124.

*Annotation*:—*Refd.* *Stokes v. Verrier* (1677), 3 Swan. 634.

—*J.*—*See* MORTGAGE, Vol. XXXV., p. 249, No. 83.

**33. Distinguished from rent.]**—A. being seised in fee of a moiety of certain lands, & B. being seised for life of the other moiety, they, in 1805, by indenture, reciting that they were entitled thereto as tenants in common, & that they had agreed to grant a perpetual lease thereof to C., his heirs, etc., granted, demised, etc., the same to C., "his heirs, exors., administrators, & assigns, for ever," to hold from a day then past unto & to the use of C., "his heirs, exors., administrators, & assigns for ever"; yielding & paying therefor yearly & every year to A. & B., their heirs, etc., the clear yearly rent or sum of £120, half yearly, etc. The deed contained all the covenants usually found in an ordinary lease:—*Held*: in the absence of proof, that, at the date of the deed, the premises were in the occupation of tenants, so that a reversion only could pass, & the expressed intention of the parties precluding the ct. from presuming that there had been livery of seisin, the deed could not operate as a conveyance of the fee, subject to a rentcharge, but created only a tenancy from year to year.—*DOE d. ROBERTON v. GARDINER* (1852), 12 C. B. 319; 21 L. J. C. P. 222; 19 L. T. O. S. 168, 204; 138 E. R. 927.

*Annotation*:—*Refd.* *Hardon v. Hesketh* (1859), 4 H. & N. 175.

**34. —.]**—By agreement dated in 1634, the Earl of P., owner of the R. estate, agreed to pay to the churchwardens & overseers of the poor of the parish of P. a yearly rent of £6 for certain charity lands belonging to the parish, which were lying intermixed with his estate, & to set out sufficient land of a better value for performance thereof, which he should either tie for the said yearly rent, or otherwise assure & convey to such persons as should be nominated to be feoffees in trust for the same. No land appeared to have been set out or assured in accordance with this agreement, & the successive owners of the R. estate continued to pay the rent of £6, but in the course of time the estate became greatly subdivided, & upon a division & settlement of the property in 1786 a portion thereof was conveyed to the person through whom the present owner claimed it.

Upon the title deeds of this portion the annual payment of £6 was recited to be due to the parish of P.; & the owners of the other portions were indemnified against the payment. The portion of the estate which as between the several owners was liable to the payment was bought by the father of the present owner. The £6 was regularly paid by the purchaser & by the present owner when he came into possession, & a receipt for the money was expressed to be "for rent of parish lands." Upon an information filed at the relation of the churchwardens & overseers of the parish, charging that the boundaries had been confused, & praying for a commission to set out the parish lands, or other lands of equal value:—*Held*: the agreement of 1634 did not amount to a sale of the lands in consideration of a rentcharge, but with the entries & receipts conclusively established a tenancy from year to year, at a rent of £6.—*A.-G. v. STEPHENS* (1855), 1 K. & J. 724; 3 Eq. Rep. 1072; 24 L. J. Ch. 694; 25 L. T. O. S. 316; 19 J. P. 642; 1 Jur. N. S. 1039; 3 W. R. 649; 69 E. R. 651; *on appeal*, 6 De G. M. & G. 111, L. C.

*Annotations*:—*Refd.* *Scarle v. Cooke* (1890), 43 Ch. D. 519. *Mentd.* *Brown v. Wales* (1872), L. R. 15 Eq. 142.

**35. Distinguished from tithe rentcharge.]**—So far as the endowments of the benefice consisted of land this payment might constitute a valid legal rentcharge issuing out of that land; but it is otherwise with regard to tithes, on which the charge would not be in strictness a legal rentcharge, as is shown by the passages in *Co. Litt.*, p. 47 a, & *Gilbert on Rents*, p. 21 (*STIRLING, L.J.*)—*RE ALMS CORN CHARITY, CHARITY COMRS. v. BODE*, [1901] 2 Ch. 750; 71 L. J. Ch. 76; 85 L. T. 533, L. J.

*Annotation*:—*Mentd.* *Underwood v. Bank of Liverpool, Same v. Barclays Bank*, [1924] 1 K. B. 775.

—*J.*—*See, generally*, ECCLESIASTICAL LAW, Vol. XIX., p. 489, Nos. 3465-3470.

**36. Whether reservable out of easement—Royal prerogative.]**—*Re GERARD (LORD) & BEECHAM'S CONTRACT*, No. 7, *ante*.

**Whether capable of division.]**—*See* PARTITION, Vol. XXXVI., pp. 304, 305, Nos. 20-22.

**Quit rents, rents of assize, etc.]**—*See, generally*, COPYHOLDS, Vol. XIII., pp. 99, 100, Nos. 1265-1277.

**Fee farm rent.]**—*See* Law of Property Act, 1925 (c. 20), s. 205 (xxiii); Administration of Estates Act, 1925 (c. 23), s. 55 (xxi).

#### SUB-SECT. 2.—WHETHER REAL OR PERSONAL PROPERTY.

**37. Right of heir or executor.]**—A rentcharge shall go to the exor. & not to the heir.—*DARREL v. WILSON* (1598), *Cro. Eliz.* 645; 78 E. R. 884.

**38. — Reservation to grantee & executor—Out of leaseholds.]**—*J. S.*, lessee of land to him & his heirs for three lives, assigns the whole estate, reserving a rent to him & his exors. & dies; his exors. & not his heir, are entitled to the rent.—*JENISON v. LEXINGTON (LORD)* (1719), 1 P. Wms. 555; 2 Eq. Cas. Abr. 430, pl. 10; 24 E. R. 515.

*Annotation*:—*Refd.* *Pluck v. Digges* (1831), 5 Bl. N. S. 31.

**39. — —.]**—A. by will gave a leasehold estate to B., his exors., etc., subject to a rentcharge to his wife during her widowhood, with power to the widow to enter for non-payment, & to enjoy, etc., until the arrears were satisfied; & after the widow's marriage or death he willed that B. should pay the rentcharge to C., his exors., administrators & assigns; the widow married, on which C. received the rentcharge during his

**Sect. 2.—Rentcharges: Sub-sect. 2. Sect. 3: Sub-sect. 1.]**

life, & then C., died without disposing of the rentcharge, appointing D. his exor.:—*Held*: D. had no right of entry for non-payment of the rentcharge.—*HASSELL d. HODGSON v. GOWTHWAITE* (1744), Willes, 500; 125 E. R. 1289.

*Annotation*:—*Reid*. *Bearpark v. Hutchinson* (1830), 7 Bing. 178.

**40. — Rent granted by coparcener.]**—Bond given by one parcener to pay to the other parcener, his exors. or administrators, an annual sum during the life of J. S. for owelty of partition, shall go to the exor., & not to the heir.—*HULBERT v. HART* (1682), 1 Vern. 133; 23 E. R. 367.

**41. — Grant pur autre vie.]**—(1) Annuity out of personal, devised to A. during life of his exor. A. dies in the life of the exor., the annuity does not cease, but goes to A.'s exor. *Aliter*, if such devise of annuity charged on real estate.

(2) An annuity is a personal thing, & in order to be given to another wants no words of limitation; if it is to continue after the death of the annuitant, it goes to his exors. (LORD HARDWICKE, C.).

(3) If one gives by will an annuity not existing before, to A., A. shall have it only for life (LORD HARDWICKE, C.).—*SAVERY v. DYER* (1752), Amb. 139; Dick. 162; 27 E. R. 91, L. C.

*Annotations*:—As to (1) *Apld.* *Re Drayton*, Francis v. Drayton (1912), 56 Sol. Jo. 253. *Reid*. *Tweedale v. Tweedale* (1840), 10 Sim. 453; *Ross v. Borer* (1862), 6 L. T. 514. As to (2) *Reid*. *Nichols v. Hawkes* (1853), 10 Hare, 342. As to (3) *Consd.* *Blewitt v. Roberts* (1841), Cr. & Ph. 271. *Follid.* *Baynes v. Ridge* (1853), 1 Eq. Rep. 157; *Re Grove's Trusts* (1859), 28 L. J. Ch. 536; *Re Cannon*, *Cannon v. Cannon* (1915), 114 L. T. 231. *Reid*. *Yates v. Madden* (1851), 3 Mac. & G. 532; *Kerr v. Middlesex Hospital* (1852), 2 De G. M. & G. 576; *Mansergh v. Campbell* (1858), 3 De G. & J. 232; *Bent v. Cullen* (1871), 6 Ch. App. 235. *Generally*, *Reid*. *Re Blight*, *Blight v. Hartnoll* (1881), 30 W. R. 513. *Mentd.* *Gardiner v. Barber* (1854), 2 Eq. Rep. 888.

**42. — —.]**—Testator gave a rentcharge to issue out of lands in England, to A. for life, & directed that after her death it should be continued, & equally divided between B., C., & D. during their lives & the life of the longest liver. B. died domiciled abroad, leaving an English will, by which she disposed of her personal estate. On the death of A., who was survived by C. & D., the Crown claimed from B.'s exors. legacy duty in respect of B.'s third share of the rentcharge:—*Held*: such duty was payable, for the interest in the rentcharge which passed to B.'s exors. was, by the Wills Act, "an estate *pur autre vie*, applicable by law in the same manner as personal estate," & therefore fell within 36 Geo. 3, c. 52, s. 20, & it was not exempt from duty by reason of B.'s foreign domicile, inasmuch as, although it was by law applicable in the same manner as personal estate, it was not by any of the statutes made personal estate, but was really not following the person.—*CHATFIELD v. BERCHTOLDT* (1872), 7 Ch. App. 192; 41 L. J. Ch. 255; 26 L. T. 267; 20 W. R. 401, L. J.J.

*Annotation*:—*Reid*. *Re Berchtold*, *Berchtold v. Capron*, [1923] 1 Ch. 192.

**43. Right of election of holder.]**—T. devised an annuity of £300 *per annum* to his wife for life, then to accumulate to make a portion for his first daughter who should marry; then, in order to raise portions for other daughters; then to remain to his eldest son, & on his decease, to the heirs male of his body, & in case of his having no issue, remainder to his next eldest son & his heirs male. The daughters married in the life of the wife; the

eldest & two other sons of testator died, leaving the wife without issue. This is not personal estate, vesting absolutely in the eldest son, on the principle, that it would be an estate tail in land; neither does it vest as an executory devise in the fourth son of testator who survived, but it is an annuity, & being exhausted by the events, there being nobody to take it as such, sinks into the residuary estate of testator.

Where it is charged upon land, it may be real or personal at the election of the holder: he may proceed against the land or against the person. If it is out of the coffers, it is personal only as to the remedy; but the property itself is real as to its descent to the heir (LORD LOUGHBOROUGH).—*TURNER v. TURNER* (1783), Amb. 776; 1 Bro. C. C. 316; 28 E. R. 1155.

*Annotations*:—*Reid*. *Taylor v. Martindale* (1841), 12 Sim. 158; *Re Rivett-Carnac's Will* (1885), 30 Ch. D. 136.

**44. Rentcharge issuing out of leaseholds—Chattel interest.]**—*ST. AUBY'S CASE*, No. 480. *post*.

**45. — —.]**—*SAFFERY v. ELGOOD*, No. 482. *post*.

**46. — — Chattel real.]**—*Re FRASER*, *LOWTHER v. FRASER*, No. 246, *post*.

**47. Payment for land taken under statutory powers—Government annuities.]**—Money paid by certain comrs. under an Act of Parliament for land of which A. was seized in fee in remainder, & which money had been invested in £3 per cent. annuities:—*Held*: to be real not personal estate.—*Re STEWART'S ESTATE*, *Ex p. FRAMER* (1852), 1 Sm. & G. 32; 22 L. J. Ch. 369; 20 L. T. O. S. 87; 16 Jur. 1063; 1 W. R. 17; 65 E. R. 15.

*Annotation*:—*Apld.* *Re Harrop's Estate* (1857), 3 Drew. 726. **Descent of rentcharge on gavelkind land.]**—*See DESCENT*, Vol. XVIII., p. 16, Nos. 147–150.

### SECT. 3.—ANNUITIES.

#### SUB-SECT. 1.—IN GENERAL.

**Annuity a personal thing.]**—*See* Sub-sect. 2, *post*.

**48. Not chose in action.]**—*DIGGS' CASE* (1583), Moore, K. B. 133; 72 E. R. 488.

**49. —.]**—Testator bequeathed a leasehold estate to trustees, upon trust as therein mentioned; & first, he charged the estate with the payment of an annuity, to his daughter, during all his interest in the estate. The daughter afterwards mortgaged her annuity, first to A. & afterwards to B.; but B. gave the trustees notice of his mtge. before A. did:—*Held*: the annuity was not a chose in action, but a chattel interest.—*WILTSHIRE v. RABBITS* (1844), 14 Sim. 76; 13 L. J. Ch. 284; 8 Jur. 769; 60 E. R. 285.

*Annotations*:—*Reid*. *Lee v. Howlett* (1856), 2 K. & J. 531; *Consolidated Investment & Insc. v. Riley* (1859), 1 Giff. 371; *Ward v. Duncombe*, [1893] A. C. 369; *Taylor v. London & County Banking Co.*, *London & County Banking Co. v. Nixon*, [1901] 2 Ch. 231.

**50. Whether entailable.]**—*WYARD v. WORSE* (1639), 1 Rep. Ch. 129; 21 E. R. 528.

**51. —.]**—Upon the death of the late duke, the Crown claimed estate duty upon the principal value of the Goodwood Estates & the securities of which the late duke was entitled as tenant in tail male:—*Held*: the coal duties were realty or tenements within the Statute De Donis, 1285 (c. 1), as issuing out of or concerning some certain place, namely, the port of Newcastle, & were an

#### PART I. SECT. 2, SUB-SECT. 2.

**441. Rentcharge issuing out of leaseholds—Chattel interest.]**—*Re RAMADGE'S SETTLEMENT*, *HAMILTON v. RAMADGE*, [1919] 1 I. R. 205.—*IR*.

inheritance entailable under that Statute De Donis, 1285 (c. 1), & therefore the annuities were entailable also.—*A.-G. v. RICHMOND (DUKE)* (No. 2), [1907] 2 K. B. 910; 76 L. J. K. B. 1019; 97 L. T. 791; 23 T. L. R. 742.

**52. Portion of estate.]**—By will in 1810, B. devised to trustees his estate in Jamaica to hold to the use that H. should, out of the rents & profits, receive for life an annuity payable quarterly for her separate use, with powers of distress & entry & perception of the rents & profits, & after her decease to the use that the trustees should pay the annuity unto her children, as she should appoint, for their lives. Testator gave other annuities out of the rents & profits of same estate, & gave the estate to the use of his son for life, with remainders over. The last payment on account of H.'s annuity was in 1842. H. died in 1853. She made an appointment, & arrears were due to her & her appointees. The estate was for some years a waste, & no rents & profits were received till 1870, & when received they were paid into ct.

These annuitants are, in my judgment, as much entitled to recover their annuities as the estate itself, as they are only portions of the estate (*HALL, V.-C.*).—*PITT v. DACRE (LORD)* (1876), 3 Ch. D. 295; 45 L. J. Ch. 796; 24 W. R. 943.

**53. Whether within Settled Land Acts.]**—It occurred to me . . . whether a purely personal annuity granted to a man & his heirs general, as to a man & the heirs of his body would be within Settled Land Act, 1882 (c. 38). . . . Such an annuity is not within the Statute De Donis, 1285 (c. 1), & consequently where it is limited to a man & the heirs of his body, he takes a fee simple conditional which becomes absolute on the birth of issue (*CHITTY, J.*).—*Re RIVETT-CARNAC'S WILL* (1885), 30 Ch. D. 136; 54 L. J. Ch. 1074; 53 L. T. 81; 33 W. R. 837; 1 T. L. R. 582.

*Annotations:—Mentd. Re Aylesford's S. E.* (1886), 32 Ch. D. 162; *Re Sebright's S. E.* (1886), 55 L. T. 354; *Hill v. Hill*, [1897] 1 Q. B. 483; *Cowley v. Cowley*, [1900] P. 305.

**54. —.]**—The words "stands for the time being limited to or in trust for any persons by way of succession" in Settled Land Act, 1882 (c. 38), s. 2 (1), include the case of annuities charged on the settled land followed by subsequent limitations although not secured by any term or trust.—*Re TRAFFORD'S SETTLED ESTATES*, [1915] 1 Ch. 9; 84 L. J. Ch. 351; 112 L. T. 107.

*Annotations:—Consd. Re Carnarvon's Chesterfield S. E.* *Re Carnarvon's Highclere S. E.*, [1927] 1 Ch. 138. *Reid. Re Monckton's Settlement*, *Monckton v. Calder* (1916), 115 L. T. 899; *Re Allington & L. C. C.'s Contract*, [1927] 2 Ch. 253; *Re Ogile's S. E.*, [1927] 1 Ch. 229.

**55. Distinguished from periodical payment.]**—*BIGNOLD v. GILES*, No. 296, *post*.

**56. —.]**—It happened that under the circumstances the wife became entitled to certain annual payments, but that did not make it of the nature of an annuity. It was part of the wife's capital estate. The husband had no power to assign it, & that part which was not reduced into possession the wife takes by survivorship (*JAMES, V.-C.*).—*BENN v. GRIFFITH* (1870), 18 W. R. 403.

**57. —.]**—By a deed of separation between a husband & wife, the husband agreed that so long as the wife observed the stipulations of the deed he would pay her every three months £625 by quarterly payments on Sept. 29, Dec. 25, Mar. 25, & June 24, in every year.—*Held: this was an annuity of £2,500.*—*LEWIS v. INLAND REVENUE COMRS.*, [1898] 2 Q. B. 290; 67 L. J. Q. B. 694; 78 L. T. 745.

*Annotations:—Reid. Jackson v. I. R. Comrs.* (1902), 87 L. T. 269; *Underground Electric Rys. of London & Glyn, Mills, Currie v. I. R. Comrs.*, [1916] 1 K. B. 306.

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**58. —.]**—A deed of separation entered into by applt. & his wife contained a clause to the effect that applt. would & should during the joint lives of himself & his wife, if his wife should continue to perform & observe the stipulations therein contained & on her part to be performed & observed, pay to his wife the clear weekly sum of £1, & in the event of the wife surviving applt. & not having forfeited payment during his lifetime, the sum should continue to be paid to her by her husband's representatives.—*Held: the agreement was a security for an indefinite period for a sum of money at weekly periods, & not for an annuity or yearly sum payable by weekly instalments.*—*JACKSON v. INLAND REVENUE COMRS.* (1902), 87 L. T. 269; 66 J. P. 630; 50 W. R. 666; 18 T. L. R. 678; 46 Sol. Jo. 725.

**59. Distinguished from legacy.]**—Generally speaking, annuities are legacies, although a distinction is made between them, in many cases, arising from the peculiar terms of the will.—*WARD v. GREY* (1859), 26 Beav. 485; 29 L. J. Ch. 74; 31 L. T. O. S. 50; 5 Jur. N. S. 948; 7 W. R. 569; 53 E. R. 986.

*Annotations:—Mentd. Newill v. Newill* (1871), L. R. 12 Eq. 432; *Re Pettitt, Flaxman v. Pettitt* (1894), 38 Sol. Jo. 531; *Re Smith, Prada v. Vandroy*, [1916] 1 Ch. 523.

**60. —.]**—A gift in a will to trustees of £400 a year each for their trouble for five years, described afterwards in a codicil as an annual allowance is an annuity payable out of income, not a legacy of £400 at the end of each year.—*SCHOLEFIELD v. REDFERN* (1863), 2 Drew. & Sm. 173; 1 New Rep. 465; 32 L. J. Ch. 627; 8 L. T. 487; 9 Jur. N. S. 485; 11 W. R. 453; 62 E. R. 587.

*Annotations:—Appld. A.-G. v. Coole*, [1921] 3 K. B. 607. *Reid. Re Hawkins, White v. White*, [1916] 2 Ch. 570. *Mentd. Bulkeley v. Stephens* (1863), 3 New Rep. 105; *Fremantle v. Whitbread* (1865), L. R. 1 Eq. 266; *Bulkeley v. Stephens*, [1896] 2 Ch. 211; *Re Peel's S. E.*, 1 Ch. 389.

**61. —.]**—Testator, after giving pecuniary legacies which had priority & were provided for, gave the residue of his property upon trust to pay the income of eight specified sums to eight persons respectively for life, each capital sum on the death of each of four of the legatees to fall into the ultimate residue, the other four sums being settled. The estate was insufficient to provide the eight sums.—*Held: the four legatees, the capital of whose legacies was at their respective deaths to fall into residue, ought to be treated as annuitants; in accordance with the rule in Re Cottrell, Buckland v. Beddingfield*, No. 195, *post*, their annuities & the other four legacies ought to be put on a level & abate rateably; & accordingly, the annuities must be valued as at a year from testator's death & the four amounts so ascertained must be treated as pecuniary legacies, & each of those amounts & of the other four legacies must bear its rateable proportion of the total abatement.

I think the case of *Arnold v. Arnold*, No. 532, *post*, is a sufficient authority for holding that legatees whose legacies are life interests in sums directed to be appropriated for their benefit are really annuitants (*EVE, J.*).—*Re RICHARDSON, RICHARDSON v. RICHARDSON*, [1915] 1 Ch. 353; 84 L. J. Ch. 438; 112 L. T. 554.

**62. —.]**—Testator left his estate to trustees on trust as to the income of four-fifths thereof to pay £500 a year to his wife for the maintenance of their son until he should be twenty-one. Eighteen months after the death of testator the son died, about eighteen months before attaining twenty-one years. The widow duly applied the £500 a year to his maintenance from the death of testator to that of the son.—*Held: the £500 a year was an*



## Sect. 3.—Annuities: Sub-sects. 1 &amp; 2. Part II.

## Sect. 1: Sub-sects. 1, 2 &amp; 3, A.]

annuity & not a legacy.—A.-G. v. COOLE, [1921] 3 K. B. 607; 91 L. J. K. B. 250; 126 L. T. 24; 37 T. L. R. 955.

—.]—See WILLS.

## SUB-SECT. 2.—WHETHER REAL OR PERSONAL PROPERTY.

**63. Annuity a personal thing.**—HUNTINGDON'S (PRIOR) CASE (1482), Y. B. 21 Edw. 4, fo. 83, pl. 38.

**64. —.**—DIGGS' CASE (1583), Moore, K. B. 133; 72 E. R. 488.

**65. — As to remedy.**—TURNER v. TURNER, No. 43, *ante*.

**66. Chattel interest.**—WILTSHIRE v. RABBITS, No. 49, *ante*.

**67. Whether descendable to heir.**—HUNTINGDON'S (PRIOR) CASE (1482), Y. B. 21 Edw. 4, fo. 83, pl. 38.

**68. —.**—TURNER v. TURNER, No. 43, *ante*.

**69. —.**—RADBURN v. JERVIS, HARE v. HILL, No. 474, *post*.

—.]—See, now, Administration of Estates Act, 1925 (c. 23), s. 45 (1) (a).

**70. Bond given by co-parcener.**—HULBERT v. HART, No. 40, *ante*.

**71. Exchequer annuities.**—DOD v. DICKENSON (1727), 2 Eq. Cas. Abr. 325; 22 E. R. 277.

**72. Annuity granted by Crown out of revenue.**—Annuity in fee granted by King Charles II. out of Barbadoes duties is not a rent, nor realty; nor within the statutes either of frauds, or *de donis*, etc. Therefore being settled on A. & the heirs of her body, it was held to amount to a fee-simple conditional at the common law, the remainder over being void.—STAFFORD (EARL) v. BUCKLEY (1750), 2 Ves. Sen. 170; 28 E. R. 111, L. C.

*Annotations:—*Consd. Turner v. Turner (1783), 1 Bro. C. C. 315; Buckeridge v. Ingram (1795), 2 Ves. 652. *Fold.* Radburn v. Jervis (1841), 3 Beav. 450. *Reid.* Taylor v. Martindale (1841), 5 Jur. 648; *Ex p.* Wynch (1854), 5 De G. M. & G. 188; *Re* Rivett-Carnac's Will (1885), 30 Ch. D. 136. *Mentd.* Doe d. Chattaway v. Smith (1816), 5 M. & S. 126.

**73. —.**—An annuity of £1,000 charged upon the Post Office, until a sum of £100,000 should be paid, in order to be laid out in land, continues to be a mere personal annuity, & as such to pass by grant or transfer.—HOLDERNESSE v. CARMARTHEN (1784), 1 Bro. C. C. 377; 28 E. R. 1188, L. C.

*Annotations:—*Consd. Buckeridge v. Ingram (1795), 2 Ves. 652. *Mentd.* A.-G. v. Jones (1849), 1 H. & Tw. 493.

**74. —.**—By letters patent, 24 Car. 2, the King granted to the use of A., his heirs & assigns for ever, an annuity of £1,000 to be paid out of his revenue of 4½ per cent. at Barbadoes & the Leeward Islands:—*Held*: this annuity was personal property, & duly passed under a will attested by two witnesses, by a residuary clause bequeathing all the rest, residue, & remainder of testatrix's personal estate, of what nature or kind soever, to her exors.—AUBIN v. DALY (1820), 4 B. & Ald. 59; 106 E. R. 860.

*Annotations:—*Apld. Radburn v. Jervis (1841), 3 Beav. 450. *Reid.* *Ex p.* Wynch (1854), 5 De G. M. & G. 188.

**75. —.**—RADBURN v. JERVIS, HARE v. HILL, No. 474, *post*.

**76. Annuity charged on real & personal**

estate.]—Testator gave his real & personal estate to his wife, subject, amongst other bequests, to an annuity of £50 to A. B. for ever:—*Held*: on A. B.'s death intestate, the annuity passed not to his heir, but to his personal representative.—TAYLOR v. MARTINDALE (1841), 12 Sim 158; 10 L. J. Ch. 339; 5 Jur. 648; 59 E. R. 1092.

*Annotation:—*Fold. Parsons v. Parsons (1869), L. R. 8 Eq. 260.

**77. —.**—Testator gave real & personal estate to A., charged with the payment of annuities to testator's six children "or their heirs respectively":—*Held*: the annuities were personal estate, & the statutory next of kin of one of the six children who was dead at the date of the will were entitled to one of the annuities.—PARSONS v. PARSONS (1869), L. R. 8 Eq. 260; 17 W. R. 1005.

*Annotations:—*Reid. *Re* Morgan, Morgan v. Morgan (1893), 69 L. T. 407. *Mentd.* *Re* Clerke, Clowes v. Clerke, [1915] 2 Ch. 301.

**78. — Consideration for grant to statutory body.**—By an indenture of grant, dated Aug. 14, 1827, R. B. who was the tenant for life of one-eighth share in certain realty & personalty, constituting the old waterworks at C. joined with the owners of the other seven shares in conveying such waterworks to the City of C. Waterworks co., incorporated pursuant to a special Act of Parliament passed in May, 1826. The indenture contained a recital to the effect that the consideration for the grant had been agreed at the annual sum of £500, to be payable for ever by quarterly payments to be secured as therein mentioned & to be divided between the grantors, their respective exors., administrators, & assigns, according to their shares & interests in the waterworks.

The property granted consisted mainly of easements, or rights in the nature of easements, & of personal chattels; but it was not clear that it comprised any corporeal as opposed to incorporeal hereditaments though these were words sufficient to pass such corporeal hereditaments, if any, as formed part of the old waterworks at C. The question was, whether the annual sum payable by the waterworks co. was real or personal estate:—*Held*: the indenture did not create a perpetual fee farm rent or rentcharge; & the annual sum was nothing else but personal estate.—*Re* BAXTER'S TRUSTS, MALLING v. ADDISON (1911), 104 L. T. 710; 27 T. L. R. 425, C. A.

**79. Annuity given as estate tail.**—*Re* WYNCH'S TRUSTS, *Ex p.* WYNCH, No. 316, *post*.

**80. Whether legal assets of husband—Grant for life of wife.**—A. granted to B. an annuity, in consideration of purchase of trade stock, for their joint lives, & for the life of A. & B.'s wife, unless B. should transfer it in his lifetime, it was provided that B. should have a right to sell his wife's reversionary interest as if it were payable to him *in presenti*. B. was indebted at the time of the transaction, & it being determined, after B.'s death, without having aliened the annuity, that the wife's reversionary interest was assets for B.'s creditors, it was now determined that it was legal assets.—SHEE v. FRENCH, FRENCH v. FRENCH (1857), 3 Drew. 716; 3 Jur. N. S. 428; 61 E. R. 1076; *sub nom.* HUE v. FRENCH, 26 L. J. Ch. 317; 28 L. T. O. S. 365; 5 W. R. 386.

*Annotations:—*Reid. O'Grady v. Wilmot, [1916] 2 A. C. 231. *Mentd.* Richards v. James, Sharpe v. James (1867), L. R. 2 Q. B. 285; *Re* Nurse, *Ex p.* Foxley (1868), 17 L. T. 623; *Re* O'Sullivan, *Ex p.* Baller (1892), 61 L. J. Q. B. 228; *Re* Mouat, Kingston Cotton Mills Co. v. Mouat, [1899] 1 Ch. 831.

## PART I. SECT. 3, SUB-SECT. 2.

**76 i. Annuity charged on real & personal estate.**—JOYNT v. RICHARDS

(1882), 11 L. R. Ir. 278.—IR.

**79 i. Annuity given as estate tail.**—*Re* LOUGHHEAD, HAMILTON v. LOUGHHEAD, [1917] 1 L. R. 227.—IR.

**b. Annuity secured by term of years.**—*Re* RAMADGE'S SETTLEMENT, HAMILTON v. RAMADGE, [1917] 1 L. R. 205.—IR.



## Part II.—Creation of Rentcharges and Annuities.

## SECT. 1.—RENTCHARGES.

## SUB-SECT. 1.—WHO MAY CREATE.

See Law of Property Act, 1925 (c. 20), s. 122 (1).

**81. General rule—Owner of inheritance.]**—The nature of a rentcharge is plain & distinct. It cannot come into existence but by the act of the person who is entitled to the inheritance. The owner of the inheritance alone can make a rentcharge (BACON, V.-C.).—BAILEY v. BADHAM (1885), 30 Ch. D. 84; 54 L. J. Ch. 1067; 53 L. T. 13; 49 J. P. 680; 33 W. R. 770; 1 T. L. R. 548.

*Annotations* :—**Consd.** Hambro v. Hambro, [1894] 2 Ch. 564. **Refd.** Searle v. Cooke (1890), 43 Ch. D. 519.

**82. Joint tenant.]**—If there be two joint tenants in fee, & one grants a rentcharge in fee, & afterwards releases to the other, & dies, the survivor shall not avoid the rent.—ABERGAVERNNEY'S (LORD) CASE (1607), 6 Co. Rep. 78 b; 77 E. R. 373.

*Annotations* :—**Refd.** Lillingston's Case (1608), 7 Co. Rep. 38 a; Byne v. Vivian (1800), 5 Ves. 604. **Mentd.** Daniel v. Waddington (1615), 3 Bulst. 130.

**83. Donee of power of appointment.]**—A settlor lands to the use of himself for life, remainder to such of his four children, & in such shares & proportions as A. by any writing shall appoint. A. may not only limit the land to any of his children, but may charge the land with any rentcharge or sums of money for any of his children.—THWAYTES v. DYE (1688), 2 Vern. 80; 23 E. R. 661, L. C.

*Annotations* :—**Consd.** *Re* Redgate, Marsh v. Redgate, [1903] 1 Ch. 356. **Refd.** Althamar v. Bath (1693), Freem. Ch. 193; Roberts v. Dixall (1738), West temp. Hard. 536; Middleton v. Pryor (1760), Amb. 391; Thornton v. Bright (1836), 2 My. & Cr. 230. **Mentd.** A.-G. v. Barnes (1708), Gilb. Ch. 5; Alexander v. Alexander (1755), 2 Ves. Sen. 640; Langton v. Blackmore (1755), Amb. 289; Kenworthy v. Bate (1802), 6 Ves. 793; *Re* Mackenzie, Bain v. Mackenzie [1916] 1 Ch. 125.

**84. Mortgagor in possession.]**—FREEMAN v. EDWARDS, No. 489, *post*.

**Clergy—Whether out of benefices.]**—See ECCLESIASTICAL LAW, Vol. XIX., pp. 413-417.

## SUB-SECT. 2.—FOR WHAT ESTATES RENTCHARGES MAY BE CREATED.

**85. Fee simple.]**—GILBERTSON v. RICHARDS, No. 96, *post*.

**86. Estate for life.]**—A rentcharge may be created for an estate for life & for a remainder after an estate for life.—SMITH v. FARNABY (1666), Cart. 52; 2 Keb. 29, 55, 84; 1 Sid. 285; 1 Lev. 144; 124 E. R. 819.

**87. — Under power of appointment.]**—PROCTOR v. BULSTRODE (1742), 2 Coop. temp. Cott. 534; 47 E. R. 1291, L. C.

**88. Estate pur autre vie.]**—BOWLES v. POORE, No. 270, *post*.

**89. Estate in remainder—After estate for life.]**—SALTER v. BUTLER, No. 264, *post*.

**90. — — —.]**—SMITH v. FARNABY, No. 86, *ante*.

**91. Joint tenancy.]**—If a grant be made of an annuity of £100 to five persons to be equally divided between them, *videlicet* £20 to each,

habendum the said £20 to them & their assigns for their lives, *videlicet*, £20 to each of them respectively, & that on the death of any of them the share of the party so dying shall be paid equally to the others, but that there shall be no survivor of either of their parts:—*Qu.*: whether the grantees in such case are joint tenants or tenants in common.—WARD v. EVANS (1695), 5 Mod. Rep. 25; Holt, K. B. 368; 87 E. R. 497; *subsequent proceedings*, *sub nom.* WARD v. EVERARD (1699), 1 Salk. 390.

**92. Estate tail.]**—GIFFARD v. WITHINGTON (1846), cited in [1903] 1 Ch. at p. 866; 72 L. J. Ch. at p. 759.

*Annotation* :—**Foll.** Robinson v. Giffard, [1903] 1 Ch. 865.

## SUB-SECT. 3.—CREATION BY INSTRUMENT INTER VIVOS.

## A. Form of Instrument.

**93. Necessity for deed.]**—Grant of an advowson pleaded without alleging to be by deed, good if the issue be taken upon collateral matter.—LIGHTFOOT v. BRIGHTMAN (1622), Hut. 54; 123 E. R. 1096.

*Annotations* :—**Refd.** Pollitt v. Forrest (1848), 11 Q. B. 962; Foquet v. Moor (1852), 7 Exch. 870; Young v. Austen (1869), L. R. 4 C. P. 553.

**94. — — —.]**—A right of way or a right of passage for water, where it does not create an interest in the land, is an incorporeal right, & stands upon the same footing with other incorporeal rights, such a rights of common, rents, advowsons, etc. It lies not in livery but in grant, & a freehold interest in it cannot be created or passed, even if a chattel interest may, which I think it cannot, otherwise than by deed (BAYLEY, J.).—HEWLINS v. SHIPPAM (1826), 5 B. & C. 221; 7 Dow. & Ry. K. B. 783; 4 L. J. O. S. K. B. 241; 108 E. R. 82.

*Annotations* :—**Apld.** Cooker v. Cowper (1834), 1 Cr. M. & R. 418; Wood v. Leadbitter (1845), 13 M. & W. 838; Aldin v. Latimer Clark, Muirhead, [1894] 2 Ch. 437. **Refd.** Liggins v. Inge (1831), 7 Bing. 682; Perry v. Fitzhove (1846), 8 Q. B. 757; Taplin v. Florence (1851), 10 C. B. 744; Met. Ry. v. Fowler, [1892] 1 Q. B. 165. **Mentd.** Wallis v. Harrison (1838), 1 Horn. & H. 405; Mounsey v. Ismay (1865), 12 L. T. 26; McManus v. Cooke (1887), 35 Ch. D. 681; Hurst v. Picture Theatres, [1915] 1 K. B. 1.

**95. Grant of annuity by deed poll—Effect of subsequent charge on estate.]**—Deed poll is made for an annuity, & after charges his estate for the payment of it, he shall have security, & not restrain the deed poll.—GRENON v. RAWSON (1726), Cas. temp. King, 57; 25 E. R. 221.

**96. Who must execute deed—Assignee of land out of which rentcharge reserved.]**—There is no creation of a rentcharge good at common law, because the release in fee simple does not execute the deed.

A rent in fee simple may be granted to a man & heirs to continue for ever (MARTIN, B.).—GILBERTSON v. RICHARDS (1859), 4 H. & N. 277; 28 L. J. Ex. 158; 33 L. T. O. S. 107; 157 E. R. 845; *on appeal* (1860), 5 H. & N. 453, Ex. Ch. *Annotations* :—**Refd.** Morgan v. Davey (1883), Cab. & El. 114. **Mentd.** Nash v. Ash (1862), 1 H. & C. 160; Birmingham Canal Co. v. Cartwright (1879), 11 Ch. D. 421;

remainders over, executing a disentailing deed:—*Held*: the disentailing deed created merely a base fee in each rentcharge determinable upon the failure of the issue in tail.—PINKERTON v. PRATT, [1915] 1 I. R. 406.—**IR.**

## PART II. SECT. 1, SUB-SECT. 2.

**911. Joint tenancy.]**—FLEMING v. FLEMING (1855), 5 I. Ch. R. 129; 8 Ir. Jur. 31.—**IR.**

**921. Estate tail.]**—*Re* LOUGHHEAD, HAMILTON v. LOUGHHEAD, [1918] 1

I. R. 227.—**IR.**

**c. Equitable estate tail.]**—PINKERTON v. PRATT, [1915] 1 I. R. 406.—**IR.**

**d. Base fee.]**—Two tenants in tail of equitable rentcharges, which had been granted to them *de novo* without

**Sect. 1.—Rentcharges: Sub-sect. 3, A., B. (a) & (b), C. & D.]**

*Blight v. Hartnoll* (1881), 19 Ch. D. 294; *L. & S. W. Ry. v. Gomm* (1882), 20 Ch. D. 562.

**97. General words of charge not essential.]—**To constitute a charge in equity by deed or writing it is not necessary that any general words of charge should be used, but it is sufficient if the ct. can gather from the instrument an intention by the parties that the property referred to should constitute a security.—*CRADOCK v. SCOTTISH PROVIDENT INSTITUTION*, [1894] 70 L. T. 718, C. A.

**98. Whether operating at common law or under Statute of Uses.]—WEBSTER v. ASHTON-UNDER-LYNE OVERSEERS, ORME'S CASE, No. 102, post.**

—**]**—*See, now, Law of Property Act, 1925 (c. 20), s. 207, Sched. VII.*

**Construction of deeds.]—See, generally, DEEDS, Vol. XVII., pp. 239 et seq.**

**B. Acquisition of Seisin.**

**(a) Grant Operating at Common Law.**

**99. Possession not presumed.]—**Where a freehold rentcharge was granted by deed in Jan. 1845, the first payment to be made in Jan. 1846:—*Held*: the grantee was not in possession under Representation of the People Act, 1832 (c. 45), s. 26, until the rent had been received, or had become due.

The question undoubtedly turns upon the meaning of the words "actual possession," & we think those words mean a possession in fact, as contradistinguished from a possession in law; & that as the possession in fact of a rentcharge must be the actual, manual receipt of the rent itself, or some part of it, or something in lieu of it, so there could be no such possession in fact in this case (*TINDAL, C.J.*).

As in the case of land there must be more than the execution of the conveyance—there must be the actual possession or receipt of the rents & profits, there seems no reason why, in the case of an incorporeal hereditament, there should not be such further actual possession as the nature of the subject itself is capable of (*TINDAL, C.J.*).—*MURRAY v. THORNFLEY* (1846), 2 C. B. 217; *Cox & Atk.* 140; *Bar. & Arn.* 742; 1 *Lut. Reg. Cas.* 496; *Pig. & R.* 336; 15 *L. J. C. P.* 155; 10 *Jur.* 270; 135 *E. R.* 927; *sub nom.* *McCONNELL v. THORNFLEY*, 6 *L. T. O. S.* 483.

**Annotations:—***Apld.* *Hayden v. Twerton Overseers* (1846), 4 C. B. 1. **Consd.** *Anelay v. Lewis* (1855), 17 C. B. 316. *Apld.* *Heelis v. Blain* (1864), 18 C. B. N. S. 90; *Webster v. Ashton-under-Lyne Overseers, Orme's Case* (1872), *L. R.* 8 C. P. 281. **Consd.** *Webster v. Ashton-under-Lyne Overseers, Hadfield's Case* (1873), *L. R.* 8 C. P. 306; *Druitt v. Christchurch Overseers* (1883), 12 Q. B. D. 365.

**100. —.]—**The assignee of a rentcharge is not entitled to be registered, unless he has been in the actual receipt of it for six months before the last day of July.

The authorities relied on in that case [*Murray v. Thornfley*, No. 99, *ante*] show that actual seisin is quite independent of the rent being due. The payment may be forward or backward. Claimants here became first actually possessed of this rentcharge on Apr. 29, & therefore have not been in actual possession for the time required by the Act (*MAULE, J.*).—*HAYDEN v. TWERTON OVERSEERS* (1846), 4 C. B. 1; 136 *E. R.* 400; *sub nom.* *HAYDEN v. TIVERTON OVERSEERS*, 1 *Lut. Reg. Cas.* 510; 16 *L. J. C. P.* 88; 8 *J. T. O. S.* 120; 10 *J. P.* 774; 10 *Jur.* 950.

**Annotations:—***Apld.* *Anelay v. Lewis* (1855), 17 C. B. 316. **Distd.** *Heelis v. Blain* (1864), 18 C. B. N. S. 90. **Consd.**

*Webster v. Ashton-under-Lyne Overseers, Orme's Case* (1872), *L. R.* 8 C. P. 281. **Refd.** *Webster v. Ashton-under-Lyne Overseers, Hadfield's Case* (1873), *L. R.* 8 C. P. 306.

**101. —.]—**Where a rentcharge is created by means of a conveyance to uses, the grantee immediately acquires "actual seisin," by the words of 27 Hen. 8, c. 10, s. 1, & is entitled to be registered in respect thereof, notwithstanding he may not have actually received any part of the rent. *Aliter*, where the rentcharge is created by an ordinary grant at common law.—*HEELIS v. BLAIN* (1864), 18 C. B. N. S. 90; *Hop. & Ph.* 189; 5 *New Rep.* 128; 34 *L. J. C. P.* 88; 11 *L. T.* 480; 29 *J. P.* 343; 11 *Jur. N. S.* 18; 13 *W. R.* 262; 144 *E. R.* 374.

**Annotations:—***Distd.* *Webster v. Ashton-under-Lyne Overseers, Orme's Case* (1872), *L. R.* 8 C. P. 281. **Apld.** *Webster v. Ashton-under-Lyne Overseers, Hadfield's Case* (1873), *L. R.* 8 C. P. 306; *Lowcock v. Broughton Overseers* (1883), 12 Q. B. D. 369.

**102. —.]—**On Oct. 13, 1871, A., being seised in fee of certain lands, by indenture granted out of them "unto B., C., & D., & their heirs, one perpetual yearly rentcharge of £9, to be payable by equal half-yearly payments on Apr. 5, & Oct. 5, in each year," the first payment to be on Apr. 5, 1872, "To hold the rentcharge unto B., C., & D., their heirs & assigns, to the use of the said B., C., & D., their heirs & assigns for ever, as tenants in common, & in equal shares." The first half-yearly payment was duly made on Apr. 5, 1872:—*Held*: (1) the use being specific & not inconsistent with the rest of the *habendum*, the whole *habendum* must be read as specific, & so read, the deed operated as a grant at common law, & not under the Statute of Uses; (2) the grantees had not been in the "actual possession" of the rentcharge.—*WEBSTER v. ASHTON-UNDER-LYNE OVERSEERS, ORME'S CASE* (1872), *L. R.* 8 C. P. 281; 2 *Hop. & Colt.* 60; 42 *L. J. C. P.* 38; 37 *J. P.* 55; 21 *W. R.* 171; *sub nom.* *ASHTON-UNDER-LYNE OVERSEERS v. WEBSTER, ORME'S CASE*, 27 *L. T.* 652.

**Annotations:—***As to* (1) **Refd.** *Savill v. Bethell*, [1902] 2 Ch. 523. **Generally.** **Refd.** *Webster v. Ashton-under-Lyne Overseers, Hadfield's Case* (1873), *L. R.* 8 C. P. 306; *Lowcock v. Broughton Overseers* (1883), 12 Q. B. D. 369. **Mentd.** *Boon v. Howard* (1874), *L. R.* 9 C. P. 277.

**(b) Grant Operating under Statute of Uses.**

*See, now, Law of Property Act, 1925 (c. 20), s. 207, sched. VII.*

**103. Actual possession presumed.]—HEELIS v. BLAIN, No. 101, ante.**

**104. —.]—**By a deed executed on Jan. 29, 1872, which operated under the Statute of Uses, an annual rentcharge of £35 14s. was granted to the use of seventeen persons in fee as tenants in common, to be payable by equal half-yearly payments on Jan. 29, & July 29. The first payment, payable on July 29, 1872, was paid on July 30:—*Held*: as the grant operated under the Statute of Uses, the case came within the decision in *Heelis v. Blain*, No. 101, *ante*, on the authority of that case the grantees, by force of the Statute of Uses, had been in "actual possession" of the rentcharge from the date of the grant.—*WEBSTER v. ASHTON-UNDER-LYNE OVERSEERS, HADFIELD'S CASE* (1873), *L. R.* 8 C. P. 306; 2 *Hop. & Colt.* 89; 42 *L. J. C. P.* 146; 28 *L. T.* 901; 37 *J. P.* 486; 21 *W. R.* 637.

**Annotations:—****Refd.** *Lowcock v. Broughton Overseers* (1883), 12 Q. B. D. 369. **Mentd.** *Leonard v. Alloways* (1878), 2 *Hop. & Colt.* 411; *Winyard v. Toogood, Hance v. Fortnum* (1882), 10 Q. B. D. 218; *Bonnard v. Perryman*, [1891] 2 Ch. 269.

**105. —.]—**A. being possessed of a rentcharge issuing out of freehold lands, granted it unto B., C., & D., & their heirs, to hold same

unto B., C., & D., & their heirs, to the use of A., B., C., & D. their heirs & assigns for ever, in equal one-fourth shares as tenants in common:—*Held*: all the grantees took under the Statute of Uses, & that by force of the statute & on the authority of *Heelis v. Blain*, No. 101, *ante*, they were from the date of the deed in actual possession of their shares of the rentcharge.—*LOWCOCK v. BROUGHTON OVERSEERS* (1883), 12 Q. B. D. 369; *Colt*. 335; 53 L. J. Q. B. 144; 51 L. T. 399; 32 W. R. 247, D. C.

### C. Time of Commencement.

See Law of Property Act, 1925 (c. 20), s. 121 (6).

**106. Grant may commence in futuro.]—THROCKMERTON v. TRACY** (1555), as reported in 1 Plowd. 145; 75 E. R. 225.

*Annotations:—***Refd.** *Petty v. Goddard* (1662), O. Bridg. 35. **Mentd.** *Wrotesley v. Adams* (1559), 1 Plowd. 187; *Bellamy's Case* (1605), 6 Co. Rep. 38 a; *Leyfield's Case* (1611), 10 Co. Rep. 88 a; *Lofeld's Case* (1612), 10 Co. Rep. 106 a; *Berry v. Berry* (1615), 3 Bulst. 62; *Counden v. Clerke* (1619), Hob. 29; *Farrington's Case* (1625), Cro. Car. 10; *Miller v. Manwaring* (1635), Cro. Car. 397; *Berry v. White* (1662), O. Bridg. 82; *R. v. Trinity House* (1662), 1 Keb. 331; *Lyn v. Wyn* (1665), O. Bridg. 122; *Foot v. Berkeley* (1666), O. Bridg. 527; *Graves v. Ashenhurst* (1673), Freem. K. B. 77; *Lawrence v. Dodwell* (1699), 1 Ld. Raym. 438; *Fisher v. Wigg* (1700), 1 P. Wms. 14; *Freshwater v. Eaton* (1717), 1 Stra. 49; *Scott v. A'Chez* (1743), Park. 21; *Doe d. Timmis v. Steele* (1843), 4 Q. B. 663; *Hunt v. Gunn* (1862), 13 C. B. N. S. 226; *Kennedy v. Brown* (1863), 13 C. B. N. S. 677; *Malcomson v. O'Dea* (1863), 10 H. L. Cas. 593; *Burchell v. Clark* (1876), 2 C. P. D. 88; *Hanbury v. Jenkins*, [1901] 2 Ch. 401.

**107. —.]—OSMERE v. SHEAFE**, No. 240, *post*.

**108. — On determination of grant for life.]—ANON.** (undated), Plowd. Queries 31 a, pl. 174; 75 E. R. 902.

**109. —.]—A.** was entitled for the joint lives of himself & his father to a rentcharge of £500 charged on an estate of which his father was tenant for life, with remainder to A. in fee. A. having agreed to sell to B. a perpetual rentcharge of £500 issuing out of the estate, assigned to B. the rentcharge to which he was so entitled, & conveyed his reversion in fee to trustees in trust to secure to B. a rentcharge of £500 a year, to commence on the termination of the prior rentcharge:—*Held*: the transaction was not to be considered as a sale of an interest in reversion, as A. when he made the agreement, had it in his power to secure to B. a perpetual rentcharge of £500 in possession.—**WARDLE v. CARTER** (1835), 7 Sim. 490; 58 E. R. 925.

**110. — Application of rule against perpetuities.]—A.**, being mtgd. in fee simple of certain lands, & the equity of redemption in fee belonging to B., by indentures of lease & release, dated Oct. 1838, between B. of the first part, A. of the second part, I. of the third part, & H. of the fourth part, B. did limit & appoint, & A. conveyed to H., & B. confirmed, the said lands, to have & to hold the same to H., his heirs & assigns, to the use of H., his heirs & assigns, for ever, subject to a proviso for redemption by B., his heirs, etc., on payment of £5,000. Amongst other provisos there was one, that if default should be made in payment of the £5,000, it should be lawful for H., his heirs & assigns to sell. This deed contained a proviso for quiet enjoyment by B. until default, also the following: "Provided always, & it is hereby expressly agreed & declared, between & by the parties hereto, that, if at any time hereafter, when, & so soon as H. & every other person claiming or to claim B. from, through, or under him, shall, under or by virtue, of any power or authority herein contained, enter into or upon or otherwise become possessed of the said

premises, or any part thereof, the same shall from thenceforth be subjected & be charged to & with the payment to B., & his assigns of the annual sum of £40, & the same shall thenceforth be recovered or recoverable by distress or otherwise upon or out of the mtgd. premises." This conveyance was executed by A. & B. but not by H. Default having been made in payment, H. entered into possession for the purpose of exercising the power of sale, & by indenture, dated in 1847, conveyed to T., who entered into possession of the lands & duly paid the £40 rent:—*Held*: (1) the rent was well created by way of use; (2) the rentcharge was not invalid as commencing at a period too remote, & so contravening the rule against perpetuities.—**GILBERTSON v. RICHARDS** (1860), 5 H. & N. 453; 29 L. J. Ex. 213; 6 Jur. N. S. 672; 157 E. R. 1258, Ex. Ch.

*Annotations:—**As to* (1) **Consd.** *Nash v. Ash* (1862), 1 H. & C. 160. *As to* (2) **Apld.** *Birmingham Canal Co. v. Cartwright* (1879), 11 Ch. D. 421. **Idid.** *L. & S. W. Ry. v. Gomm* (1882), 20 Ch. D. 562. **Fold.** *Morgan v. Davey* (1883), Cab. & El. 114. **Refd.** *Blight v. Hartnoll* (1881), 19 Ch. D. 294.

**111. —.]—MORGAN v. DAVEY** (1883), Cab. & El. 111.

—.]—*See, generally*, PERPETUITIES, Vol. XXXVII., pp. 55 *et seq.*

### D. Enforcement of Agreement to Grant.

*See, generally*, SPECIFIC PERFORMANCE.

**112. What may be enforced—Agreement for settlement of lands subject to jointure—Death of husband before settlement—Re-marriage of widow.]—WOOD v. INGRAM** (1710), 2 Eq. Cas. Abr. 211; 22 E. R. 180.

**113. — Annuity charged on estate not belonging to grantor.]—CAREY v. STAFFORD** (1725), Amb. 520, 831; 27 E. R. 336, 522; *sub nom.* **CAREY v. STAFFORD**, 3 Swan. 427, n.; *sub nom.* **ANON.**, 1 Eq. Cas. Abr. 31, pl. 4, H. L.

*Annotations:—***Expld.** *Thurkettle v. Howorth* (1727), Bumb. 241. **Refd.** *Kaye v. Moore* (1822), 1 Sim. & St. 61. **Mentd.** *Binnington v. Wallis* (1821), 4 B. & Ald. 650.

**114. — Covenant to settle—After-acquired property.]—S.** covenants to convey & settle houses, lands & tenements or a rentcharge issuing thereout to certain uses. S. afterwards purchases lands, but does not make any settlement of them pursuant to the articles & covenant, & then dies. These after-purchased lands shall be to the uses of the settlement.—**DEACON v. SMITH** (1746), 3 Atk. 323; 26 E. R. 988, L. C.

*Annotations:—***Consd.** *Mornington v. Keane* (1858), 2 De G. & J. 292. **Refd.** *Wellesley v. Wellesley* (1839), 4 My. & Cr. 561; *Mathias v. Mathias* (1858), 3 Sm. & G. 552.

**115. — Agreement for sale of land in consideration of annuity—Death of party before conveyance.]—J.** agrees to sell his estate to B. in consideration of an annuity for his life. The time limited for the conveyance was Oct. 31; but the annuity was to commence & A. was to have the rents & profits of the estate from Apr. 5 preceding. J. died on Nov. 12, before any conveyance was executed. On a bill brought by A. for a specific performance of this agreement, the ct. dismissed it, without costs.—**POPE v. ROOTS** (1774), 1 Bro. Parl. Cas. 370; 1 E. R. 628, H. L.

*Annotations:—***Refd.** *Davies v. Cooper*, *Cooper v. Jackson* (1840), 5 My. & Cr. 270. **Mentd.** *Wyvill v. Exeter* (Bp.) (1815), 1 Price, p. 294, n.

**116. —.]—A.** agreed to purchase an estate from B., & upon the estate being conveyed, to grant a life annuity to B., to be secured by bond:—*Held*: B. had no lien on the estate for the payment of the annuity, but was entitled, the purchaser being dead & there having been no conveyance, to have the annuity secured by a valid

**Sect. 1.—Rentcharges: Sub-sect. 3, D., E. & F.; sub-sects. 4, 5 & 6.]**

& effectual bond before he could be called upon to convey the estate.—*DIXON v. GAYFERE, DIXON v. GAYFERE, FLUKER v. GORDON* (1857), 1 De G. & J. 655; 27 L. J. Ch. 148; 30 L. T. O. S. 162; 3 Jur. N. S. 1157; 6 W. R. 52; 44 E. R. 878, L. C.

**Annotations:—***Refd.* Collins v. Collins (No. 2), Downes v. Downes (1862), 31 Beav. 346. *Mentd.* Re Albert Life Assco., *Ex p.* Western Life Assce. Soc. (1870), L. R. 11 Eq. 164; Re Stucley, Stucley v. Kekewich (1905), 75 L. J. Ch. 58; Barker v. Stickney, [1918] 2 K. B. 356.

**117. ——— Death of vendor before payment.]**—A contract that the one party shall convey an estate, & the other shall grant an annuity, shall be carried into execution, though the vendor died previous to any payment of the annuity, one having accrued due, & having been tendered.—*JACKSON v. LEVER* (1792), 3 Bro. C. C. 605; 29 E. R. 724, L. C.

**Annotations:—***Fold.* Kenney v. Wexham (1822), 6 Madd. 355. *Distd.* Strickland v. Turner (1852), 7 Exch. 208. *Refd.* Twigg v. Fifield (1807), 13 Ves. 517; Pritchard v. Ovey (1820), 1 Jac. & W. 396. *Mentd.* Wyvill v. Exeter (1815), 1 Price, p. 294, n.

**118. ———**—Contract for the sale of an estate for a life annuity must be executed; though the vendor dies before the end of the first half-year.—*COLES v. TRECOTHICK* (1804), 9 Ves. 234; 1 Smith, K. B. 233; 32 E. R. 592.

**Annotations:—***Apld.* Kenney v. Wexham (1822), 6 Madd. 355. *Distd.* Strickland v. Turner (1852), 7 Exch. 208. *Mentd.* Randall v. Errington (1805), 10 Ves. 423; Blagden v. Bradbear (1806), 12 Ves. 466; Morse v. Royal (1806), 12 Ves. 355; Buckmaster v. Harrop (1807), 13 Ves. 456; Emmerson v. Heelis (1809), 2 Taunt. 38; Peacock v. Evans, Evans v. Peacock (1809), 16 Ves. 51; Kemeys v. Proctor (1813), 3 Ves. & B. 57; Copis v. Middleton (1817), 2 Madd. 410; Henderson v. Barnewell (1827), 1 Y. & J. 387; Goshell v. Archer (1835), 2 Ad. & El. 500; Graham v. Musson (1839), 7 Scott, 769; Re Robinson & Farrand, *Ex p.* Holdsworth (1841), 1 Mont. D. & De G. 475; Carter v. Palmer (1842), 8 Cl. & Fin. 657; Tottenham v. Green (1863), 32 L. J. Ch. 201; Coles v. Bristowe (1868), L. R. 6 Eq. 149; Seal v. Claridge (1881), 7 Q. B. D. 516; Plowright v. Lambert (1885), 52 L. T. 646; Luddy's Trustee v. Peard (1886), 33 Ch. D. 500; Potter v. Peters (1895), 64 L. J. Ch. 357; Re Boles & British Land Co.'s Contract (1901), 71 L. J. Ch. 130.

**119. ——— Consideration must be adequate.]**—An agreement to purchase land for an annuity for the life of the vendor, to be a charge on the land & to be paid quarterly, entitles the vendor, not only to the security of the charge, but to the covenant of the purchaser for the payment of the annuity.

The ct. may not perhaps enforce the specific performance of a contract for the sale of an estate where the consideration is uncertain, as a life annuity, if such consideration be greatly inadequate; but a difference of 7 or 8 per cent. is not such inadequacy.—*BOWER v. COOPER* (1842), 2 Hare, 408; 11 L. J. Ch. 287; 6 Jur. 681; 67 E. R. 168.

**120. ——— Execution of deed—Effect of refusal.]**—By a decree a peer was ordered to execute a certain deed to secure to his wife a rentcharge, to which, in the suit, she had established her right against him. Upon his refusal, the ct., on a petition under Trustee Act, 1850 (c. 60), appointed a person to execute the deed for him.—*WELLESLEY v. WELLESLEY, MORNINGTON v. MORNINGTON, Ex p. MORNINGTON (COUNTESS)* (1853), 4 De G. M. & G. 537; 1 Eq. Rep. 369; 22 L. J. Ch. 966; 1 W. R. 248; 43 E. R. 617, L. J.J.

**121. ——— Covenant to execute jointure—Husband becoming lunatic.]**—Devise of real estate to tenants for life in succession, with remainders over, with power to the several tenants for life when & as they should severally & successively be in possession, to appoint, by way of rentcharge, a

jointure of a certain amount to any woman or women with whom they might respectively intermarry. One of the tenants for life covenanted on the occasion of his marriage, that if he should come into the possession of the devised estates, he would execute the power of jointuring in favour of his wife. After this, & before coming into possession of the estates under the devise, he became of unsound mind & continued so until his death, before which, however, he had become entitled to the possession of the estates:—*Held:* his widow was entitled to have the rentcharge enforced by way of jointure against the devised estates, under the covenant made by her deceased husband on his marriage with her.—*AFFLECK v. AFFLECK* (1857), 3 Sm. & G. 394; 26 L. J. Ch. 358; 29 L. T. O. S. 37; 3 Jur. N. S. 326; 5 W. R. 425; 65 E. R. 709.

**Annotations:—***Refd.* Johnson v. Touchet (1867), 37 L. J. Ch. 25; Charlton v. Charlton, [1906] 2 Ch. 523. *Mentd.* Re Anstis, Chetwynd v. Morgan, Morgan v. Chetwynd (1886), 31 Ch. D. 596.

—**Agreement to charge.]**—See MORTGAGE, Vol. XXXV., pp. 265 *et seq.*

**122. Right to lien on estate—Covenant to secure annuity.]**—*Semble:* that if a person covenants that he will, on or before a certain day, secure an annuity by a charge upon freehold estates or by investment in the funds, or by the best means in his power, such covenant will create a lien upon any property to which he becomes entitled between the date of the covenant & the day so limited for its performance.—*WELLESLEY v. WELLESLEY* (1839), 4 My. & Cr. 561; 9 L. J. Ch. 21; 4 Jur. 2; 41 E. R. 216, L. C.; *affg.* S. C. *sub nom.* PATTERSON v. WELLESLEY (1837), 6 L. J. Ch. 191.

**Annotations:—***Mentd.* Langton v. Horton (1842), 11 L. J. Ch. 299; Joseph v. Tyndall (1843), 13 L. J. Ch. 23; Hoare v. Dresser (1859), 7 H. L. Cas. 290; Trevor v. Hutchins (1897), 76 L. T. 183.

**123. ———**—By arts. of separation between M. & his wife, he covenanted that he would on or before Feb. 1, 1835, either by a charge on freehold estates to be situate in E., etc., or by an investment of money, secure the payment of an annuity to a trustee for his wife:—*Held:* this covenant did not create a lien on M.'s lands, but only provided for doing a future act, by which a lien might be created.—*MORNINGTON v. KEANE* (1858), 2 De G. & J. 292; 27 L. J. Ch. 791; 32 L. T. O. S. 97; 4 Jur. N. S. 981; 6 W. R. 434; 44 E. R. 1001, L. C. & L. J.J.

**Annotations:—***Refd.* Beavan v. Mornington (1860), 8 H. L. Cas. 525; Montagu v. Sandwich (1886), 32 Ch. D. 525; Tailby v. Official Receiver (1888), 13 App. Cas. 523.

**124. ———**—*DIXON v. GAYFERE, DIXON v. GAYFERE, FLUKER v. GORDON*, No. 116, *ante*.

**125. ——— Contract under statutory powers—Unpaid arrears.]**—By an agreement dated in 1851, a co., under powers conferred by the Lands Clauses Consolidation Act, 1845 (c. 18), contracted, in consideration of the payment of a yearly rentcharge, to purchase land for the construction of docks. The co. had entered, and completed the construction of the docks, but had not made any payment in respect of the rentcharge:—*Held:* the vendors were not entitled to a lien for the unpaid arrears of the rentcharge.—*JERSEY (EARL) v. BRITON FERRY FLOATING DOCK CO.* (1869), L. R. 7 Eq. 409.

**Annotations:—***Refd.* Re Gerard & Beecham's Contract, [1894] 3 Ch. 295. *Mentd.* Barker v. Stickney, [1919] 1 K. B. 121.

—**See, generally, LIEN**, Vol. XXXII., pp. 215 *et seq.*

*E. Registration of Instrument.*

See Judgments Act, 1855 (c. 15), s. 12; Land Charges Act, 1900 (c. 26), s. 1; Land Charges

Act, 1925 (c. 22), ss. 4, 5, 10, 24, Sched.; Law of Property Act, 1925 (c. 20), s. 199.

**126. Effect of failure to register—As against subsequent purchaser with notice.]—**Annuity granted out of lands lying in Middlesex; A. hath notice of this grant, & then purchases the inheritance of the lands; the grantee shall have his annuity against A. though his grant was not registered.—*CHEVAL v. NICHOLLS* (1725), 2 Eq. Cas. Abr. 63; 1 Stra. 664; 22 E. R. 56.

*Annotation:—Distd. Le Neve v. Le Neve* (1747), Amb. 436.

**127. —As against subsequent incumbrancer with notice.]—**A landowner, by deed in Feb. 1872, charged his land with two life annuities. He subsequently made several mtges. of the property by deeds, some of which recited the annuity deed. The annuity deed had not been registered as required by Judgments Act, 1854 (c. 15), s. 12:—*Held*: as above Act was in similar terms to the clauses in the Registry Acts, which had been decided not to make an unregistered conveyance void as against a subsequent purchaser who had notice of it, the Legislature must be taken to have used the words in the later Act in the sense given to them by those decisions, & the annuities therefore were valid as against all the subsequent incumbrancers who took with notice of them, & against the trustee in bkpey. of the grantor.—*GREAVES v. TOFIELD* (1880), 14 Ch. D. 563; 50 L. J. Ch. 118; 43 L. T. 100; 28 W. R. 840, C. A. *Annotations:—Distd. Re Monolithic Building Co., Tacon v. The Co.*, [1915] 1 Ch. 643. *Refd. Jay v. Johnstone*, [1893] 1 Q. B. 25. *Mentd. Foster v. G. K. Ry.*, [1920] 2 K. B. 574.

**128. —As against trustee in bankruptcy of grantor.]—***GREAVES v. TOFIELD*, No. 127, *ante*.

#### *F. Stamp Duties.*

*See* REVENUE, pp. 252-296, *post*.

#### SUB-SECT. 4.—CREATION BY TESTAMENTARY DISPOSITION.

**Words creating rentcharge.]—***See* Part I., Sect. 1, *ante*.

**Construction of wills.]—***See, generally*, WILLS.

#### SUB-SECT. 5.—CREATION UNDER STATUTORY POWERS.

**129. Power of municipal corporation—To sell lands in consideration of perpetual rentcharge.]—**A municipal corpn. has power under Municipal Corporations Act, 1882 (c. 50), to dispose of its corporate lands, with the approval of the Local Government Board, in consideration of a perpetual yearly chief rent charged upon the lands.—*SCARBOROUGH CORPN. v. COOPER*, [1910] 1 Ch. 68; 79 L. J. Ch. 38; 101 L. T. 552; 74 J. P. 44; 26 T. L. R. 88; 8 L. G. R. 54.

**130. Power of tenant for life—To grant easement in consideration of perpetual rentcharge—Agreement confirmed by private Act—Right to alter.]—**Under a settlement dated July 7, 1888, P. P. C. was in 1900 tenant for life in possession of a settled estate in the Isle of Thanet & was then a bachelor, & G. P. C. was then tenant for life in remainder. By an agreement dated Apr. 20, 1900 & made between P. P. C. & G. P. C. of the one part & the W. & B. Water Co. of the other part the co. was authorised to make an adit or tunnel under the settled estate, to be completed by Dec. 31, 1914, or such later date as the grantors

should appoint, & it was agreed that upon completion the grantors should by deed grant to the co. the right in perpetuity to maintain & use the adit & that the co. should pay to the grantors in perpetuity a rent of 1s. a yard *per annum* & should supply a certain quantity of water free to farms on the estate. The grantors were defined as P. P. C. & G. P. C. & their successors in title under the settlement.

By the W. & B. Water Act, 1900, the co. was (*inter alia*) authorised to make the said adit, & by sect. 42 the said agreement was confirmed & made binding on the parties thereto & was set out in a sched. to the Act, but the settlement was not otherwise referred to nor any special powers conferred upon the grantors. The adit was not completed by the agreed date, which had been extended to June 30, 1915. It was now proposed that the completion should be postponed till Dec. 31, 1930, & that the co. should in consideration of the extension of time pay an increased rental & supply an increased amount of free water to the estate. P. P. C. was now married & had three daughters:—*Held*: though when an agreement confirmed by a private Act confers powers on a grantor outside any statutory powers special reference to such powers ought to be made in the Act, the confirmation of the agreement sufficiently expressed the intention of Parliament to confer such powers, & P. P. C. & G. P. C. jointly could further extend the time for completion of the works & grant a perpetual easement in consideration of a perpetual rentcharge which could be increased beyond the amount specified in the agreement.—*WESTGATE & BIRCHINGTON WATER CO. v. POWELL-COTTON* (1915), 85 L. J. Ch. 459; 113 L. T. 689.

—*See* Settled Land Act, 1925 (c. 18), s. 39 (2), (3), (4).

**Power of registered proprietor.]—***See* Land Registration Act, 1925 (c. 21), s. 18 (1) (b) (d), (2).

**131. King's Clog—Transfer of obligation—Metropolis Water Act, 1902 (c. 41).]**—The King's Clog, now consisting of an annual sum of £400, is an obligation which has been transferred to & is now an obligation of, the Metropolitan Water Board by virtue of above Act, & the same is under sect. 4 secured upon the water fund established by that Act.—*METROPOLITAN WATER BOARD v. ADAIR & NEW RIVER CO.* (1911), 27 T. L. R. 253; 55 Sol. Jo. 270, H. L.; *affg. S. C. sub nom. ADAIR v. NEW RIVER CO. & METROPOLITAN WATER BOARD* (1908), 25 T. L. R. 193, C. A.

**Consideration for compulsory sale.]—***See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 165, 166, Nos. 436-441.

**Improvement charges—Under Improvement of Land Acts.]—***See* LAND IMPROVEMENT, Vol. XXX., p. 281, Nos. 62-67.

—**Under Settled Land Act, 1925 (c. 18).]**—*See* LAND IMPROVEMENT, Vol. XXX., pp. 293, 294, Nos. 196-205.

—**Under Private Improvement Acts.]—***See* LAND IMPROVEMENT, Vol. XXX., pp. 294-296, Nos. 209-221.

—**Under Land Drainage Acts.]—***See* LAND IMPROVEMENT, Vol. XXX., p. 296, Nos. 222, 223.

#### SUB-SECT. 6.—PRESUMPTION FROM LONG POSSESSION.

**132. Long continued possession.]—***COLLET v. JACQUES* (1669), 1 Cas. in Ch. 120; 22 E. R. 723. *Annotations:—Refd. Basingstoke Corpn. v. Bolton* (1852). 1 Drew. 270. *Mentd. Bouverie v. Prentice* (1783) 1 Bro. C. C. 200.



**Sect. 1.—Rentcharges : Sub-sects. 6, 7, 8 & 9.]**

**133. —.]—**Where by great length of time it is become impossible to know out of what particular lands ancient quit rents are issuable, cts. of equity have exercised a jurisdiction; & have constantly, on proof of payment within a reasonable time, decreed a satisfaction for all arrears of such rents, & payment of the same for the future.—**BRIDGEWATER (DUKE) v. EDWARDS** (1733), 6 Bro. Parl. Cas. 368; 2 E. R. 1139.

**Annotations:—***Reid*, Basingstoke Corp'n. v. Bolton (1852), 1 Drew. 270. *Mentd.* Leeds v. New Radnor Corp'n. (1789), 2 Bro. C. C. 518.

**134. —.]—**The owner of landed estate in a parish by his will, made in 1769, gave £2,000 to two persons, one of whom succeeded to the estate, to be invested upon trust to pay the income thereof to the vicar of the parish for the time being in augmentation of his stipend. Testator died in 1771, but the £2,000 was never set apart. The owners of the estate, however, continued to pay £60 a year to the vicar for the time being of the parish, & though a question was suggested on certain occasions that the gift was void under Mortmain Act, & that the payment of the £60 a year was a voluntary payment, the vicars of the parish claimed it as of right, & the owners of the estate in their succession duty accounts treated it as a charge on the land, & a deduction in respect of the £60 a year was claimed by them & was allowed:—*Held*: the true inference was that the £60 a year was a charge upon the estate to which the vicar of the parish for the time being was entitled.—**ROBINSON v. SMITH** (1908), 24 T. L. R. 573.

**Annotation:—***Mentd.* Harper v. Hedges, [1923] 2 K. B. 314.

**135. — Fee farm rent.]—FOLEY'S CHARITY TRUSTEES v. DUDLEY CORPN., No. 967, post.**

**SUB-SECT. 7.—CREATION BY ORDER OF COURT.**

**136. When order made—To secure annuity—Part purchase price of estate.]—REMINGTON v. DEVERALL** (1795), 2 Anst. 550; 145 E. R. 963.

**Annotation:—***Reid*, Dixon v. Gayfere, Dixon v. Gayfere, Fluker v. Gordon (1857), 1 De G. & J. 655.

**137. — Sale of estate of lunatic.]—**Under Lunacy Act, 1890 (c. 5), ss. 117, 120, the ct. has power to sanction a sale of a lunatic's real estate in consideration of a perpetual rentcharge & will exercise such power if the evidence shows that such a sale will be for the benefit of the lunatic.—*Re WARE*, [1892] 1 Ch. 344; 61 L. J. Ch. 279; 66 L. T. 389; 8 T. L. R. 136, C. A.

**Annotation:—***Apld.* Scarborough Corp'n. v. Cooper, [1910] 1 Ch. 68.

**138. Effect of order to pay annuity.]—**An order made, by consent, by the Ct. of Probate, under Court of Probate Act, 1857 (c. 77), ss. 25, 83, to pay to A. B. an annuity of £25 was afterwards registered in the Ct. of C. P. The annuity was assigned to pltf., who instituted a suit praying for a declaration, that the annuity was a charge upon certain leasehold property:—*Held*: orders of the Ct. of Probate were not charges upon land, within Judgments Act, 1838 (c. 110).—**PRATT v. BULL** (1863), 1 De G. J. & Sm. 141; 1 New Rep. 298;

32 L. J. Ch. 144; 7 L. T. 702; 9 Jur. N. S. 239; 11 W. R. 295; 46 E. R. 55, L. C.

**Annotations:—***Apld.* Bull v. Hutchens (1863), 32 Beav. 615. *Reid*, *Ex p.* Holden (1863), 13 C. B. N. S. 641; Waller v. Turner (1864), 10 Jur. N. S. 147; Crispin v. Cumano (1869), L. R. 1 P. & D. 622; Clarke v. Clarke (1873), L. R. 3 P. & D. 57; Heath v. Heath (1874), 22 W. R. 266; *Re* Harrison & Bottomley, [1899] 1 Ch. 465.

**139. —.]—**A registered order of the Ct. of Probate does not create a charge on lands.

By an order of the Ct. of Probate, made on Feb. 5, 1861, it was ordered that pltf. should pay one of debts, an annuity of £25 during her life. This order was duly registered at the office of the senior master of the Common Pleas under Judgments Act, 1838 (c. 110). The annuity was afterwards assigned to P., who on Sept. 12, 1862, filed his bill to have it declared that the annuity was a charge on the leasehold property of pltf.

The more important point is that which was raised in *Pratt v. Bull*, No. 138, *ante*, & was, whether a registered order of the Ct. of Probate was a charge on this property. At this moment it is established, by the decision of Vice-Chancellor Stuart & the Lord Chancellor, that it creates no such charge (*ROMILLY, M.R.*).—**BULL v. HUTCHENS** (1863), 32 Beav. 615; 2 New Rep. 306; 8 L. T. 716; 9 Jur. N. S. 954; 11 W. R. 866; 55 E. R. 242.

**Annotations:—***Mentd.* Bell v. Holtby (1873), L. R. 15 Eq. 178; Lawrie v. Lees (1881), 7 App. Cas. 19; *Re* Highett & Bird's Contract, [1902] 2 Ch. 214.

**SUB-SECT. 8.—WHAT ESTATES LIABLE TO BE CHARGED.**

**140. Grant by remainderman in tail.]—**A tenant in tail, remainder to B. in tail; B. granted a rentcharge in fee, & the tenant in tail afterwards suffered a common recovery, & died without issue:—*Held*: this rentcharge was barred; & a common recovery, by a tenant in tail, not only bound the remainder & all charges by the remainderman, but also the reversion, & all incumbrances by the reversioner; & there was no difference between a reversion & a remainder, expectant upon an estate tail, in that respect.

The possession of a feoffee of tenant in tail, so long as the feoffment remains in force, is not subject to the charges of the remainderman.—**CAPEL'S CASE, HUNT v. GATELEY** (1593), 1 Co. Rep. 54 a; Poph. 5; Moore, K. B. 154; 76 E. R. 121.

**Annotations:—***Expld.* Benson v. Hudson (1674), Freeman, K. B. 362. *Reid*, Mildmay's Case (1606), 6 Co. Rep. 40 a; Pells v. Brown (1620), Cro. Jac. 590; Martin d. Tregonwell v. Strachan (1741), Willes, 444; Beck d. Hawkins v. Welch (1750), 1 Wils. 276.

**141. Joint grant by grantor & grantee of land charged—Reversion to grantor.]—**A. enfeoffed B. upon condition; A. & B. by deed granted a rentcharge to C.; the condition is broken; A. re-enters; C. distrained, & A. brought replevin:—*Held*: the rent remained good, the grant of A. enuring to C. by way of confirmation.—**MAYOWE'S CASE, KETTLE v. MASON** (1594), 1 Co. Rep. 141 a; Poph. 50; 76 E. R. 326.

**Annotations:—***Reid*, Lampett's Case (1612), 10 Co. Rep. 46 b. *Mentd.* Beaumont's Case (1613), 9 Co. Rep. 138 b; Baker v. Willis (1637), Cro. Car. 476; Poole v. Haskey (1663), O. Bridg. 364.

**142. —.]—**At common law, if donor & donee had joined in a grant of a rentcharge, & the

**PART II. SECT. 1, SUB-SECT. 8.**

**a. Grant charged on more than one estate—Real, freehold & personal.]—**Testator devised & bequeathed the residue of his property, real, freehold

& personal, to L. subject to payment of his debts, funeral & testamentary expenses, & appointed L. his exor. Testator died possessed of freehold & leasehold property, as well as ordinary

personalty:—*Held*: the annuity was charged only on the freeholds, & not on the leaseholds or other personality.—*Re* WARING, GREER v. WARING, [1896] 1 L. R. 427.—**IR.**

donee died without issue, the donor should hold the land charged.—**LAMPET'S CASE** (1612), as reported in 10 Co. Rep. 46 b; 77 E. R. 991.

**Annotations:—***Reid*, *Pells v. Brown* (1620), Cro. Jac. 590; *Jemmot v. Cooly* (1668), 2 Keb. 20, 184, 270, 295; *Hornbeald Petition* (1691), Freem. Ch. B. 331; *Fitzgerald v. Fitzgerald* (1868), 37 L. J. P. C. 44. **Mentd.** *Bartholomew v. Belfield* (1613), Cro. Jac. 332; *Sheffield v. Ratcliffe* (1615), Hob. 334; *Sheriff v. Wrotham* (1618), Cro. Jac. 509; *Child v. Bailye* (1622), W. Jo. 15; *Marsh v. Newman* (1624), Poph. 163; *Kent v. Steward & Scott* (1634), Cro. Car. 358; *Baker v. Willis* (1637), Cro. Car. 476; *Blunket v. Holmes* (1661), 1 Keb. 119; *Goring v. Bickerstaffe* (1663), Freem. Ch. 163; *Poole v. Haskey* (1663), O. Bldg. 364; *Cookes v. Bellamy* (1664), 1 Sid. 187; *Burgis v. Burgis* (1674), 1 Mod. Rep. 114; *Warman v. Seaman* (1675), Freem. Ch. 306; *Cage v. Acton* (1699), 1 Ld. Raym. 515; *Kimpland v. Courtney* (1701), Freem. Ch. 250; *Marks v. Marks* (1718), 10 Mod. Rep. 419; *Gower v. Grosvenor* (1740), Barn. Ch. 54; *Beauclerk v. Dormer* (1742), 2 Atk. 308; *Doe d. Hayes v. Sturges* (1816), 2 Marsh. 505; *Wilson v. Hirst* (1833), 4 B. & Ad. 760; *Doe d. Shaw v. Steward* (1834), 1 Ad. & El. 300; *Wood v. Lambirth* (1841), 1 Ph. 8; *Re Bellamy, Elder v. Pearson* (1883), 25 Ch. D. 620; *Johns v. Pink*, [1900] 1 Ch. 296; *Re Ashforth, Sibley v. Ashforth*, [1905] 1 Ch. 535; *Re Francis, Francis v. Francis*, [1905] 2 Ch. 295; *Re Nash, Cook v. Frederick*, [1910] 1 Ch. 1.

**143. Grant charged on more than one estate—Liability of estate legally subject.]—**Estates at W. were settled to the use of J. L. for his life, remainders to his eldest son, the son's wife & their children, & ultimately to J. L. himself in fee. By lease & release afterwards executed, J. L., for the advancement of his eldest son & younger son, & for the settling, conveying, & assuring the messuage, lands, etc., after mentioned & particularly described, granted & released the same, which were also in W., but were entirely distinct from the first mentioned estates; & also all other, his messuages, cottages, closes, lands, tenements & hereditaments whatsoever in W. or elsewhere; & the reversion, remainder, rents, etc., of all & singular the premises granted & released, & all his estate therein, to the use that he, J. L., should receive thereout an annuity of £30 a year for his life, & after his decease that his eldest son should receive thereout an annuity of £10 a year for his life; & subject to the said annuities, to the use of J. L.'s younger son, his heirs & assigns for ever. He also assigned all his household goods to the younger son, on his covenanting to pay £20 to the elder:—**Held:** the first mentioned estates, though not named, passed to the younger son by the general words; & although the annuity of £10 could not legally be charged on both estates, this did not negative the intention to pass both; but the annuity must be taken as charged upon the estate which might legally be subjected to it, the property being sufficient.—**DOE d. PEIL v. JEVES** (1830), 1 B. & Ad. 593; 9 L. J. O. S. K. B. 82; 109 E. R. 908.

**Annotations:—***Mentd.* *Doe d. Meyrick v. Meyrick* (1832), 2 Tyr. 178; *Doe d. Howell v. Thomas* (1840), 1 Man. & G. 335.

**144. — Freeholds & leaseholds.]—****BUTT'S CASE**, No. 6, *ante*.

**145. — Manors & lands appurtenant.]—**A rent granted out of several manors, & the messuages, lands, tenements, & hereditaments, of the grantor, situate, lying & being, in the parishes of E. W. & C. or elsewhere, in the same county, in any way appertaining or belonging to the said manors, or to any of them, issues only out of the said manors & the lands appurtenant to them, & is not also issuing out of an acre of land, in the parish of C. of which the grantor was seised in fee at the time of the grant, & which acre was not parcel of any of the manors.—**FINCH'S CASE**

(1605), 6 Co. Rep. 39 a; 77 E. R. 310; *sub nom.* **CRATE v. MOOR**, Brownl. 184; *sub nom.* **PRATT v. MOON**, Yelv. 82.

**Annotations:—***Consd.* *Stukeley v. Butler* (1614), Hob. 168; *Winter v. Loveday* (1696), 1 Com. 37. **Mentd.** *Trenchard v. Hoskins* (1628), Litt. 203; *Thin v. Thin* (1664), 1 Sid. 190.

**146. — Freeholds & copyholds—Grantor not admitted tenant of copyholds.]—**Testator charged his real estate, of which he should die seised, with the payment of certain annuities. At the date of his death his real estate consisted of certain freehold premises & a copyhold public-house of which he had never been admitted tenant upon the rolls:—**Held:** testator did not "die seised" of the copyhold premises, & the annuities were a valid equitable charge upon the freehold premises, but not upon the copyhold premises of which he was not admitted tenant.—**Re NORMAN, THACKRAY v. NORMAN** (1914), 111 J. T. 903; 58 Sol. Jo. 706.

**147. Grant out of manor—Liability of copyholder.]—****SWAYNE'S CASE** (1608), 8 Co. Rep. 63 a; 77 E. R. 568; *sub nom.* **SWAINE v. BECKETT**, Moore, K. B. 811.

**Annotations:—***Consd.* *Samner v. Force* (1610), 2 Brownl. 208. **Mentd.** *Rowles v. Mason* (1612), 2 Brownl. 192; *Needler v. Winchester* (1614), Hob. 220; *Liford's Case* (1615), 11 Co. Rep. 46 b; *Secheverel v. Dale* (1627), Poph. 193; *Thorne v. Tyler* (1641), March. 161; *Barnardiston v. Soam* (1671), 3 Keb. 419; *Gosling v. Veley & Josling* (1850), 19 L. J. Q. B. 111.

**148. — ]—****SAMNER v. FORCE** (1610), 2 Brownl. 208; 123 E. R. 900.

**149. — Two manors of same name—Liability of manor of sufficient value.]—****HARDING v. SUFFOLK (COUNTS)** (1640), 1 Rep. Ch. 138; 21 E. R. 531.

**150. Grant prior to purchase of land.]—**One covenants to settle land of such a value, or an annuity out of land, & he afterwards purchases land, having no land before, & devises it, & dies, this land shall be liable to the covenant.—**TOOKE v. HASTINGS** (1689), 2 Vern. 97; 23 E. R. 671.

**Annotations:—***Consd.* *Deacon v. Smith* (1743), 3 Atk. 323. **Reid.** *Wellesley v. Wellesley* (1839), 4 My. & Cr. 561.

**151. Grant out of supposed freeholds—Estate actually leasehold.]—**Testator gave his real estate upon trust to pay to his housekeeper 12s. per week, & the remainder of the rents & profits to be divided as therein mentioned. Testator had no freehold estate, but he had leaseholds for a long term, which he always believed to be of freehold tenure:—**Held:** the leaseholds were charged with the weekly payment.—**GULLY v. DAVIS** (1870), L. R. 10 Eq. 562; 39 L. J. Ch. 684; 19 W. R. 265.

**Annotations:—***Consd.* *Butler v. Butler* (1884), 28 Ch. D. 66; *Re Holt, Holt v. Holt*, [1921] 2 Ch. 17. **Mentd.** *Re Davison, Greenwell v. Davison* (1888), 58 L. T. 301.

#### SUB-SECT. 9.—AVOIDANCE OF GRANT.

**152. Grounds of avoidance — Unreasonable terms—Reversionary rentcharge.]—**Grant of a reversionary rentcharge, after the death of pltf.'s father, who was old & infirm, upon unreasonable terms, set aside; but to remain as a security for the money really advanced, & costs to be paid as in redeeming a mtge.—**GWYNNE v. HEATON** (1778), 1 Bro. C. C. 1; 28 E. R. 949, L. C.

**Annotations:—***Consd.* *Day v. Newman* (1788), 2 Cox, Eq. Cas. 77. **Reid.** *Hoffman v. Cooke* (1800), 5 Ves. 623; *Peacock v. Evans, Evans v. Peacock* (1810), 16 Ves. 512; *Bowes v. Heaps* (1814), 3 Ves. & B. 117; *Smyth v. Smyth* (1817), 2 Madd. 75; *Byle v. Swindells* (1824), M'Cle. 519; *Portmore v. Taylor* (1831), 4 Sim. 182; *King v. Hamlet* (1833), Coop. temp. Brough. 281; *Pennell v. Millar*

**150.1. Grant prior to purchase of land.]**  
(1850), 1

**1. Grant out of unspecified lands—**  
**Covenant to secure on specified lands—**  
**Liability of whole estate if specified**

**lands deficient.]—****WATSON v. SADLER**  
(1829), 1 Mol. 585.—**IR.**



**Sect. 1.—Rentcharges: Sub-sect. 9. Sect. 2: Sub-sect. 1, A, B. & C.]**

(1857), 23 Beav. 172; *Tottenham v. Green* (1863), 32 L. J. Ch. 201; *Miller v. Cook* (1870), L. R. 10 Eq. 641; *Nevill v. Snelling* (1880), 15 Ch. D. 679; *Samuel v. Newbold*, [1906] A. C. 461; *Abrahams v. Dimmock* (1914), 110 L. T. 699.

**153. Fraud—Question of fact.]**—The ct. will not determine whether the circumstances attending the grant of a rentcharge are such as show the grant to be void, upon the ground of fraud; that being a matter of fact which the barrister must find for himself.—*NEWTON v. MOBBERLEY OVERSEERS, NEWTON v. CROWLEY OVERSEERS* (1846), Bar. & Arn. 695; 2 C. B. 203, 207; 1 Lut. Reg. Cas. 427; 6 L. T. O. S. 485; 10 Jur. 318; 135 E. R. 921, 923.

— **Grant by Crown.]**—See, generally, CONSTITUTIONAL LAW, Vol. XI., pp. 560–564, Nos. 602–641.

**SECT. 2.—ANNUITIES.**

**SUB-SECT. 1.—CREATION BY INSTRUMENT INTER VIVOS.**

**A. Form of Instrument.**

**154. Necessity for deed.]**—An instrument reciting that it had been agreed to sell an annuity, secured upon property in possession of the grantor, but containing no words of present grant, cannot be sued upon in a ct. of law, even though it should be enrolled.

A grant of annuity must be by deed, & no action at law can be maintained upon any other instrument for the arrears of an annuity (*per* CUR.).—*Re LOCKE* (1823), 2 Dow. & Ry. K. B. 603; *sub nom. Re LOCKE, Ex p. LANGSLOW*, 1 L. J. O. S. K. B. 129.

**155. — Life annuity]**—An agreement for a life annuity may be in writing, without deed, & an action of *assumpsit* will lie upon such agreement.—*DURHAM (Bp.) v. ALLNUTT* (1851), 16 L. T. O. S. 411.

— **Equitable enforcement of agreement.]**—See Sub-sect. 1, B., *post*.

**156. Necessity for writing—Contract within Statute of Frauds.]**—An agreement between an author & a bookseller, by which the latter is to be paid an annuity for life, without any apparent consideration, & without any signature, other than the initials of the parties, is void under above statute.—*SWEET v. LEE* (1841), 3 Man. & G. 452; 4 Scott. N. R. 77; 5 Jur. 1134; 133 E. R. 1220.

*Annotations:—Apld. Davey v. Shannon* (1879), 4 Ex. D. 81. *Refd. Dobson v. Collis* (1856), 25 L. J. Ex. 267; *Knowlman v. Bluet* (1874), L. R. 9 Exch. 307; *Mounickendam v. Leunse* (1923), 39 T. L. R. 445.

— *See, generally, CONTRACT, Vol. XII., pp. 118–172.*

— **Executed contract.]**—See *CONTRACT, Vol. XII., p. 165, Nos. 1209, 1210.*

**157. — Effect of part performance—Reconciliation after deed of separation.]**—Upon the separation of husband & wife the husband covenanted with a trustee for the wife to pay her an annuity for her life. Shortly before the death of the husband, & at his solicitation, a reconciliation & recohobitation took place in consideration of a parol promise by him to the wife & to her trustee to continue the payment of the annuity to her, & to charge it upon his real estate. The husband died without having carried into effect the parol

promise:—*Held*: such promise was effectual to charge the land with the annuity as against the devisee of the real estate under the husband's will.—*WEBSTER v. WEBSTER* (1857), 27 L. J. Ch. 115; 29 L. T. O. S. 351; 3 Jur. N. S. 655; 5 W. R. 725. — *See CONTRACT, Vol. XII., pp. 168–171, Nos. 1233–1255.*

**B. Agreement for Annuity.**

**158. Enforcement in equity—Specific performance.]**—Agreement to grant an annuity is not within 17 Geo. 3, c. 26. Execution of such an agreement against the exors.—*NIELD v. SMITH* (1808), 14 Ves. 491; 33 E. R. 609.

*Annotations:—Apld. Pritchard v. Ovey* (1820), 1 Jac. & W. 396. *Refd. Re Locke* (1823), 2 Dow. & Ry. K. B. 603.

**159. — Annuity for lives—Lives not named.]**—Specific performance of an agreement for the sale of an annuity to commence from the date of the agreement & to continue for three lives, to be named by the grantee decreed where the lives had not been named the delay having been occasioned by the grantor.—*PRITCHARD v. OVEY* (1820), 1 Jac. & W. 396; 37 E. R. 426. *Annotation:—Mentd. Hughes v. Morris* (1852), 21 L. J. Ch. 761.

**160. —.]**—By agreement, a partnership between two solrs. was to be dissolved, the accounts taken, & the continuing partner to pay an annuity quarterly, for three years, to the retiring partner. The latter died before the expiration of the third year, without having received any part of the annuity. On bill, filed within six years from his death, but after six years from the quarter day preceding it:—*Held*: the annuity was part of the agreement; & his representative was entitled to specific performance of the whole of the agreement, irrespective of the question whether he was or not barred by Stat. Limitations from recovering the annuity in a ct. of equity.—*MURRAY v. PARKER* (1850), 19 L. J. Ch. 530; 15 L. T. O. S. 22; 14 Jur. 664.

**161. —.]**—An agreement between two solrs. in partnership together, that one of them should continue to carry on the business under their joint names, & should be entitled to all the profits thereof, & should grant to the other partner an annuity of £300 during the life of his mother, & in the event of his dying in the lifetime of his mother should pay to his widow an annuity of £100 during the remainder of his mother's life, & should indemnify him against all liability in respect of his name being used, & that the partnership should cease on the death of the mother of the retiring partner:—*Held*: the agreement must be considered to mean that an annuity was to be granted by deed, & the retiring partner was entitled to enforce specific performance of such agreement.—*AUBIN v. HOLT* (1855), 2 K. & J. 66; 25 L. J. Ch. 36; 4 W. R. 112; 60 E. R. 696.

**162. —.]**—Past cohobitation is a sufficient consideration for an agreement to grant an annuity, & such agreement will be enforced by a ct. of equity.—*KEENAN v. HANDLEY* (1864), 2 De G. J. & Sm. 283; 10 L. T. 800; 28 J. P. 660; 10 Jur. N. S. 906; 12 W. R. 1021; 46 E. R. 384, L. J.

**163. — After award in arbitration.]**—(1) A demand for the payment of an annuity during the joint lives of two persons is properly the subject of a suit in equity.

(2) Where A. agrees with B. to pay money to C.,

**PART II. SECT. 2, SUB-SECT. 1.—B.**

**E. Enforcement in equity—Specific performance—No adequate remedy at**

*law.]*—An agreement for the payment of a personal annuity for the joint lives of A. & B. will be specifically performed, & deft. directed to pay it, on the ground

that there is no adequate remedy at law.—*SWIFT v. SWIFT* (1841), 3 T. Eq. R. 267.—*IR.*

the agreement may be enforced by a bill in equity filed by B. & C. against A. R. agreed with E. Y., for valuable consideration, to pay an annuity to W. for the joint lives of W. & R. Afterwards, at the suggestion of E. Y., R. consented to allow the matters in question to be referred to arb'n. R. declined to comply with the award of the arbitrator, & a bill was filed by E. Y. & W. against R. to enforce compliance with the award, or, alternatively, for the specific performance of the previous agreement:—*Held*: on demurrer, a suit to enforce pltf.'s demand was sustainable in equity.—*PEEL v. PEEL* (1869), 17 W. R. 586.

**164. Time for performance—Whether of essence of contract.**—Upon a motion for a reference of title, where the performance of the contract is resisted upon other grounds, the ct. will look into the answer to see whether those other grounds are substantial or frivolous. Where the subject of the contract was a life annuity, & deft. insisted that time was of the essence of the contract a motion for a reference to the master upon the title was refused.—*WITBY v. COTTLE* (1823), *Turn. & R.* 78; 1 Sim. & St. 174; 1 L. J. O. S. Ch. 117; 37 E. R. 1024, L. C.

*Annotations*:—*Refd.* *Wood v. Machu* (1846), 5 Hare, 158. *Mentd.* *Walker v. Eastern Counties Ry.* (1848), 6 Hare, 594; *Adams v. London & Blackwall Ry.* (1850), 6 Ry. & Can. Cas. 271; *Reed v. Dom Pedro North Del Rey Gold Co.* (1863), 2 New Rep. 413.

**165. Construction—Contract ascertained from correspondence.**—Upon the construction of certain letters, aided by parol evidence:—*Held*: (1) testator for valuable consideration contracted to grant an annuity for the lives of certain persons; & upon the construction of testator's will; (2) the same annuity was charged as a "debt" upon his real estate, in exoneration of his personality.—*MONEYPENNY v. MASCALL* (1845), 2 Coll. 213; 63 E. R. 704.

**166. — "Well & sufficiently secure"—Right to bond & covenant.**—When a party agrees to "well & sufficiently" secure an annuity & nothing is specified as to the security, the annuitant is entitled to have the bond & covenant of the grantor, although the grantor may invest a sum of money in the names of trustees in the public securities, the interest upon which would equal the amount of the annuity.—*PATER-NOSTER v. PATER-NOSTER* (1846), 6 L. T. O. S. 520.

**167. — Annuity to be granted by deed.**—*AUBIN v. HOLT*, No. 161, *ante*.

**168. — Expression of intention to make allowance.**—*Re LINDREA, LINDREA v. FLETCHER*, No. 372, *post*.

**168a. — — — — —**—*SKEETE v. SILBERBERG* (1895), 11 T. L. R. 491.

#### C. Covenant to Pay.

**169. Construction—Covenant controlled by recital—Liability restricted.**—By a deed of separation, after reciting an agreement by the husband to allow the wife £250 out of his salary as a searcher, the husband covenants generally to pay her £250 *per annum* during her life. The covenant is controlled by the recital, & dismissal from the office justifies non-payment of the annuity.—*HESSE v. ALBERT* (1828), 3 Man. & Ry. K. B. 406.

*Annotation*:—*Consd.* *Crouch v. Crouch*, [1912] 1 K. B. 378.

**170. — Dividends of specified stock—Stock converted by Act of Parliament.**—By a marriage settlement, the husband covenanted to secure to the wife for her life, if she survived him, the dividends of a sum of £4,000 Navy 5 per cent. annuities. The husband had no stock in the Navy 5 per cents., at the date of the settlement, or at any subsequent period. By an Act of Parliament,

the Navy 5 per cents. were converted into New 4 per cents., & by another Act, it was provided, that all obligations for the transfer of Navy 5 per cents. should be satisfied by a transfer of £105 in the New 4 per cents. for every £100 in the Navy 5 per cents. By a subsequent Act the New 4 per cent. annuities were converted into New 3½ per cent. annuities, & it was provided, that all obligations to transfer the New 4 per cents. should be satisfied by transferring an equal sum of New 3½ per cents. The widow under her settlement is entitled only to a transfer of £105 in the New 3½ per cents. for every £100 of the Navy 5 per cents. under her husband's covenant.—*MILWARD v. MILWARD* (1834), 3 My. & K. 311; 3 L. J. Ch. 141; 40 E. R. 119.

**171. Restraint on anticipation—Attached to covenant with married woman—Valid.**—A deed of separation was executed in 1894 by resp. & his wife, the former covenanting to pay to a trustee thereunder an annuity for the separate use of the latter without power of anticipation. Power was reserved to resp. to give notice to the trustee after the expiration of twelve months from the date of the deed of his intention to pay a reduced amount, in which case, unless all the parties agreed as to the amount to be thereafter paid, the covenants in the deed should be void & of no further effect. Before the expiration of twelve months notice of such intention was given to the wife's solrs., & the wife instructed them to waive the stipulated notice to the trustee. In an action brought in 1904 to recover all arrears of annuity due under the deed as a still subsisting arrangement, the Supreme Ct. of the colony decreed the amount, holding that the wife's waiver of notice to the trustee was in contravention of the restraint clause in the deed:—*Held*: on the true construction of the deed the restraint clause applied to the annuity so long as it was payable, but not to the notice. Personal service thereof on the trustee was a mere formality which the wife was entitled to waive. Otherwise it was inequitable that she should enforce an obligation from which she had induced her husband to omit to free himself in the manner stipulated.

If there be a personal covenant for the payment of an annuity to a married woman for her separate use, there seems to be no reason why a restraint on anticipation should not be attached to the separate use; & when so attached, be as valid to all intents & purposes as it would be, if the subject of the separate use were income of a settled fund (*LORD MACNAGHTEN*).—*MACNAGHTEN v. PATERSON*, [1907] A. C. 483; 76 L. J. P. C. 94; 97 L. T. 412; 23 T. L. R. 727, P. C.

—*Sec HUSBAND & WIFE*, Vol. XXVII., pp. 101–132.

**172. Right of covenantor—Evidence that annuitant alive.**—The ct. has no jurisdiction under R. S. C., Ord. 54, to make a declaration on an originating summons as to what evidence, if any, ought to be furnished to a person liable to pay an annuity to show that the annuitant is alive.

The position of a covenantor in a deed of this kind is that if he is sued he must decide whether he will defend the action, & if he does so, it is at his own risk. If the action goes on, it is for pltf. to prove that the event has happened which renders deft. liable to any claim, & it is impossible to prescribe which evidence can be given of that (*COZENS-HARDY, M.R.*).—*HUNT v. HUNT* (1907), 97 L. T. 822, C. A.

**By steward of manor to pay annuity to retiring steward.**—*See COPYHOLDS*, Vol. XIII., p. 44, No. 518.

**What amounts to performance in equity.**—*See EQUITY*, Vol. XX., p. 498, Nos. 2290–2292.

*Sec. 2.—Annuities: Sub-sect. 1, C., D., E., F., G. & H.; sub-sect. 2, A. & B.*

**What amounts to satisfaction in equity.]—See EQUITY, Vol. XX., p. 492, No. 2196.**

**Covenant in contract for separation.]—See HUSBAND & WIFE, Vol. XXVII., pp. 231–233, Nos. 2028–2045.**

#### *D. Consideration.*

*See CONTRACT, Vol. XII., pp. 172–234.*

**Void or illegal contract.]—See CONTRACTS, Vol. XII., pp. 234–303.**

**Void or illegal bonds.]—See BONDS, Vol. VII., pp. 168–179.**

**Consideration in contracts for separation.]—See HUSBAND & WIFE, Vol. XXVII., pp. 224–227.**

#### *E. Annuity Subject to Condition.*

**Whether condition precedent or subsequent.]—See CONTRACT, Vol. XII., p. 426, Nos. 3422–3425.**

#### *F. Necessity for Registration.*

*See Land Charges Act, 1925 (c. 22), ss. 4, 5, 25, Sched.*

#### *G. Stamp Duties.*

*See REVENUE, pp. 252–296, post.*

#### *H. Other Cases.*

**173. Commencement in futuro—After death of grantor.]—TEWKLEY v. CLOTHWORKER (1630), Litt. 245; 124 E. R. 229; *sub nom.* CLOTWORTHY v. CLOTWORTHY, Hct. 137; *on appeal* (1636), Cro. Car. 436.**

**174. Non-disclosure of material circumstance—Known to grantee.]—A grant of an annuity is void, where a material circumstance, known to the grantee, was not communicated to the grantor.—POPHAM v. BROOKE (1828), 5 Russ. 8; 6 L. J. O. S. Ch. 184; 38 E. R. 930.**

**175. —Known to grantor.]—Where the grantee of an annuity is induced by false representations or improper concealment of facts on the part of the grantor or his agent, to become the purchaser of an annuity, although he may have relief at law, a ct. of equity has concurrent jurisdiction.—ADAMSON v. EVITT (1830), 2 Russ. & M. 66; 9 L. J. O. S. Ch. 1; 39 E. R. 319.**

**176. Equities between grantors—Grantees not affected—Where no notice at time of grant.]—HOLLIER v. EYRE, No. 771, *post*.**

**177. Purchase by lunatic—Lunacy unknown to grantor.]—Unsoundness of mind will not vacate a contract, if it be unknown to the other contracting party, & no advantage be taken of the lunatic, especially where the contract is executed in whole or in part, so that the parties cannot be restored to their original position. Therefore, where a lunatic purchased certain annuities for his life, of a society which at the time had no knowledge of his unsoundness of mind, the transaction being in the ordinary course of human affairs, & fair & *bonâ fide* on the part of the society:—*Held*: after the death of the lunatic his personal representatives could not recover back the premiums paid for the annuities.—MOLTON v. CAMROUX (1849), 4 Exch. 17; 18 L. J. Ex. 356; 13 L. T. O. S. 305; 154 E. R. 1107, Ex. Ch.**

*Annotations:—Apld.* Beavan v. McDonnell (1851), 9 Exch. 309. *Consd.* Campbell v. Hooper (1855), 3 Sm. & G. 153;

Elliot v. Ince (1857), 7 De G. M. & G. 475; Moss v. Tribe (1862), 3 F. & F. 297; Imperial Loan Co. v. Stone, [1892] 1 Q. B. 599; York Glass Co. v. Jubb (1925), 134 L. T. 36. *Reid*, Price v. Berrington (1851), 3 Mac. & G. 486; Jacobs v. Richards, Jacobs v. Porter (1854), 18 Beav. 300; Matthews v. Baxter (1873), L. R. 8 Exch. 132; *Re* London Celluloid Co. (1888), 39 Ch. D. 190.

—.]—*See, generally*, LUNATICS, Vol. XXXIII., pp. 128 *et seq.*

**Mortgages by way of annuity.]—See MORTGAGE, Vol. XXXV., pp. 271, 272, Nos. 280, 285–291.**

**Annuity by Crown.]—See CONSTITUTIONAL LAW, Vol. XI., p. 576, Nos. 760–762.**

**Annuity by infant.]—See INFANTS, Vol. XXVIII., p. 174, Nos. 350, 351.**

**Investment of property of lunatic.]—See LUNATICS, Vol. XXXIII., p. 197, Nos. 1008–1011.**

#### SUB-SECT. 2.—CREATION BY WILL.

##### *A. Simple Bequest.*

**178. Until convenient to invest sum—Not absolute legacy.]—Bequest of an annuity of £200 for the use of A., & her children, to be paid out of the general effects until it is convenient to the exors. to invest £5,000 in the funds in lieu thereof for her & their use, & to the longest liver, subject to an equal division of the interest, while more than one alive:—*Held*: an annuity, not an absolute legacy.—JONES v. MITCHELL (1801), 6 Ves. 461; 31 E. R. 1146; *affd.* (1803), 9 Ves. 212, L. C. *Annotations:—Apld.* Blewitt v. Roberts (1841), Cr. & Ph. 274. *Consd.* Yates v. Maddan (1851), 1 Mac. & G. 532. *Distd.* Hedges v. Harpur (1858), 3 De G. & J. 129.**

**179. Right to value—Effect of forfeiture clause.]—GRATRIX v. CHAMBERS (1860), 2 Giff. 321; 7 Jur. N. S. 960; 66 E. R. 131. *Annotation:—Consd.* Re Sinclair, Allen v. Sinclair, Hodgkins v. Sinclair, [1897] 1 Ch. 921.**

**180. Right to have security set apart.]—HARBIN v. MASTERMAN, No. 392, *post*.**

**181. —.]—In the final distribution of an insufficient estate the dividend on the capital value of an annuity bequeathed to a married woman, with restraint on anticipation, was ordered to be laid out in the purchase of an annuity for her. Before the annuity was purchased she died:—*Held*: the capital belonged to her estate.**

The right of an annuitant *sui juris* in the case where the estate is treated as insufficient is to have the value of the proportionate part of the annuity paid over in cash. . . . If the estate were ample to pay the annuity in full, that would be another matter. All that the annuitant would then be entitled to would be to have the annuity kept down out of the estate (NORTH, J.).—*Re* ROSS, ASHTON v. ROSS, [1900] 1 Ch. 162; 69 L. J. Ch. 192; 81 L. T. 578; 48 W. R. 264. *Annotation:—Apld.* *Re* Dempster, Borthwick v. Lovell, [1915] 1 Ch. 795.

**Right when assets insufficient.]—See Part V., Sect. 3, sub-sect. 2, *post*.**

**Whether annuity perpetual or for life.]—See Part IV., Sect. 1, sub-sect. 2, B., *post*.**

**Construction of will.]—See WILLS.**

##### *B. Power or Direction to Set Apart Fund.*

**182. Failure to set apart—Annuity paid out of rents of real estate—Liability of executor to invest fund.]—Testator directed his exors. to purchase sufficient stock in the £3 per cent. consols, to**

#### PART II. SECT. 2, SUB-SECT. 1.—H.

**h. Annuity secured on retired allowance of military officer.]—An annuity secured & payable out of the**

half-pay or retired allowance of an artillery officer, is invalid & cannot be enforced in a ct. of equity.—KELLY v. WOOD (1829), 2 Ir. L. Rec. 1st ser. 391.—IR.

#### PART II. SECT. 2, SUB-SECT. 2.—A.

**k. Appropriation—Annuity charged on several specific shares.]—JOHNSTON v. BROPHY (1878), 4 V. L. R. (Eq.) 77.—AUS.**

produce £20 *per annum*, which he directed to be annually divided among the poor of a parish. He then devised his real estates in that parish to A. & B., whom he also appointed exors. A. died a few years after testator. The annual sum of £20 was paid in the manner directed by the will, out of the rents of the real estates, by B. during his life, & after his death by his devisees on the supposition that it was a charge on the real estates. These payments were continued for about twenty-five years, when the devisees refused to continue the payment, & the exor. of B. then paid the £20 *per annum* for seven years, when he declined to continue to pay it. He had not received sufficient assets of B. to purchase the requisite amount of stock. An information having been filed to compel the exor. of B. to purchase the requisite amount of stock :—*Held* : he must be considered as having admitted assets of B., & he was decreed to purchase the stock, & make good the arrears of the annuity. —*A. G. v. CHAPMAN* (1840), 3 Beav. 255 ; 10 L. J. Ch. 90 ; 49 E. R. 99.

**183. Misapplication of fund—Liability of executor's interest—Enforcement against assignee.]**—Testator bequeathed to A. & B., two of his three exors., so much money as would purchase £6,666 Consols, which stock he directed should stand in their joint names, upon trust to pay the dividends to C. for life ; the capital after C.'s death, to sink into the residue. He then, out of the residue, gave several pecuniary legacies, amongst which was a legacy of £5,000 to B., & bequeathed the surplus residue to D. Upon the death of testator, A. & B. purchased the Consols, pursuant to the directions of the will. A. afterwards died, & then B. sold out the stock, & applied the proceeds to his own use :—*Held* : *quoad* B. no appropriation was made of the stock, so as to separate it from the residue, & consequently C. & D. were entitled to be reimbursed rateably out of B.'s legacy of £5,000 the losses which they had respectively incurred by means of B.'s breach of trust.

If an exor. assigns his reversionary legacy, the assignee takes it subject to the equities which attached to the exor. ; & therefore, if the latter, though subsequently to the assignment, wastes testator's assets, the assignee cannot receive the legacy till satisfaction has been made for the breach of trust.—*MORRIS v. LIVIE* (1842), 1 Y. & C. Ch. Cas. 380 ; 11 L. J. Ch. 172 ; 62 E. R. 934.

*Annotations* :—*Fold*. *Barnett v. Sheffield* (1852), 1 De G. M. & G. 371. *Refd*. *Irby v. Irby* (No. 3) (1858), 25 Beav. 632 ; *Wilkins v. Sibley* (1863), 4 Giff. 442 ; *Re Knapman*, *Knapman v. Wreford* (1881), 18 Ch. D. 300 ; *Re Hervey*, *Short v. Parratt* (1889), 61 L. T. 429 ; *Edgar v. Plumley*, [1900] A. C. 431 ; *Re Jewell's Settlement*, *Watts v. Public Trustee*, [1919] 2 Ch. 161 ; *Re Pain*, *Gustavson v. Haviland*, [1919] 1 Ch. 38.

**184. ———.]**—Testator directed his trustees to raise a sum of money, the income of which would produce a clear income to £100 *per annum*, & to invest it upon govt. or real securities, & pay an annuity of £100 to a legatee ; & he directed them to stand possessed of the fund so raised, & the securities on which it should be invested, but subject to, & charged with the annuity, on the same trusts as the residue ; & he directed that, if the income of the trust fund should, from any cause or circumstance whatever, prove insufficient to answer the annuity, the deficiency should be made good out of the residue. The trustees invested a sum of £3,500 on a mtge. at 5 per cent. ; & the annuitant, who was one of the trustees, assigned the annuity to a purchaser, by a deed reciting that the £3,500 was appropriated to answer it. He afterwards was permitted by his co-trustees to call it in, & to misapply it :—*Held* : (1) the recital in the assignment precluded

the purchaser of the annuity from being heard to say that there had not been an effectual appropriation of a fund to answer it ; (2) the provision in the will as to the insufficiency of the fund did not apply to the case ; (3) although the legatee of the annuity was only one of the trustees of the will, the purchaser from him could take no part of the assets till his defalcation was made good ; (4) on all these grounds, the purchaser of the annuity had no claim upon the residue.—*BARNETT v. SHEFFIELD* (1852), 1 De G. M. & G. 371 ; 21 L. J. Ch. 692 ; 16 Jur. 942 ; 42 E. R. 595, L. J.

**185. ——— Notwithstanding release.]**—Under a bequest of an annuity of £100 out of money to be invested in real or Govt. securities, & a gift over of the capital, the exor.'s estate held liable, under special circumstances, to make good the amount of consols which would have produced £100 *per annum* at the time of the death of the annuitant, notwithstanding a release then given, & a subsequent delay of ten years.—*ASPLAND v. WATTE* (1855), 20 Beav. 474 ; 25 L. J. Ch. 53 ; 25 L. T. O. S. 231 ; 1 Jur. N. S. 968 ; 3 W. R. 526 ; 52 E. R. 686.

**186. ——— Order for payment into court.]**—*ISON v. COE* (1850), 15 L. T. O. S. 325 ; 14 Jur. 845.

**187. Appropriation—When discretion left to trustees—Whether exercised by court.]**—Where trustees are directed to pay a certain sum to a person for life, & are empowered according to their discretion to invest the trust funds out of which that sum is to arise, but decline or neglect to act, & the assistance of a ct. of equity is sought in order to carry into effect the purposes of the will, the ct. will not, as a matter of course, exercise that discretion, but will only act on its established & known rules, unless the intention of testator plainly appears to exclude such a mode of proceeding.

Testator, after making certain specific bequests, proceeded as follows : " I give & bequeath to my trustees hereinafter named, so much of my personal estate & effects as, at the time of my decease, shall produce the clear annual income of £1,500 ; & I direct that the same shall be selected & appropriated & set apart, as soon as may be, etc., by my said trustees, in their uncontrolled discretion, upon trust to pay to his wife the dividends during her life or widowhood, & after her death or second marriage, the same was to become part of his residuary personal estate. He directed that if the annual produce so appropriated should be increased or reduced in amount, his wife was to receive the increased or reduced dividends, as the case might be, in lieu of those before directed to be paid to her. The trustees were fully empowered at their discretion to permit the personal estate to continue on the same securities as at the time of his decease, or to sell & re-invest, as testator himself might do. Some of the foreign funds ceased to pay any dividends, & the trustees refused to exercise their discretion as to altering the investments, but submitted to act as the ct. should direct.

The ct. refused to exercise the discretion vested in the trustees, but acting on its general rule in such matters, as testator had not expressed a different intention, directed the annuity to be raised by the purchase of an adequate sum in consols, & ordered the master to inquire, having regard to the interests of other parties under the will, what investments must be called in to effect this object :—*Held* : the decree thus made was correct.—*PRENDERGAST v. PRENDERGAST* (1850), 3 H. L. Cas. 195 ; 14 Jur. 989 ; 10 E. R. 75, H. L. ;

**Sect. 2.—Annuities: Sub-sect. 2, B., C. & D. (a).]**

*affg. S. C. sub nom. PRENDERGAST v. LUSHINGTON* (1847), 5 Hare, p. 177, L. C.

**Annotations:—***Apld.* *Re McMahon, Wells v. Tyrer* (1911), 55 Sol. Jo. 552. **Consd.** *Re Marsh, Rhys v. Needham* (1917), 62 Sol. Jo. 141. *Apld.* *Re Hollins, Hollins v. Hollins*, [1918] 1 Ch. 503. **Refd.** *Thornton v. Ellis* (1852), 15 Beav. 193; *Harbin v. Masterman* (1895), 44 W. R. 421. **Menid.** *Seaven v. Nicholson* (1853), 21 L. T. O. S. 334; *Re Elmore's Trusts* (1860), 3 L. T. 359.

**188.** ———. ]—Where a trust has been created for the investment of sufficient money to produce a given income, & the trustees are given a discretion as to the investment thereof, which they decline to exercise, & then apply to the ct. for its direction, the ct. cannot exercise any discretion in the matter, but is bound to direct investment in Consols, as being the govt. investment offering the most permanent security, & the least likely to be redeemed.—*Re HOLLINS, HOLLINS v. HOLLINS*, [1918] 1 Ch. 503; 87 L. J. Ch. 326; 118 L. T. 672; 34 T. L. R. 310; 62 Sol. Jo. 403, C. A.; *reusg.* (1917), 87 L. J. Ch. 135.

**Annotation:—****Consd.** *Re Marsh, Rhys v. Needham* (1917), 62 Sol. Jo. 141.

**189.** ———. **Investment—Whether restricted to Consols.]—***PRENDERGAST v. PRENDERGAST*, No. 187, *ante*.

**190.** ———. ]—A bequest to trustees of the sum of £20 *per annum* long annuities, or an annual sum equal thereto, upon trust to pay the same to E. for life; & after her decease, to pay, assign, transfer & make over the principal stock or money which should be set apart for the payment of the said yearly sum to E.'s children share & share alike. Testatrix, at the date of her will, & thence till her death, had £50 a year bank long annuities, which would terminate in 1860:—**Held:** testatrix intended to give a perpetual annuity of £20, & the trustees of the will had not an option to make either a permanent investment, or set apart £20 a year long annuities, at their discretion; but were bound to take the course which was most for the advantage of the children of E., by investing in Consols such a sum as would produce £20 a year, to answer the legacy.—*HAGGAR v. NEATBY* (1854), Kay, 379; 2 Eq. Rep. 176; 23 L. J. Ch. 455; 23 L. T. O. S. 49; 2 W. R. 287; 69 E. R. 160.

**191.** ———. ]—The ct. can exercise a discretion as to what govt. securities "a sum to bring in up to £100 a year" should be invested in, & is not tied down to investing that sum in Consols, or making a calculation on the basis of an investment in Consols. In the present case an investment in War Loan was sanctioned.—*Re MARSH, RHYS v. NEEDHAM* (1917), 62 Sol. Jo. 141.

**192.** ———. ]—*Re HOLLINS, HOLLINS v. HOLLINS*, No. 188, *ante*.

**193.** ———. **Real security—Mortgage of freehold ground rents.]—**Testatrix directed the exors. & trustees of her will to invest such a sum of money as, when invested, would produce the annual sum of £150, & to pay the annuity to A. for life, & after his death to stand possessed of the capital of the annuity for B. absolutely; & she appointed her trustees residuary devisees & legatees. The trustees, who had large discretionary powers of investment, secured a sum of £3,530 to answer the annuity, on a mtge. at 4½ per cent. of freehold ground rents, which were valued at £4,300:—**Held:** this was a sufficient security, & the trustees, being also residuary legatees, were not compellable to set apart a larger sum as the capital of the annuity.—*VICKERY v. EVANS* (1863), 33 Beav. 376; 3 New Rep. 286; 33 L. J. Ch. 261; 9 L. T.

822; 10 Jur. N. S. 30; 12 W. R. 237; 55 E. R. 413.

— **Effect of.]—***See* Part IV., Sect. 2, sub-sect. 2.

**194. Right of annuitant—No right to value of annuity.]—***WRIGHT v. CALLENDER*, No. 424, *post*.

**195.** ———. ]—Testatrix by her will, after giving certain pecuniary legacies, bequeathed to her husband an annuity of one pound a week during his life, & directed her trustees to appropriate & set apart & invest such sum of money as would when invested produce by the income thereof an annual sum equal to the amount of the annuity & to apply the income or, if necessary, the corpus of the fund so appropriated in payment of the annuity, which sum should on the dropping of the annuity fall into & form part of her residuary trust estate; & she devised & bequeathed the residue of her real & personal estate to her trustees upon trust for sale & conversion & payment of her debts, funeral & testamentary expenses, & legacies, & to invest the moneys which should remain in certain investments, & to hold such investments upon certain trusts for the benefit of her son. The estate of testatrix was insufficient to pay the pecuniary legacies & to set apart a sum sufficient to answer the annuity to her husband in full. It was, however, sufficient to pay the pecuniary legacies, & the value of the annuity as at the date of her death:—**Held:** (1) the proper course for the trustees to adopt was to value the annuity as at the date of the death of testatrix according to the Govt. scale & to pay the amount of such valuation to the annuitant or invest it in the purchase of an annuity, as he should choose, & to pay the pecuniary legacies in full.

(2) In the ordinary case where there is a gift of an annuity to an annuitant with a direction to set aside a fund to answer the annuity, & the annuity is payable out of capital as well as income & there is a gift over of the residue, it was decided in *Wright v. Callender*, No. 424, *post*, & I think it is the law, that the right of the annuitant is to have the directions of testator carried into effect, & that if the estate is not sufficient to pay the annuity in full he is entitled to have the deficiency made up out of capital, but he must take the estate as it stands, & is not entitled to have the value of the annuity paid over to him (*WARRINGTON, J.*).—*Re COTTRELL, BUCKLAND v. BEDINGFIELD*, [1910] 1 Ch. 402; 79 L. J. Ch. 189; 102 L. T. 157.

**Annotations:—***As to* (1) *Apld.* *Re Dempster, Borthwick v. Lovell*, [1915] 1 Ch. 795; *Re Richardson, Richardson v. Richardson*, [1915] 1 Ch. 353.

**196.** ———. **To enforce directions of testator.]—***Re COTTRELL, BUCKLAND v. BEDINGFIELD*, No. 195, *ante*.

— **When assets deficient.]—***See* Part V., Sect. 3, sub-sect. 2.

**Construction of wills.]—***See* WILLS.

### C. Power to Purchase.

**197. What amounts to exercise of discretion—Payment of several sums—More than annuity & less than capital.]—**Bequest of a share of residue to trustees upon trust to pay the income to C. for life, with a gift over of the principal, & a proviso that it should be lawful for the trustees, if they should think it desirable, to purchase with such share for the benefit of A., an irredeemable annuity. No annuity was purchased, but the acting trustee paid to A. various sums exceeding the income of the share, & amounting together to three-fourths of the capital:—**Held:** the discretionary power was *pro tanto* well exercised, & the remaindermen on the death of C. were only entitled to so much of



the share as was undisposed of.—*MESSENA v. CARR* (1870), L. R. 9 Eq. 260; 39 L. J. Ch. 216; 22 L. T. 3; *sub nom.* *MASSENA v. CARR*, 18 W. R. 415.

**198. Sale of property for purchase of annuity—Annuitant dying before completion.]**—Testatrix by her will bequeathed life annuities charged on land & subject to the annuities, devised the land to trustees on trust for sale. By a codicil she empowered the trustees to purchase govt. annuities for the annuitants, such govt. annuities, if purchased, to be in place of the annuities given to them respectively, & directed that the purchase-money should be a first charge on the proceeds of sale of the land, & that upon purchase of the govt. annuities the land should be discharged. The trustees proceeded to sell the land; the sale was completed &, pursuant to the conditions of sale, a sufficient sum of money was deposited in a bank for the purchase of the govt. annuities, but such annuities were not actually purchased. One of the annuitants died after the contract of sale was entered into, but before completion or payment of the purchase-money. Another annuitant had subsequently died:—*Held*: the legal personal representative of the annuitant who died before completion was not entitled to receive from the trustees the value of her annuity; but the legal personal representative of the other annuitant was so entitled.

A proviso such as I find in this will expressed merely *in terrorem*, that is to say, without any gift over, is not allowed to take effect (*KEKEWICH, J.*).—*Re MABBETT, PITMAN v. HOLBORROW*, [1891] 1 Ch. 707; 60 L. J. Ch. 279; 64 L. T. 447; 39 W. R. 537.

**199. — Annuitant dying after completion.]**—*Re MABBETT, PITMAN v. HOLBORROW*, No. 198, *ante*.

**Construction of will.]**—*See WILLS*.

#### D. Direction to Purchase or to Invest Given Sum.

##### (a) Right of Annuitant.

**200. Right to value of annuity.]**—Bequest of £3,000 to trustees, in trust to be by them employed in purchasing in their names upon the life of G., an annuity in the Govt. Life Annuities, of the value of £3,000 to be paid to him every six months during his life. Under this clause G. is entitled to have the £3,000 paid to him absolutely. Testator was in the habit of allowing to G. who resided in Holland an annuity of 3,200 guilders, amounting to £300, & after the date of his will he by letter directed his agents there to continue the annuity till his exors. should have arranged his affairs & he left a written paper to the same effect. G. survived testator three years & during that time received the annuity of 3,200 guilders from the agents in Holland, but no govt. life annuity was ever purchased G., being unable to come to England to attend at the annuity office:—*Held*: G.'s representatives were entitled to the £3,000 deducting the money paid to G. by the agents in Holland.—*PALMER v. CRAUFURD* (1819), 3 Swan. 483; 2 Wils. Ch. 79; 36 E. R. 945.

*Annotations*:—*Consd.* Dawson v. Hearn (1831), 1 Russ. & M. 606. *Distd.* *Re Mabbett, Pitman v. Holborrow*, [1891] 1 Ch. 707. *Consd.* *Re Robbins, Robbins v. Legge*, [1906] 2 Ch. 648.

#### PART II. SECT. 2, SUB-SECT. 2.—D. (a).

**200 i. Right to value of annuity.]**—Where a testator directed his exors. to purchase an irredeemable govt. annuity for the benefit of his adult son, payable half-yearly, & declared that it was intended as a provision for his son

during life & that it should not be competent for his exors. to pay to him the value thereof:—*Held*: the annuitant was entitled to require payment to him of a sum equivalent to the purchase money of the annuity, in lieu of its purchase.—*Re THOMAS* (1877), 3 V. L. R. (Eq.) 241.

**200 ii. —.]**—*DEMPSTER'S TRUS-*

**201. —.]**—*DANIELL v. DANIELL* (1849), reported in 3 De G. & Sm. 337; 64 E. R. 505.

*Annotations*:—*Mentd.* Yeats v. Yeats (1852), 16 Beav. 170; Mathews v. Foulsham (1864), 4 New Rep. 500; *Re Emery's Estate*, Jones v. Ratcliffe (1876), 34 L. T. 846; *Newman v. Piercy* (1876), 35 L. T. 461; *Re Stephenson, Donaldson v. Bamber* (1896), 66 L. J. Ch. 93.

**202. —.]**—Testator directed his exors. to purchase, in their names, an annuity from govt. or any public co., for B.:—*Held*: B. was entitled to have a govt. annuity purchased, &, at his option, to take the price in lieu of the annuity.—*FORD v. BATLEY* (1853), 17 Beav. 303; 23 L. J. Ch. 225; 51 E. R. 1051.

*Annotation*:—*Distd.* *Re Smith*, Royal Exchange Assee. v. Lee (1923), 130 L. T. 185.

**203. — To be purchased "as soon as convenient."]**—*Re CASTLE, NESBITT v. BAUGH*, [1916] W. N. 195.

*Annotation*:—*Distd.* *Re Smith*, Royal Exchange Assee. v. Lee (1923), 130 L. T. 185.

**— Effect of death of annuitant.]**—*See Sub-sect. 2, 1). (b), post.*

**— When estate insufficient.]**—*See Part V., Sect. 3, sub-sect. 2, post.*

**204. Annuity for joint lives & life of survivor—Order directing investment of estate—Right of survivor.]**—Testator directed his residuary estate to be laid out in the purchase of an annuity for the joint lives of his wife & daughter, & the life of the survivor of them, to be paid to them in equal shares during their joint lives, & on the death of either the whole annuity to be paid to the survivor for her life. The amount of annuity which the residuary estate was sufficient to purchase was ascertained, but no annuity was purchased, & by an order of the ct. the residuary estate was directed to be invested in permanent securities, & the income to be paid to the widow & daughter equally during their joint lives, & it was declared that the difference for the time being between the value of the investments, & the price at which such an annuity could for the time being be purchased, would belong during their joint lives to the widow & daughter in equal moieties, & that each of them had power to dispose by will of one moiety of so much of the capital as, having regard to that declaration, should not be required to be retained as the price at which such annuity could for the time being be purchased. One of the annuitants died intestate, & by her death the price at which an annuity for the life of the survivor could be purchased was much reduced:—*Held*: the survivor was entitled to the whole amount set free by such reduction.—*THURPP v. GOODRICH* (1870), 39 L. J. Ch. 656; 18 W. R. 632, L. J.

**205. Amount of purchase price or capital value—Price of government annuity.]**—*Re CASTLE, NESBITT v. BAUGH*, [1916] W. N. 195.

*Annotation*:—*Distd.* *Re Smith*, Royal Exchange Assee. v. Lee (1923), 130 L. T. 185.

**206. — Not required when discretion given to trustees.]**—An annuitant is not entitled to insist on trustees abandoning a discretion given to them by their testator of purchasing a safe annuity from some public co., & purchasing a govt. annuity instead. The ct. will not force upon residuary legatees in such a case the payment of the larger sum required to purchase a govt.

*v. DEMPSTER*, [1921] S. C. 332.—**SCOT.**

**200 iii. —.]**—*BRANFORD'S TRUSTEES v. POWELL*, [1924] S. C. 439.—**SCOT.**

**1. Ascertainment of sum to be set apart.]**—*PATERSON v. MCMASTER* (1865), 11 Gr. 337.—**CAN.**

**Sect. 2.—Annuities: Sub-sect. 2, D. (a) & (b). & E.]**  
**annuity.—***Re SMITH, ROYAL EXCHANGE ASSURANCE Co. v. LEE* (1923), 130 L. T. 185; 67 Sol. Jo. 457.

**Request of annuity until convenient to invest.]—**  
*See No. 178, ante.*

**Construction of will.]—***See WILLS.*

(b) *Effect of Death of Annuitant.*

**207. Death before purchase of annuity.]—**One devises that his exors. shall sell his lands, & invest the money in purchasing an annuity for J. S., & gives her the residue of his personal estate; testator dies, & the annuitant dies three months after the testator; yet the administrator of the annuitant shall compel a sale, & shall have the money arising therefrom, & also the rents & profits till sale.—*YATES v. COMPTON* (1725), as reported in 2 P. Wms. 308; 24 B. R. 743, L. C.

*Annotations:—***Fold.** *Palmer v. Craufurd* (1819), 3 Swan. 482; *Dawson v. Hearn* (1831), 1 Russ. & M. 606. **Refd.** *Bayley v. Bishop* (1803), 9 Ves. 6; *Re Mabbett, Pitman v. Holbrow*, [1891] 1 Ch. 707; *Re Robbins, Robbins v. Legge*, [1906] 2 Ch. 648. **Menfd.** *Whittaker v. Whittaker* (1792), 4 Bro. C. C. 31.

**208. —.]—**Legacy of stock to A. to be laid out in annuity for her life: A. died two days after testator & before any alteration of the stock: her administrator is entitled to a transfer.—*BARNES v. ROWLEY* (1797), 3 Ves. 305; 30 E. R. 1024.

*Annotations:—***Fold.** *Palmer v. Craufurd* (1819), 3 Swan. 482; *Dawson v. Hearn* (1831), 1 Russ. & M. 606. **Distd.** *Hatton v. May* (1876), 3 Ch. D. 148. **Refd.** *Bayley v. Bishop* (1803), 9 Ves. 6; *Walters v. Corpe* (1851), 15 Jur. 764; *Power v. Hayne* (1869), L. R. 8 Eq. 262; *Re Mabbett, Pitman v. Holbrow*, [1891] 1 Ch. 707; *Re Robbins, Robbins v. Legge*, [1906] 2 Ch. 648.

**209. —.]—***PALMER v. CRAUFURD*, No. 200, *ante*.

**210. — Annuitant consenting to postpone payment.]—**Where testator directs a govt. annuity of a certain amount to be purchased for his wife within a given time, & the wife, at the request of the exors., assents to postpone the time of purchase, & afterwards dies before it is purchased, her personal representative will be entitled to the sum which would have purchased the annuity.—*DAWSON v. HEARN* (1831), 1 Russ. & M. 606; 9 L. J. O. S. Ch. 249; 39 E. R. 232, L. C. *Annotation:—***Fold.** *Re Robbins, Robbins v. Legge*, [1907] 2 Ch. 8.

**211. —.]—**Testator by his will directed his trustees out of the proceeds of sale & conversion of his estate, after payment of his debts, & funeral & testamentary expenses, to purchase in the name of his wife a Govt. annuity of £400 for her life. The wife survived testator, but died sixteen days later, before the will was proved or any of the debts were paid:—*Held*: the annuity, & the right to take its value in cash instead of the annual payment, vested in the widow on testator's death, & therefore her legal personal representatives were entitled to such a sum as would, at the date of testator's death, have purchased the annuity.—*Re ROBBINS, ROBBINS v. LEGGE*, [1907] 2 Ch. 8; 76 L. J. Ch. 531; 96 L. T. 755; 51 Sol. Jo. 445, C. A.

*Annotation:—***Fold.** *Re Brunning, Gammon v. Dale*, [1909] 1 Ch. 276.

**212. —.]—**Testator bequeathed an annuity to his sister for life to commence from his decease & to be paid by equal quarterly payments, & directed his exors. to provide for the annuity by purchasing a govt. annuity. Testator died on Sept. 21, 1907, & on Dec. 20, 1907, his exors. made the first quarterly payment of the annuity. The

annuitant died on Mar. 16, 1908, before the govt. annuity had been purchased:—*Held*: her legal personal representative was entitled to such a sum as would have purchased the annuity on Dec. 20, 1907, that being the date up to which the annuity had been paid, with interest on that sum from that date at the rate of 4 per cent. *per annum*.—*Re BRUNNING, GAMMON v. DALE*, [1909] 1 Ch. 276; 78 L. J. Ch. 75; 99 L. T. 918.

**213. —.]—**An annuitant is entitled only to the annuity, & not to the fund which ought to have been laid out in the purchase of it.—*Re STRANGE, LAMB v. BOSSI LEU* (1916), 60 Sol. Jo. 610.

**214. Annuity to be purchased after life tenancy —Annuitant predeceasing life tenant.]—**Devise to the devisor's wife for life, & from & after her decease to trustees, upon trust to sell, & among other bequests to lay out £500 in an annuity for the life of his son. A vested interest in the son, surviving the devisor; but dying in the life of the wife: the period of enjoyment being deferred with reference to the circumstances of the estate, not of the legatee.—*BAYLEY v. BISHOP* (1803), 9 Ves. 6; 32 E. R. 501.

*Annotations:—***Apld.** *Palmer v. Craufurd* (1819), 3 Swan. 482; *Day v. Day* (1853), 1 Eq. Rep. 195. **Distd.** *Power v. Hayne* (1869), L. R. 8 Eq. 262; *Hatton v. May* (1876), 3 Ch. D. 148. **Consd.** *Re Robbins, Robbins v. Legge*, [1906] 2 Ch. 648. **Refd.** *Dawson v. Hearn* (1831), 1 Russ. & M. 606; *Walters v. Corpe* (1851), 15 Jur. 764; *Re Mabbett, Pitman v. Holbrow*, [1891] 1 Ch. 707.

**215. —.]—**Where testator gave all his residuary real & personal estate to trustees upon trust to pay the income to his wife for life, & after her decease, to sell the whole & stand possessed of the proceeds of such sale in sevenths, & as to one-seventh, upon trust to lay out & invest the same in a govt. annuity for the life of his son C. & to pay the same when & as it should become payable, not by anticipation, to him for life, for his own use; but declared that if his said son should, either before or after his, testator's, death, become bkpt. or insolvent, or assign, or do any act to affect or incumber the said annuity, then it was to go over to his, testator's, three sons, T., B., & A. C. survived testator, but died in the lifetime of the tenant for life, without, however, having been bkpt. or insolvent, or assigned, or done anything to affect or incumber the said annuity:—*Held*: C. had a vested interest in the annuity, & his personal representatives were entitled to his one-seventh share of testator's property, notwithstanding he died in the lifetime of the tenant for life.—*DAY v. DAY* (1853), 1 Drew. 569; 1 Eq. Rep. 195; 22 L. J. Ch. 878; 23 L. T. O. S. 216; 17 Jur. 586; 1 W. R. 402; 61 E. R. 569.

*Annotations:—***N.F.** *Power v. Hayne* (1869), L. R. 8 Eq. 262; *Hatton v. May* (1876), 3 Ch. D. 118; *Re Draper* (1888), 57 L. J. Ch. 912; *Re Strange, Lamb v. Bossi Leu* (1916), 60 Sol. Jo. 610.

**216. —.]—**Testator directed his exors., after the death of his wife, to invest one-sixth of his residuary estate in the purchase of an annuity during the life of P., & to pay the annuity into the proper hands of P. for his support & maintenance; & in case P. should anticipate, assign, charge, or incumber the annuity or become bkpt. or insolvent, testator directed that the annuity should go to the other residuary legatees. P. died in the lifetime of testator's widow, without having assigned or incumbered his annuity, or become bkpt. or insolvent:—*Held*: there was an intestacy as to one-sixth of the residuary estate after the death of the widow.—*POWER v. HAYNE* (1869), L. R. 8 Eq.

PART II. SECT. 2, SUB-SECT. 2.—D. (b).

207 i. *Death before purchase of annuity.]—**BROWN'S TRUSTEES v. THOM* (1915), 53 Sc. L. R. 59.—*SCOT*.



262; *sub nom.* POWER v. HAYNE, BURCHELL v. DISNEY, 17 W. R. 783.

*Annotations* :—**Fold.** Hatton v. May (1876), 3 Ch. D. 148; Re Draper (1888), 57 L. J. Ch. 942; *Re* Strange, Lamb v. Bossi Leu (1916), 60 Sol. Jo. 640.

**217.** ———.]—Testator, having an absolute power of disposition over a fund subject to the interest of a tenant for life, directed that at the death of the tenant for life £1,000 of the fund should be invested in the purchase of a life annuity for the benefit of D., & that in the event of insolvency or alienation by D. the annuity fund should fall into residue, & he gave his residuary estate to the aforesaid tenant for life :—*Held* : the gift of the annuity fund failed, & the fund fell into the residue.—*Re* DRAPER (1888), 57 L. J. Ch. 942; 58 L. T. 942; 36 W. R. 783.

*Annotation* :—**Fold.** *Re* Strange, Lamb v. Bossi Leu (1916), 60 Sol. Jo. 640.

**Construction of will.]—See WILLS.**

### *E. Provision against Payment of Value to Annuitant.*

**218. Effect of restraint on anticipation.]—**Testator directed that one-third of his residuary estate should be invested in the purchase of an annuity for the life of a female, who was single at the date of the will & the death of testator, & this annuity he gave to her separate use, & independent of any husband she might happen to marry, & without power to sell or assign the same by anticipation :—*Held* : she was entitled, if she chose, to the fund at once, without having it laid out, & this option was not affected by the clause against anticipation.—WOODMESTON v. WALKER (1831), 2 Russ. & M. 197; 9 L. J. O. S. Ch. 257; 39 E. R. 370, L. C.

*Annotations* :—**Apld.** Brown v. Pocock (1833), 2 Russ. & M. 210. **Consd.** Hatton v. May (1876), 3 Ch. D. 148. **Reid.** Knight v. Knight (1834), 6 Sim. 121; Massey v. Parker (1834), 2 My. & K. 174; Malcolm v. O'Callaghan (1835), 5 L. J. Ch. 137; Bradley v. Hughes (1836), Donnelly, 116; Davies v. Thornycroft (1836), 6 Sim. 420; Johnson v. Freeth (1836), Donnelly, 16; Stille v. Everitt (1836), 5 L. J. Ch. 138; Scarborough v. Borman (1840), 4 Jur. 38; Tullett v. Armstrong (1840), 4 My. & Cr. 390; *Re* Gaffee (1850), 1 Mac. & G. 541; Power v. Hayne (1869), L. R. 8 Eq. 262.

**219.** ———.]—A clause against anticipation, annexed to a life interest in a trust fund bequeathed to a female infant, does not prevent her, after she comes of age & before marriage, from effectually assigning her whole interest in the legacy.—BROWN v. POCOCK (1833), 2 Russ. & M. 210; *Coop. temp.* Brough. 70; 4 L. J. Ch. 15; 39 E. R. 374, L. C.

*Annotations* :—**Consd.** Tullett v. Armstrong (1840), 4 My. & Cr. 390. **Reid.** Massey v. Parker (1834), 2 My. & K. 174; Bradley v. Hughes (1836), 8 Sim. 149; *Re* Gaffee (1850), 1 Mac. & G. 541. **Mentd.** Davies v. Thornycroft (1836), 6 Sim. 420.

**220.** ———.]—Bequest of Consols, in trust to purchase a life annuity for a lady, to be held for her separate use without power of anticipation; & in case of her illness or incapacity, testator gave the trustees a discretionary power as to the application of the annuity, for her maintenance, support or otherwise for her personal benefit. The legatee unmarried :—*Held* : she was entitled to a transfer of the Consols.—*Re* BROWNE'S WILL (1859), 27 Beav. 324; 54 E. R. 127.

**221.** ———.]—Testator directed his trustees to purchase out of his residuary estate from govt. an annuity for M., a single woman, who was not to be entitled to elect to receive the price or value of the annuity in lieu thereof, & he directed such annuity to be paid to her for her separate use, & that if she should at any time sell, assign, incur, or in anywise dispose of or anticipate such annuity, or any part thereof, the same should cease & be void,

& should sink into the residue :—*Held* : M. was not entitled to the value of the annuity, but the annuity was to be purchased by the trustees, & held by them to pay to M. until she should do any act of alienation.—HATTON v. MAY (1876), 3 Ch. D. 148; *sub nom.* HALTON v. MAY, 24 W. R. 754.

*Annotations* :—**Expld.** Roper v. Roper (1876), 3 Ch. D. 714.

**Fold.** *Re* Strange, Lamb v. Bossi Leu (1916), 60 Sol. Jo. 640. **Reid.** *Re* Mabbett, Pitman v. Holborrow, [1891] 1 Ch. 707.

**222. Application at discretion of trustees—For benefit of annuitant—Right not affected.]—***Re* BROWNE'S WILL, No. 220, *ante*.

**223. Declaration negating right to value—Whether sufficient.]—**Testatrix directed a govt. annuity to be purchased for an annuitant, & declared that the annuitant should not be allowed to accept the value of the annuity in lieu thereof :—*Held* : this declaration was ineffectual, & the annuitant was entitled to receive the purchase-money instead of the annuity.—STOKES v. CHEEK (1860), 28 Beav. 620; 29 L. J. Ch. 922; 54 E. R. 501.

*Annotation* :—**Apld.** *Re* Mabbett, Pitman v. Holborrow, [1891] 1 Ch. 707.

**224.** ———.]—Testator by his will, executed three days before his death, directed his execs. to purchase an annuity out of a particular fund in the name & for the benefit of his housekeeper A. B., whether living in his service at the time of his death or not. The will contained a direction that the annuitant should not take the money instead of the annuity :—*Held* : the direction was inoperative.—*Re* NUNN'S TRUSTS (1875), L. R. 19 Eq. 331; 44 L. J. Ch. 255; 23 W. R. 376.

**225.** ———.]—**Accompanied by provision against alienation.]—**HATTON v. MAY, No. 221, *ante*.

**226.** ———.]—Testatrix gave a sum of £20,000 stock to be laid out by the trustees of her will in the purchase of a govt. annuity in the name of & for the benefit of her grandson for the term of his natural life; & directed that the annuitant should not be entitled to have the value of his annuity in lieu thereof, & that if he should sell his annuity the same should cease & form part of her residuary estate. The trustees purchased an annuity in the name, & payable during the life, of the annuitant, & he entered into a contract to sell the same :—*Held* : the annuitant was absolutely entitled to the annuity, & he could make a good title to it to the purchaser.—HUNTFOULSTON v. FURBER (1876), 3 Ch. D. 285; 24 W. R. 756.

*Annotation* :—**Reid.** *Re* Mabbett, Pitman v. Holborrow, [1891] 1 Ch. 707.

**227.** ———.]—**Accompanied by gift over.]—***v.* ROPER, No. 545, *post*.

**228.** ———.]—*Re* MABBETT, PITMAN v. HOLBORROW, No. 198, *ante*.

**229. Provision for cesser on assignment—Gift over to residuary legatee.]—**By a will certain pecuniary legacies were given to relations, & two annuities were given to two ex servants of testatrix, who directed that her trustees should provide for the annuities by setting aside & appropriating a portion of her estate sufficient to answer them by the income thereof; that until such appropriation the annuities should be paid out of the residuary estate; & that upon cesser of an annuity a proportion of the capital so set aside & appropriated should sink into & form part of her residuary estate. She also declared that neither annuitant should be allowed to have the value of the annuity in lieu thereof, & that if the annuitant should do or suffer any act or thing whereby the

**Sect. 2.—Annuities: Sub-sect. 2, E.; sub-sect. 3. Part III. Sect. 1.]**

annuity should be assigned, charged, or incumbered, the annuity should thenceforth cease to be payable. She gave her residuary estate in trust for other persons. The estate was sufficient to pay all the pecuniary legacies in full & to provide sums enough to purchase annuities of the amounts given by the will, but was not sufficient to pay the legacies in full & to provide the two funds sufficient by their income to pay the annuities in full:—*Held*: the declaration as to cesser of the annuity on assignment, charge or incumbrance was not repugnant to the previous gift of the annuities, but there was a good gift over, on such an event happening, to the residuary legatees.—*Re DEMPSTER, BORTHWICK v. LOVELL*, [1915] 1 Ch. 795; 84 L. J. Ch. 597; 112 L. T. 1124.

**Construction of will.]—See WILLS.**

**SUB-SECT. 3.—CREATION BY OR UNDER STATUTE.**

**230. Annuity raised under local Act—In favour of clerk to commissioners.]—**In case against the clerk of certain comrs. under a local Act, the declaration stated, that plff. advanced to the comrs. a sum of money for the purchase of an annuity, & that five of the comrs., by a grant made according to the form of the statute, did by virtue of the Act, grant an annuity out of the rates granted, & to arise by virtue of the Act, & that afterwards a quarterly payment of the annuity became due, & that the comrs. had in their hands out of the rates granted by the Act, more than sufficient to pay it, & that it became their duty to pay it, but that they did not:—*Held*: (1) a plea, traversing the comrs.' duty to pay the quarterly payment, was bad on special demurrer; (2) it was not cause of general demurrer to the declaration that there was no averment that the money was advanced to the comrs. for the purposes of the

Act, or there was no averment that the comrs. had sufficient to pay all demands on the rates.—*CANE v. CHAPMAN* (1836), 5 Ad. & El. 647; 2 Har. & W. 355; 1 Nev. & P. K. B. 104; 6 L. J. K. B. 49; 111 E. R. 1310.

**Annotations:—Generally, Mentd.** Bogg v. Pearse (1851), 10 C. B. 534; Seymour v. Maddox (1851), 16 Q. B. 326; Addison v. Preston Corpn. (1852), 16 Jur. 643; Edwards v. Lowndes (1852), 1 E. & B. 81; Moffatt v. Dickson (1853), 1 C. L. R. 294; Dent v. Basham (1854), 2 W. R. 201; Brown v. London Corpn. (1861), 7 Jur. N. S. 729; R. v. Southampton Port & Harbour Comrs. (1861), 30 L. J. Q. B. 244.

**231. — Right to reduce annuity.]—**By a local Act, s. 76, it is enacted that "it shall be lawful for the trustees from time to time to pay & allow to any officer or servant of the trustees whose services may, from any other cause than that of misconduct, be no longer required by the trustees, such annuity or other allowance as, having regard to length of service & all the other circumstances of the case, may, in the judgment of the trustees, be reasonable & proper," & to pay the same out of moneys in their hands by virtue of their special Acts. Under this sect. the trustees, by resolution not under seal, granted to their clerk upon his resignation of his office, an annuity of £300 a year:—*Held*: the trustees were entitled afterwards to reduce the amount of the annuity.—*MARCHANT v. LEE CONSERVANCY BOARD* (1874), L. R. 9 Exch. 60; 43 L. J. Ex. 44; 30 L. T. 367, Ex. Ch.

**Annotation:—Mentd.** R. v. St. George's, Southwark, Vestry (1887), 19 Q. B. D. 533.

**For particular purposes.]—See TITLES passim.**

**For church rate.]—See ECCLESIASTICAL LAW, Vol. XIX., p. 519, No. 3821.**

**Compensation to retiring incumbent—On union of benefices.]—See ECCLESIASTICAL LAW, Vol. XIX., p. 410, No. 2443.**

**Annuities under Savings Bank Acts—Not chargeable under Judgments Act, 1838 (c. 110).]—See EXECUTION, Vol. XXI., p. 650, No. 2887.**

**Annuities for raising money for public purposes.]—See REVENUE, pp. 308–312, post.**

## Part III.—Alienation of Rentcharges and Annuities and Estates Charged Therewith.

**SECT. 1.—RENTCHARGES AND ANNUITIES.**

**232. Right to assign.]—HUNTINGDON'S (PRIOR) CASE** (1482), Y. B. 21 Edw. IV., fo. 83, pl. 38.

**233. — Rentcharge out of copyholds.]—**A rent out of a copyhold aliened by surrender & admittance, for a valuable consideration, good in equity.—*SPINDLER v. WILFORD* (1686), 2 Vern. 16; 23 E. R. 621, L. C.

**234. — Annuity for life or years—Out of annuity in fee.]—**If a grantee of an annuity in fee grants an annuity for lives or years; it is good; for this is an estate settled, & of continuance; but a grant of the arrears of this annuity is void (*per Cur.*).—*ANON.* (1568), as reported in Jenk. 236; 145 E. R. 165.

**Annotation:—Reid.** *Mirchouse v. Remell* (1832), 8 Bing. 490.

**235. — Arrears of annuity.]—ANON.** (1568), No. 234, ante.

**PART III. SECT. 1.**

**232.1. Right to assign.]—SUMBHOOLLOL GIRDHULLOL v. SURAT (COLLECTOR OF)** (1860), 8 W. R. 505, P. C.—**IND.**

**m — Annuity not raisable out**

**of corpus.]—**When an annuity is one which, at the time of the petition, cannot legally be raised out of the corpus of the estate, the comrs. will not sell on the petition of the annuitant.—*Re MORNINGTON (EARL)* (1850), 15

**236. — Contingent equitable interest.]—**Where one person is entitled to land in the event of his surviving another person, an annuity to be raised out of the rents & profits of such land can be sold under the provisions of Judgments Act, 1864 (c. 112).—*Re COOPER* (1889), 60 L. T. 95; 37 W. R. 330.

**Annotations:—Reid.** *Re Harrison & Bottomley*, [1899] 1 Ch. 465; *Woods v. Harrison* (1899), 43 Sol. Jo. 242. **Mentd.** *Re Martin & Varlow* (1894), 43 W. R. 247.

**—]—See CHOSES IN ACTION, Vol. VIII., pp. 433–435, 437–440, Nos. 103–109, 124–126, 147–172.**

**237. Right to devise—Rentcharge pur autre vie.]—GAWEN v. RANTES** (1600), Moore, K. B. 625; Cro. Eliz. 804; 72 E. R. 800.

**Annotation:—Reid.** *Took v. Glascock* (1669), 1 Saund. 260.

**238. Who may assign—Devises of rentcharge.]—**Testator devised his freehold estates to trustees, in trust to permit his wife to receive the rents for her life, & after her decease upon trust to permit

**L. T. O. S. 374.—IR.**

**n. — For benefit of creditors.]—**A will provided for the payment of an annuity to W. "for the maintenance of herself & such of her unmarried daughters as shall for the time being

his nephew, his heirs & assigns, to hold & enjoy the estates & receive the rents & profits, subject to the payment of £20 yearly & every year for ever to his niece, her exors., administrators & assigns; & testator made chargeable his freehold estates with the payment of the said sum. The annuitant died, & her devisees contracted to sell the rentcharge, which was stated to have been given to testator's niece, her heirs, exors., administrators & assigns:—*Held*: the rentcharge might be legally distrained for, & the thing contracted to be sold was within the words of the contract, & a decree was made for specific performance.—*RAMSAY v. THORNGATE* (1849), 16 Sim. 575; 18 L. J. Ch. 238; 13 L. T. O. S. 63; 60 E. R. 997.

**239. — Commissioners for Reduction of National Debt.**—The ct. has jurisdiction under Court of Chancery Act, 1841 (c. 5), s. 4, to restrain the Comrs. for the Reduction of the National Debt from paying or transferring an annuity payable by them.—*WATTS v. WATTS* (1871), 40 L. J. Ch. 388; 24 L. T. 120; *sub nom. Ex p. WATTS*, 19 W. R. 400.

**240. Grant must not commence in futuro.**—Where a new rent is created, though for life, or in fee, it may in its creation be limited to take effect at any time *in futuro*, because it has no existence till that time comes, & so no suspension of any freehold. But it is otherwise, where an old rent is granted for life, or in fee, to commence *in futuro*, for there the grant is void because there is a rent *in esse*, & so the freehold of that rent will be suspended, & therefore such grant is void; *quod fuit concessum per curiam*.—*OSMERE v. SHEAFE* (1693), Carth. 307; 90 E. R. 781.

*Annotations*:—*Reid*, *Declarans v. Horwood* (1834), 4 Moo. & S. 400. *Mentd*, *Stedman v. Bates* (1694), 1 Ld. Raym. 64; *Wilkes v. Broadbent* (1744), 1 Wils. 63; *Doe d. Milbourne v. Simpson* (1755), 2 Wils. 22; *Roe d. Wilkinson v. Tranman* (1757), Wilses. 682; *Roe d. Berkeley v. York* (Archbp.) (1805), 6 East, 86.

**241. Whether assignor bound to make out title of grantor.**—*Qu.*: whether upon the sale of an annuity, charged upon a real estate, the vendor must make out the title of the grantor to the estate charged.—*RADCLIFFE v. WARRINGTON* (1806), 12 Ves. 326; 33 E. R. 124, L. C.

**242. Amendment of assignment—Lands wrongly described.**—Fine of a rentcharge amended by substituting lands out of which it issued, for the premises out of which the fine erroneously described it to issue.—*CAREY v. BEDINGFIELD* (1815), 6 Taunt. 276; 128 E. R. 1041.

**243. Sale by auction—Duty of auctioneer—Description of annuity.**—*COVERLEY v. BURRELL*, No. 822, *post*.

**244. Enforcement of contract for sale—Specific performance.**—The ct. will decree a specific performance of a contract for sale of a life annuity, though the annuitant be dead at the time of the decree.—*KENNEY v. WEXHAM* (1822), 6 Madd. 355; 56 E. R. 1126.

*Annotations*:—*Distd*, *Strickland v. Turner* (1852), 7 Exch. 208. *Reid*, *Counter v. Macpherson* (1845), 5 Moo. P. C. C. 83; *Coles v. Bristowe* (1868), L. R. 6 Eq. 149.

**245. — — —**—*RAMSAY v. THORNGATE*, No. 238, *ante*.

**246. — Death of purchaser before completion—Liability of next of kin for purchase-money.**—In Apr. 1898, testator entered into a contract for the purchase of a rentcharge issuing out of leasehold property in England. Testator died in Aug. 1898. At that time the contract had not been completed:—*Held*: the rentcharge was a chattel

real, & testator's next of kin were liable under Real Estate Charges Acts, to discharge the vendor's lien for unpaid purchase-money.—*Re FRASER, LOWTHER v. FRASER*, [1904] 1 Ch. 726; 73 L. J. Ch. 481; 91 L. T. 48; 52 W. R. 516; 20 T. L. R. 414; 48 Sol. Jo. 383, C. A.

*Annotations*:—*Mentd*, *Re Joseph, Pain v. Joseph* (1908), 98 L. T. 392; *Re Taylor, Dale v. Dale*, [1909] W. N. 59; *Re Whiting, Ormond v. De Launay*, [1913] 2 Ch. 1; *Re Aynsley, Kyrie v. Turner*, [1914] 2 Ch. 422; *Re Wedgwood, Sweet v. Cotton*, [1914] 2 Ch. 245; *Re Smith, Prada v. Vandroy*, [1916] 1 Ch. 523; *Re Florence, Lydall v. Haderdashers' Co.* (1917), 87 L. J. Ch. 86; *Re Hardyman, Teesdale v. McClintock*, [1925] Ch. 287.

**246a. From when sale effective—Interest on purchase-money.**—*TWIGG v. FIFIELD* (1807), 13 Ves. 517; 33 E. R. 388, L. C.

*Annotation*:—*Reid*, *Re Clayton, Smith v. Clayton*, [1920] 1 Ch. 257.

**247. Recovery of purchase-money—Paid in ignorance of death of annuitant.**—L. who resided at Sidney, New South Wales, being entitled to an annuity for his life, assigned it, in 1847, to certain trustees, to dispose of it for his benefit. Pltf. entered into a correspondence by letter with the trustees, upon the subject of the purchase, & from the various letters which passed between the parties, it appeared that the terms of the purchase were not finally determined upon & settled until Feb. 28, 1849. Upon Feb. 6, the annuitant died. The purchase-money was paid by pltf. in ignorance of the fact, & was ultimately received by the extrix. of deceased:—*Held*: as at the time of the purchase of the annuity it had ceased to exist, pltf. was entitled to recover back the whole of the purchase-money from the extrix., on the ground that the money had been paid without consideration.—*STRICKLAND v. TURNER* (1852), 7 Exch. 208; 22 L. J. Ex. 115; 155 E. R. 919.

*Annotations*:—*Mentd*, *Hastie v. Couturier* (1853), 9 Exch. 102; *Persian Investment Corp. v. Khan* (1893), 37 Sol. Jo. 340; *Huddersfield Banking Co. v. Lister*, [1895] 2 Ch. 273; *Turner v. Green*, [1895] 2 Ch. 205.

**248. Effect of assignment—Consideration partly paid by surety—Annuity not extinguished.**—*BROWNE v. LEE*, No. 775, *post*.

**249. Priority of assignee—As against creditor of grantor—Annuities charged on annuity.**—D., by indenture, in 1799, demised estates in Ireland, of which he was seised for life, to trustees for ninety-nine years, on trust to pay him an annuity of £10,000, & to apply the residue of the rents & profits in payment of his debts. He soon after received the rents to his own use, excluding a receiver appointed by the Ct. of Ch. in England, in a suit instituted against him & the trustees for carrying the trusts into execution. In 1819 D. joined his eldest son B., the tenant in tail, in suffering recoveries of the estates, which, by a deed executed by them in 1822, were limited to trustees, among other trusts, to pay B. two annuities during D.'s life, with power to D. to charge the estates with £217,000, & power to B. to charge them with £100,000. In 1832, B. assigned his annuities & charge to W. to secure the repayment of moneys advanced. In 1835, W. having filed a bill in Ireland against D. & B., & others, for enforcing these securities, some of D.'s creditors, under the deed of 1799, who, in a suit instituted there in 1828, had obtained the benefit of the suit pending in England, with the appointment of a receiver over the trust estates claimed by their answer to W.'s bill, to be first incumbancers on D.'s annuity, to the amount of the

be living with her":—*Held*: an assignment by W. & her daughters of the annuity for the benefit of her creditors was valid.—*Re PHARAZYN, IZARD v. LLOYD* (1905), 25 N. Z. L. R. 591.—*N.Z.*

*o. Right to avoid sale—For inadequacy of price.*—Mere inadequacy of price, unless very gross, is not

sufficient ground to set aside the sale of an annuity.—*VERNER & ROYTON v. WINSTANLEY* (1805), 2 Sch. & Lef. 393.—*IR.*

*p. Notice of title of assignor—Duty*

*Sect. 1.—Rentcharges and annuities. Sect. 2. Part IV. Sect. 1: Sub-sect. 1, A., B., C. & D.]*

rents received by him in breach of the trusts of the deed of 1799; & they filed a bill against him for an account, in 1836:—*Held*: as D.'s creditors, in their suits, never sought to attach his annuity before he granted the annuities out of it to B., but confined their proceedings to the carrying of the trusts of the deed of 1799 into execution, B. being no party to them, was by the deed of 1822 a purchaser for valuable consideration, without notice; his two annuities were well charged on D.'s annuity of £10,000; & W., as B.'s assignee, was a prior incumbrancer on it.—*HOULDITCH v. WALLACE* (1838), 5 Cl. & Fin. 629; 7 F. R. 543. H. L.

**250. Effect of alteration of amount of annuity.]**

—An annuity duly charged on freeholds was by deed assigned, & by that deed a further security was given by the grantors upon copyholds in consideration of an additional sum of money paid to the grantors & the sum payable for redemption was increased in amount. The assignees of the annuity appeared in the memorial to be trustees for other persons, but the trust was not disclosed on the deed of assignment:—*Held*: the deed of assignment, so far as it affected the copyholds & so far as it contained any alteration of the term on which the original annuity was granted was void, but that it was valid as an assignment of the original annuity.—*TIDD v. LISTER* (1854), 3 De G. M. & G. 874; 2 Eq. Rep. 876; 23 L. T. O. S. 101; 78 Jur. 543; 2 W. R. 406; 43 E. R. 342, L. C.

*Annotations:—Mentd.* *Hudson v. Carmichael* (1854), Kay, 613; *Re Duffy's Trust* (1860), 28 Beav. 35; *Life Assn. of Scotland v. Siddal* (1861), 3 De G. F. & J. 27; *Durham v. Crackles* (1862), 1 New Rep. 165; *Knox v. Wells* (1864), 2 Hem. & M. 674; *Re Carr's Trusts* (1878), L. R. 12 Eq. 609; *Taunton v. Morris* (1879), 11 Ch. D. 779.

**251. Action by assignee for arrears of annuity—**

**Right of grantor to set off—Sums paid prior to notice of assignment.]**—A person entitled to an annuity under a deed assigned the annuity. The assignee filed a bill to recover some arrears of the annuity, deft., the covenantor, filed an affidavit stating that he had claims against the original covenantor more than the amount claimed by the bill:—*Held*: deft. had, by his affidavit, precluded himself from raising the point that pltf.'s demand was merely legal, & the pltf. was entitled to

proceed in equity, but deft. might set off any sums *bond fide* advanced or paid on account of the annuity previous to the notice of assignment.—*LAWRANCE v. BELL* (1866), 14 W. R. 753.

**Assignment pendente lite.]**—See ACTION, Vol. I., p. 77, No. 626.

**Sale by sheriff.]**—See EXECUTION, Vol. XXI., p. 480, No. 605.

**Sequestration of annuity.]**—See EXECUTION, Vol. XXI., p. 598, Nos. 1833–1836.

**Attachment of annuity.]**—See EXECUTION, Vol. XXI., p. 635, No. 2159.

**SECT. 2.—LAND CHARGED.**

See Land Charges Act, 1925 (c. 22), s. 10.

**252. Effect of assignment of estate charged.]**—*CORNWALLIS (VISCOUNT) v. SAVAGE & CORNWALLIS* (1628), 1 Rep. Ch. 6; 21 E. R. 491.

**253. — Liability of purchaser—Without notice of charge.]**—*MAYNARD v. EAST GREENSTED* (1634), Toth. 160; 21 E. R. 154; *sub nom.* *EAST-GREENSTED'S CASE*, Duke, 64.

**254. — Land converted into roadway.]**—Certain rentcharges were admittedly charged by the will of W., dated in 1619, upon certain premises, which were subsequently acquired by the Corp'n. of London subject to these charges, & thrown by them into a roadway. The corp'n. subsequently sold property abutting on the roadway, which now formed the premises in question, by auction to T., subject to any rentcharges upon the property; & the question arose whether he was liable in respect of the rentcharge as owner of the soil of the street to the centre, which must be presumed to have passed to him on the conveyance of the property abutting thereon:—*Held*: as to the presumption of the highway passing *ad medium filum*, T. was liable to pay the rentcharge, the rule applied to streets in towns as much as to the country; & the presumption was not rebutted by the fact that the corp'n. had owned the soil beyond the *medium filum*.—*Re WHITE'S CHARITIES, CHARITY COMRS. v. LONDON CORPN.*, [1898] 1 Ch. 659; 67 L. J. Ch. 430; 78 L. T. 550; 46 W. R. 479; 42 Sol. Jo. 429.

*Annotations:—Refd.* *L. & N. W. Ry. v. Westminster Corp'n.*, [1902] 1 Ch. 269; *London Land Tax Comrs. v. C. L. Ry.*, [1913] A. C. 364.

## Part IV.—Rights as Affected by Various Forms of Limitation.

**SECT. 1.—COMMENCEMENT AND DURATION OF RENTCHARGES AND ANNUITIES.**

**SUB-SECT. 1.—RENTCHARGES.**

**A. Rentcharge without Words of Limitation.**

**255. Grant by owner in fee simple—Life estate.]**

—(1) The law will always have a regard to the estate of the grantor, so that such a general grant shall not be of longer continuance than the estate of the grantor. As if one be seised of land in fee,

& grants a rent to another out of this land, without expressing any certain estate, the grantee shall have this for his life (*DODDERIDGE, J.*).

(2) & so if tenant in tail grant a rentcharge out of his land, without expressing what estate, the grantee shall have this for his life, but yet with this limitation, to be determined by the death of tenant in tail (*DODDERIDGE, J.*).

(3) If the King by his letters patents grants a rent unto another, without limitation of any estate,

*of purchaser to inquire.]*—*RODDY v. WILLIAMS* (1845), 3 Jo. & Lat. 1.—**IR.**

**PART III. SECT. 2.**

**a. Effect of assignment of estate**

*charged—Liability of purchaser.]*—Where lands are devised subject to the payment of annuities, such lands will be charged in the hands of a purchaser, but not where there is also a charge of debts.—*MCMILLAN v. MCMILLAN* (1874),

21 Gr. 594.—**CAN.**

**PART IV. SECT. 1, SUB-SECT. 1.—A.**

**255 i. Grant by owner in fee simple—Life estate.]**—*Re GILLMAN'S ESTATE* (1875), 10 L. R. Eq. 92.—**IR.**

this shall be but at will where it is in the King's case, for this shall be taken most beneficial for the King (DODDERIDGE, J.).

(4) If lessee for years grants such a rent, not limiting any estate, the grantee here shall not have any freehold, because this is derived out of a chattel, but he shall have this for so many years as the other hath in the land, if the grantee so long shall live (DODDERIDGE, J.).—*GOUGH v. HOWARDE* (1615), 3 Bulst. 121; 81 E. R. 104.

*Annotation*:—*Generally*, *Refd.* Doe d. Payne v. Plyer (1849), 14 Q. B. 512.

**256. Grant by tenant in tail—Life estate.**—*GOUGH v. HOWARDE*, No. 255, *ante*.

**257. Grant by lessee for years—Chattel interest—Until either estate determines.**—*GOUGH v. HOWARDE*, No. 255, *ante*.

**258. Grant by Crown—Estate at will.**—*GOUGH v. HOWARDE*, No. 255, *ante*.

**259. Effect of Wills Act, 1837 (c. 26), s. 28.**—Above sect. applies to the devise of an existing estate or interest, & not to an estate or interest which testator, by his will, creates *de novo*; & therefore a gift by will since the statute, of an annuity to A., without words of limitation, but which was by the will charged upon real estate, is not a devise of a perpetual annuity or rentcharge, & is a gift of an annuity for life only, as it would have been before the statute.—*NICHOLS v. ILAWKES* (1853), 10 Hare, 342; 22 L. J. Ch. 255; 20 L. T. O. S. 257; 1 W. R. 124; 68 E. R. 958.

**Construction of wills.**—*See* WILLS.

#### *B. Rentcharge granted by Lessee for Years.*

**260. Grant for life—Chattel interest—Until either estate determined.**—*ST. AUBY'S CASE*, No. 480, *post*.

**261.** — — — — —.]—*BUTT'S CASE*, No. 6, *ante*.

**262.** — — — — —.]—*SAFFERY v. ELGOOD*, No. 482, *post*.

**263. Grant to stranger—Effect of surrender of term.**—If lessee for years grants a rentcharge to a stranger, & after surrenders his term to the lessor, the stranger shall have the rent during the term.—*DAVENPORT'S CASE* (1610), 8 Co. Rep. 144 b; 77 E. R. 693.

*Annotations*:—*Refd.* Doe d. Beadon v. Pyke (1816), 5 M. & S. 116; *Piggott v. Stratton* (1859), 1 De G. F. & J. 33; *Harding v. Preece* (1882), 9 Q. B. D. 281. **Mentd.** *Comendani's Case*, *Woodley v. Exeter (Bp.) & Mannering* (1624), Win, 94; *Fisher v. Wigg* (1700), 1 Ld. Raym. 622; *David v. Sabin*, [1893] 1 Ch. 523.

**Grant pur autre vie.**—*See* Nos. 265, 266, *post*.

**Grant without words of limitation.**—*See* No. 255,

**Construction of wills.**—*See* WILLS.

#### *C. Rentcharge pur autre vie.*

**264. Grantee predeceasing cestui que vie—Right of personal representative—Whether administrator entitled.**—If a rent be granted to A. his exors., & assigns, during the life of B., & A. dies intestate before *cestui que vie*, it must determine; for his administrator cannot claim it, either as assignee or as occupant.—*SALTER v. BUTLER* (1602), Cro. Eliz. 901; *Moore, K. B.* 664; *Yelv.* 10; 78 E. R. 1124.

*Annotations*:—*Consd.* *Holden v. Smallbrooke* (1668), Vaugh. 187; *Kendal v. Mielcild* (1740), Barn. Ch. 46; *Hassell d. Hodgson v. Gowthwaite* (1744), Willes, 500. **Refd.** *Savery v. Dyer* (1752), Amb. 139; *Bearpark v. Hutchinson* (1830), 7 Bing. 178. **Mentd.** *Scattergood v. Edge* (1699), 12 Mod. Rep. 278.

**265. — — — — — Executor—Rentcharge payable out of leaseholds.**—A. devises to B. rent out of a lease for years determinable on lives, to be paid half-yearly, if the *cestui que vies* lived so long. B. dies during their lifetime. Decreed the rent was not determined, but should be paid to the exors. of B. during the term.—*GIFFORD v. GOLDSEY* (1687), 2 Vern. 35; 23 E. R. 632, L. C.

*Annotation*:—*Consd.* *Savery v. Dyer* (1752), Amb. 139.

**266. — — — — —**—A. devises a college lease for twenty-one years to wife for life, remainder to his son, she paying £10 *per annum* to his son during her life; the son dies in the life of his mother; the rent continues during the life of the wife, & shall go to the exor. of the son, & the wife is compellable to pay her proportion for a renewal of the lease.—*LOCK v. LOCK* (1710), 2 Vern. 666; 23 E. R. 1035.

**267. — — — — —**—*SAVERY v. DYER*, No. 41, *ante*.

**268. — — — — —**—A rentcharge *pur autre vie*, if grantee dies living *cestui que vie*, goes to grantee's exor., though not named in the grant.—*BEARPARK v. HUTCHINSON* (1830), 7 Bing. 178; 4 Moo. & P. 848; 9 L. J. O. S. C. P. 1; 131 E. R. 69.

**269. — — — — — Descent to heir—Limitation to grantee & his heirs.**—*WILKINS v. PERRAT* (1609), *Moore, K. B.* 876; 72 E. R. 967.

**270. — — — — —**—A rentcharge granted to a man & his heirs during his life & the lives of three others, is good, & it shall descend to the heir as occupant.—*BOWLES v. POORE* (1611), Cro. Jac. 282; 1 Bulst. 135; 79 E. R. 212.

*Annotation*:—*Mentd.* *Gravenor v. Woodhouse* (1821), 2 Bing. 71.

**Construction of wills.**—*See* WILLS.

#### *D. Other Cases.*

**271. Grant by one coparcener in tail to other—Rentcharge in tail.**—If a rent is granted to one until he has received £20 of it, & the rent is 20s. *per annum* the grantee has not an estate for life, but only for twenty years, because it is certain that he will receive the money in that time. So if a rent is granted to one until S. is of full age, he has but an estate for years. But if land of the value of 20s. *per annum* is given to one until he has received £20 of the issues of it, & livery is made, there he has an estate for life.—*ANON.* (undated), *Plowd. Queries*, 43, pl. 233; 75 E. R. 919.

**272. Rent until third party of age—Estate for years.**—*ANON.* (undated), No. 271, *ante*.

**273. Rent until specified sum reached—No life estate—Duration until sum reached.**—If there are two coparceners of land in tail, & one of them grants a rent to the other for equality of partition, this rent is in tail, & of the same condition as the first is.—*ANON.* (undated), *Plowd. Queries*, 50, pl. 273; 75 E. R. 928.

*Annotations*:—*Mentd.* *Dillam v. Frain* (1594), 1 And. 309; *Corbet's Case* (1599), 2 And. 131.

**274. Renewal after cesser—Rent de novo—Distinguished from rent in esse.**—A rentcharge created *de novo* may cease & revive, but not a rent *in esse*.—*ANON.* (1527), *Jenk.* 199; 145 E. R. 133.

**275. Rent on death of grantor without issue—Effect of death with issue—When issue die without issue.**—A. granted to B. a rentcharge out of his lands to begin when S. died without issue of his body. S. dies having issue, which issue dies without issue:—*Held*: the grant shall not take effect, for S. at the time of his death had issue, & therefore from thence the grant shall not begin, & if

#### PART IV. SECT. 1, SUB-SECT. 1.—B.

**r. Continuation until expiration of term—Notwithstanding death of annuitant.**—*Re* FINLAY'S ESTATE, [1907] 1 I. R. 24.—*IR.*

*Sect. 1.—Commencement and duration of rentcharges and annuities: Sub-sect. 1, D.; sub-sect. 2, A. (a) & (b), & B. (a).]*

not then, then not at all.—ANON. (1577), 4 Leon. 33; 74 E. R. 710.

276. ———.—[A. granted to B. a rentcharge out of his lands to begin when J. died without issue of his body. J. died having issue, which issue died without issue.

The grant shall not take effect, for J. at the time of his death had issue (DYER, J.).—ANON. (1581), 3 Leon. 103; 4 Leon. 232; 74 E. R. 568.

277. Grant by tenant in tail—Rent in esse—In fee—Distinguished from rent de novo.]—Distinction between a grant in fee by tenant in tail of a rent *in esse*, & such a grant of a rent *de novo*, which is absolutely determined by his death.—CASE OF FINES (1602), 3 Co. Rep. 84 a; 76 E. R. 824.

*Annotations:—*Refd. Hankey v. Martin (1883), 49 L. T. 560. *Mentd.* Stone v. Newman (1635), Cro. Car. 427; Anon. (1641), March, 105; Took v. Gluscock (1669), 1 Saund. 260; Hunt v. Burne (1702), 1 Com. 124; Machell v. Clerk (1702), 1 Com. 119; Doe d. Brune v. Martyn (1828), 2 Man. & Ry. K. B. 485; Doe d. Thomas v. Jones (1831), 1 Tyr. 506; Crange v. Tiving (1883), O'Bridg. 107.

278. Grant to husband & wife as joint tenants—Death of husband—Right of wife to arrears.]—CAREW v. BINGEN (1624), Benl. 140; 73 E. R. 1010.

279. Rentcharge limited after estate tail—Barred by disentail—Not preserved by term created by tenant in tail.]—Feoffment to the use of B. in tail, remainder to C. in tail, etc., provided that on failure of B.'s estate tail, D. shall have a rent out of the land; B. creates a term of one thousand years, & after levying a fine suffering a recovery, dies without issue;—*Held*: the rent was barred by the recovery & was not preserved during the term.—BENSON v. HUDSON (1674), Freem. K. B. 362; 1 Mod. Rep. 108; T. Raym. 236; 3 Keb. 274, 287, 292; 2 Lev. 28; 89 E. R. 269.

*Annotations:—*Refd. Page v. Hayward (1704), 2 Salk. 570; Martin d. Tregonwell v. Strachan (1744), Willes, 414. *Mentd.* Ratcliffe's Case (1719), 1 Stra. 267.

280. Rentcharge subject to determination on insolvency.]—An annuity charged on land was made payable to a trustee upon trust to pay the same to H. during his life, "unless or until he became an insolvent debtor within some Act of Parliament then in force, or thereafter to be in force, for the relief of insolvent debtors in England or Ireland." In Mar. 1857, H. was imprisoned for debt, & on Mar. 13 the usual vesting order in insolvency was obtained;—*Held*: the right of H. to receive the annuity ceased from the date of the vesting order.—HOWARD v. HOWARD (1858), 32 L. T. O. S. 120; 4 Jur. N. S. 1270; 7 W. R. 41.

281. Rentcharge on reversion—Charged under power—Payment not postponed during life tenancy.]—Settlor conveyed freehold property to trustees, upon trust for himself for life; then upon trust for his widow for life; & after the death of the survivor of himself & his wife, as he should by will appoint; & subject thereto upon trust for his widow absolutely. The deed contained powers for the trustees during the lives of the tenants for life of the freeholds to lease & exchange them. Settlor, by his will, exercised the power of appointment, & bequeathed an annuity of £100 *per annum* to ptf. to be raised out of his freehold property. Testator died, leaving his widow surviving;—*Held*: the payment of the annuity was not to be postponed till the death of the tenant for life of

the property, upon the reversionary interest in which it was charged; but was immediately raisable out of such interest.—PETTINGER v. AMBLER (1865), 34 Beav. 542; 55 E. R. 744; *sub nom.* PETTINGER v. BUNN, 12 L. T. 133.

*Annotation:—*Consd. *Re* Tucker, Tucker v. Tucker, [1893] 2 Ch. 323.

Rentcharge by way of jointure.]—See SETTLEMENTS.

Rentcharge by way of mortgage.]—See MORTGAGE, Vol. XXXV., pp. 271, 272, Nos. 285-291.

## SUB-SECT. 2.—ANNUITIES.

### A. Commencement.

#### (a) Creation by Will.

282. From testator's death.]—The distinction between an annuity & a legacy is that the former commences from the death & the first payment is due at the end of the year. A legacy generally does not begin to carry interest till the end of the year.

If an annuity is given, the first payment is paid at the end of the year from the death: but if a legacy is given for life, with remainder over, no interest is due till the end of two years. It is only interest of the legacy; & till the legacy is payable, there is no fund to produce interest. I remember, when it was not clear in the case of the annuity; though it is so now certainly (LORD ELDON, C.).—GIBSON v. BOTT (1802), 7 Ves. 89; 32 E. R. 37, L. C.

*Annotations:—*Consd. *Re* Robbins, Robbins v. Legge, [1906] 2 Ch. 648. *Refd.* Douglas v. Congreve (1836), 1 Keen, 410; Taylor v. Clark (1841), 1 Hare, 161; Caldecott v. Caldecott (1842), 1 Y. & C. Ch. Cas. 312; Morgan v. Morgan (1851), 14 Beav. 72. *Mentd.* Angerstein v. Martin (1823), Turn. & R. 232; Mills v. Mills (1835), 7 Sim. 501; Meyer v. Simonsen (1852), 5 De G. & Sm. 723; Thursby v. Thursby (1875), L. R. 19 Eq. 395; *Re* Woods, Gabellini v. Woods, [1904] 2 Ch. 4.

283. ———.]—Where an annuity is given by will with a direction that it shall be paid monthly, the first payment is to be made at the end of a month after testator's death.—HIGHTON v. FRANKLIN (1823), 1 Sim. & St. 390; 1 L. J. O. S. Ch. 231; 57 E. R. 156.

*Annotation:—*Consd. *Re* Robbins, Robbins v. Legge, [1906] 2 Ch. 648.

284. ———.]—Testator charged his estate with payment of his debts & of an annuity to his wife in lieu of dower. The real estates having been sold to pay the debts, & the income of the remaining proceeds being insufficient to pay the annuity:—*Held*: the annuity being wholly in arrear the arrears were to be computed from testator's death.—STAMPER v. PICKERING (1838), 9 Sim. 176; 59 E. R. 325.

*Annotation:—*Refd. Forbes v. Richardson (1853), 11 Hare, 354.

285. ———.]—Testator gave an annuity for life, & an annuity for twenty-one years from his death, both payable by four equal quarterly payments on the usual quarter days;—*Held*: a proportional part only of each annuity was payable on the first quarter day after his decease.

The true construction is that they all commenced from testator's death (STUART, V.-C.).—WILLIAMS v. WILSON (1865), 5 New Rep. 267.

286. ———.]—PETTINGER v. AMBLER, No. 281, *ante*.

287. ———.]—*Re* ROBBINS, ROBBINS v. LEGGE, No. 211, *ante*.

288. ——— Unless contrary direction in will.]—A. devised to trustees to pay debts & then to hold

## PART IV. SECT. 1, SUB-SECT. 2.—

### A. (a).

#### 282i. From testator's death.]—Bequest

of a weekly sum, the first payment is payable to the legatee at the end of a week from testator's death.—BYRNE v. HEALY (1828), 2 Mol. 94.—IR.

288i. ——— Unless contrary direction in will.]—INGHAM v. DALY (1882), 9 L. R. Ir. 484.—IR.



till his son should attain twenty-one, then to the son, he paying the father of testator £10 per quarter. The annuity does not commence till the estate of the son comes *in esse*.—TURNER v. PROBYN (1792), 1 Anst. 66; 145 E. R. 802.

289. ———.]—*Qu.*: where annuities are given out of a residue, & no time of payment is directed by the will, do the annuities commence before the end of one year from testator's death? Where the time of payment is fixed by the will, as in this case, the first quarter day after testator's death the payment must be as directed.—STORER v. PRESTAGE (1818), 3 Madd. 167; 56 E. R. 472.

290. ———.]—Where testator gives an annuity to A. for life, & directs the first payment to be made within one month from his, testator's death, the annuity commences from the death of testator; & though the first year's payment is to be made at the appointed time, the payment for the second year does not become due till the end of the year.—IRVIN v. IRONMONGER (1831), 2 Russ. & M. 531; 39 E. R. 496.

*Annotation*:—Mentd. Middleton v. Middleton (1852), 15 Beav. 450.

#### (b) Creation by Deed.

**Time from which deed operates.**—See DEEDS, Vol. XVII., pp. 228–229, Nos. 426–436.

291. **From execution of deed.**—The deed which created this annuity was executed in 1713, by which an appointment was made of an estate under a power by a wife in favour of her husband; & it is an appointment of a legal estate, & not of a trust, as has been argued; for she appoints the trustees who stood seised to her use to stand seised to the use of her husband in fee, which is a conveyance of the legal estate; & she by the same deed has made this estate liable to these annuities; as to the commencement of which it seems to be her intent that they should not commence till after her death; for it seems an extraordinary thing, that she who has land at present in her hands, without any charge upon it, should make it liable to annuities to her relations immediately, when her husband & she might have children; but whatever her intent was, as she has not expressed when they shall begin, the law will raise a commencement for her, viz. from the execution of the deed. As to its being argued, that these annuities are to be paid three years after her death, those words in the appointment are so relative as to be applicable only to the gross sums in charity. . . . The present demand is either a rentcharge or a rent seck, & more naturally a rent seck, as there is no power of distress annexed to it, & it is not an annuity, for it is issuing out of land, & nobody's person charged (LORD HARDWICKE, C.).—WESTON v. BOWES (1742), 9 Mod. Rep. 309; 88 E. R. 472, L. C.

#### B. Duration.

##### (a) Whether for Life or Perpetual.

292. **General rule—Life annuity.**—SAVERY v. DYER, No. 41, *ante*.

293. ———.]—Testator directed the investment of his property in the funds, & bequeathed to A. £50 per year for her & her three children; & after her decease, the money to be paid to each of them, as they attain the age of twenty-one; but, if either of them died, to be paid

to the survivors:—*Held*: this gave not a life annuity, but such a sum in the funds as would produce £50 a year.

Where there is a simple bequest of an annuity, it implies no more than a gift for life, unless there is something else in the will to enlarge the gift.—POTTER v. BAKER (1851), 13 Beav. 273; 21 L. J. Ch. 11; 15 Jur. 1068; 51 E. R. 105; *sub nom.* POTTER v. BAKER, BALLARD v. WALLIS, 18 L. T. O. S. 115, L. J.J.

*Annotations*:—*Reid*. Nicholls v. Hawkes (1853), 22 L. J. Ch. 255; Mansergh v. Campbell (1858), 3 De G. & J. 232.

294. ———.]—Testator, by his will, gave an annuity in the following terms: I give devise & bequeath unto my son E. one clear annuity of £100 *per annum*, for & during his natural life, & should he die, a child him surviving, I continue the same annuity for such child's use & benefit, to be paid to his or her mother; & after making other bequests of legacies & annuities, he devised & bequeathed the residue of his estate real & personal or mixed on trust to keep up his plantations in the West Indies, in the next place to pay satisfy & discharge the several legacies & annuities before given & to apply the residue for the benefit of his wife & his other children:—*Held*: (1) the daughter of E. was, on the death of her father, entitled not to a perpetual annuity but to an annuity during her life only; (2) the direction to pay the annuity to the mother did not show that the annuity was to be confined to the minority of the child of E.

The general rule is, that where an annuity is given to a person by will, the will also creating the annuity, the annuitant takes it for life only.

On the principle of antecedent improbability adverted to by LORD COTTENHAM in *Blewitt v. Roberts*, No. 305, *post*, the rule is that an annuity given indefinitely is an annuity for life only, & an annuitant claiming a perpetual annuity must establish an exception in his favour (LORD TRURO, C.).—YATES v. MADDAN (1851), 3 Mac. & G. 532; 21 L. J. Ch. 24; 16 Jur. 45; 42 E. R. 365, L. C.

*Annotations*:—*As to* (1) *Apld.* Potter v. Baker (1852), 15 Beav. 489. *Foll.* *Re* Grove's Trusts (1859), 1 Giff. 74. *Reid*. Hedges v. Harpur, Hedges v. Blick (1858), 3 De G. & J. 129.

295. ———.]—C., by his will, directed his trustees, out of the produce of his estate, to pay the clear yearly sum of £180 to A., & the clear yearly sum of £180 to D., daughter of A., during the life of A.; & after her death, to pay £20 in addition to the £180 to D.:—*Held*: the gift to A. was a life annuity only.—BAYNES v. RIDGE (1853), 1 Eq. Rep. 157; 22 L. T. O. S. 76.

296. ———.]—(1) An annuity to A. & the heirs of his body since Statute De Donis, 1285 (c. 1), does not create an estate tail, an annuity not being expressed by the word tenement.

(2) A gift of an annuity out of personalty without words indicating its nature, may give an absolute interest, unless there is an intention to the contrary.

(3) An annuity without words of direction or termination is a life annuity, & a direction to invest does not alter it.

(4) A gift of a portion of dividends stands on a different footing from a money gift of an annuity *simpliciter*, being a gift of an *aliquot* part of a capital fund.

Testator gives a particular sum of annual

#### PART IV. SECT. 1, SUB-SECT. 2.— B. (a).

291. **General rule—Life annuity.**—BENWELL v. CLANCY (1837), 2 Jo. K. Lr. 338.—IR.

292. ———.]—*Re* FORSTER'S ESTATE (1889), 23 L. R. Ir. 269.—IR.

t. **Limitation to children.**—STEVELLY v. STEVELLY (1854), 7 Ir. Jur. 145.—IR.

a. ———.]—**Effect of codicil.**—WARREN v. WRIGHT (1861), 12 I. Ch. R. 401.—IR.

b. ———.]—COURTENAY v. GALLAGHER

(1856), 5 I. Ch. R. 154, 356.—IR.

c. ———.]—BARDEN v. MEAGHER (1867), 1 I. R. Eq. 246.—IR.

d. ———.]—WARD v. WARD, [1903] 3. 211.—IR.

———.]—WALSH, KENT v.



*Sect. 1.—Commencement and duration of rentcharges and annuities: Sub-sect. 2. B. (a).]*

dividends in trust to pay to three persons an annuity of £20 each during their lives, & he directs that the remainder of dividends should be paid to A. during his life, & as & when the three persons first named should depart this life, the three several annuities of £20 each should devolve & be paid to A. & two other persons; the eldest taking the first of annuities that should fall, & the other in like manner by seniority, & after the death of the survivor of them, A. & the two persons last named, then over:—*Held*: each annuity continued until the death of the survivor of the three last named persons.—*BIGNOLD v. GILES* (1859), 4 Drew. 343; 28 L. J. Ch. 358; 32 L. T. O. S. 308; 5 Jur. N. S. 84; 7 W. R. 195; 62 E. R. 133.

297. ———.]—*Re GROVE'S TRUSTS*, No. 441, *post*.

298. ———.]—Testator devised & bequeathed all his property of every description to trustees for the following uses, intents, & purposes, viz., he left the sum of £56 per annum to be paid quarterly to his wife, H. He gave to A. the sum of £50 during her life. He left £800 *per annum* out of the proceeds of an East Indian estate, to be appropriated by his trustees to the maintenance & education of the eight children of his daughter, I., wife of C., provided the children should take his name, under forfeiture of the £800 *per annum*, should they decline to do so. If there should be an increased profit to £800 *per annum*, testator bequeathed the same as therein mentioned. If any of the children should die, their mother should have the benefit of deceased child or children's share or shares. The trustees should have the power, should any one of the children get into debt, to forfeit his share, & divide it with the other children. The trustees should have power to sell the East Indian estate, should the profits of the working not be sufficient to pay the annuities to the children; the proceeds of the sale to be invested in certain bonds, in the names of the said trustees for the benefit of the children. Should the profits not reach £800 annually from the working or sale of the estate, then the trustees should charge the residue of testator's property to make up the said annual sum of £800. Should the sale realise more than enough, when invested, to pay the sums, the extra proceeds should be invested in the aforesaid bonds for the benefit of I., but the sum to be paid to her from the said investment should not exceed £500 annually:—*Held*: the annuity to testator's widow was for life only; but the annuities to the children of I. were perpetual.—*HICKS v. ROSS* (1872), L. R. 14 Eq. 141; 41 L. J. Ch. 677; 26 L. T. 470.

299. ———.]—Testatrix bequeathed an annuity payable out of the rental of certain hereditaments to her sister C. for life, with remainder for life to certain persons, & on their deaths testatrix directed her exors. to pay the annuity out of the said rental to the surviving children of B.:—*Held*: the children of B. took the annuity for their lives only.

As a general rule there can be no doubt that the gift of an annuity to A. is a gift of the annuity during the life of A. & nothing more. . . . There are cases in which the ct. has come to the conclusion

that the gift is not really that of an annuity, but the gift to a person of the income arising from a particular fund without limit, & there the ct. holds that the unlimited gift of the income is a gift of the *corpus* from which the income arises. . . . It seems to me impossible to say that this is an appropriation of the fund unless I am prepared to hold that every charge of an annuity on any property & every gift of an annuity & of any property is an appropriation of the fund to meet the annuity so as to be a gift of the fund (*FRY, J.*).—*BLIGHT v. HARTNOLL* (1881), 19 Ch. D. 294; 51 L. J. Ch. 162; *sub nom. Re BLIGHT, BLIGHT v. HARTNOLL*, 45 L. T. 524; 30 W. R. 513.

*Annotations*:—*Consd. Re Morgan, Morgan v. Morgan*, [1893] 3 Ch. 222. *Reid, Re Evans, Thomas v. Thomas* (1908), 77 L. J. Ch. 583; *Townsend v. Ascroft*, [1917] 2 Ch. 14.

300. ———.]—Testator directed his trustees to appropriate & invest, in their own names, a sufficient portion of his estate to pay certain annuities, one of which was of £500 a year. Upon the question whether such annuity was perpetual or for life:—*Held*: as testator had not specified any particular portion of his property to be taken for the purpose of answering annuities, the annuity in question was for the life of the party only.

A gift of an annuity to A. B. is a gift during the life of the party & nothing more. If in the gift a certain property is pointed out to ensure the annuity, that is a gift of the thing indicated (*BACON, V.-C.*).—*Re TABER, ARNOLD v. KAYESS* (1882), 51 L. J. Ch. 721; 46 L. T. 805; 30 W. R. 883.

301. ———.]—*Re DOANE* (1893), 10 T. L. R. 100.

302. ———.]—Bequest of an annuity of £150 a year to be secured to C. held to be an annuity for life only.—*Re STRATHEDEN & CAMPBELL* (LORD), *COOPER v. STRATHEDEN & CAMPBELL* (LORD) (1893), 9 T. L. R. 455; 37 Sol. Jo. 495.

303. ———.]—Although an annuity *primâ facie* is given for the life of the annuitant, if another term for payment is pointed out that term is not inserted by way of restriction to the period of the annuitant's life, but is in substitution for that period.

Where the only interest that testator gave to his wife was restricted to her widowhood & the benefits other than those in respect of income given to the children did not cease until the wife died or remarried:—*Held*: testator had sufficiently indicated an intention that the annuities given by the will to his children should continue during the widowhood of testator's wife, & should not cease on the death of the annuitant.—*Re CANNON, CANNON v. CANNON* (1915), 114 L. T. 231; 32 T. L. R. 51; 60 Sol. Jo. 43.

304. Gift of interest of fund—Without limitation.]—An unlimited bequest of the interest of stock, passes the principal also.—*STRETCH v. WATKINS* (1816), 1 Madd. 252; 56 E. R. 94.

*Annotation*:—*Distd. Blewitt v. Roberts* (1841), Cr. & Ph. 274.

305. ———.]—Testator bequeathed to his wife £600 *per annum* for her life, to be paid quarterly, & after her death the annuity to be equally divided between six persons, whom he named, or the survivors or survivor of them. He also gave to each of these six persons £100 *per*

*POWER* (1906), 9 Ndd. L. R. 205.—*NFLD.*

f. — *Living at death of annuitant.*]—*SULLIVAN v. GALBRAITH* (1870), 4 I. R. Eq. 582.—*IR.*

g. *With power of disposition.*]—*BURKE*

*v. LAMBERT* (1840), 2 Dr. & Wal. 608.—*IR.*

h. "For ever."]—*ASHTON v. ADAMSON* (1841), 1 Dr. & War. 198.—*IR.*

k. *Limitation of residue to annuitants.*]—*GOSS v. SUECKLING* (1910), 30 N. Z. L. R. 543.—*N.Z.*

l. *Gift by deed—With remainder to children.*]—*M'KINNON v. M'INNES* (1877), 3 V. L. L. (Eq.) 253.—*AUS.*

m. — *Joint annuity—Limitation to survivor.*]—*COLEMAN v. HILL* (1885), 10 O. R. 172.—*CAN.*

*annum* during their lives, to be paid quarterly, with power to leave their respective annuities at their deaths to any persons they might marry, or any children they might leave, but in case of any of them dying without exercising such power, then to the survivors or survivor:—*Held*: the gifts over of the annuities of £600 & £100 respectively were not gifts of so much stock in the 3 per cent. as would produce those annuities, but gifts of annuities for the respective lives only of the persons, to whom they were limited, as tenants in common.

Giving the interest of personalty without limitation passes the whole interest, unless there are words to confine it to a life interest. . . . An annuity may be perpetual, or for life, or period of years (LORD COTTENHAM, C.).—BLEWITT v. ROBERTS (1841), Cr. & Ph. 274; 41 E. R. 495; *sub nom.* BLEWITT v. ROBERTS, BLEWITT v. STAUFFERS, 10 L. J. Ch. 342; 5 Jur. 979, L. C.

*Annotations*:—*Expld.* Stokes v. Heron (1845), 12 Cl. & Fin. 161. *Dtd.* Yates v. Maddan (1851), 3 Mac. & G. 532. *Apld.* Baynes v. Ridge (1853), 1 Eq. Rep. 157. *Distd.* Ford v. Batley (1853), 23 L. J. Ch. 225; Hedges v. Harpur, Hedges v. Bliek (1858), 3 De G. & J. 129; Mansergh v. Campbell (1858), 3 De G. & J. 232; Bent v. Cullen (1871), 6 Ch. App. 235. *Apld.* Blight v. Hartnoll (1881), 19 Ch. D. 294. *Consd.* Re Morgan, Morgan v. Morgan (1893), 69 L. T. 407; Townsend v. Ascroft, [1917] 2 Ch. 14. *Refd.* Kerr v. Middlesex Hospital (1852), 2 De G. M. & G. 576; Nicholls v. Hawkes (1853), 22 L. J. Ch. 255; Hill v. Hattey (1862), 2 John. & H. 634; Re Evans, Thomas v. Thomas (1908), 77 L. J. Ch. 583. *Mentd.* Rogers v. Towsey (1845), 2 Holt, Eq. 270.

306. ———.]—BIGNOLD v. GILES, No. 296, *ante*.

307. ———.]—Where a sum of money is so bequeathed for payment of an annuity, as that the whole of the principal is dedicated to the annuity, the interest of the annuitant in the bequest is an absolute one; & he or his representatives will be entitled to be paid the whole of the sum.—WAKEHAM v. MERRICK (1867), 37 L. J. Ch. 45; 17 L. T. 134; 16 W. R. 73.

308. ———.]—Testator bequeathed to his wife £50 a year, which he directed his exors. to pay to her out of the interest, dividends, & produce arising from all his personal property during her life or widowhood, & after her decease or next marriage he bequeathed the said £50 unto & amongst his two daughters, S. & A., & his granddaughter M., equally between them or the survivors of them:—*Held*: the gift was of a perpetual annuity, & S. having died in the lifetime of testator, that A. & M., who survived the widow, were each entitled to a moiety of such a sum of money as at her death would be sufficient to purchase so much 3 per cent. Bank Annuities as would produce the yearly sum of £50.

[The] gift of the income of a fund to a particular person or persons is a gift of the whole fund (LORD HATHERLEY, C.).—BENT v. CULLEN (1871), 6 Ch. App. 233; 40 L. J. Ch. 250; 19 W. R. 368, L. C.

*Annotations*:—*Apld.* Evans v. Walker (1876), 3 Ch. D. 211. *Distd.* Re Blight, Blight v. Hartnoll (1881), 45 L. T. 521. *Dtd.* Re Morgan, Morgan v. Morgan, [1893] 3 Ch. 222.

309. ———.]—BLIGHT v. HARTNOLL, No. 299, *ante*.

310. ———.]—Testator gave all his real & personal property upon trust to pay out of the interest & rents arising from the same the following sums of money; I give to my wife £250 *per annum* . . . to H. or to his descendants, £250 *per year*; also to P. or his descendants, £250 *per year*; to Mrs. A. or her descendants, £250 *per year*; to Mrs. S. £50 *per year*; to Mrs. D., 10s. *per week*. . . . With regard to the residue of the interest & rents after the above payments have been made, testator gave it in tenths &

twentieths for certain charitable purposes in England & the United States:—*Held*: the annuitants took their annuities for life only; & as to H., P., & A., with substitutionary gifts to the respective descendants, if any, living at testator's death, of such of them as should not survive testator.—Re MORGAN, MORGAN v. MORGAN, [1893] 3 Ch. 222; 62 L. J. Ch. 789; 69 L. T. 407; 37 Sol. Jo. 581, C. A.

*Annotation*:—*Mentd.* Re Bawden, Bawden v. Cresswell, National Provincial Bank v. Cresswell (1893), 63 L. J. Ch. 412.

311. ——— Conditional on bankruptcy or alienation.]—Testator gave his residuary personal estate to trustees upon trust to invest £10,000 in Consols, & to retain so much thereof as would realise the clear yearly income of £150, & to pay the dividends to H., until he should become bkpt., or his interest should by assignment, charge, or any other means whatsoever become vested in any other person, in which case the trust for his benefit was to cease; & subject to the aforesaid trust the sum of £10,000 was to become part of the residue. H. died without becoming bkpt. or assigning his interest:—*Held*: the gift of income to H. was not perpetual, but ceased with his life.—BANKS v. BRAITHWAITE (1863), 1 New Rep. 306; 32 L. J. Ch. 198; 8 L. T. 80; 9 Jur. N. S. 294; 11 W. R. 298.

312. Conditional gift in fee simple.]—Bequest of an annuity to A. & B., & to the survivor for life; & if A. should have any children then to be equally divided between them; but if A. should die without lawful issue, then to A. & his heirs for ever:—*Held*: the children of A. took absolute interests in a perpetual annuity.—ROBINSON v. HUNT (1841), 4 Beav. 450; 49 E. R. 413.

*Annotation*:—*Consd.* Yates v. Maddan (1851), 3 Mac. & G. 532.

313. Bequest subject to life interest—Limitation to children—Effect of codicil.]—TWEEDALE v. TWEEDALE, No. 469, *post*.

314. ———.]—(1) A will disposing only of personalty contained these words: My will is, that whatever I die possessed of, or in any way entitled to, together with whatever property my wife may be any way entitled to, shall produce to my wife an annuity of £100 *per annum*, to each of my daughters £100 *per annum* for themselves & their children, & to my wife's mother an addition to any property she may possess so as to make up to her during her life an annuity of £100 *per annum*, said annuities, after the decease of my wife & her mother, to be equally divided among my three children, William, Mary, & Julia Louisa; all the rest & residue of my property & possessions I give & bequeath to my son William. At the date of the will & of testator's death, his daughters had no children:—*Held*: all the annuities thus created were perpetual annuities.

(2) Where a will clearly establishes a perpetual annuity, the estate in the annuity cannot be restricted, by a codicil, to a life estate, unless the expressions there used are clear & undoubted.

Testator's daughter M. died, & after her death he made a codicil to his will, dividing her annuity between his two surviving children, but in other respects confirming the will. His wife's mother having died, he made a second codicil in these words: & in case my son William shall die without leaving issue male lawfully begotten, my will is that, after the decease of my wife & my daughter J. L., my remaining property shall then be divided between two relations named in the codicil, & their children:—*Held*: these codicils did not alter the nature of the annuities given by the will to

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**Julia Louisa.**—**STOKES v. HERON** (1845), 12 Cl. & Fin. 161; 9 Jur. 563; 8 E. R. 1361, H. L.

**Annotations:—As to (1) Distd.** *Yates v. Maddan* (1851), 3 Mac. & G. 532. **Apld.** *Kerr v. Middlesex Hospital* (1852), 2 De G. M. & G. 576. **Consd.** *Hedges v. Harpur, Hedges v. Blick* (1858), 3 De G. & J. 129; *Mansergh v. Campbell* (1858), 3 De G. & J. 232. **Distd.** *Re Grove's Trusts* (1859), 33 L. T. O. S. 365; *Lett v. Randall* (1860), 2 De G. F. & J. 388. **Apld.** *Hill v. Rattey* (1862), 2 John. & H. 634; *Bent v. Cullen* (1871), 6 Ch. App. 235; *Evans v. Walker* (1876), 3 Ch. D. 211. **Consd.** *Re Taber, Arnold v. Kayess* (1882), 51 L. J. Ch. 721. **Refd.** *Nicholls v. Hawkes* (1853), 22 L. J. Ch. 255; *Re Boddington, Boddington v. Chairat* (1884), 50 L. T. 761; *Coward v. Larkman* (1888), 60 L. T. 1; *Re Morgan, Morgan v. Morgan* (1893), 69 L. T. 407. **Generally, Mentd.** *Piers v. Piers* (1849), 13 Jur. 569; *Audsley v. Horn* (1859), 1 De G. F. & J. 226; *Re Hutchinson, Alexander v. Jolley* (1886), 55 L. J. Ch. 574; *Capes v. Dalton* (1902), 86 L. T. 129.

**315.** ———.]—**POTTER v. BAKER**, No. 293, ante.

**316.** ———.]—Bequest to M., a married woman, of an annuity "for her life & the issue from her body lawfully begotten on failure of which to revert to my heirs," with a request that K. & C. would act as trustees for M. so that the annuity might be secured for her sole use & benefit:—**Held:** (1) M. took an interest for life only with a gift in the nature of a remainder to her issue; (2) according to the true construction of the devise the life interest of M. was merely equitable & the interest of the issue legal, & therefore M. could not have taken an estate tail even if the devise had been of real estate; & also, admitting the annuity to partake of the nature of real estate, it did not follow that in construing the will it ought to be treated as real estate, for it was in fact personal estate with peculiar incidents belonging to it in that character.—**Re WYNCH'S TRUSTS, Ex p. WYNCH** (1854), 5 De G. M. & G. 188; 2 Eq. Rep. 1025; 23 L. J. Ch. 930; 23 L. T. O. S. 259; 18 Jur. 659; 2 W. R. 570; 43 E. R. 842, L. C. & L. JJ.

**Annotations:—As to (1) Apld.** *Goldney v. Crabb* (1854), 19 Beav. 338; *Surridge v. Clarkson* (1866), 14 W. R. 979. **Consd.** *Re Barker's Trusts* (1883), 52 L. J. Ch. 565. **Refd.** *Re Banks' Trusts, Ex p. Hovill* (1855), 2 K. & J. 387; *Law v. Thorp* (1858), 27 L. J. Ch. 649; *Re Andrew's Will* (1859), 27 Beav. 608; *Williams v. Lewis* (1859), 6 H. L. Cas. 1013; *Jackson v. Calvert* (1860), 1 John. & H. 235; *Re Jeaffreson's Trusts* (1866), L. R. 2 Eq. 276; *Herrick v. Franklin* (1868), L. R. 6 Eq. 593.

**317.** ———.]—**HAGGAR v. NEATBY**, No. 190, ante.

**318.** ———.]—Testator bequeathed to each of his five daughters £400 per annum, to be payable half-yearly during the term of their natural lives, & after their respective decease, he gave the same to their children respectively, share & share alike, such children not to be entitled to more than their deceased parent's share, & in case any or either of his said daughters should die without issue, he directed such annuity to cease & to fall into the residue of his estate:—**Held:** (1) the annuities were perpetual annuities; (2) the daughters did not take absolute interests, but life interests only in the annuities.—**HEDGES v. HARPUR, HEDGES v. BLICK** (1858), 3 De G. & J. 129; 27 L. J. Ch. 742; 32 L. T. O. S. 67; 4 Jur. N. S. 1209; 6 W. R. 842; 44 E. R. 1218, L. JJ.

**Annotations:—As to (1) Distd.** *Lett v. Randall* (1860), 30 L. J. Ch. 110. **Generally, Refd.** *Hill v. Rattey* (1862), 2 John. & H. 634. **Mentd.** *Re Birks, Kenyon v. Birks* (1899), 68 L. J. Ch. 319.

**319.** ———.]—Testator devised & bequeathed to trustees, their heirs, exors. & administrators, all & singular his freehold, leasehold & copyhold estates, & also all his personal estate, of what nature or kind soever the same might be,

upon trust to pay & make up to his wife £1,200 per annum, including any sums of money to which might be entitled under her late father's will, by equal quarterly payments, for & during the term of her natural life; & directed that from & after the decease of his wife the said sum of £1,200 so to be paid to her should go & be equally divided unto & amongst all & every testator's children who should be then living, share & share alike:—**Held:** the gift was not of a perpetual annuity, but was limited to the lives of testator's widow & children.—**LETT v. RANDALL** (1860), 2 De G. F. & J. 388; 30 L. J. Ch. 110; 3 L. T. 455; 6 Jur. N. S. 1359; 9 W. R. 130; 45 E. R. 671, L. C.

**Annotations:—Refd.** *Hill v. Rattey* (1862), 2 John. & H. 634; *Blight v. Hartnoll* (1881), 19 Ch. D. 294; *Re Morgan, Morgan v. Morgan* (1893), 69 L. T. 407. **Mentd.** *Tamsay v. Shelmerdine* (1865), L. R. 1 Eq. 129.

**320.** ——— **Right of last taker.]**—Testator directed his property to be invested in the funds, for the best advantage of those he should after name; & he bequeathed £50 a year to A. for life, & after her decease, then that the £50 a year should go, half to B. & the other half to C.:—**Held:** the annuity was perpetual, & B. & C. were entitled to such a sum in the funds as would produce £50 a year.—**POTTER v. BAKER** (1852), 15 Beav. 489; 51 E. R. 627.

**Annotation:—Consd.** *Mansergh v. Campbell* (1858), 3 De G. & J. 232.

**321.** ———.]—Testator gave to B. an annuity of £50 per annum for her life, & after her decease to the children she might have, born in wedlock, equally to be divided between them during their lives, & after the decease of the survivor, to go to his nephew & his two nieces equally between them. B. having died without issue:—**Held:** (1) the gift to the nephew & nieces was not void for remoteness; (2) they took the capital from whence the annuity proceeded absolutely, in equal shares as tenants in common.

I, therefore, understand the law to be, that when there is a gift of an annuity to one for life, or to several for lives, & then a gift afterwards to another person without any restriction, that means that the last taker is to have the capital from which the annuity was produced; consequently this annuity being given to the nephew & two nieces generally, without any words of restriction, they take the capital absolutely (**MALINS, V.-C.**).—**EVANS v. WALKER** (1876), 3 Ch. D. 211; 25 W. R. 7.

**Annotations:—As to (1) Refd.** *Re Harvey, Peck v. Savory* (1888), 39 Ch. D. 289; *Wainwright v. Miller*, [1897] 2 Ch. 255; *Re Ashforth, Sibley v. Ashforth*, [1905] 1 Ch. 535. **As to (2) N.F.** *Blight v. Hartnoll* (1881), 19 Ch. D. 294. **Refd.** *Re Morgan, Morgan v. Morgan* (1893), 69 L. T. 407.

**322. Annuities to be provided from particular property.]**—Testator by his will gave certain annuities in the following terms: I desire that my exors. shall purchase annuities for each of my two sisters, B. & F., of £100 a year each, the said annuities to be purchased in the British Funds. After giving other annuities *simpliciter* & legacies, testator added, I direct my landed property at O. to be sold, & the produce to go to the carrying out of the aforesaid annuities & legacies; & should the produce of the sale not be found sufficient for that purpose, I desire that the remainder shall be made up from my personal property: & he directed the remainder of his personal property after the above annuities & all legacies have been paid & effected, to be laid out in the purchase of an annual income in the 3 per cent. Consols for the benefit of a hospital:—**Held:** the annuities to B. & F. were perpetual annuities.—**KERR v.**

MIDDLESEX HOSPITAL (1852), 2 De G. M. & G. 576; 22 L. J. Ch. 355; 20 L. T. O. S. 160; 17 Jur. 49; 1 W. R. 93; 42 E. R. 990, L. C. & L. JJ.

*Annotations* :—**Apld.** *Lett v. Randall*, *Lett v. Dormer* (1855), 3 Sm. & G. 83. (See (1860), 2 De G. F. & J. 388.) **Fold.** *Ross v. Borer* (1862), 2 John. & H. 469. **Refd.** *Nichols v. Hawkes* (1853), 10 Har. & 342; *Tawson v. Tawson* (1854), 23 L. J. Ch. 954; *Re Grove's Trusts* (1859), 33 L. T. O. S. 365; *Re Taber*, *Arnold v. Kayess* (1882), 51 L. J. Ch. 721; *Re Stratheden & Campbell*, *Cowper v. Stratheden & Campbell* (1893), 37 Sol. Jo. 495.

323. —. —.]—*Hicks v. Ross*, No. 298, *ante*.

324. —. —.] **What amounts to appropriation.**—

BLIGHT v. HARTNOLL, No. 299, *ante*.

325. —. —.]—*Re TABER*, *ARNOLD v. KAYESS*, No. 300, *ante*.

326. —. —.]—*Re DOANE* (1893), 10 T. L. R. 100.

327. **Direction postponing sale.**—A bequest to F. of £60 a year out of the 4 per cent. bank stock, followed by a direction that it was not to be sold till after the death of F. & his wife, nor until his youngest child should attain twenty-one, is in point of duration a perpetual annuity. *Semble* : it is an absolute gift to F.—*PAWSON v. PAWSON* (1854), 19 Beav. 146; 23 L. J. Ch. 954; 2 W. R. 321; 52 E. R. 304.

328. **Charge on property devised in fee simple.**—Testator bequeathed an annuity or clear yearly rentcharge or sum of £300 to A. for life, & after her death to her children equally, to be applied for the support, maintenance, & education of the children until the youngest should attain twenty-one, when he directed that the said annuity should be sold by the children, & that the proceeds should be equally divided among them; & he charged all his freehold estates with the annuity :—*Held* : the annuity was perpetual.

I am unable, however, from the mere charge of an annuity on property devised in fee simple, to collect an intention that the duration of the annuity should correspond with the limits of the estate charged (*LORD CHELMSFORD, C.*).—*MANSERGH v. CAMPBELL* (1858), 3 De G. & J. 232; 28 L. J. Ch. 61; 32 L. T. O. S. 168; 4 Jur. N. S. 1207; 7 W. R. 72; 44 E. R. 1257, L. C.

*Annotation* :—**Refd.** *Lett v. Randall* (1860), 2 De G. F. & J. 388.

329. **Gift out of residue.**—Bequest as follows : I give & bequeath to E. all my property, real & personal, except £500 a year, which I give & bequeath unto R.:—*Held* : (1) R. was entitled to so much of testator's residuary estate as would produce £500 a year in perpetuity; (2) R. was entitled to so much of a sum of new 3 per cents., part of testator's estate remaining unapplied, as would produce the £500 a year, since he had a right to the best security to be obtained.—*HILL v. RATTEY* (1862), 2 John. & H. 634; 70 E. R. 1212; *sub nom.* *HILL v. POTTS*, 31 L. J. Ch. 380; 5 L. T. 787; 8 Jur. N. S. 555; 10 W. R. 439.

*Annotations* :—As to (2) **Distd.** *Hicks v. Ross*, [1891] 3 Ch. 499. *Generally*, **Mentd.** *Re Tredwell*, *Jaffray v. Tredwell* (No. 2) (1891), 65 L. T. 742.

330. **Direction to executor to purchase government stock.**—Direction to exor. to purchase an annuity in govt. securities, to the amount of £50 a year, for A.:—*Held* : the annuity was perpetual.—*ROSS v. BORER* (1862), 2 John. & H. 469; 31 L. J. Ch. 709; 6 L. T. 514; 8 Jur. N. S. 1058; 10 W. R. 644; 70 E. R. 1143.

331. **Gift of residue in proportion to annuities.**—*SHEEPSHANKS v. WILLIAMS* (1831), 10 Sim. 461, n.; 59 E. R. 694.

*Annotation* :—**Apld.** *Twcedale v. Twcedale* (1840), 10 Sim. 453.

332. **Term for payment pointed out.**—*Re CANNON*, *CANNON v. CANNON*, No. 303, *ante*.

**Construction of wills.**—*See WILLS.*

333. **Covenant on marriage—By father of intended husband—To continue if wife survive husband—For purposes of settlement.**—By a marriage settlement, property of the wife was settled upon the usual trusts for the wife for life, with remainder to the husband for life, with remainder to the children of the marriage. By arts. of agreement of even date, which recited the settlement, the father of the husband agreed to pay £350 every year during the life of his son, & in case the wife should survive the husband, then to continue the yearly payment to the trustees of the settlement for the purposes thereof:—*Held* : this created a liability on the part of the father to pay a perpetual annuity of £350; & a sum of £11,666 Consols which had been set apart out of the father's estate to answer the annuity, was ordered, on the death of the son leaving his wife surviving, to be transferred to the trustee of the settlement to be held upon the trusts thereof.—*DAWSON v. ROBINSON* (1871), 25 L. T. 486.

334. **To annuitant & heirs of his body—No estate tail.**—*BIGNOLD v. GILES*, No. 296, *ante*.

335. —. —.] **Fee conditional.**—*Re RIVETT-CARNAC'S WILL*, No. 53, *ante*.

336. **Grant under power of appointment—Perpetual annuity.**—Testator gave to his daughter an annuity of £30 for her life, with a general power of leaving it by her will. The annuity was charged upon testator's real estates. The daughter married, & by her will exercised the general power of appointment by giving "the said annuity of £30" to her daughter absolutely:—*Held* : the appointee was entitled to a perpetual annuity of £30.—*TOWNSEND v. ASCROFT*, [1917] 2 Ch. 14; 86 L. J. Ch. 517; 116 L. T. 680; 61 Sol. Jo. 507.

(b) *Pur autre vie*.

337. **General rule—Annuity continues notwithstanding death of annuitant.**—*ST. NICHOLAS v. HARRIS* (1641), 1 Rep. Ch. 149; 21 E. R. 534.

338. —. —.]—*SAVERY v. DYER*, No. 41, *ante*.

339. —. —.]—Testator also bequeathed to his son an annuity of £10 from the period of his majority to the death or second marriage of testator's wife. The son attained twenty-one, & died before the widow:—*Held* : the legal personal representative of the son was entitled to the annuity until the death or second marriage of the widow.

It has never been doubted that a gift of an annuity for a term or *pur autre vie* is a gift to the annuitant & his personal representatives during the term on the life of the *cestui que vie* (*JAMES, L.J.*).—*Re ORD*, *DICKINSON v. DICKINSON* (1879), 12 Ch. D. 22; 41 L. T. 13; 28 W. R. 141, C. A.

*Annotations* :—**Fold.** *Re Cannon*, *Cannon v. Cannon* (1915), 114 L. T. 231. **Mentd.** *Re Portal & Lamb* (1884), 27 Ch. D. 600; *Cave v. Harris* (1887), 57 L. J. Ch. 62.

340. —. —.]—Payment "during the widowhood of my said wife . . . out of the income of my trust" of "the following yearly sums of money; . . . to my said daughter, E., £100" gives an annuity to E., which continues to be payable after her death to her legal personal representative during the widowhood of testator's widow.—*Re DRAYTON*, *FRANCIS v. DRAYTON* (1912), 56 Sol. Jo. 253.

341. —. —.]—*Re CANNON*, *CANNON v. CANNON*, No. 303, *ante*.

**Construction of wills.**—*See WILLS.*

*Sect. 1.—Commencement and duration of rentcharges and annuities: Sub-sect. 2, B. (c), (d) & (e).]*

(c) *Annuity to Trustee or Executor virtute officii.*

**342. Trustee—So long as he continue to execute office—Determines on payment over of fund.]—**Testatrix gave her property to trustees to convert & pay the income to her niece for life, & then to her children at twenty-one or marriage, & she gave an annuity to W., one of the trustees, "so long as he should continue to execute the office of trustee under her will." An administration suit was instituted:—*Held*: the annuity continued to be payable until the fund was actually paid over.—*HULL v. CHRISTIAN* (1868), 18 L. T. 50.

**343. ———.]—**A gift of an annuity to a trustee, so long as he should continue to execute the office of trustee:—*Held*: to determine on the cesser of active trusts by the payment of the whole of the trust property to a person absolutely entitled, without a devolution of the office of trustee or any other person.—*HULL v. CHRISTIAN* (1874), L. R. 17 Eq. 546; 43 L. J. Ch. 861; 22 W. R. 611.

**Executor.]—**See EXECUTORS, Vol. XXIII., p. 443, Nos. 5131, 5132.

**Construction of wills.]—**See WILLS.

(d) *Annuities for Maintenance and Education.*

**Maintenance of infants, generally.]—**See INFANTS, Vol. XXVIII., pp. 216 *et seq.*

**344. Agreement to pay annuity to tutor—Whether for tutor's life.]—**A. engages B. as preceptor & travelling tutor to his son, & verbally agrees to pay him an annuity of £200 per ann. The annuity is paid during the continuance, & after the determination of the tutorship, & down to the last quarter day anterior to A.'s death. B. then files his bill against the representatives of A. insisting, that this annuity was agreed to be paid to him for his own life, & praying satisfaction for the arrears & growing payments of it. But for want of sufficient evidence of such an agreement, the bill was dismissed; & the order of dismissal affirmed upon an appeal.—*JAMESON v. SKIPWITH* (1780), 1 Bro. Parl. Cas. 376; 1 E. R. 632, H. L.

**345. Provision for minors—Whether confined to minority.]—**Testator directed the interest of a sum of money to be applied for the maintenance & education of his infant nephew, but made no disposition of the principal:—*Held*: the nephew was entitled to the interest, during his life.—*SOAMES v. MARTIN* (1839), 10 Sim. 287; 59 E. R. 624; *sub nom.* *SOMES v. MARTIN*, 8 L. J. Ch. 367 3 Jur. 1144.

*Annotations:—*N.F. Gardiner v. Barber (1854), 2 Eq. Rep. 888. *Fold.* Frewen v. Hamilton (1877), 47 L. J. Ch. 391. *Wilkins v. Jodrell* (1879), 13 Ch. D. 564. *Reid.* Thorp v. Owen (1843), 2 Hare, 607; *Williams v. Papworth*, [1900] A. C. 563.

**346. ———.]—***YATES v. MADDAN*, No. 294, ante.

**347. ———.]—***GARDINER v. BARBER*, No. 519, post.

**348. ———.]—**By a marriage settlement property was vested in trustees upon trust, after the death of the wife, to pay the rents & profits to the husband for life, or until he married again, & in case he married again & there was issue of the

intended marriage, then to pay him one-half of the rents & profits, & out of the other half to levy & raise for the maintenance & education of one child one-fourth, of two or three children one-third, & of four or more children the whole income of such other half, & subject thereto to pay the whole income thereof to the husband for his life, & if there should be no issue, then to pay the whole of the rents & profits to the husband. The husband married again, & at the date of the decree there were four children of the first marriage, two daughters & one son, who had attained twenty-one, one son under age, & a child of a deceased daughter:—*Held*: the trust for maintenance & education did not cease upon the children attaining twenty-one, but the four children were entitled equally to one-half of the rents & profits during the life of their father, the daughters were equally entitled in the event of their marrying, & that the word "issue" was restricted to the first generation, & therefore, the child of a deceased daughter took no interest.—*FREWEN v. HAMILTON* (1877), 47 L. J. Ch. 391.

**349. ———.]—***WILKINS v. JODRELL*, No. 352, post.

**350. ——— Children take joint interest—Survivorship.]—***WILKINS v. JODRELL*, No. 352, post.

**351. ———.]—**Where a rentcharge or annuity is held by trustees to be applied by them for the maintenance & education of children or the survivor:—*Held*: the children take a joint interest therein, but that the shares of the minors are to be applied as directed.

Nor is a provision for the maintenance of adults anything more than a provision for their benefit. . . . The children take a joint interest in the annuity, but the shares of minors are to be applied for their maintenance & education (*LORD MACNAUGHTEN*).—*WILLIAMS v. PAPWORTH*, [1900] A. C. 563; 69 L. J. P. C. 129; 83 L. T. 184, P. C.

**352. ——— Annuity given to mother first—Continuation "in event of her death"—Not provision against lapse of annuity.]—**Testator by his will gave to a woman an annuity of £100, & directed as follows: "in the event of her death the annuity is to be continued to her children for their maintenance, & education, & I have to request" G. "to see it carried into execution." The woman survived testator & received the annuity up to her death, at which time all her six children had attained twenty-one:—*Held*: (1) the words "in the event of her death" could not be construed as only providing against a lapse of the annuity, & the annuity took effect in favour of the children; (2) the annuity was not confined to the minorities of the children, but was payable to them during their joint lives & to the survivors & survivor of them during their & his life, the children for the time being entitled as joint tenants.—*WILKINS v. JODRELL* (1879), 13 Ch. D. 564; 49 L. J. Ch. 26; 41 L. T. 649; 28 W. R. 224.

*Annotations:—*As to (2) *Consd.* *Williams v. Papworth*, [1900] A. C. 563. *Reid.* *Re Booth, Booth v. Booth*, [1891] 2 Ch. 282.

**353. Provision for adult—Absolute gift for general benefit.]—**Testator directed his trustees to pay an annuity to his brother, until he should attempt to charge it, or some other person should claim it, & then to apply it for his support &

#### PART IV. SECT. 1, SUB-SECT. 2.— B. (c).

**n. Executor—For administration of estate—Determination on cesser of trusts.]—***HENRIOT v. BONHAM* (1844), *Drury temp. Sug.* 476.—*IR.*

**o. ———.]—**Testator gave to one of his exors. & trustees an

annuity for his trouble in the executorship, so long as he should continue in the administration thereof:—*Held*: in such cases the annuity is co-existent with the duties or trusts for the fulfilment of which it is given, & the willingness of the annuitant to perform them.—*M'DERMOT v. O'CONNOR* (1876), 10 L. R. Eq. 352.—*IR.*

#### PART IV. SECT. 1, SUB-SECT. 2.— B. (d).

**p. Provision for minors—Whether terminable on ability to earn living.]—***HOLMES v. TAGGART* (1862), 1 N. S. W. S. C. 11. (Eq.) 27.—*AUS.*

**q. Gift to mother—Conditional on education of children.]—***Re*



maintenance. The annuitant having become insolvent:—*Held*: his assignees were entitled to the annuity.—*YOUNGHUSBAND v. GISBORNE* (1846), 15 L. J. Ch. 355; 7 L. T. O. S. 221; 10 Jur. 419, L. C.

*Annotations*:—*Distd. Re Coleman, Henry v. Strong* (1888), 39 Ch. D. 443. *Reid. Watkins v. Watkins*, [1896] P. 222; *Re Fitzgerald, Surman v. Fitzgerald*, [1903] 1 Ch. 933; *Re Evans, Public Trustee v. Evans*, [1920] 2 Ch. 304.

354. ———. ———.]—*WILLIAMS v. PAPWORTH*, No. 351, *ante*.

355. Gift by father of illegitimate child—Settled on husband of mother—Proviso for cesser if child not maintained—Annuity continues after death of child.—The reputed father of an illegitimate child executed a deed upon the marriage of the mother, by which he granted to a trustee an annuity of £26 per annum, to be paid to the husband for his life, & then to the child for her life; with a proviso, that if the husband did not provide proper maintenance & education for the child, the annuity was to be no longer payable to him, but was to be applied for the benefit of the child. The child died in the lifetime of the husband:—*Held*: the annuity did not cease on the death of the child.—*DODD v. CARY* (1843), 13 L. J. Ch. 103; 2 L. T. O. S. 245, L. C.

Gift to mother—During joint lives of mother & children—Death of child in lifetime of mother.—*See BONDS*, Vol. VII., p. 188, No. 280.

(c) *Duration Fixed by Reference to Marriage or Co-Habitation.*

356. Annuity in marriage articles—Duration depends on general tenor of articles.—*DEATH v. DENNIS* (1687), 1 Lut. 459; 125 E. R. 241.

357. Gift to husband & wife—"To daughter or her husband"—Continuation for joint lives—& to survivor for life.—*HOOK v. SWAIN* (1663), 1 Keb. 555; 1 Lev. 102; 1 Sid. 151; 83 E. R. 1110.

358. ——— "During their two lives"—Cesser on death of either.—A bond to pay an annuity to a man & his wife during their two lives becomes extinct on the death of either of them.—*SLATER v. CAREW* (1674), 1 Mod. Rep. 187; 86 E. R. 818.

359. ——— "Live together"—Construction.—*GATLAND v. CHATFIELD* (1699), 1 Lut. 555; 125 E. R. 292.

360. Voluntary covenant—Covenant not carried beyond express limitation.—A. possessed of an Exchequer annuity for ninety-six years by marriage arts. covenants to pay it to the wife . . . then to the survivor of husband & wife for life . . . & after to the children of the marriage, & if no child, then to be for the benefit of A. Husband & wife die leaving a child who soon after dies.

A ct. of equity must not carry the covenant, being a free gift, beyond the letter (*per* Cur.).—*BASSE v. GREY* (1715), Gilb. Ch. 97; 2 Vern. 692; 1 Eq. Cas. Abr. 363; 23 E. R. 1049.

361. Gift to widow—During widowhood.—*SCOTT v. TYLER* (1788), 2 Bro. C. C. 431; 2 Dick. 712; 29 E. R. 241.

*Annotations*:—*Consd. Newton v. Marsden* (1862), 2 John. & H. 356. *Reid. Stackpole v. Beaumont* (1796), 3 Ves. 89; *Lloyd v. Branton* (1817), 3 Mer. 108; *Morley v. Rennoldson*, *Morley v. Linkson* (1843), 2 Har. 570; *Graham v. Drummond*, [1896] 1 Ch. 968; *Re Nourse, Hampton v. Nourse*, [1899] 1 Ch. 63; *Re Hewitt, Eldridge v. Iles*, [1918] 1 Ch. 458. *Mentd. Pearce v. Loman* (1796), 3 Ves. 135; *Hill v. Simpson* (1802), 7 Ves. 152; *M'Leod v. Drummond* (1810), 17 Ves. 152; *Clarke v. Parker* (1812),

19 Ves. 1; *Wilson v. Moore* (1831), 1 My. & K. 337; *Godfrey v. Hughes* (1847), 5 Notes of Cases, 499; *Vane v. Igden* (1870), 5 Ch. App. 663; *Bellairs v. Bellairs* (1874), L. R. 18 Eq. 510; *Re Whiting's Settlement*, *Whiting v. De Ruitzen*, [1905] 1 Ch. 96; *Re Chaplin & Staffordshire Potteries Waterworks Co.'s Contract*, [1922] 2 Ch. 824; *Re Kennal & Still's Contract*, [1923] 1 Ch. 293.

362. Gift to single woman—Condition subsequent—Marriage with consent of trustees.—A mother by her will says, that if her daughter marry with the consent of trustees, or the major part of them, & signified in writing, before such marriage had, then I give to her, & not otherwise, £800 & directed M. to pay her £30 yearly whilst she continued sole, by £15 each May Day, & All Saints Day, & charged all her real estate with debts of all kinds & legacies. The daughter after the death of the mother married pltf. without the consent of the trustees, & died soon after, but before her death the trustees declared their consent & approbation in writing. Lord Chancellor directed pltf. should be paid the arrears of the £30 *pro rata* till the marriage; & in case the personal estate should be exhausted by payment of debts, so much of the real estate to be sold as will pay the £800 & arrears of the annuity.

In our law, where the condition is precedent, the legatary takes nothing till the condition is performed, & consequently has no right to come & demand the legacy; but it is otherwise where the condition is subsequent, for in that case the legatary has a right, & the ct. will decree him the legacy; but this difference only holds where the legacy is a charge on the real assets, & therefore, if this had been merely a personal legacy, should have been of opinion that as the marriage without consent would not have precluded M. of her right to this legacy in the Ecclesiastical Ct., no more would it have done so here (*LORD HARDWICKE, C.*).—*REYNISH v. MARTIN* (1746), 3 Atk. 330; 26 E. R. 991, L. C.; *sub nom. RHENISH v. MARTIN*, 1 Wils. 130.

*Annotations*:—*Apld. Re Berens* (1888), 4 T. L. R. 473. *Consd. Re Nourse, Hampton v. Nourse*, [1899] 1 Ch. 63. *Reid. Re Moore, Trafford v. Maconochie* (1888), 39 Ch. D. 116. *Mentd. Pearce v. Loman* (1796), 3 Ves. 135; *Sheppard v. Wilson* (1845), 4 Har. 392.

363. ——— Reduction on marriage.—A covenant to pay to E. during her life, subject to the proviso thereafter contained, an annuity of £40; the proviso being, that in case E. should at any time thereafter happen to marry, the annuity should thenceforth be reduced to £20 only, which sum should in such case be paid & payable to E. from the time of her marriage for the remainder of her life:—*Held*: to be, in effect, a covenant to pay an annuity of £40 until marriage, & afterwards an annuity of £20 only: the proviso for reducing the annuity being part of the original gift itself, & not operating as a condition subsequent so as to be void as in restraint of marriage.—*WEBB v. GRACE, Ex p. ELBOROUGH* (1848), 2 Ph. 701; 18 L. J. Ch. 13; 12 Jur. 987; 41 E. R. 1114, L. C.

*Annotations*:—*Consd. Corbett v. Corbett* (1888), 14 P. D. 7. *Apld. Re Hewitt, Eldridge v. Iles*, [1918] 1 Ch. 458. *Reid. Re Moore, Trafford v. Maconochie* (1888), 39 Ch. D. 116. *Mentd. Re Machu* (1882), 21 Ch. D. 838; *Re Dugdale, Dugdale v. Dugdale* (1888), 38 Ch. D. 176.

364. ———.]—Testator gave to an unmarried woman with whom he cohabited an annuity of £500 for life without any condition as to marriage. By codicil made in anticipation of the birth of a son, subsequently born, he revoked that

the annuity notwithstanding her marriage, can be inferred from the terms of the bequest.—*WEST v. KERR* (1853), 23 L. T. O. S. 24.—*IR.*

*R.* ——— Increase conditional on birth of child to testator.—*BATEMAN v. BATEMAN* (1870), 17 Gr. 227.—*CAN.*

*GUNN* (DECEASED) (1912), 32 N. Z. L. R. 153.—*N.Z.*

PART IV. SECT. 1, SUB-SECT. 2.—*B. (e).*

361 i. Gift to widow—During widow-

hood.—A bequest of an annuity to a widow, "so long as she shall continue single & unmarried" will fail if the widow marry in testator's lifetime, though with his knowledge, unless some general intent in the mind of the testator, that the widow should have

*Secl. 1.—Commencement and duration of rentcharges and annuities: Sub-sect. 2, B. (e) & (f), & C*  
*Secl. 2: Sub-sect. 1.]*

annuity & gave her an annuity of £1,200 for life, & declared that if she should marry after his death she should be paid an annuity of £800 in lieu of the £1,200 & directed his trustees after her marriage to apply a sum of £400 a year or part thereof for the maintenance & advancement of his son till twenty-one, & on his attaining twenty-one to pay him any accumulated balance & thereafter to pay him an annuity of £400 till her death. He devised his real estate for the benefit of his son & charged all his estate with payment of the annuities. By a codicil made after the birth of the son he repeated the provisions of the earlier codicil:—*Held*: the effect of the gift was an annuity of £1,200 only until marriage with a gift over of £400 of it on marriage & residuary annuity of £800 for life.—*Re HEWETT, ELDRIDGE v. LIES*, [1918] 1 Ch. 458; 87 L. J. Ch. 209; 118 L. T. 524.

*Annotation:—Mentd. Re Wilkinson, Page v. Public Trustee*, [1926] Ch. 842.

**365. — Cesser on marriage.]—**A bequest of an annuity to a single woman during the term of her natural life, “if she shall so long remain sole & unmarried”:—*Held*: to be a limitation as distinguished from a condition, & the annuity ceased upon the marriage of the legatee.

It must be agreed on all hands that by the English law, it is competent for a man to give to a single woman an annuity until she shall die or be married, whichever of these two events shall first happen (*KNIGHT BRUCE, L.J.*).—*LEATH v. LEWIS* (1853), 3 De G. M. & G. 954; 1 Eq. Rep. 55; 22 L. J. Ch. 721; 21 L. T. O. S. 135; 17 Jur. 443; 1 W. R. 314; 43 E. R. 374, L. J.

*Annotations:—Reid. Jones v. Jones* (1876), 24 W. R. 274; *Re Moore, Trafford v. Maconochie* (1888), 39 Ch. D. 116. *Mentd. Evans v. Rosser* (1864), 2 Hem. & M. 190.

**366. Gift to married woman—Condition to live apart.]—**Bequest of an allowance to a *feme covert* on condition she lived apart from her husband, held the condition *contra bonos mores* & void.—*BROWN v. PECK* (1758), 1 Eden, 140; 28 E. R. 637.

*Annotations:—Consd. Cartwright v. Cartwright* (1853), 3 De G. M. & G. 982; *Beun v. Griffiths* (1855), 1 Jur. N. S. 1045; *Re Moore, Trafford v. Maconochie* (1888), 39 Ch. D. 116. *Reid. Powys v. Mansfield* (1836), 6 Sim. 528; *Davys v. Boucher* (1839), 3 Y. & C. Ex. 397; *Yonge v. Furze* (1857), 3 Jur. N. S. 603; *Re Lovell, Sparks v. Southall*, [1920] 1 Ch. 122.

**367. —.]—**Testator bequeathed an annuity to his daughter, a married woman, “in case she shall be living apart from her husband, & should continue so to do,” during the lifetime of his widow, with a direction, that if at any time the annuitant should cohabit with her husband, the annuity should cease. By the same will he bequeathed a share in the residue, upon trust to pay the income to the same daughter during such time as she should continue to live apart from her said husband; but should she at any time cohabit with him, testator directed that during such time the income should be paid between other legatees. The will also contained a trust for children of the daughter by any other husband. At the date of the will the daughter & her husband were living apart, but before & at the date of testator's death, they were reconciled, & living together, & so continued to live:—*Held*: the daughter was entitled to the bequests.—*WREN v. BRADLEY* (1848), 2

De G. & Sm. 49; 17 L. J. Ch. 172; 10 L. T. O. S. 438; 12 Jur. 168; 64 E. R. 23.

*Annotations:—Distd. Re Moore, Trafford v. Maconochie* (1888), 39 Ch. D. 116. *Reid. Yonge v. Furze* (1857), 3 Jur. N. S. 603.

**368. —.]—**Testator directed his trustee to pay to his sister M. “during such time as she may live apart from her husband, before my son attains the age of twenty-one years, the sum of £2 10s. per week for her maintenance whilst so living apart from her husband.” M. & her husband were married some years before the date of the will, & never lived apart till some time after the death of testator. Testator's son was living & an infant:—*Held*: the bequest to M. was not to be construed as a gift to her during the joint lives of herself & her husband until the son attained twenty-one, upon a condition, which might have been rejected as against the policy of the law, that she & her husband should not live together, but as a limited gift of weekly payments to be made during a period the commencement & duration of which were fixed in a way which the law does not allow, & the gift was void.

Testator did not like the husband, & his apparent object was to induce the wife to live separate from him. If so, the gift was for a purpose which is contrary to the law of England, for that law does not allow provisions made in contemplation of a future separation between husband & wife. According to English law if a condition subsequent which is to defeat an estate, is against the policy of the law, the gift is absolute, but if the illegal condition is precedent there is no gift (*COTTON, L.J.*).—*Re MOORE, TRAFFORD v. MACHONCHIE* (1888), 39 Ch. D. 116; 57 L. J. Ch. 936; 59 L. T. 681; 37 W. R. 83; 4 T. L. R. 591, C. A.

*Annotations:—Consd. Corbett v. Corbett* (1888), 14 P. D. 7; *Re Hope Johnstone, Hope Johnstone v. Hope Johnstone*, [1904] 1 Ch. 470; *Re Wagstaff, Wagstaff v. Jalland*, [1907] 2 Ch. 35. *Distd. Re Charleton, Bracey v. Sherwin* (1911), 55 Sol. Jo. 339. *Reid. Re Wilkinson, Page v. Public Trustee*, [1926] Ch. 842.

—.]—*See, generally, HUSBAND & WIFE*, Vol. XXVII., pp. 82, 83, 222, 223, Nos. 646–649, 1929–1941.

**369. Annuity to woman for her separate use & free from anticipation—Marriage of covenantor & annuitant—Suspension of annuity.]—**A man by deed covenants to pay a woman an annuity for her life, payable half-yearly, for her separate use, & free from anticipation. The covenantor afterwards marries the annuitant, & dies leaving her surviving:—*Held*: the annuity is not extinguished, but only suspended by the marriage, & the widow is entitled to recover arrears accrued subsequent to the death of her husband.—*FITZGERALD v. FITZGERALD* (1868), L. R. 2 P. C. 83; 5 Moo. P. C. C. N. S. 180; 37 L. J. P. C. 44; 16 E. R. 481, P. C.

*Annotation:—Reid. Re Price, Price v. Price* (1879), 11 Ch. D. 163.

**Promise on marriage of daughter.]—***See Nos 371, 372, post.*

**Gift to wife after death of husband.]—***See BONDS*, Vol. VII., p. 188, No. 281.

**Construction of wills.]—***See WILLS.*

(f) Other Cases.

**370. Gift for twenty-one years if grantors or survivor so long live—Death of beneficiaries during term—Whether administrator entitled to annuity for remainder of term.]—**A. & B. by deed, reciting that

**365i. Gift to single woman—Cesser on marriage.]—***Re NEWCOMEN* (1865), 16 I. Ch. R. 315.—*IR.*

**365ii. —.]—***Re M'LOUGHLIN'S*

ESTATE (1878), 1 L. R. Ir. 421.—*IR.*

*t. — Or death.]—WATSON v. POWELL* (1863), 14 I. Ch. R. 38.—*IR.*

*limitation or condition subsequent.]—Re KING'S TRUSTS* (1892), 29 L. R. Ir. 401.—*IR.*



C. had left them estates in strict settlement, with remainder over on failure of issue male, to D., out of their regard to D., & considering that C. had made no other provision for him, agreed with D., his exors. & administrators, to pay him an annuity for twenty-one years, if A. & B., or the survivor of them should so long live; & in case of the death of D. within the term, to his child or children, if any, in such proportions as D. should appoint, or in default of appointment, to all of them equally; & if there should be no child, to his then wife, so long as she should remain a widow. D. covenanted with A. & B., their exors., etc., that in case he or his heirs should come into possession of the said estates under the will of C., then that he, D., his heirs, exors., or administrators, should pay to the exors. or administrators of A. & B., or the survivors of them, all sums of money received by him, his children, or wife, for & on account of the annuity. D., his wife & child, died within the term, & it was held that the deed did not operate as the grant of an annuity for the term of twenty-one years absolutely, but that it was determinable by the death of the grantee, his children & wife, & therefore that D.'s administrator was not entitled to claim payment of the annuity.—*BARFORD v. STUCKEY* (1824), 3 B. & C. 308; 5 Dow. & Ry. K. B. 118; 3 L. J. O. S. K. B. 1; 107 E. R. 748.

**371. Promise on marriage of child—Joint lives of grantor & child.]—***Re CURTIS, Ex p. ANNANDALE* (1834), 2 Mont. & A. 19; 4 Deac. & Ch. 511, Ct. of R.

*Annotations:—Folld. Re Lindrea, Lindrea v. Fletcher* (1913), 109 L. T. 623. *Refd. Mudge v. Rowan* (1868), L. R. 3 Exch. 85.

**372. ———.]—**Where a father, on the day before his daughter's marriage, wrote to her intended husband & said "My dear B., when you marry my daughter I. I agree to give £150 a year, & I hope a bit more," & the marriage took place & the £150 *per annum* was paid:—*Held*: such a document was sufficient to satisfy Stat. Frauds, but was only a contract on the part of the father to pay to the daughter an allowance of £150 a year during the joint lives of the father & the daughter.—*Re LINDREA, LINDREA v. FLETCHER* (1913), 109 L. T. 623; 58 Sol. Jo. 47.

**Annuities until remarriage or death of cestui que vie.]—***See Nos. 339–341, ante.*

#### C. Forfeiture and Extinction.

*See Part VII., post.*

### SECT. 2.—RIGHTS AS TO PROPERTY CHARGED—CAPITAL OR INCOME.

#### SUB-SECT. 1.—SIMPLE GIFT FOLLOWED BY RESIDUARY GIFT.

**373. Charge on corpus.]—**An annuity devised & charged on that part of testator's estate which should remain unsold after debts, etc., paid: The lands were sold, & some of the purchase-money remained after the debts, etc., were paid: decreed that the surplus purchase-money, & the rents of what is unsold, shall both be applied to discharge this annuity.—*COLEMAN v. COLEMAN* (1680), Cas. temp. Finch, 459; 23 E. R. 249, L. C.

**374. ———.]—**Testator gives to his wife an annuity of £100 & the sum of £1,000, which he considers will, with the property which she

is entitled to after his death, make up to her an income of £2,500 a year; in fact those gifts, make up her income only to £1,800 a year; she is entitled to have the deficiency supplied out of his residuary estate.—*TREVOR v. TREVOR* (1828), 5 Russ. 24; 6 L. J. O. S. Ch. 182; 38 E. R. 936.

*Annotations:—Mentd. Fowler v. Cohen* (1856), 4 W. R. 412; *Gummoe v. Howes* (1856), 3 Jur. N. S. 176.

**375. ———.]—**A sum of money, in the 5 per cents., set apart to answer an annuity, was reduced to 3½ per cents., & the dividends having become insufficient to pay the annuity, the ct. made a prospective order for the sale, from time to time, of a sufficient part of the capital to meet the accruing payments of the annuity.—*SWALLOW v. SWALLOW* (1831), 1 Beav. 432, n.; 48 E. R. 1008. *Annotation:—Folld. Hodge v. Lowin* (1839), 1 Beav. 431.

**376. ———.]—***STAMPER v. PICKERING*, No. 284, *ante*.

**377. ———.]—**The dividends of a sum in ct. being insufficient for the payment of an annuity charged upon it, a prospective order was made, for the sale, from time to time, of so much of the corpus as would, together with the dividends, be necessary for raising the amount of the annuity.—*HODGE v. LEWIN* (1839), 1 Beav. 431; 48 E. R. 1007.

**378. ———.]—***TAYLOR v. TAYLOR*, No. 538, *post*.

**379. ———.]—***WROUGHTON v. COLQUHOUN*, No. 540, *post*.

**380. ———.]—**Where there is a clear gift by will of a life interest & the reversion, & the estate proves insufficient, the tenant for life & reversioner must proportionately bear the loss. *Semble*: where there is a gift of an annuity & of the residue, the annuity must be paid in full to the extent of the property.—*CROLY v. WELD* (1853), 3 De G. M. & G. 993; 1 Eq. Rep. 131; 22 L. J. Ch. 916; 43 E. R. 389, L. J.

**381. ———.]—**Testator, after bequeathing two pecuniary legacies, bequeathed three "clear" annuities for the lives of the annuitants. He then bequeathed his residuary estate in trust to pay a clear annuity of £1,000 to his widow, & upon trust, after payment of the four annuities, to pay the residue of the income during the life of the widow to A. The capital of the residue, after the widow's death, was to be held as to £5,000, upon such trusts as the widow should appoint, & subject to her appointment the £5,000 was to be held in trust for B. for life, & after her death to fall into the general residue; & subject to such disposition as aforesaid, & as to the residue of testator's estate & effects after the widow's death, & subject as to the £5,000 & the interest thereof as aforesaid, upon trust to pay certain legacies amounting to £18,000, with an ultimate residuary gift to E.; & there was a direction that, upon the death of the several annuitants, the funds on which the annuities were secured should follow the ultimate destination of the residue:—*Held*: (1) the two first mentioned pecuniary legacies & three annuities had priority over every other gift; (2) the annuities were charged on the capital of the residue, but A. was entitled to retain the surplus income paid to her in one year, & to receive the surplus for another, although the income was in the subsequent years insufficient to answer the annuities; (3) on the death of an annuitant in the lifetime of the widow the ultimate residuary legatee did not become at once entitled to the fund set apart to answer the annuity; (4) after the widow's death the £5,000,

#### PART IV. SECT. 2, SUB-SECT. 1.

**3731. ———.]—***COATS' TRUSTEES v. COATS* (1903), 5 F. (Ct. of Sess.) 401; 40 Sc. L. R. 330; 10 S. L. T.

**Sect. 2.—Rights as to property charged—Capital or income: Sub-sects. 1 & 2, A.]**

would have no priority over the other reversionary legacies; (6) the reversionary legatees were not entitled to have any surplus income during the widow's life set apart to secure payment of their legacies.—*HAYNES v. HAYNES* (1853), 3 De G. M. & G. 590; 43 E. R. 232, L. J. J.

**Annotations:—Generally, *Mentd.*** *Wilks v. Groom* (1856), 27 L. T. O. S. 270; *Banks v. Braithwaite* (1862), 32 L. J. Ch. 35; *Re Coles' Will* (1869), L. R. 8 Eq. 271; *Re Currie, Bjorkman v. Kimberley* (1888), 57 L. J. Ch. 743; *Re Saunders, Saunders v. Gore*, [1898] 1 Ch. 17.

**382. —[—A devise of real estate charged with a gross or annual sum simply operates as a charge on the corpus, & not on the rents.—***THORNBER v. WILSON* (1858), as reported in 28 L. J. Ch. 145; 32 L. T. O. S. 115; 7 W. R. 24.

**Annotations:—*Mentd.*** *Re Delany, Conoley v. Quick*, [1902] 2 Ch. 642; *Re Garrard, Gordon v. Craigie*, [1907] 1 Ch. 382; *Re Davidson, Minty v. Bourne*, [1909] 1 Ch. 567.

**383. —[—Life annuity bequeathed by will held payable out of the corpus of the estate.—***HOWARTH v. ROTHWELL* (1862), 30 Beav. 516; 31 L. J. Ch. 449; 8 Jur. N. S. 69; 10 W. R. 263; 51 E. R. 989.

**384. —[—Testator gave an annuity to his wife of £1,000, & other annuities to other persons, to be paid out of the income arising from certain shares & a plantation in the Island of Ceylon. There was also a trust to invest the residue of the yearly income arising from his shares & other his real & personal estate, & to invest the surplus for the benefit of all his children, to be transferred & paid as therein directed, but subject nevertheless & charged & chargeable with the payment of the annuities thereinbefore directed to be paid:—*Held*: the annuity to the wife & the other annuities were charges on the corpus of testator's estate.—***POTTS v. SMITH* (1868), 18 L. T. 207.

**385. —[—*Re GRANT, WALKER v. MARTINEAU*, No. 633, *post*.**

**386. —[—Testator bequeathed a pecuniary legacy & a life annuity to his widow, & gave all his real & personal estate to trustees, upon trust, subject to the payment of the legacy & annuity, to pay the rents & income to his daughter for life, & he directed that, after her death, the estate should be held in trust for his grandchild. He empowered his trustees to continue his business of a brick manufacturer, & to increase or diminish the real or personal estate employed therein at his death:—*Held*: the annuity was a first charge upon the corpus of the real & personal estate.—***Re WEBB, LEEDHAM v. PATCHETT* (1890), 63 L. T. 545.

**387. —[—*Re TUCKER, TUCKER v. TUCKER*, No. 920, *post*.**

**388. Fund set aside by trustees—Subsequent diminution of income.]—An investment at Calcutta in the co.'s bonds, for securing an annuity for life, under a will, does not discharge testator's estate, if the co. lower their interest.—***GORDON v. BOWDEN* (1822), 6 Madd. 342; 56 E. R. 1121.

**389. —[—Testator gave the yearly sum of £2,000 sterling to his wife for her life, & after her decease, to his trustees, upon the same trusts as after declared concerning the yearly sum of £3,000. He then gave to his trustees the yearly sum of £3,000 sterling to issue out of a sufficient sum of stock in the 5 per cents., to be invested in the names of his trustees for that purpose, in trust for his daughter for life, & after her decease, for her children. The trustees invested £100,000 5 per cents., to answer the two years sums. The stock was afterwards converted into 4 per cents., whereby the dividends became**

insufficient to pay the yearly sums:—*Held*: the legatees were not entitled to have the deficiency supplied out of testator's residuary estate.—*KENDALL v. RUSSELL* (1830), 3 Sim. 424; 8 L. J. O. S. Ch. 108; 57 E. R. 1057.

**390. —[—Testator bequeathed an annuity to his wife for life, & his residuary estate to his children. The exors. set apart a fund to answer the annuity. Some of the children settled their shares in this fund, by specific description, & they afterwards incumbered the shares in the other residuary estate. By the reduction of the interest of the fund set apart, the capital of it was resorted to for payment of the annuity:—*Held*: the persons claiming under the settlements were not entitled, as against the incumbrancers of the residue, to have the annuity fund made good out of the residuary estate.—***WEDDERBURN v. WEDDERBURN* (1858), 25 Beav. 113; 53 E. R. 579.

**391. Fund set aside by order of court—Subsequent diminution of income.]—Testator having directed an annuity to be paid out of his personal estate, a sum of 5 per cent. stock was, in the course of the cause, ordered to be set apart to answer the annuity. This fund having become insufficient for the purpose, by the conversion of the 5 per cents. into 4 per cents., the deficiency was directed to be supplied out of another fund, to which other persons interested in the residue had been declared to be entitled.—***DAVIES v. WATTIER* (1823), 1 Sim. & St. 463; 57 E. R. 184.

**Annotations:—*Consd.*** *Kendall v. Russell* (1830), 3 Sim. 424. ***Refd.*** *Arundell v. Arundell* (1833), *Coop. temp. Brough*. 139; *Innes v. Mitchell* (1846), 1 Ph. 710; *Stelfox v. Sugden* (1859), *John*. 234.

**392. —[—Where an annuity is payable out of the clear residuary estate of testator the ct. has jurisdiction to set apart a sufficient sum to answer the annuity; & to pay the remainder of the residue to the residuary legatees. This jurisdiction will be exercised in a proper case notwithstanding the opposition of the annuitant. The annuitant has nevertheless the right to resort if it becomes necessary, to the corpus of the fund set apart.—***HARBIN v. MASTERMAN*, [1896] 1 Ch. 351; 65 L. J. Ch. 195; 73 L. T. 591; 44 W. R. 421; 12 T. L. R. 105; 40 Sol. Jo. 129, C. A.

**Annotations:—*Apld.*** *Re Earle, Tucker v. Donne* (1923), 131 L. T. 383. ***Refd.*** *Re Evans & Bettell's Contract*, [1910] 2 Ch. 438.

**393. Subsequent direction by testator to set apart fund.]—Testator gave an annuity of £250 to his widow, & directed that a competent part of his money should be invested, to the intent that the widow might receive the annuity "out of the interest, dividends, proceeds, & produce" thereof; & he gave the moneys to secure, but subject to, the annuity, & his residuary personal estate to plffs.:—*Held*: the annuity was a charge on the capital; & the assets being deficient, the exors. had properly paid the annuity out of the capital.—***MINER v. BALDWIN* (1853), 1 Sm. & G. 522; 17 Jur. 823; 65 E. R. 229.

**Whether deficiency payable out of corpus.]—***See Part V., Sect. 3, sub-sect. 2 A., post.*

**394. —[—Testator by his will gave a life annuity which he directed to be issuing out of his real estate until a nephew attained twenty-one, & thenceforth out of his personal estate. He directed the real estate to be sold by trustees, who were also exors. of the will, on the nephew attaining twenty-one, & the proceeds to be held upon the trusts thereafter declared. He also directed the trustees to sell his personal estate & out of the proceeds to pay his debts, funeral & testamentary expenses & legacies, & to invest the residue, with**

the surplus rents & profits of the real estate until it was sold, & the proceeds of it after the sale, & stand possessed of the investments upon trust to set apart thereout a fund for payment of the annuity, & on its determination to apply the fund, set apart to answer it, in the same manner as was therein directed with respect to the residue of the personal estate, & he gave the residue of the trust fund to his nephew. An insufficient fund was set apart to answer the annuity, of which there were consequently arrears at the annuitant's death:—*Held*: (1) the legacies were payable out of the proceeds of the real as well as of the personal estate; (2) the annuity was also payable out of the mixed fund; (3) the arrears of it were payable out of the fund set apart to answer it.—*BRIGHT v. LARCHER* (1858), 3 De G. & J. 148; 44 E. R. 1225, L. J. J.; *subsequent proceedings* (1859), 4 De G. & J. 608, L. J. J.

*Annotations*:—As to (2) *Apld.* *Perkins v. Cooke* (1862), 2 John. & H. 393. *Follid.* *Brayne v. Rees* (1866), 15 W. R. 195. *Generally, Refd.* *Fild v. Pockett* (No. 1) (1861), 29 Beav. 568; *Gee v. Mahood* (1878), 47 L. J. Ch. 641.

395. —.]—Where an annuity is, by will, expressly charged on the corpus of an estate, subsequent words tending to show that testator contemplated that it should abate in the event of the income of the property being insufficient:—*Held*: not to deprive the annuitant of the right to have the corpus applied towards making good any deficiency of income to meet the annuity.—*PEARSON v. HELLIWELL* (1874), L. R. 18 Eq. 411; 31 L. T. 159; 22 W. R. 839.

396. —.]—*Re MASON, MASON v. ROBINSON*, No. 406, *post*.

397. —.]—Where there is in a will an absolute gift of an annuity, the fact that this is followed by a direction to set apart a fund to answer the annuity out of the income thereof does not exonerate the capital of the estate from the liability to have the amount necessary for payment of the annuity made up thereout from time to time in case of insufficiency of income.—*Re TAYLOR, ILLSLEY v. RANDALL* (1884), 53 L. J. Ch. 1161; 50 L. T. 717; 33 W. R. 13.

#### SUB-SECT. 2.—DIRECTION TO TRUSTEES OF GENERAL ESTATE.

##### A. To Pay Annuity out of Income.

398. *Charge on corpus.*—Annuities given by a will out of the interest, dividends, or proceeds of testator's estate:—*Held*: to be chargeable upon the corpus.—*EMERY v. BOND* (1851), 17 L. T. O. S. 275.

399. —.]—Testator was in 1792 possessed of freehold lands, & of an equitable fee in a copyhold estate. He made a will, by which he subjected the whole of his real estate in aid of his personality, to the payment of his debts, & subject thereto, he gave all his "messuages, tenements, lands, hereditaments, & premises, with the buildings, mines, etc.," thereon & therein, over which he had a disposing power, to trustees, for five hundred years, out of the rents, etc., or by assignment, etc., of the term, to raise money to pay his debts, legacies, & after payment thereof, to apply the rents, etc., or the remainder of the estate, to the use of his grandson C., on his attaining twenty-

three, & to raise £1,000 to pay to his other grandson R., on his attaining twenty-three, & in order that these two grandsons might be properly educated, testator directed that the sum of £200, until C. should attain twenty-three & £100 afterwards, & till R. should attain twenty-three, should be raised for that purpose. By the custom of the manor the copyholds which testator possessed would descend to his customary heir or heirs, the tenure being gavelkind. Testator had not made any surrender of them to the use of the will. When he died in 1799, his only daughter, the mother of C. & R., was his customary heir, & on her death, they became her customary heirs. The annuities created for the maintenance of the grandsons had fallen into arrear:—*Held*: (1) they were charged on the real estate itself, & not merely on the annual rents & profits; (2) the annuities did not carry interest.—*TORRE v. BROWNE* (1855), 5 H. L. Cas. 555; 24 L. J. Ch. 757; 26 L. T. O. S. 129; 10 E. R. 1017, H. L.; *affg.* S. C. *sub nom.* *DAVIS v. BROWNE* (1851), 14 Beav. 127.

*Annotations*:—As to (2) *Consd.* *Booth v. Coulton* (1861), 2 Giff. 514. *Apld.* *Edwards v. Warden* (1876), 1 App. Cas. 281; *Wheatley v. Davies* (1876), 35 L. T. 306; *Re Hiscoc, Hiscoc v. Walto* (1902), 71 L. J. Ch. 347.

400. —.]—Testator by his will gave to a daughter on her marriage a sum of stock producing an income of £210, & further out of his general dividends the sum of about £190 annually, making in all £400 *per annum*. He also referred to the settlements of two married daughters, & directed that the income of the property settled upon them by him at their respective marriages should be increased out of the same general dividends to £400 annually to each:—*Held*: the provision amounted to a gift of corpus, & the trustees of the respective settlements were entitled to receive as corpus, out of testator's estate, sums sufficient, in each instance, to produce the supplementary income.—*ENGELHARDT v. ENGELHARDT* (1878), 26 W. R. 853.

401. — *Annuity & residuary bequest.*—Testator, after reciting that the income of his wife, in case she survived him, would consist, in part, of the rent of a leasehold estate, which he had settled on her, directed his trustees, in case the lease should expire in her lifetime, to pay to her, out of the dividends & interest arising from a sufficient part of his personal estate, at their discretion, so much *per annum* as would be an equivalent for the rent lost thereby; & he gave his residuary personal estate to the trustees, in trust to invest it in the usual securities, & to accumulate the income until the lease should expire in his wife's lifetime, & then, during the remainder of her life, to pay her the income of the accumulated fund, & after her death, to stand possessed of the capital for his grandchildren. The lease expired in the wife's lifetime; but the income of the residuary fund was not equivalent to the rent lost:—*Held*: the wife was entitled to have the deficiency of her income made good out of the capital of the residuary fund.—*BOYD v. BUCKLE* (1840), 10 Sim. 595; 59 E. R. 746.

*Annotations*:—*Distd.* *Miller v. Huddleston* (1851), 3 Mac. & G. 513. *Dbtd.* *Perkins v. Cooke* (1862), 2 John. & H. 393. *Consd.* *Harbin v. Masterman* (1895), 73 L. T. 591.

402. —.]—Testator, subject & charged with the payment of his annuities, devised his real

#### PART IV. SECT. 2, SUB-SECT. 2.—A.

398 i. *Charge on corpus.*—A bequest of annuities out of "the net income or proceeds" of property directed to be converted into money renders the corpus subject to the payment of said annuities if the income therefrom is

insufficient to pay the same, since the word "proceeds" included corpus unless it is clear that a more restricted meaning is intended.—*BEAL v. EASTERN TRUST CO.* (1914), 14 E. L. R. 432.—*CAN.*

398 ii. —.]—*BELL v. BELL* (1872),

6 I. R. Eq. 239.—*IR.*

398 iii. —.]—*Re WEST'S ESTATE*, [1898] 1 I. R. 75.—*IR.*

398 iv. —.]—*ADAMSON'S TRUSTEES v. ADAMSON'S EXECUTORS* (1891), 18 R. (Ct. of Sess.) 1133; 28 Sc. L. R. 869.—*SCOT.*

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estate to trustees, as to part for his wife for life, & then, in the first place, out of the rents, to pay the annuities, & subject to the life estate of his wife & the annuities to A. for life, etc.:—*Held*: the real estates were liable to be sold for payment of the arrears of the annuities.—*PICARD v. MITCHELL* (1851), 14 Beav. 103; 51 E. R. 225.

*Annotation*:—*Consd.* *Re Tucker, Tucker v. Tucker*, [1893] 2 Ch. 323.

**403.** *Residuary bequest subject to annuity.*—Leaseholds were bequeathed, upon trust, out of the rents & profits, to pay an annuity of £52 for the life of the annuitant, & “subject & without prejudice to the annuity,” were bequeathed upon other trusts, but without any trust for sale. They were purchased by a railway co. under the provisions of Lands Clauses Consolidation Act, 1845 (c. 18), & the proceeds paid into ct.; but the income was insufficient to keep down the annuity:—*Held*: portions of the corpus ought to be sold from time to time to satisfy the growing payments.—*Re LONDON, BRIGHTON & SOUTH COAST RY. CO., Ex p. WILKINSON* (1849), 3 De G. & Sm. 633; 19 L. J. Ch. 257; 14 L. T. O. S. 171; 14 Jur. 301; 64 E. R. 638.

*Annotations*:—*Apld.* *Re Howarth, Howarth v. Makinson*, [1909] 2 Ch. 19. *Refd.* *Re Boden, Boden v. Boden*, [1907] 1 Ch. 132.

**404.** —]—Testator directed his trustees out of the income of his residuary real & personal estate to pay an annuity of £200, & after the decease of the annuitant to permit the fund out of which the annuity should arise to fall into his general residuary personal estate, & the will contained gifts over of the residuary real & personal estate. The income of testator's estate being insufficient for payment of the annuity:—*Held*: the deficiency ought to be made good out of the corpus.—*PERKINS v. COOKE* (1862), 2 John. & H. 393; 31 L. J. Ch. 823; 8 Jur. N. S. 1150; 70 E. R. 1110.

*Annotation*:—*Refd.* *Birch v. Sherratt* (1867), 2 Ch. App. 644.

**405.** —]—Testator directed his trustees to convert & invest his property, “with & out of the interest, dividends, & annual proceeds thereof, levy & raise the annual sum of £100,” & pay it to his mother for life, “& from & after the payment of the annual sum of £100, & subject thereto,” he declared that the trustees should stand possessed of his trust moneys, stocks, funds, & securities, upon the trusts thereafter mentioned. The income of the whole estate being insufficient to pay the annuity:—*Held*: the deficiency must be paid out of the corpus.—*BIRCH v. SHERRATT* (1867), 2 Ch. App. 644; 36 L. J. Ch. 925; 17 L. T. 153; 16 W. R. 30, L. JJ.

*Annotations*:—*Distd.* *Michell v. Wilton* (1875), L. R. 20 Eq. 209. *Consd.* *Gee v. Mahood* (1878), 9 Ch. D. 151; *Re Tucker, Tucker v. Tucker*, [1893] 2 Ch. 323. *Distd.* *Re Boden, Boden v. Boden*, [1907] 1 Ch. 132. *Consd.* *Re Howarth, Howarth v. Makinson*, [1909] 1 Ch. 485; *Re Boulcott's Settlement, Wood v. Boulcott* (1911), 104 L. T. 205. *Apld.* *Re Watkins' Settlement, Wills v. Spence*, [1911] 1 Ch. 1. *Refd.* *Rawson v. McCausland* (1873), 22 W. R. 145; *Hambro v. Hambro* (1894), 63 L. J. Ch. 627; *Re Jordison, Raine v. Jordison*, [1922] 1 Ch. 440.

**406.** —]—Testator bequeathed his annuities to various persons, & then bequeathed his general personal estate to trustees, “upon trust out of the income thereof to pay & keep down” the annuities, & “subject thereto,” upon trusts for his son & daughters:—*Held*: the

annuities were chargeable on the corpus.—*Re MASON, MASON v. ROBINSON* (1878), 8 Ch. D. 411; 47 L. J. Ch. 660; 26 W. R. 734.

*Annotations*:—*Apld.* *Re Taylor, Illsley v. Randall* (1884), 53 L. J. Ch. 1161. *Consd.* *Re Tucker, Tucker v. Tucker*, [1893] 2 Ch. 323; *Re Howarth, Howarth v. Makinson*, [1909] 1 Ch. 485.

**407.** —]—Testator, by his will, gave his real & the residue of his personal estate to his brother upon trust for sale & conversion, & to hold the proceeds “upon trust to pay out of the income thereof the sums following, that is to say” one clear annuity to each of three depts. for her separate use without power of anticipation, & “subject to the aforesaid annuities” testator directed that the fund should be held upon trust for his brother absolutely.

The income had recently proved insufficient for the payment in full of the annuities:—*Held*: having regard to the terms of the gift over the annuities were a charge upon the corpus.—*Re HOWARTH, HOWARTH v. MAKINSON*, [1909] 2 Ch. 19; 78 L. J. Ch. 687; 100 L. T. 865; 53 Sol. Jo. 519, C. A.

*Annotations*:—*Distd.* *Re Boulcott's Settlement, Wood v. Boulcott* (1911), 104 L. T. 205. *Apld.* *Re Watkins' Settlement, Wills v. Spence*, [1911] 1 Ch. 1. *Foll.* *Re Young, Brown v. Hodgson*, [1912] 2 Ch. 479. *Refd.* *Re Jordison, Raine v. Jordison*, [1922] 1 Ch. 440.

**408.** —]—By a marriage settlement certain property was conveyed by the husband to trustees upon trust, after his death, out of the income of the trust premises to pay a clear annual sum of a given amount to his widow for life & “subject thereto” upon certain trusts over:—*Held*: the words “subject thereto” meant subject to the annuity, & consequently the annuity was a charge on the corpus.—*Re WATKINS' SETTLEMENT, WILLS v. SPENCE*, [1911] 1 Ch. 1; 80 L. J. Ch. 102; 103 L. T. 749; 55 Sol. Jo. 63, C. A.

**409.** —]—Testator gave his real & personal estate to trustees upon trust for sale & investment, & to hold the investments in trust out of the income thereof, to pay two annuities to the annuitants for their respective lives, & upon further trust to accumulate the residue of the income until the youngest child of J. should attain the age of twenty-one years, or until the expiration of twenty-one years from testator's death, whichever should first happen, & after the attainment of the age aforesaid by the youngest child of J. or the expiration of the term, which should first happen, testator directed his trustees to hold the trust fund, & accumulations, “subject nevertheless to the said annuities,” in trust for the children of J. then living & the children of any deceased children *per stirpes*. The will also empowered the trustees to apply the income of the share of a child or grandchild of J. in the trust fund, or the accumulations thereof, “subject to & after payment of the annuities,” for or towards the maintenance of the child or grandchild & “subject to providing for the annuities,” to raise a part of the expectant, presumptive or vested share of a child or grandchild in the trust fund & the accumulations, & to pay or apply the same for his benefit:—*Held*: notwithstanding the direction to accumulate the residue of the income the annuities were a charge upon the corpus.

*Qu.*: whether there is any difference between a charge on corpus & a continuing charge on income.—*Re YOUNG, BROWN v. HODGSON*, [1912] 2 Ch. 479; 81 L. J. Ch. 817; 107 L. T. 380.

*Annotation*:—*Refd.* *Re Turner, Klaffenberger v. Groombridge*, [1917] 1 Ch. 422.

**410. Charge on income.]—***PHILIPPS v. PHILIPPS*, No. 934, *post*.

**411. —.]—**By a trust deed the trustees were empowered, by sale or mtge. of the trust estates, to pay specified debts, & secondly, the mtges. on the trust estates, with a direction, "out of the rents or any other moneys held by them upon the trusts of the deed," to pay an annuity to A. until the mtges. should be paid off:—*Held*: upon the import of the whole instrument, "other moneys" had reference to those *ejusdem generis*, & the annuity was payable out of income only.—*CLIFFORD v. ARUNDELL* (1860), 1 De G. F. & J. 307; 45 E. R. 378, L. C.

**412. —.]—**Testator devised lands, with power of distress & entry, to trustees, upon trust to pay out of the rents & profits of the same an annuity to B. A suit was instituted to administer the estate, to which B. was made a party, who afterwards sold his annuity, with the arrears, to C. Upon C. filing his bill praying for payment of the annuity, & the arrears, by sale or mtge. of the estate:—*Held*: there was not a charge on the corpus of the estate.—*LAMBERT v. TURNER* (1862), as reported in 7 L. T. 521; 8 Jur. N. S. 1223; 11 W. R. 51.

**413. —.]—**Testator devised his real estate to trustees upon trust in the first place out of the rents, issues & profits to pay life annuities; "& subject to the trusts aforesaid" to pay the residue of the rents, issues & profits to his four grandsons for life, & as any of them died he devised his one-fourth of the real estates to their children in tail:—*Held*: the annuities were not charged on the corpus of the estate.—*SHEPPARD v. SHEPPARD* (1863), 32 Beav. 194; 55 E. R. 76.

**414. —.]—**An annuity given by will held not to be a charge on corpus, it appearing on the whole will that testator, when he made the gift of the annuity, was dealing with income only, of which he considered there would be a surplus, & that he had made a subsequent gift of the entire corpus.—*SALVIN v. WESTON* (1866), 35 L. J. Ch. 552; 12 Jur. N. S. 700; 14 W. R. 757.

**415. —.]—**Testator gave all his residuary real & personal estate to trustees upon trust for sale & conversion & investment, & to hold the same "In case I shall leave any child living at my decease then upon trust to pay to my wife during her life & so long as any child of mine shall be living such a sum out of the income of my residuary trust funds as with the income which my wife shall from time to time receive under or by virtue of the settlement made on our marriage shall make up the total annual income of £8,000. But in case I shall leave no child surviving me or leaving such, every such child shall die in the lifetime of my wife then upon trust to pay to her during her life such further sum as with the income to be derived from the settlement shall make up the annual sum of £10,000, & I direct that the annual sums of £8,000 or £10,000 as the case may be shall be deemed to commence & be payable as from my death & subject to the trusts aforesaid in trust to divide my residuary trust funds unto & equally between all & every my children" who shall attain twenty-one or marry. "But in case I shall leave no child surviving me who shall take a vested interest in my residuary trust funds then subject to the trusts aforesaid I give & bequeath the same to my nephew H." There was no child of the marriage, & the income of testator's resi-

duary estate was insufficient to pay the annuity:—*Held*: the direction to pay out of income, though expressed only in the case of the £8,000 annuity, applied also to the £10,000 annuity, & this direction charged the annuity only on income during the widow's life, & did not create either a charge on the corpus or a continuing charge on the income.—*Re BODEN, BODEN v. BODEN*, [1907] 1 Ch. 132; 76 L. J. Ch. 100; 95 L. T. 741, C. A.

*Annotations*:—*Consd. Re Howarth, Howarth v. Makinson*, [1909] 2 Ch. 19. *Foll. Re Boulcott's Settlt.*, Wood v. Boulcott (1911), 104 L. T. 205. *Consd. Re Young, Brown v. Hodgson*, [1912] 2 Ch. 479; *Re Rose, Rose v. Rose* (1915), 85 L. J. Ch. 22. *Reid. Re Bigge, Granville v. Moore*, [1907] 1 Ch. 714; *Re Watkins' Settlt.*, Willis v. Spence, [1911] 1 Ch. 1. *Mentd. Re Joseph, Pain v. Joseph*, [1908] 2 Ch. 507.

**416. —.]—**There is no rule of construction that a direction to pay an annuity out of the income of a residuary estate, without any words limiting the direction to current income, creates a continuing charge upon income. The intention to create such a charge must be found in the will.

B. by will gave her residuary estate to trustees upon trust to realise & invest, & out of the income thereof to pay certain annuities, & subject thereto to pay the income to T. for her life, & after her death to raise out of the capital thereof certain legacies & "subject to the trusts aforesaid," to hold the trust premises & the income thereof in trust for certain named persons in equal shares. The income of testatrix's estate was insufficient to pay the annuities in full:—*Held*: the annuities were not charged upon the corpus, & were not a continuing charge upon the income, but only on the current income, & must fail so far as the current income was insufficient to meet them.—*Re BIGGE, GRANVILLE v. MOORE*, [1907] 1 Ch. 714; 76 L. J. Ch. 413; 96 L. T. 903; 51 Sol. Jo. 410.

*Annotations*:—*Distd. Re Howarth, Howarth v. Makinson*, [1909] 1 Ch. 485. *Overd. Re Watkins' Settlt.*, Willis v. Spence, [1911] 1 Ch. 1. *Reid. Re Strict, Vivers v. Holman* (1922), 67 Sol. Jo. 79.

**417. —.]—**By a settlement settlor conveyed property, which was partly reversionary, to trustees, who were to pay, subject to his mother's life interest, the rents & other income to himself & his assigns during his life. It included a proviso that if settlor died leaving a widow surviving him the trustees should from & after the death of the tenant for life of the reversionary property & after settlor's death & until his widow should remarry, pay the annual income up to the amount of £100 *per annum* by equal half-yearly payments, such payments to commence at the expiration of six calendar months from the death or second marriage of settlor's mother & the death of settlor if his widow should be still alive & unmarried, & if she should marry again or die on any other day than one of the half-yearly days for payment then immediately after such death or marriage pay to such widow or her exors. so much of the annuity as shall be proportionate to the period which shall have elapsed of the then current year. The settlement then proceeded: "& it is hereby agreed & declared that subject to the trusts & provisions hereinbefore expressed the said trustees hereof shall stand seised & possessed of the premises hereinbefore expressed to be conveyed upon trust for such children of the settlor as should attain twenty-one years or marry in equal shares." There was no child of the marriage, & the income of the settlement funds was insufficient to keep down the annuity, & two questions were raised

**410 i. Charge on income.]—***BOWMAN v. BOWMAN*, [1912] S. R. Q. 260.—*AUS. b. — Annuity & residuary bequest—Both payable out of income.]—*

*MACHRAY v. HIGGINS* (1892), 8 Man. L. R. 29.—*CAN.*

c. — *Annuity payable out of*

*income of residue.]—**COUSINS v. MCILVRIDE* (1912), 31 N. Z. L. R. 1104.—*N.Z.*



**Sect. 2.—Rights as to property charged—Capital or income: Sub-sect. 2, A. & B.]**

by the summons: (a) was the annuity charged on corpus; & (b) if not, was there a continuing charge on the income?—*Held*: (1) the annuity was not charged on corpus; (2) it was in the contemplation of settlor that on the death of the widow there would be a reversion of the property, & the trustees should stand possessed of it, subject to the payment of the annuity during her life on a different set of trusts; on this point it was similar to *Re Boden, Boden v. Boden*, No. 415, *ante*, & therefore, the annuity did not create a continuing charge on the income. — *Re BOULCOTT'S SETTLEMENT*, *WOOD v. BOULCOTT* (1911), 104 L. T. 205; 55 Sol. Jo. 313.

**418. — Continuing charge.]**—Where certain annuities & an annual allowance were directed to be raised out of the annual rents & profits of an estate, & paid & applied for the uses of the daughters of testator, & the surplus of the rents & profits to be accumulated for twenty-one years, or until sums of £40,000 & £100,000 should be raised & invested, when the annuities & allowance should cease: it was held that the annuities & allowance were not charges on the corpus of the estate; but that the arrears of such annuities & allowance, which the rents & profits during the twenty-one years had been insufficient to pay, ought to be raised & paid out of the rents & profits accruing after the expiration of the twenty-one years.—*FORBES v. RICHARDSON* (1853), 11 Hare, 354; 21 L. T. O. S. 86; 1 W. R. 230; 68 E. R. 1312.

**419. — —.]**—Testator gave his real & personal estate to trustees in trust to pay his debts & legacies, & then out of the annual profits of the residue, to pay three life annuities, & "subject as aforesaid," to stand possessed of the residue, upon trust to apply the income for the benefit of G. for life, & after his death the testator gave the residue to P. The income of the residue proved insufficient to pay the three annuities in full, & the trustees paid them rateably till Nov. 1868, when one of the annuitants died with an arrear owing to him; the tenant for life being still living.—*Held*: the annuities were a continuing charge on the rents & profits, & the rents & profits since Nov. 1868, must be applied first in payment of the arrears of the three annuities *pari passu*, & then in payment of the two subsisting annuities.—*BOOTH v. COULTON* (1870), 5 Ch. App. 684; 39 L. J. Ch. 622; 18 W. R. 877, L. J.

*Annotations*:—*Consd.* *Re Mason, Mason v. Robinson* (1878), 8 Ch. D. 411; *Re Boden, Boden v. Boden*, [1907] 1 Ch. 132. *Fold.* *Re Howarth, Howarth v. Makinson*, [1909] 1 Ch. 485. *Apld.* *Re Boulcott's Settlement, Wood v. Boulcott* (1911), 104 L. T. 205. *Consd.* *Re Rose, Rose v. Rose* (1915), 85 L. J. Ch. 22. *Refd.* *A.-G. v. Glossop* (1906), 76 L. J. K. B. 199.

**420. — —.]**—Testator gave all the residue of his real & personal estate to trustees for a term of eleven years from his decease, upon trust to pay out of the rents, interest, dividends, & proceeds, certain life annuities; & he directed that the residue of the rents, etc., should, during the term, be accumulated for the benefit of the person who should become entitled to the residue of his personal estate at the expiration of the term; & after the determination of the term he devised his real estate, subject to & charged with the payment of the annuities for the residue of the lives, with powers of distress & entry for the recovery of the same, as if the same had been secured by a lease

for years, unto the trustees, in strict settlement:—*Held*: the arrears & the annuities were not charged upon the corpus, but upon the income, & must be paid out of the income & future income, so far as any might be required.—*TAYLOR v. TAYLOR, Re TAYLOR'S ESTATE ACT* (1874), L. R. 17 Eq. 324; 43 L. J. Ch. 314; 30 L. T. 49; 22 W. R. 349.

*Annotations*:—*Distd.* *Horton v. Hall* (1874), L. R. 17 Eq. 437. *Dbtd.* *Re Tucker, Tucker v. Tucker*, [1893] 2 Ch. 323; *Hambro v. Hambro*, [1894] 2 Ch. 564. *N.F. Re* Young, *Brown v. Hodgson*, [1912] 2 Ch. 479. I am bound to follow *Re Howarth*, [1909] 2 Ch. 19, & to treat *Taylor v. Taylor* as overruled by that case (*PARKER, J.*). *Refd.* *Kelsey v. Kelsey* (1874), 22 W. R. 433; *Pearson v. Helliwell* (1874), L. R. 18 Eq. 411.

**421. — —.]**—Testator devised his real estate & bequeathed his residuary personal estate on trust, in the first place, out of the rents & profits thereof to pay his widow the clear annual sum of £300 during her life, & to pay the remainder of such rents & profits to his sister during her life, & after her decease, as to the trust estate, in trust for all the children of his sister as tenants in common. The rents & profits were insufficient to pay in full the annuity to the widow:—*Held*: the widow was not entitled to a continuing charge upon the rents & profits after her own death until the arrears of her annuity should be satisfied, but only to the rents & profits during her life.—*WORMALD v. MUZEEN* (1881), 50 L. J. Ch. 776; 45 L. T. 115; 29 W. R. 795, C. A.

*Annotations*:—*Consd.* *Re Bigge, Granville v. Moore*, [1907] 1 Ch. 714. *Dbtd.* *Re Howarth, Howarth v. Makinson*, [1909] 1 Ch. 485.

**422. — —.]**—Testator gave an annuity to his widow, which he directed should be paid in full, & subject to that & other annuities he directed the income of his estate to be accumulated for the benefit of his children attaining twenty-three, the accumulations of income to be "subject to such payments thereof as aforesaid," & declared that no portion of capital or corpus should be made over to his children so as to prejudice or affect the due payment of the annual sums hereinbefore bequeathed:—*Held*: the widow's annuity was a continuing charge on the income of the estate, & the arrears thereof must be made up after the widow's death.—*Re ROSE, ROSE v. ROSE* (1915), 85 L. J. Ch. 22; 113 L. T. 142.

**B. To Set Apart Fund for Payment.**

**423. Charge on corpus—Bestowal of annuity testator's main object.]**—Testator having directed his exors. to lay out in what govt. security they pleased, as much money as would produce a certain annual interest, & having given that annual interest to his wife during her life, in case she did not marry again, the exors. invested in the 5 per cents. a sum which yielded dividends exactly equal to the specified income; those dividends being afterwards diminished by the conversion of the 5 per cents. into 4 per cents., the widow was held entitled to have the deficiency made good, either by the sale from time to time of portions of the appropriated stock, or out of any other part of the residue which could be made available.—*MAY v. BENNETT* (1826), 1 Russ. 370; 38 E. R. 144.

*Annotations*:—*Distd.* *Kendall v. Russell* (1830), 3 Sim. 424. *Apld.* *Arundell v. Arundell* (1833), Coop. temp. Brough. 139. *Distd.* *Innes v. Mitchell* (1846), 1 Ph. 710. *Apld.* *Wright v. Callender* (1852), 2 De G. M. & G. 652. *Fold.* *Mills v. Drewitt* (1855), 22 Beav. 632. *Distd.* *Hindle v. Taylor* (1855), 20 Beav. 109; *Baker v. Baker* (1858), 6 H. L. Cas. 616. *Apld.* *Brayne v. Rees* (1866), 15 L. T. 349; *Carmichael v. Gee* (1880), 5 App. Cas. 588.

**PART IV. SECT. 2, SUB-SECT. 2.—B.**

**d. Charge on corpus.]**—*BROWN v. ABBOTT* (1908), 5 C. L. R. 487.—**AUS.**

424. ———.]—Testator directed his exors. to stand possessed of his personal estate, upon trust to invest a sufficient portion thereof in the funds to produce an annuity of £2 per week, to be paid to one of his sons, & that after his son's decease the sum to be so invested should fall into the residue. He directed his exors., as soon as his youngest child should attain twenty-one, to divide his remaining estate amongst all his children, except the annuitant, equally, & directed that, upon the decease of the annuitant, the sum invested to produce his annuity should be divided in like manner among all testator's other children who should then be living, & the issue of such as should be dead, share & share alike. The income of the residuary estate was insufficient to pay the annuity:—*Held*: the annuitant was entitled to have the deficiency made up out of the capital, but not to have the annuity valued & the amount of the valuation paid to him.—*WRIGHT v. CALLENDER* (1852), 2 De G. M. & G. 652; 21 L. J. Ch. 787; 19 L. T. O.S. 308; 16 Jur. 617; 42 E. R. 1027, L. J.J.

*Annotations*:—*Apld.* *Croly v. Weld* (1853), 3 De G. M. & G. 993; *Miner v. Baldwin* (1853), 1 Sm. & G. 522. *Follid.* *Ingelman v. Worthington* (1855), 25 L. J. Ch. 46. *Distd.* *Hindle v. Taylor* (1855), 20 Beav. 109; *Baker v. Baker* (1858), 6 H. L. Cas. 616. *Apld.* *Upton v. Vanner* (1861), 1 Drew. & Sm. 594; *Brayno v. Roes* (1866), 15 L. T. 349. *Consd.* *Michell v. Wilton* (1875), L. R. 20 Eq. 269. *Apld.* *Carmichael v. Gee* (1880), 5 App. Cas. 588; *Re Cottrell*, *Buckland v. Beddingfield* (1910), 79 L. J. Ch. 189. *Refd.* *Hickman v. Upsall* (1860), 6 Jur. N. S. 367; *Re Dempster*, *Borthwick v. Lovell*, [1915] 1 Ch. 795.

425. ———.]—Testator directed his trustees to invest so much money as would be sufficient to produce an annuity of £20 per annum, & to pay the annual sum of £120 to his widow until certain property to which he would be entitled should fall into possession, when his trustees were to invest so much money as would, with the money before directed to be invested, produce an annual income of £250, & to pay the sum of £250 to his widow for her life, & after her decease in trust to call in the sum of £1,000, part of the money so directed to be invested, & pay that sum to such persons as the widow should appoint, or, in default of appointment, to her next of kin. Testator then gave other legacies & bequeathed the residue of his property. The income of testator's estate proved to be insufficient for the payment of the annuity to his widow, & the arrears would exhaust the whole estate:—*Held*: the arrears of the annuity were the first charge upon the estate, in priority over the legacy of £1,000 & the other general legacies.—*INGLEMAN v. WORTHINGTON* (1855), 25 L. J. Ch. 46; 26 L. T. O. S. 253; 1 Jur. N. S. 1062; 4 W. R. 61.

426. ———.]—Testator directed the investment in the funds of sufficient to produce £40 a year, & the dividends to be paid to his wife for life, & he bequeathed his general residue & the fund invested, after her death, to other persons. An investment was made in 5 per cents., which were reduced & produced less than £10:—*Held*: (1) the widow was entitled to have the deficiency made good out of the corpus of the fund.

The widow had received less than £40 for thirty-three years:—*Held*: (2) there had been no laches or acquiescence, the question now relating to the respective rights of parties to an existing trust fund.—*MILLS v. DREWITT* (1855), 20 Beav. 632; 25 L. T. O. S. 293; 1 Jur. N. S. 816; 3 W. R. 626; 52 E. R. 748.

*Annotations*:—*As to* (1) *Distd.* *Earle v. Bellingham* (1857), 24 Beav. 445. *Refd.* *Re Baker's Estate* (1855), 7 De G. M. & G. 681; *Phillips v. Gutteridge* (1862), 7 L. T. 402; *Gee v. Mahood* (1878), 47 L. J. Ch. 641.

427. ———.]—Testator gave to his trustees & exors. a debt of £1,000, due & owing to him from

his son T. together with all securities for the same, authorising them to allow the principal to remain outstanding at their discretion; & he directed his trustees to invest the same when called in, & stand possessed of "the said debt & of the interest to accrue due thereon, & also of the said stocks, funds & securities," upon trust to pay to pltf. an annuity of £30 for her life. He also directed his trustees to pay to his daughter M. three-fourth parts "of the residue of the interest or dividends to be received from the said debt, or the investment thereof." In a codicil to his will, he spoke of the same sum of money as "the said debt":—*Held*: the annuity was not merely payable out of the interest of the debt, but was a charge upon the capital, & upon the stock, funds & securities in which it might be invested; & a sufficient portion of the same was ordered to be set apart to satisfy the annuity.—*HICKMAN v. UPSALL* (1860), 2 Giff. 124; 2 L. T. 80; 6 Jur. N. S. 367; 8 W. R. 359; 66 E. R. 53.

428. ———.]—*GRATRIX v. CHAMBERS* (1860), 2 Giff. 321; 7 Jur. N. S. 960; 66 E. R. 134.

*Annotation*:—*Refd.* *Re Sinclair*, *Allen v. Sinclair*, *Hodgkins v. Sinclair*, [1897] 1 Ch. 921.

429. ———.]—Testator devised his real & personal estate to trustees, of whom his wife was one, upon trust for conversion & to invest in govt. or real securities, & that his trustees should stand possessed of the trust premises to pay his wife an annuity of £100 clear of all deductions whatsoever, & directed the trustees to appropriate & set apart a fund for securing such annuity, & after the death of his wife, directed the trustees to pay & divide or transfer the money hereinbefore appropriated & directed to be set apart among his, testator's, children. Part of testator's property consisted of £2,500 4 per cent. stock, which at his death, & for some time after, produced £100 a year; this fund was set apart by the trustees for securing payment of the widow's annuity, but, owing to successive reductions of the interest of the stock by Parliament, there was, at the widow's death, a considerable arrear to make up the deficiency between the £100 a year & the reduced income of the fund which had for many years been received by the widow:—*Held*: on the construction of the will the widow would have been entitled to have the deficiency made good out of the corpus; but she having forborne to assert her claim for so long a period during her lifetime, & having been aware of the dealings of several of her children, in respect of their shares, with persons who were acting on the belief that they were shares in a certain definite amount of stock, without giving any intimation of her intention to claim such arrears out of the corpus, the representatives of the widow could not, as against the parties who so dealt for value, with the knowledge of the widow, assert the claim, to which she would otherwise have been entitled, to have the arrears of the annuity made good out of the corpus.—*UPTON v. VANNER* (1861), 1 Drew. & Sm. 594; 5 L. T. 480; 8 Jur. N. S. 405; 10 W. R. 99; 62 E. R. 505.

430. ———.]—Testator directed a sale of his estate & a sufficient sum to be laid out in the funds to produce annuities for his nieces, & he gave his residue to his wife for life:—*Held*: the surplus income after paying the annuities which accrued prior to the sale & investment being made, was liable to make up the fund necessary to produce the annuities, & it did not belong to the widow.—*ANDERSON v. ANDERSON* (1863), 33 Beav. 223; 55 E. R. 353.

431. ———.]—Testator bequeathed all the residue of his estate & effects to three persons,



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their heirs, exors. & administrators, upon trust to receive the rents & after paying certain specified outgoings, to pay an annuity of £130 to his son E., & another annuity of £80 to each of his sons, R., J., & S. for their respective lives. Testator directed that out of the surplus, if any, of the yearly rent, issues & profits of said residue, after such deductions & payments as aforesaid, £100 a year should be retained to provide for repairs. He directed that when certain houses were put into complete repair, & after providing for the payment of the said annuities, then the residue should go & be divided amongst the persons therein mentioned; & in two other portions of his will he spoke of "so much of his estate & effects as might be set apart for the payment of the said annuities":—*Held*: inasmuch as there was to be no distribution of the estate till the annuities were paid, the same were a charge upon the corpus; & as the rents were insufficient, a sale was decreed.—*PROWETT v. PROWETT* (1864), 10 L. T. 564; 12 W. R. 819.

**432.** ———.]—By his marriage settlement, a husband assigned certain securities to trustees, on trust thereout to pay £500 to his wife during her widowhood, & subject thereto for himself. He also covenanted that, in case the securities did not produce £500 a year, he would transfer a sufficient capital sum to make it up. By his will he gave his residuary estate to his wife for her life, with remainders over. The securities did not produce £500 a year:—*Held*: she was entitled to have the reversion sold, & the proceeds invested, & the income applied to make up the £500 a year.—*HARRINGTON (COUNTESS) v. ATHESTON* (1864), 2 De G. J. & Sm. 352; 5 New Rep. 1; 11 L. T. 291; 10 Jur. N. S. 1088; 13 W. R. 62; 46 E. R. 411, L. J.

**433.** ———.]—Testator directed his trustees to convert the residue of his real & personal estate, & to invest so much money as would produce £200 a year, & to pay it to his wife during her life, & he gave the residue, not wanted for that purpose, to other persons. The widow survived five years, & the deficiency of the income of the residue to pay her annuity amounted to nearly £700:—*Held*: the deficiency was payable out of the corpus.—*PERCY v. PERCY* (1866), 35 Beav. 295; 55 E. R. 909.

**434.** ———.]—Where an annuity is charged upon a fund or an estate & the dividends arising from the fund, or the income from the estate, prove insufficient to meet the annuity, the annuitant is entitled to have the deficiency paid out of the fund, or so much of the estate sold as would be sufficient to meet the deficiency, unless the grant of the annuity can be construed as showing a contrary intention.—*BRAYNE v. REES* (1866), 15 L. T. 349; 15 W. R. 195.

**435.** ———.]—Testatrix having made deft. her sole residuary legatee & extrix., by a codicil gave an annuity of £100 a year to two ladies upon trust that they should apply the same for the benefit of a ladies' college, & the education of women therein, as they should think best. She also directed her extrix., & out of her pure personality, to purchase such an amount of stock as

would be sufficient "by means of the dividends thereof" to satisfy the annuity, & until such purchase, she directed the annuity to be paid "out of the income" of her pure personality, & on the determination of the annuity, the stock to sink into her general personal estate. The pure personality being insufficient to provide the sum of stock required:—*Held*: the annuity was a charge on the corpus of the fund.—*MARTIN v. BOSTOCK* (1870), 23 L. T. 216.

**436.** ———.]—Testator appointed his wife & two other persons his trustees & exors., he empowered his trustees to make grants of his real estate in fee, or otherwise to sell his real & personal estate, & to stand possessed of the money arising therefrom in trust to invest the same, & set apart a sufficient portion of such investments as will produce the annuity of £1,200 "which I bequeath to my wife for her life," payable on the usual quarter days, "the first payment to be made on the first of such days as shall happen after my decease, such annuity, in case of my wife's second marriage, to be reduced to the annual sum of £150," & subject to such investment to set apart £5,000 for his daughter Z. "As to the entire residue of my trust estate, & as to that part set apart in favour of my wife, & as to such part thereof as shall be no longer required to be set apart in consequence of her second marriage," in trust for three grandchildren:—*Held*: this was the bequest of an annuity & of an annuity not so restricted as to make it payable exclusively out of the income of a particular fund arising during the widow's lifetime. While the property remained unconverted, as might be the case during the whole of her life, the annuity was a charge on the whole income of the estate. The fund not being sufficient to produce the £1,200 a year, the deficiency was to be made good out of the corpus.—*CARMICHAEL v. GEE* (1880), 5 App. Cas. 588; 49 L. J. Ch. 829; 43 L. T. 227; 29 W. R. 203, H. L.; *affg.* S. C. sub nom. *GEE v. MAHOOD* (1879), 11 Ch. D. 891, C. A.

*Annotation*:—*Expld. Re Campbell*, [1902] 1 K. B. 113.

**437.** ———.]—Bonus shares declared on investment set aside to form an appropriated fund belong to such appropriated fund & do not fall into residue when testator directs the formation of an appropriated fund to answer annuities. Such annuities are a continuing charge on the fund, & not only a charge from year to year on the income of the fund.—*Re STRICT, VIVERS v. HOLMAN* (1922), 67 Sol. Jo. 79.

**438. Charge on income.**—An annuity held payable out of the interest only of a fund, & not out of the corpus, & to fail upon a deficiency of the income.—*EARLE v. BELLINGHAM* (No. 1) (1857), 24 Beav. 445; 53 E. R. 429.

*Annotations*:—*Distd.* Phillips v. Gutteridge (1862), 3 De G. J. & Sm. 332. *Refd.* Birch v. Sherratt (1867), 2 Ch. App. 644.

**439.** ———.]—Where corpus intended to remain intact.]—*Re TYLER'S TRUSTS*, No. 510, *post*.

**440.** ———.]—*BAKER v. BAKER*, No. 511, *post*.

**441.** ———.]—G. directed his trustees to purchase a house, & to allow M. to reside therein, & to have the use thereof for her sole & separate use, & after her decease it was to go to her children equally. Testator further requested his trustees,

**4391. Charge on income—Where corpus intended to remain intact.**—*Re IRWIN* (1912), 21 O. W. R. 562; 4 D. L. R. 803.—**CAN.**

**e.** ———.]—*Gift over on death of annuitant.*—Where the fund set apart to provide the annuity is given, on the death of the annuitant, over, & does

not fall into the residue, the annuitant is entitled only to the income that the fund produces.—*TRUSTEES, EXECUTORS & AGENCY CO. v. DIMOCK* (1892), 18 V. L. R. 729.—**AUS.**

**1. Annuity charged on real & personal estate—Right of annuitant to have**

*allocation of these estates—To secure annuity.*—*Re MCINTYRE, MCINTYRE v. LONDON & WESTERN TRUSTS CO.* (1902), 22 C. L. T. 90; 3 O. L. R. 212; 1 O. W. R. 56.—**CAN.**

**g.** ———.]—*McINTYRE v. MILLS* (1805), 2 Sch. & Lef. 338.—**IR.**

after buying the house, to invest in govt. securities sufficient money to produce £40 *per annum*, & to pay the same quarterly for M.'s sole & separate use, without power of anticipation:—*Held*: M. was entitled to an annuity for her life only, & she was not entitled to have the corpus of the fund transferred to her.—*Re GROVE'S TRUSTS* (1859), 1 Giff. 74; 28 L. J. Ch. 536; 33 L. T. O. S. 365; 5 Jur. N. S. 855; 7 W. R. 522; 65 E. R. 831.

**442.** ———.]—Testator directed his trustees to invest a sum sufficient to pay £50 *per annum* to H. & on her marriage or death to divide the stocks, etc., from which the £50 should have been produced equally amongst his nephews & nieces. The interest on the estate was insufficient to produce £50 *per annum*:—*Held*: on the construction of the will the deficiency could not be supplied out of the corpus.—*TARBOTTOM v. EARLE* (1863), 11 W. R. 680.

*Annotations*:—*Refd.* *Michell v. Wilton* (1875), L. R. 20 Eq. 269; *Gee v. Mahood* (1879), 48 L. J. Ch. 657.

**443.** ———.]—Testator gave all his property to trustees upon trust to pay the income to his wife for the maintenance of herself & his children until the youngest attained twenty-one, when the trustees were to invest a "sufficient sum" to secure an annuity of £50, which was to be paid to his wife "as the dividends were received" & "subject thereto" the trustees were to "divide the whole of his trust estate" amongst his eight children. Upon testator's youngest child attaining twenty-one, the income of the entire property was insufficient to meet the annuity:—*Held*: the deficiency was not payable out of the corpus.—*MICHELL v. WILTON* (1875), L. R. 20 Eq. 269; 44 L. J. Ch. 490; 23 W. R. 789.

**444.** ———.]—*Corpus devised to annuitant—Subject to sale by trustees.*—S. by his will gave *pltf.* an annuity of £200 for the benefit of E. By a codicil he appointed one-fourth share of certain real estate, part of which was liable to be sold, to E., & appointed the same share to *pltf.* & another, upon trust to apply the rents or the money when the estate was sold towards the payment of E.'s annuity, & on the death of E. he gave her share of the real estate over:—*Held*: the annuity was charged in the first instance on the income of E.'s share in the real estate, & then on testator's residuary personal estate in priority to the corpus of E.'s share.—*SKIRROW v. SKIRROW* (1869), 17 W. R. 759.

#### C. To Pay from Income of Specific Property Set Apart.

**445. Charge on corpus—Sale of estate charged—Investment in government stock—Conversion.**—A jointress, having a rentcharge secured in the usual way by a trust term, concurred in selling & conveying the estate exonerated therefrom, a part of the purchase-money being laid out in the Navy 5 per cents., the dividends of which she by deed declared she accepted in full discharge or satisfaction of such rentcharge. The income of this investment having, by the successive conversion of the Navy 5 per cents. into 4 per cents. & 3½ per cents., become less than the amount of the rentcharge, it was held that the jointress was entitled to have the deficiency supplied out of the corpus of the stock.—*ARUNDELL v. ARUNDELL* (1833), 1 My. & K. 316; *Coop. temp. Brough*. 139; 47 E. R. 50, L. C.

*Annotation*:—*Consd.* *Mortimer v. Picton* (1834), 33 L. J. Ch. 337, n.

**446. Property given over subject to annuity.**—Testatrix directed her trustees to levy & raise, out of the interest, dividends & annual produce of certain trust funds, an annual sum of £100, & pay the same to P. during his life; & "subject & without prejudice to the payment of the annuity," to pay the income of the trust funds to P. for life, & after his decease, "subject & without prejudice, as aforesaid" to stand possessed of the trust funds for other persons. The income of the fund was insufficient to pay the annuity:—*Held*: such arrears were a charge upon the corpus of the trust property, & the tenant for life was only bound to keep down the interest of such arrears.—*PLAYFAIR v. COOPER, PRINCE v. COOPER* (1853), 17 Beav. 187; 1 Eq. Rep. 137; 23 L. J. Ch. 341, 343; 21 L. T. O. S. 177; 1 W. R. 376; 51 E. R. 1004.

*Annotations*:—*Apld.* *Re Croxon, Ferrers v. Croxon*, [1915] 2 Ch. 290. *Refd.* *Wheatley v. Davies* (1876), 35 L. T. 306. *Mentd.* *Edgar v. Reynolds* (1858), 4 Jur. N. S. 399; *Obce v. Bishop* (1859), 1 De G. F. & J. 137.

**447.** ———.]—Testator directed his trustees, out of the proceeds of the sale of his estate, to appropriate £15,000, & to invest the same, & pay the income thereof to his wife for her life, & after her death he gave the £15,000 in trust for his children equally, & the residue of his estate amongst his children in unequal proportions. The widow & the trustees entered into a written agreement to appropriate certain railway preference stock & other securities of the value at the time of the appropriation of about £15,000 to represent this fund. At the death of the widow the securities comprised in this agreement had considerably fallen in value:—*Held*: the residuary estate must make good the deficiency in the fund thus set apart.—*STEWART v. SANDERSON* (1870), L. R. 10 Eq. 26; 39 L. J. Ch. 337; 22 L. T. 10; 18 W. R. 278.

**448.** ———.]—*Property given over after payment of antecedent trusts.*—Testator gave leaseholds to trustees upon trust to receive the rents & profits & to pay the annual sum of £60 to H. for life, & after the death of H. to raise by sale or mtge. the sum of £400 for the children of H., & after the death of H. & the raising & payment of the £400, to assign the said leaseholds, or such part thereof as should remain undisposed of, unto T. absolutely. The income proving insufficient to satisfy the annuity, it was held that it was chargeable upon the corpus.—*PHILLIPS v. GUTTERIDGE* (1862), 3 De G. J. & Sm. 332; 1 New Rep. 3; 32 L. J. Ch. 1; 7 L. T. 402; 8 Jur. N. S. 1196; 11 W. R. 12; 46 E. R. 664, L. C.

*Annotations*:—*Apld.* *Brayne v. Rees* (1866), 15 W. R. 195; *Pearson v. Hellwell* (1874), L. R. 18 Eq. 411; *Re Howarth, Howarth v. Makinson*, [1909] 2 Ch. 19. *Refd.* *Hambro v. Hambro* (1894), 63 L. J. Ch. 627; *Re Boden, Boden v. Boden*, [1907] 1 Ch. 132.

**449. Charge on income—Income of specified leaseholds.**—Testator bequeathed two leasehold houses to trustees, in trust, out of the rents, to pay £50 a year to his daughter-in-law so long as she should remain his son's widow, & to invest the surplus in stock, to be held in trust for his wife for life, remainder for his grand-daughters; & after his death, in case his daughter-in-law should be then married, or after her decease or second marriage, whenever the latter event might happen, to sell the houses & invest the proceeds in stock, to be held in trust for his wife for life, remainder for his grand-daughters. The daughter-in-law continued single, & the trustees paid her the £50 a

#### PART IV. SECT. 2, SUB-SECT. 2.—C.

**448 i. Charge on corpus—Property given over after payment of antecedent trusts.**—*Re BUCHANAN, STEPHENS v. DRAPER*, [1915] 1 I. R. 95.—*IR.*

*Sect. 2.—Rights as to property charged—Capital or income: Sub-sect. 3, C. Sect. 3: Sub-sect. 1.]*

year out of the rents, & disposed of the surplus in the manner directed, until the lease of the houses expired:—*Held*: after the death of testator's widow, the stock purchased with the surplus rents, was not subject to the payment of the annuity, notwithstanding the lease had expired.—*DARBON v. RICKARDS* (1845), 14 Sim. 537; 14 L. J. Ch. 344; 9 Jur. 364; 60 E. R. 466.

*Annotation*:—*Consd.* *Forbes v. Richardson* (1853), 11 Hare, 354.

**450. ——— Gift over after annuitant's death.**—Testator by a codicil to his will directed his exor. to pay 15s. per week to his widow, so long as two leasehold houses should be let, & if one or both should become vacant, he left it to the discretion of his exor., to sell the houses & invest the proceeds for the purpose of paying such weekly allowance, or in proportion according to the amount the houses might produce; & he revoked a gift in his will of the profits of the houses to his widow, having considered that the 15s. per week was quite sufficient to maintain her & make her comfortable; & his will contained a gift over of his property. Testator's property, including the houses, having been sold & realised, produced a fund insufficient to pay 15s. weekly to the widow:—*Held*: such allowance could not be made good out of the capital.—*HAWKE v. KEMP* (1843), 7 Jur. 294.

**451. ——— Subject to distress or sale.**—Life annuities bequeathed by will, to be issuing & payable out of leaseholds & personalty with power to recover them when in arrear "by distress or sale," in like manner as rack rents are recovered by law:—*Held*: to be charged on the income & not on the corpus.—*ADDECOTT v. ADDECOTT* (1861), 29 Beav. 460; 54 E. R. 700.

*Annotation*:—*Refd.* *Lambert v. Turner* (1862), 7 L. T. 521.

**452. ——— Gift over "subject as aforesaid."**—Testator directed his trustees to stand possessed of £20,000 & as to one-fourth part thereof, in a certain event "upon such trusts as were therein-after declared touching the sum of £20,000, 3½ per cent. Consolidated Annuities thereafter bequeathed in trust for his son, his wife & children": he afterwards directed two other trustees to stand possessed of £20,000, 3½ per cent. Consolidated Annuities, & to pay the annual produce of the sum of £20,000 stock in a different event, upon trust for his son for life, & after his decease, in trust, during the widowhood of E. his wife to pay pay her an annuity of £200:—*Held*: (1) E. took one annuity only of £200; (2) annuity not payable out of corpus.—*HINDLE v. TAYLOR* (1855), 5 De G. M. & G. 577; 25 L. J. Ch. 78; 26 L. T. O. S. 81; 1 Jur. N. S. 1029; 4 W. R. 62, L. C.

*Annotations*:—*As to* (1) *Appl.* *Boyd v. Boyd* (1863), 2 New Rep. 486. *Fold.* *Leigh v. Leigh* (1870), 22 L. T. 837. *Cooper v. Macdonald* (1873), L. R. 16 Eq. 258. *Trew v. Perpetual Trustee Co.*, [1895] A. C. 264. *Re Beaumont, Bradshaw v. Packer*, [1913] 1 Ch. 325; *Re Wood, Wodehouse v. Wood*, [1913] 2 Ch. 274; *Re Arnell, Re Edwards, Prickett v. Prickett*, [1924] 1 Ch. 473. *Generally, Mentd.* *Re Bristol, Grey v. Grey*, [1897] 1 Ch. 946.

**453. ——— New trust arising on annuitant's death.**—Direction to invest £10,000 4 per cent. stock, in the name of trustees, & to pay thereout annuities to various persons, amounting in the whole to £400 a year; & that the trustees should hold the stock & the dividends thereof, subject to the annuities upon trust, as to so much of the dividends as from time to time should fall in by the determination of the annuities, until one-half of the dividends should have so fallen in, to invest the same & the resulting income thereof, in order

to increase the capital of the fund by accumulation; & so soon as one-half of the dividends should have so fallen in, to apply such moiety of the dividends, & also such further parts of the same as should from time to time fall in by the determination of the annuities respectively, & the whole of the dividends, when all the annuities should have ceased, to certain charitable uses. The £10,000 4 per cent. stock was invested according to the will, & was subsequently converted into 3½ per cents., & the trustees thereupon reduced the payments to the annuitants by one-eighth, the dividends having become to that extent insufficient to answer the annuities. The death of some of the annuitants afterwards released a part of the dividends, & the sums so falling in were accumulated. In an information to establish the charity:—*Held*: the annuitants were not entitled to be paid their annuities in full, either out of the capital, or out of the released dividends, but the reduction of the stock would operate to produce a proportionate reduction in the several annuities, & in the fund applicable to the charity.—*A.-G. v. POULDEN* (1844), 3 Hare, 555; 3 L. T. O. S. 99; 8 Jur. 611; 67 E. R. 501.

*Annotations*:—*Distd.* *Mills v. Drewitt* (1855), 20 Beav. 632. *Refd.* *Bridgnorth Corp. v. Collins* (1847), 15 Sim. 538; *Re Cattell, Cattell v. Cattell*, [1907] 1 Ch. 567.

**454. ———**—Testator gave freehold & leasehold estates to trustees, upon trust, to receive the rents from time to time as they became payable, & thereout to pay to his wife an annuity during her life, & after her decease upon trust to convey to other persons absolutely. The rents were inadequate to satisfy the annuity:—*Held*: the annuity must abate, & it was not charged upon the corpus of the estates.—*FOSTER v. SMITH* (1846), 1 Ph. 629; 15 L. J. Ch. 183; 41 E. R. 772, L. C.

*Annotations*:—*Distd.* *Wroughton v. Colquhoun* (1846), 1 De G. & Sm. 36. *Playfair v. Cooper* *Prince v. Cooper* (1853), 17 Beav. 187. *Consd.* *Forbes v. Richardson* (1853), 11 Hare, 354; *Mills v. Drewitt* (1855), 20 Beav. 632. *Distd.* *Torre v. Browne* (1855), 5 H. L. Cas. 556. *Fold.* *Earle v. Bellingham* (1857), 24 Beav. 445. *Distd.* *Phillips v. Gutteridge* (1862), 3 De G. J. & Sm. 332; *Brayne v. Rees* (1866), 15 L. T. 349. *Consd.* *Re Boden, Boden v. Boden*, [1907] 1 Ch. 132; *Re Boulcott's Settlement, Wood v. Boulcott* (1911), 104 L. T. 205. *Refd.* *Re L. B. & S. C. Ry., Ex p. Wilkinson* (1849), 3 De G. & Sm. 633; *Stelfox v. Sugden* (1859), John. 234; *Hickman v. Upsall* (1860), 6 Jur. N. S. 367; *Lambert v. Turner* (1862), 7 L. T. 521; *Taylor v. Taylor* (1874), 30 L. T. 49; *Gee v. Mahood* (1878), 9 Ch. D. 151; *Re Tucker, Tucker v. Tucker*, [1893] 2 Ch. 323; *Re Rose, Rose v. Rose* (1915), 85 L. J. Ch. 22.

**455. ———**—Testator, by his will, bequeathed the residue of his real & personal estate to his widow & three other persons as trustees, on trust to sell & invest in govt. securities, & out of the dividends to pay an annuity of £500 to his daughter for life, an annuity of £100 to W. for life, & on his death an annuity of £50 to the son of W. for life, & the remainder of the dividends to testator's widow for her life: testator directed that, after the death of the widow, if the daughter should be then living & should have no child then living, the trustees should pay her a further annuity of £500, that if testator's daughter should have a child living at the death of the widow the two annuities of £500 should cease, & the trustees raise & invest £20,000 & pay the dividends to the daughter for her life with remainder to her children, that the trustees should also pay £5,000 to such person or persons as the widow should by will appoint, & that the widow should also have power to dispose of £1,000, either by gift in her lifetime or by will, among her three co-trustees in such proportions as she should think fit; & testator named certain persons as residuary legatees. There being a deficiency of assets to pay the two annuities of £500, & also the legacies of £5,000 &

£1,000:—*Held*: the annuities were not payable out of the corpus of testator's estate.—*MILLER v. HUDDLESTONE* (1851), 3 Mac. & G. 513; 21 L. J. Ch. 1; 18 L. T. O. S. 147; 15 Jur. 1043; 42 E. R. 358, L. C.

*Annotations*:—*Consd.* *Street v. Street* (1863), 2 New Rep. 56. *Distd.* *Carmichael v. Gee* (1880), 5 App. Cas. 588; *Re Taylor, Illsley v. Randall* (1884), 50 L. T. 717. *Reid.* *Byam v. Sutton* (1854), 19 Beav. 556; *Birch v. Sherratt* (1867), 2 Ch. App. 644; *Rawson v. McCausland* (1873), 22 W. R. 145; *Stokes v. Bridgman* (1878), 47 L. J. Ch. 759.

**456. — Gift over of surplus income during life of annuitant.**—Annuity given by will to one for life out of the interest, dividends & annual proceeds of a given fund, although without restriction as to time, & followed by a gift over after the annuitant's decease of "the residue" of the fund:—*Held*: not a charge upon the corpus; chiefly upon the ground that the will contained a gift over of surplus income during the life of the annuitant.—*STELFOX v. SUGDEN* (1859), John. 234; 70 E. R. 410.

*Annotations*:—*Distd.* *Howarth v. Rothwell* (1862), 8 Jur. N. S. 69; *Prowett v. Prowett* (1864), 10 L. T. 564. *Consd.* *Wormald v. Muzeen* (1881), 17 Ch. D. 167. *Reid.* *Salvin v. Weston* (1866), 35 L. J. Ch. 552; *Re Mason, Mason v. Robinson* (1878), 8 Ch. D. 411; *Re Bigge, Granville v. Moore*, [1907] 1 Ch. 714.

**457. — —.**—Testator bequeathed one-third share of his residuary estate to trustees upon trust out of the income thereof to pay to his widow during her life an annuity of £1,000 a year, & "subject thereto to permit the same share & the income thereof" to devolve under trusts therein declared or referred to in favour of testator's son & daughter & their issue respectively:—*Held*: according to the true construction of the will, so long as the annuity was being paid in full the trustees had no power to retain surplus income of a past year for the purpose of making good a possible deficiency in a future year.—*Re PLATT, SYKES v. DAWSON*, [1916] 2 Ch. 563; 86 L. J. Ch. 114; 115 L. T. 524; 61 Sol. Jo. 10.

*Annotations*:—*Consd.* *Re Earle, Tucker v. Donne* (1923), 131 L. T. 383. *Reid.* *Re Strick, Vivers v. Holman* (1922), 67 Sol. Jo. 79.

### SECT. 3.—CUMULATIVE AND SUBSTITUTIONAL ANNUITIES.

#### SUB-SECT. 1.—GRANTS IN SAME INSTRUMENT.

**Satisfaction generally.**—*See EQUITY*, Vol. XX., pp. 449 *et seq.*

**458. Annuities of same amount—Substitutional.**—Two annuities of equal amount in the same will to the same person:—*Held*: not accumulative.—*HOLFORD v. WOOD* (1798), 4 Ves. 76; 31 E. R. 40.

*Annotation*:—*Mentd.* *Pratt v. Sladden* (1807), 14 Ves. 193.

**459. — —.**—Testator, by his will, gave all his property to his wife, absolutely. By a subsequent incomplete testamentary paper, he gave all his property to his wife & two other persons, in trust, to sell & pay the interest of the proceeds to his wife for her life, & after her decease, to dispose of the principal to the purposes after mentioned. Testator then gave several legacies & annuities, & directed that, after the death & failure of issue of one of the annuitants, the annuity should be paid to his residuary legatee, but he did not name any. In another testamentary paper testator gave legacies & annuities to the legatees & annuitants named in the former paper, & also to other persons:—*Held*: the legacies given by the second &

third papers were single & not cumulative.—*BRINE v. FERRIER* (1835), 7 Sim. 549; 58 E. R. 948.

**460. Annuities of different amounts—Substitutional.**—Gift of residue to pay income to widow for life, subject to the payment thereof of an annuity of £10 to A. for his life. After the decease of his widow, a disposition was made of the property, & amongst other gifts there was one of the dividends of £1,000 stock to A. for life:—*Held*: the annuity to A. ceased upon the death of the widow, & A. then took the dividends on the £1,000 in substitution.—*ADNAM v. COLE* (1843), 6 Beav. 353; 49 E. R. 862.

*Annotation*:—*Mentd.* *Trimmer v. Danby* (1856), 25 L. J. Ch. 424.

**461. — —.**—Bequest of an annuity of £800 to testator's wife, followed by a bequest, among others, of an annuity of £200 to testator's daughter, & a subsequent direction, in the same instrument, that, at the death of testator's wife, the daughter was to have £400 a year:—*Held*: the annuity of £400 given to the daughter was in substitution for, & not in addition to, the prior annuity of £200 given to the same legatee.—*YOCKNEY v. HANSARD* (1844), 3 Hare, 620; 8 Jur. 822; 67 E. R. 527.

**462. — —.**—Testator, after devising a real estate to his natural son T., bequeathed as follows: "I give & bequeath unto my sister E., to be paid out of the rents & profits of the lands, the sum of £250 *per annum*, & to live free from rent in the house I now occupy in H., with the land & buildings I now occupy, containing about 9 Lancashire acres, with the use of my household furniture, plate, linen, books, wines, spirits, carriages & horses, cows, hay, & farming utensils, & stock, for her sole use during her natural life, or so long as she shall remain unmarried; in either events, then to go to T.; but should she marry, then my will & mind is, that my exors. shall pay her £100 *per annum*, for her own use, during her natural life, out of the rents & profits of my estate." The sister married in testator's lifetime:—*Held*: that the consumable articles did not go to T., but fell into the residue; & the annuities of £250 *per annum* & £100 *per annum* were not cumulative.—*ANDREW v. ANDREW* (1845), 1 Coll. 686; 63 E. R. 598.

**463. — —.**—*HINDLE v. TAYLOR*, No. 452, ante.

**464. — Cumulative.**—Testator bequeathed to A., for her life, an annuity of £10, the annuity of nineteen guineas upon the death of A., & the annuity of £50 when the mtge. on his estate should be reduced to £500, " & which respective sums of £10, nineteen guineas & £50, as the case might be, were to be paid " half-yearly:—*Held*: they were cumulative.—*HARTLEY v. OSTLER* (1856), 22 Beav. 419; 2 Jur. N. S. 1199; 52 E. R. 1181.

**465. Grant under powers given by separate wills—Substitutional.**—Testator devised his estates to his eldest son for life, with power to charge them with a jointure of £600 a year, & to raise portions for younger children not exceeding a certain amount. The brother of testator died some time after, & devised his estates "upon & for & subject to the like uses, & to, for, & upon the like trusts, powers, provisions, & limitations, & to & for the like intents & purposes as testator's late brother by his will had devised, given, or directed of & concerning his estates."

By virtue of the powers contained in the last

#### PART IV. SECT. 3, SUB-SECT. 1.

**464i. Annuities of different amounts—Cumulative.**—*EDWARDS v. PEARSON* (1883), 4 O. R. 514.—*CAN.*

**Sect. 3.—Cumulative and substitutional annuities:**  
**Sub-sects. 1 & 2. Part V. Sect. 1.]**

testator's will, the tenant for life granted to his wife a jointure of £400 a year in addition to the £600 a year which he had power to appoint to her under the will of the first testator:—*Held*: the words of reference did not multiply the charges, & the widow was not entitled to the additional £400 a year.—*LEIGH v. LEIGH* (1870), 22 L. T. 837; 18 W. R. 991.

**Cumulative & substitutional legacies.]—See WILLIS.**

**SUB-SECT. 2.—GRANTS IN SEPARATE INSTRUMENTS.**

**Satisfaction generally.]—See EQUITY, Vol. XX., pp. 449 et seq.**

**466. Annuities of different amounts—Cumulative.]—**A man by his will gives to his exor. an annuity of £200 & charges his real estate with the payment of it. Testator by a codicil, attested by two witnesses only, gives his exor. another annuity of £100 payable as mentioned in my will:—*Held*: the exor. was well entitled to both the annuities; but the annuity given by the codicil was payable out of the personal estate.—*WRIGHT v. CADOGAN (LORD)* (1766), 1 Bro. Parl. Cas. 486; 1 E. R. 707, H. L.

**Annotations.]—Mentd.** *Twisden v. Lock* (1768), Amb. 663; *Jippon v. Dawding* (1769), Amb. 565; *Doe d. Burville v. Burville* (1773), Lofft. 101; *Compton v. Collinson* (1788), 2 Bro. C. C. 377; *Doe d. Hodsden v. Staple* (1788), 2 Term Rep. 684; *Field v. Moore*, *Meld v. Brown* (1855), 7 De G. M. & G. 691; *Dye v. Dye* (1884), 13 L. J. Q. B. 442.

**467. ———.]—**Annuities held upon the construction of the will to be cumulative, & not substitutional.—*MACKINNON v. PEACH* (1838), 2 Keen. 555; 7 L. J. Ch. 211; 48 E. R. 741.

**Annotations.]—Mentd.** *Harris v. Davis* (1844), 1 Coll. 416; *Ive v. Klug* (1852), 16 Beav. 46; *Re Rye's Settlement* (1852), 10 Hare, 106; *Re Faulding's Trust* (1858), 26 Beav. 263; *Re Lowman*, *Devenish v. Pester*, [1895] 2 Ch. 348.

**468. ———.]—**Several annuities given by a will & codicils, held to be cumulative.—*SPIRE v. SMITH* (1839), 1 Beav. 419; 48 E. R. 1002.

**469. ———.]—**Testator, by his will, bequeathed sums to his four sons absolutely, & other sums to his four daughters, for their lives, with remainder to their children. One of his sons afterwards died; & testator thereupon made a codicil as follows: "In consequence of the death of my son, T., I have opened my will, & now wish to bequeath to my wife £600 a year; to my three sons £2,000 each; to my four daughters £300 a year each; & at the death of my wife, the £600 a year to be equally divided amongst my four daughters. This memorandum will, I hope, be attended to in case of death before I make the legal alteration in my will":—*Held*: the gifts by the codicil were in addition to those by the will; & the annual sums given by the codicil were perpetual, & not mere life annuities.—*TWEEDALE v. TWEEDALE* (1840), 10 Sim. 453; 9 L. J. Ch. 147; 4 Jur. 263; 59 E. R. 691.

**Annotations.]—N.F.** *Blewitt v. Roberts* (1841), Cr. & Ph. 274. *Reid*. *Baynes v. Ridge* (1853), 1 Eq. Rep. 157; *Hill v. Potts* (1862), 8 Jur. N. S. 555.

**470. ———.]—**By her will testatrix bequeathed to pltf., in case she should remain in her sister's service, an annuity of £40 & a legacy of £30. By a codicil testatrix increased "the immediate annuity of £30" left by her will to pltf. to an annuity of £50:—*Held*: pltf. was entitled to the annuity of £50 as well as the contingent annuity of £40.—*IVES v. DODGSON* (1870), L. R. 9 Eq. 401; 39 L. J. Ch. 693; 23 L. T. 215.

**471. ——— Substitutional.]—**Testator bequeathed

to Mrs. L. Pitney an annuity of £150, payable half-yearly, for her separate use. He afterwards wrote in the margin opposite this bequest: "Now, Mrs. J. Gray, one hundred guineas *per annum*, in quarterly payments." Mrs. L. Pitney had married a Mr. Gray prior to the date of the will:—*Held*: the annuities were substitutional, & the legatee was entitled to an annuity of one hundred guineas for her separate use.—*MARTIN v. DRINKWATER* (1840), 2 Beav. 215; 9 L. J. Ch. 247; 48 E. R. 1162.

**Annotation.]—Reid.** *Willson v. O'Leary* (1871), L. R. 12 Eq. 525.

**472. ———.]—**Testator having at the time of making his will £2,000, 3 per cent. Consols, but not mentioning that fact in his will, directed his exors. to invest out of his residuary estate a sufficient sum in the 3 per cent. Consols, to produce an annual income of £279 8s., which he bequeathed to his wife for life, & after her death, he bequeathed £2,000 stock, part of the fund to be so purchased, to five trustees, upon trust, out of the dividends, & out of the rents of certain leasehold tenements, to pay to poor decayed tradesmen & poor women, residents of A., a sum of £5 each, *per annum*; & if there was a surplus of the dividends, to pay such surplus among those poor men & women, as the trustees should think proper. He afterwards sold out the £2,000, 3 per cent., & by a codicil, reciting that he had sold out "the £2,000 stock, as mentioned in his will," & bought long annuities with the proceeds, he bequeathed the dividends of those annuities to his wife for life, & after her death he bequeathed the annuities to the five trustees above referred to, upon trust, out of the dividends & out of the rents of the leaseholds before referred to, to pay to poor decayed tradesmen & poor women, natives & residents of A., a sum of £5 each *per annum*; & if there was a surplus of the dividends, to pay to six poor men & six women, the sum of £7 instead of £5 each:—*Held*: the bequests contained in the codicil were in substitution of the benefits given by the will, & were not cumulative.—*A.-G. v. GEORGE* (1843), 12 L. J. Ch. 165; 7 Jur. 141, L. C.

**473. ———.]—Re FREME'S CONTRACT, No. 812, post.**

**474. Annuities of same amount—Cumulative.]—**(1) Testator, in his lifetime, by bond secured to C. an annuity of £300 for life, payable on the usual quarter days, etc.; & by his will he confirmed it, & bequeathed a further annuity of £200 payable in the same manner, it being his intention that she should receive an annuity of £500 instead of £300. By a codicil, testator directed his trustees to raise £500 a year & pay the same to C. during her life, by quarterly payments:—*Held*: the second annuity was cumulative.

(2) A perpetual annuity was granted by King Charles II. to A. & his heirs payable out of the coal duties:—*Held*: though descendable to the heirs, it was personal & not real estate.—*RADBURN v. JERVIS, HARE v. HILL* (1841), 3 Beav. 450; 49 E. R. 177.

**Annotation.]—Generally, Mentd.** *Allen v. Maddock* (1858), 11 Moo. P. C. C. 427.

**475. ———.]—**A bequest by the will of testatrix of an annuity to her "servant" H. & a bequest by a codicil three years afterwards of an annuity of the same amount to her "servant" H.:—*Held*: to be cumulative, the word "servant" not expressing the motive, but being descriptive only.—*ROCH v. CALLEN* (1848), 6 Hare, 531; 17 L. J. Ch. 144; 12 Jur. 112; 67 E. R. 1274.

**476. ——— Substitutional.]—**If testator by will gives £2,000 a year by way of jointure to any



woman he might marry, & after marriage by codicil gives his wife the same jointure, she cannot claim both.—*OSBORNE v. LEEDS (DUKE)* (1800), 5 Ves. 369; 31 E. R. 634, L. C.

*Annotations*.—*Mentd.* *Hurst v. Beach* (1819), 5 Madd. 351; *Thorne v. Rooke* (1841), 2 Curt. 799; *Lee v. Pain* (1844), 4 Hare, 201.

477. ———.—]—Testator devised an estate to his daughter for life, with remainder to her husband for life, & charged other estates with the payment of an annuity to his daughter, & after her death, with the payment of an annuity to her husband. He then made a codicil, which, in effect, revoked the husband's life estate in remainder. By a subsequent codicil, he gave to the husband a life estate in possession in the first estate, & also an annuity in possession, to the same amount & charged upon the same estates as the former annuity.—*Held*: the second annuity was substituted for the first.—*GRAVES v. HICKS* (1833), 6 Sim. 391; 58 E. R. 641.

*Annotations*.—*Mentd.* *Hickling v. Boyer* (1851), 3 Mac. & G. 635; *Loosemore v. Knapman* (1853), Kay, 123;

*Freeman v. Ellis* (1863), 1 Hem. & M. 758; *Hambro v. Hambro* (1894), 63 L. J. Ch. 627.

478. ———.—]—Where testator living in Ireland, by his will, directed his exors. to invest sufficient money with an Irish assurance co. to pay an annuity of £20 a year to A. during her life, & afterwards he came to England, & by a codicil, directed his exors. to purchase an annuity of £20 yearly from an assurance co. in London or Dublin, to be paid to A. during her life.—*Held*: the gift of the annuity in the codicil was substitutional, & not cumulative.—*BOURNE v. HARTLEY, BOURNE v. MAHON* (1854), 2 Eq. Rep. 910; 23 L. T. O. S. 219; 18 Jur. 532; 2 W. R. 452.

479. ———.—]—An annuity of like amount, subsequently give, is in substitution for the annuity charged on the revoked gift.—*STRUTHERS v. STRUTHERS* (1857), 5 W. R. 809.

*Annotations*.—*Mentd.* *Saxton v. Saxton* (1879), 13 Ch. D. 359; *Re Russell, Russell v. Chell* (1882), 10 Ch. D. 432.

Cumulative & substitutional legacies.]—*See WILLS.*

## Part V.—Rights as Affected by Insufficiency of Grantor's Estate.

### 1.—ESTATE INSUFFICIENT AT TIME OF CREATION.

480. Grant for life out of leaseholds—Chattel interest.]—A rent for life granted out of a term for years in lands, is a chattel, & shall be satisfied out of the term, till the one or other estate determines.—*ST. AUBY'S CASE* (1590), Cro. Eliz. 183; 78 E. R. 439.

481. ———.—]—*BUTT'S CASE*, No. 6, ante.

482. ———.—]—A rentcharge granted for life by a tenant for years, is not void, but is good as a chattel interest, & the goods of a stranger not shown to hold the premises by title paramount to the rentcharge, as by a prior demise, may be distrained for the arrears.—*SAFFERY v. ELGOOD* (1834), 1 Ad. & El. 191; 3 Nev. & M. K. B. 346; 3 L. J. K. B. 151; 110 E. R. 1180.

*Annotation*.—*Refd.* *Johnson v. Faulkner* (1842), 2 Q. B. 925.

483. Grant in fee by tenant in tail—Interest determinable by death of tenant in tail—Unless estate tail barred.]—If a tenant in tail grant a rent in fee it is determinable by the death of the tenant in tail but if the tenant in tail levy a fine or suffer a recovery, by which the estate tail is barred then it is unavoidable.—*ALTON WOODS'S CASE, A.-G. v. BUSHOPP* (1600), 1 Co. Rep. 40 b; 76 E. R. 89.

*Annotations*.—*Mentd.* *Englefield's Case* (1591), 7 Co. Rep. 11 b; *Case of a Fine Levied by the King* (1605), 7 Co. Rep. 32 a; *Prince's Case* (1606), 8 Co. Rep. 1 a; *Chandos's Case* (1607), 6 Co. Rep. 55 a; *St. Saviour's, Southwark Case* (1613), 10 Co. Rep. 66 b; *Needler v. Winchester (Bp.)* (1614), Hob. 220; *R. v. Hanger* (1615), 3 Bulst. 1; *Sheffield v. Ratcliffe* (1615), Hob. 334; *Magdalen College Case* (1616), 11 Co. Rep. 66 b; *Elvis v. York (Archbp.)* (1619), Hob. 315; *Geo v. Freedland* (1626), Cro. Car. 47; *Brockham's Case* (1628), Litt. 94, 105, 128; *Grosse v. Gayer* (1629), Cro. Car. 172; *Collingwood v. Pace* (1661), O. Bridg. 410; *Holland v. Fisher* (1662), O. Bridg. 181; *Bainbridge v. Gardiner* (1665), O. Bridg. 402; *Foot v. Berkeley* (1670), 2 Keb. 654; *Thompson v. Leach* (1690), 2 Vent. 198; *Hornbee's Case* (1691), Freem. K. B. 331; *R. v. London (Bp.)* (1694), Comb. 301; *Winter v. Loveday* (1696), 5 Mod. Rep. 378; *R. v. Chester (Bp.)* (1697), 1 Ld. Raym. 292; *Iveson v. Moore* (1698), 1 Salk. 16;

*A.-G. v. Ailgood* (1743), Park. 1; *R. v. Cotton* (1751), Park. 112; *Riddell v. White* (1791), 1 Anst. 281; *Alcock v. Cooke* (1829), 2 State Tr. N. S. 327; *Gledstan v. Sandwich* (1842), 4 Man. & G. 995; *O'Connell v. R.* (1844), 11 Cl. & Fin. 155; *Nickels v. Ross* (1849), 8 C. B. 679; *Eastern Archipelago Co. v. R.* (1853), 2 E. & B. 856; *Yarmouth Corp'n. v. Simmons* (1878), 10 Ch. D. 518; *A.-G. v. British Museum Trustees* (1903), 72 L. J. Ch. 743; *Liverpool & North Wales S.S. Co. v. Mersey Trading Co.*, [1908] 2 Ch. 460.

484. Grant by tenant for life—Of penal rentcharge—Tenant for life having remainder in fee.]—A rentcharge, with a *nomine pœna*, granted by tenant for life, though an infant, is good against the feeoffee under a fine levied by the tenant for life & the infant in remainder, if the tenant for life has the remainder in fee.—*HOLT v. SAMBACH* (1628), Cro. Car. 103; 79 E. R. 691.

*Annotations*.—*Refd.* *Symonds v. Cudmore* (1690), Holt, K. B. 666; *Johnson v. Baynes* (1695), 12 Mod. Rep. 84.

485. ———.—Of rentcharge on "freeholds"—Liability of grantor's personal estate for arrears.]—The grantee, by deed of settlement on marriage, of an annuity charged upon certain lands, in which deed the grantor, there being no fraud, declared himself entitled in fee simple to the lands charged, may treat such declaration as a covenant; & on it afterwards appearing that the grantor had really only a life estate, may proceed against his estate to obtain payment of the arrears of this annuity.

M., the uncle of a person about to marry, became a party to the marriage settlement, which recited that he proposed & agreed to secure to the intended wife, in case she should survive him, an annuity to be payable out of the manors mentioned in the settlement, "of or to which he is seised or entitled in fee simple." The granting part witnessed that he granted this annuity payable out of the lands of, etc., to which he or any person in trust for him "is seised or entitled for an estate of inheritance at law or in equity": *habendum* to the intended wife for her life, subject to a mtge., & also subject to any provision he had

### PART V. SECT. 1.

*h. Grant by person having no interest—Testator possessed of undivided share granting annuity out of whole estate—Absolute liability of testator's share.*]—*RODIE v. JORDAN*, [1890] 1 L. R. 494.—*IR.*

**SECT. 1.—Estate insufficient at time of creation. Sects. 2 & 3: Sub-sect. 1.]**

made or might make in favour of his own wife. The grantor covenanted "for himself, his heirs, & assigns," with the grantee, "her exors., administrators, & assigns," that in case of the annuity falling into arrear it should be lawful for "her exors., administrators & assigns" to distrain. For further security he created a term in trustees, granting them a like power of distress. After the grantor's death it was discovered that he had only possessed a life estate in the largest part of the premises. The annuity fell into arrear:—*Held*: the deed of settlement must be construed as containing a covenant for title; the covenant for himself made his exors. liable, as there was nothing to qualify it; & as by the failure of the grantor's estate the right to distrain did not exist, the grantee was entitled to come on the personal estate of the grantor for satisfaction of the annuity.—*MONYPENNY v. MONYPENNY* (1861), 9 H. L. Cas. 114; 31 L. J. Ch. 269; 11 E. R. 671; *affg.* (1859), 3 De G. & J. 572, L. C.

*Annotations*:—*Reid, Pigott v. Stratton* (1859), 1 De G. F. & J. 33; *Ford v. Tynte* (1865), 34 L. J. Ch. 455; *Nicholls v. Bulwer* (1870), L. R. 6 C. P. 281; *Minchin v. Minchin* (1871), 19 W. R. 993.

**486. — To commence on determination of life estates.—Where no power to charge beyond own life estate.]**—Where it is the manifest intention of the parties to a deed securing a jointure & portions, to create a charge upon the corpus of settled real estates, to take effect upon the determination of the existing life estates; the fact that the person purporting to create the charge has power to charge no interest in the settled property beyond his own life estate, will not induce the ct., in order to give some effect to the deed, to impound the life estate to secure a jointure & portions which may never, in fact, be chargeable or raisable.—*FORD v. TYNTE* (1865), 2 De G. J. & Sm. 557; 6 New Rep. 51; 34 L. J. Ch. 452; 12 L. T. 512; 11 Jur. N. S. 402; 13 W. R. 643; 46 E. R. 492, L. J.

**487. Grant by person having no interest.—Personal liability of grantor.]**—*NEWTON v. WEEKES* (1648), Aleyn, 79; 82 E. R. 925.

**488. — — — — —]**—If one grants an annuity out of the manor of D., & has no such manor, yet his person is liable.—*TANKERVILLE (EARL) v. COKE* (1729), Mos. 146; 25 E. R. 319, L. C.

**489. Grant by mortgagor of copyholds.—Cesser of rentcharge on admittance of mortgagee.]**—(1) A rentcharge, with a power of distress, cannot be created except by a grant binding some legal interest in the land, & ceases to exist when the same person who is owner of the rent becomes entitled to the whole legal estate in the land out of which it issues.

(2) The interest of a mtgor. in possession is not a legal estate at all, & consequently cannot support a rentcharge with powers of distress.

(3) To trespass *de bonis asportatis* by the assignees of L., a bkpt., defts. pleaded, that L., before his bkpcy., being seised in fee of certain copyhold tenements, in consideration of £1,400 covenanted to surrender them to the use of defts., subject to a proviso for redemption; & for better payment of the interest of the sum of £1,400, L. granted to defts., that as often as the interest should be in arrear for a certain time, it should be lawful for defts. to enter & distrain for same. The plea then averred the surrender & admittance of

defts., & justified the seizure of the goods on the premises whilst in possession of L., as a distress for the interest in arrear:—*Held*: after verdict, pltf. were entitled to judgment *non obstante veredicto*, for, assuming the grant to operate as a rentcharge, it ceased to be so upon the admittance of the mtgees.; & afterwards it could only take effect as a covenant, binding such goods of bkpt. as might happen to be on the premises at the time of the distress.

If this grant be treated as a rentcharge, it could only be so as long as the estate remained in the mtgor., that is, until surrender by him & admittance of the mtgee. It may be that, until that time, the deed would operate as a grant of a rentcharge affecting the estate, just as a lease for years would be good, though a forfeiture of the copyhold as against the lord, if he chose to insist upon it. But, after surrender & admittance, the rentcharge ceased; for a person cannot at the same moment grant a rentcharge, & also the fee simple in freehold or copyhold land. Therefore, this grant ceased to be a legal obligation on the land, from the moment of surrender & admittance (*PARKE. B.*).—*FREEMAN v. EDWARDS* (1848), 2 Exch. 732; 17 L. J. Ex. 258; 11 L. T. O. S. 271; 154 E. R. 685. *Annotation*:—*As to* (1) *Reid, Jolly v. Arbutnot* (1859), 4 De G. & J. 221.

**SECT. 2.—INSOLVENCY OF GRANTOR.**

**Right to prove in bankruptcy.]**—*See BANKRUPTCY*, Vol. IV., pp. 267, 268, 295–300, 309, 387, 388, 399, Nos. 2515–2519, 2762–2819, 2896, 3546–3551, 3638, 3639, 3644; Supp. II., No. 4335a.

**Effect of discharge of grantor.]**—*See BANKRUPTCY*, Vol. IV., p. 587, Nos. 5373, 5374.

**Proof in winding up of companies.]**—*See COMPANIES*, Vol. X., pp. 935, 1076, 1077, 1088, Nos. 6415, 7527, 7529, 7610, 7611.

**—Building society.]**—*See BUILDING SOCIETIES*, Vol. VII., p. 540, No. 339.

**SECT. 3.—INSUFFICIENCY OF ASSETS ON DEATH OF GRANTOR.**

**SUB-SECT. 1.—ANNUITIES CREATED BY INSTRUMENT INTER VIVOS.**

*See Administration of Estate Act, 1925 (c. 23), s. 34 (1), Sched. I.*

**490. What are assets—Equity of redemption of mortgage.]**—Tenant in tail suffers a recovery to let in a mtge. of five hundred years, & then limits to the old uses, & by will devises all his lands for payment of debts; the equity of redemption of this mtge. held assets to satisfy creditors, or for a subsequent grantee of an annuity.—*FOSSET v. AUSTIN* (1691), Prec. Ch. 39; 2 Eq. Cas. Abr. 465; 24 E. R. 20.

**491. Right of annuitant—To prove for value of annuity.]**—Upon a deficiency of assets administered in this ct. a value must be set upon an annuity at the time of the death; & the annuitant can claim only in respect of that.—*FRANKS v. COOPER* (1799), 4 Ves. 763; 31 E. R. 394, L. C.

**492. — — — Annuity not in arrear—When administration order obtained by another.]**—Testator by deed covenanted with trustees to pay an annuity to a woman during her life, to be considered as accruing from day to day, by equal

**PART V. SECT. 3, SUB-SECT. 1.**  
**k. Right of annuitant—Postponement to prior incumbrances.]**—*HARMAN v.*

*FORSTER* (1838), 1 Dr. & Wal. 637.—**IR.**  
1. Priority between annuitants —

*Annuitants to be paid "without any abatement."*—*Re EVAN'S CHARITIES* (1858), 10 L. Ch. R. 271.—**IR.**



quarterly payments. Testator's estate was not sufficient to pay the estimated value of the annuity as well as his other debts & liabilities, & the trustees took out an originating summons under R. S. C., Ord. 55, r. 3, as creditors for administration of the estate. At the time when the summons was taken out no quarterly payment of the annuity was due:—*Held*: the trustees of the annuitant were not creditors of testator, & could not take out a summons for the administration of the estate: although if an administration order was obtained by some other person they would be entitled to prove for the estimated value of the annuity.—*Re HARGREAVES, DICKS v. HARE* (1890), 44 Ch. D. 236; 59 L. J. Ch. 375; 62 L. T. 819; 6 T. L. R. 264, C. A.

*Annotations*:—*Refd.* *Re Beeman, Fowler v. James*, [1896] 1 Ch. 48; *Re Blow, St. Bartholomew's Hospital v. Cambden*, [1914] 1 Ch. 223; *Re Hall, Hope v. Hall*, [1918] 1 Ch. 562.

**493.** ———.]—An annuity payable to one for life or until he should do or suffer some act whereby the annuity or any part thereof, if belonging to him absolutely, would become vested in some other person, was secured by deed of covenant. The estate of the covenantor was insufficient for payment of the annuity in full, & in an administration action, the annuity was valued, & was represented by a fund in ct.:—*Held*: the whole fund ought to be paid to the annuitant.—*Re SINCLAIR, ALLEN v. SINCLAIR, HODGKINS v. SINCLAIR*, [1897] 1 Ch. 921; 66 L. J. Ch. 514; 76 L. T. 452; 45 W. R. 596.

*Annotations*:—*Distd.* *Re Cottrell, Buckland v. Beddingfield*, [1910] 1 Ch. 402; *Re Dempster, Borthwick v. Lovell*, [1915] 1 Ch. 795.

**494.** ———.]—**Proof of insufficiency of estate.**]—In order to qualify an annuitant, to whom a person who died in 1922 was liable under a judgment by consent to pay the annuity, to prove for the value thereof in the administration by the ct. of deceased person's estate, it is sufficient for the annuitant to prove, as a fact, that if the annuity continues for the period normally to be expected, the estate will not suffice to meet the debts & the annuity in full.—*Re PINK, ELVIN v. NIGHTINGALE*, [1927] 1 Ch. 237; 96 L. J. Ch. 202; 136 L. T. 399; 70 Sol. Jo. 1090.

**495.** ———.]—**To retain as administratrix.**]—*MACKWORTH v. THOMAS* (1800), 5 Ves. 329; 31 E. R. 613, L. C.

*Annotations*:—*Consd.* *Jewdwin v. Agate* (1829), 3 Sim. 129. *Apld.* *Hutton v. Harris*, [1892] A. C. 547.

**496.** ———.]—An administratrix, an annuitant under covenant by her intestate whose estate is insolvent is entitled to retain all arrears falling due during administration but only to prove for the value of her future annuity.—*Re BEEMAN, FOWLER v. JAMES*, [1896] 1 Ch. 48; 65 L. J. Ch. 190; 73 L. T. 555; 44 W. R. 247; 40 Sol. Jo. 99.

**497.** ———.]—**To apply payments in discharge of prior annuities—Annuities secured by judgment.**]—In Mar. 1814, B. granted life annuities of £500, £460 & £383 to A., in consideration of sums of £3,000, £2,760 & £1,998, & as a collateral security gave judgments for double those sums. In June, 1814, B. granted six annuities to six other persons, & appointed a receiver of the rents of his real estate for securing them. The receiver took possession. A. issued *elegits* on his judgments, & extended one-half of the estate under the first, & the other half under the second, but there was a return of nil upon the third. He did not take possession of the estate, but an agreement was, in 1817, entered into between him & the six annuitants, that he should allow the receiver to continue in possession, & should be paid out of the rents £385 a year, being interest as 5 per cent. on what

he had paid for the annuities. In 1819, A. purchased part of the estate, & so extinguished his first two judgments. He continued to receive the £385 a year till 1846. A suit having been instituted by subsequent incumbrancers to enforce their charges:—*Held*: (1) apart from the agreement of 1817, as A. had never taken possession, he could not be considered to have received the £385 a year in respect of his third judgment, & therefore was not bound to apply what he received in satisfaction of that judgment; (2) under the agreement, A. did not receive the £385 a year in respect of his judgments, but in respect of his annuities, & he was at liberty to apply it in discharge of the first two annuities, though the judgments for securing them has been extinguished; (3) a judgment given for securing an annuity, carries interest under Judgments Act, 1838 (c. 110), s. 17.—*KNIGHT v. BOWYER* (1859), 4 De G. & J. 619; 45 E. R. 241, L. J.J.; *previous proceedings* (1858), 2 De G. & J. 421, L. J.J.

**498.** ———.]—**Under articles of partnership.**]—Arts. of partnership between two solrs. provided that the partnership should be for the term of ten years from May 1, 1875, if both the partners should so long live. The partnership was also made determinable by notice. There was a further provision that from the determination of the partnership the retiring partner, his exors., or administrators or the exors. or administrators of deceased partner should be entitled to receive out of the net profits of the partnership business during so much, if any, of the term of five years from May 1, 1880, as should remain after the determination of the partnership the yearly sum of £350 & during so much, if any, of the term of five years from May 1, 1885, as either the retiring partner or a widow of the retiring or deceased partner should be living, the yearly sum of £250 any sum which might under this provision for the time being become payable to the exors. or administrators of a deceased partner to be applied in such manner as such partner should by deed or will direct for the benefit of his widow & children & in default of such direction to be paid to such widow if living, for her own benefit. It was further provided that the annuity should, so far as legally might be, be constituted a charge on the net profits of the business. One of the partners died in 1883 leaving a widow but without having given any direction as to the application of the annuity. By his will he appointed his widow his universal legatee & sole extrix. He died insolvent & an action was brought by a creditor to administer his estate:—*Held*: the annuity did not form part of testator's estate but by the arts. a trust of it was created in favour of the widow, & she was entitled to it free from the claims of testator's creditors.—*Re FLAVELL, MURRAY v. FLAVELL*, (1883) 25 Ch. D. 89; 53 L. J. Ch. 185; 49 L. T. 690; 32 W. R. 102, C. A.

*Annotations*:—*Refd.* *Re Davies Davies v. Davies*, [1892] 3 Ch. 63. *Mentd.* *Ehrmann v. Ehrmann* (1894), 72 L. T. 17.

**499.** ———.]—**Under separation deed—Method of apportionment.**]—By a separation deed provision was made for the payment of an annuity by the husband to trustees for the wife. Upon the husband's death children of the marriage claimed to be entitled under the same deed to a large amount in the funds held by the trustees; such funds were, however, insufficient to satisfy their claims & also to answer the annuity, besides paying off arrears.

Upon an originating summons, taken out to decide (*inter alia*) the mode in which the available

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~~See~~ *Sub-sects. 1 & 2, A.]*

funds should be apportioned between the widow & the children:—*Held*: for the purpose of such apportionment, the amount of the arrears of the annuity to the date of the hearing of the summons must be added to the value of the annuity at the same date, ascertained according to the table of values of govt. annuities, & the fund must be divided in the proportion borne by the total so arrived at to the full amount claimed by the children.—*DELVES v. NEWINGTON* (1885), 52 L. T. 512.

**500. — To enforce charge on realty—Voluntary deed.]—**L. by deed, "in consideration of natural love & affection," granted an annuity to C. charged on certain real estate, & upon the "several chattels, goods, moneys, securities for money, & other effects" of L. At the date of the deed L. was entitled to a reversionary interest in railway stock, held by trustees. The annuity was duly paid by L. until his death, when it appeared that his personal estate was insufficient to pay his debts, & that the real estate alone was not sufficient to provide for the annuity:—*Held*: the deed being voluntary, did not create a perfect & complete equitable charge on the reversionary interest; the right of C. to such a charge depended upon contract, which the ct. would not enforce in favour of a volunteer, & C. had no priority over creditors of L. subsequent to the date of the deed.—*Re LUCAN (EARL), HARDINGE v. COBDEN* (1890), 45 Ch. D. 470; 60 L. J. Ch. 40; 63 L. T. 538; 39 W. R. 90.

**501. — To prove for arrears—Parl passu with other creditors.]—**Testator made a voluntary settlement in favour of a lunatic son & thereby covenanted to pay to the trustees the sum of £5,000 within six calendar months of his decease & in the meantime to pay an annuity of £200 *per annum*. Testator's estate proved insufficient for the payment of his debts in full. The question raised was whether Jud. Act, 1875 (c. 77), s. 10, abrogates the Chancery rule postponing voluntary debts, & entitles the trustees to prove for the arrears of the annuity & the £5,000 *pari passu* with other creditors, or whether it was still in force:—*Held*: the trustees were entitled to be paid *pari passu* with other creditors.—*Re WHITTAKER, WHITTAKER v. PALMER*, [1900] 2 Ch. 676; 69 L. J. Ch. 774; 83 L. T. 342; 49 W. R. 56; 16 T. L. R. 531; 44 Sol. Jo. 658; *affd.*, [1901] 1 Ch. 9, C. A.

*Annotation:—Re Webb (Smithfield, London), [1922] 2 Ch. 369.*

— **To administration order.]—**See EXECUTORS, Vol. XXIV., pp. 752, 753, Nos. 7806, 7807.

— **To payment out of residue.]—**See EXECUTORS, Vol. XXIII., pp. 465, 466, Nos. 5364–5371.

— **Where annuity paid for long period since death.]—**See EXECUTORS, Vol. XXIV., p. 663, No. 6895.

**502. Effect of death of one annuitant—Re-mainder entitled to payment in full.]—**A sum of 5 per cents. was held on trust to pay a number of annuities which originally exactly exhausted the income, & the capital was given over. The fund was converted into 3 per cents., & under a proviso, the annuities abated in proportion. Afterwards, by the death of an annuitant, the

income again became sufficient to pay the existing annuities in full:—*Held*: on the construction of the deed, the existing annuitants were entitled to be paid in full their annuities.—*Re MACKENZIE'S SETTLEMENT* (1863), 32 Beav. 253; 55 E. R. 100.

**Abatement of annuity.]—**See, generally, EXECUTORS, Vol. XXIII., pp. 420–423, Nos. 4913–4937.

**Insufficiency of particular estate charged.]—**See Part VI., Sect. 6, *post*.

## SUB-SECT. 2.—ANNUITIES CREATED BY WILL.

### A. In General.

**503. Right to benefit of power of sale—Neglect or refusal of trustee to pay.]—**BUTTON v. BUTTON, No. 943, *post*.

**504. Right to arrears—As against residuary legatees—When income more than sufficient to pay annuities.]—**Testator gave his whole estate to trustees to sell, & after payment of debts, expenses, & certain legacies, to pay out of the residue two annuities of £400 each to F. & P. & one of £200 to B., for their respective lives; & for the better fulfilment of that purpose, he directed them to vest sufficient capital sums on securities; & if the residue should not be sufficient, to vest whatever residue might be, & pay the dividends to the annuitants in the same proportions; & if more than sufficient, to vest the surplus, & divide it & the capital sums set apart for the annuities, as the same should become tangible by the death of each annuitant, among residuary legatees. B. predeceased testator. The residue did not yield sufficient income every year to pay F. & P. £400 each. On F.'s death, P. & F.'s personal representatives claimed payment of all the arrears out of the then enlarged income of the residue:—*Held*: F. & P. were entitled to payment of £400 each, only in those years in which the income of the residue was sufficient; when in any year that income was more than sufficient, the excess belonged to the residuary legatees; on F.'s death half the capital of the residue became divisible among them, & then P. became entitled to the income in each year of the other half; but when in any year this income exceeded £400, the excess belonged to the residuary legatees, & neither P. nor F.'s representatives were entitled to any payment of arrears.

No benefit accrued to the residuary legatees from the lapse of the annuity to B. except when thereby the income of the residue exceeded the amount of the two subsisting annuities.—*CASAMAJOR v. PEARSON* (1841), 8 Cl. & Fin. 69; 8 E. R. 27, II. L.

**505. Whether deficiency payable out of corpus.]—**MILLER v. HUDDLESTONE, No. 455, *ante*.

**506. —.]—**MINER v. BALDWIN, No. 393, *ante*.

**507. —.]—**Prospective order for the sale, from time to time, of so much of the capital of a fund in ct. as would be sufficient, with the income, to pay an annuity which the income alone was insufficient to pay.—*LAMBIE v. LAMBIE* (1853), 9 Hare, App. II., LXXIXV.; 68 E. R. 806.

**508. —.]—**Testator bequeathed so much of his personal estate as when invested in stock would produce £125 a year, to trustees, upon trust to pay the dividends of such stock to A. for

## PART V. SECT. 3, SUB-SECT. 2.—A.

**505 i. Whether deficiency payable out of corpus.]—**JONES v. JONES (1879), 27 Gr. 317.—CAN.

**505 ii. —.]—**Where a testator gave

his widow a life interest in a residence & an annuity "as long as his estate will pay the same," the annuity could not be raised by a mtge. or sale of the residence, but must come out of the estate, exclusive thereof.—*Re ERSKINE*

(1913), 24 O. W. R. 15; 4 O. W. N. 702; 10 D. L. R. 93.—CAN.

**505 iii. —.]—**WELDON v. BRADSHAW (1873), 7 L. R. Eq. 168.—IR.

life, with a direction that the capital stock should, at A.'s death, fall into the residue of his, testator's, estate, & a provision, that, if the stock should, before the trusts were fully performed, be paid off or reduced, by which any loss or deficiency might arise, the persons respectively interested therein should bear & sustain such loss or deficiency out of their respective interests, upon their becoming entitled thereto. The dividends on the stock were reduced during the life of A.:—*Held*: A. was not entitled to have the reduced dividends made up to £125 a year by a sale of a portion of the capital of the stock.—*BAGUE v. DUMERGUE* (1853), 10 Hare, 462; 20 L. T. O. S. 322; 1 W. R. 197; 68 E. R. 1008.

509. —.] — *PLAYFAIR v. COOPER, PRINCE v. COOPER*, No. 446, *ante*.

510. —.] — Testator directed his trustees, after certain pecuniary legacies, to convert all the rest of his estate, & to set apart a sufficient fund to secure an annuity of £20 to L.; & after her decease he directed the capital of the fund, after payment of the annuity, to be divided amongst three persons named, not residuary legatees. The estate was deficient, & the fund set apart produced only between £15 & £16 *per annum*:—*Held*: the annuitant was entitled to the reduced allowance only, & was not entitled to come against the corpus of the fund so set apart.—*Re TYLER'S TRUSTS* (1856), 2 Jur. N. S. 927.

511. —.] — (1) Testator directed his brother A., whom he appointed his exor. & trustee, to get in his estate & to stand possessed of the produce thereof, on trust, to raise thereout & invest in the stocks or upon mtge. such a sum of money as that, when invested, the dividends should "realise the clear annual income or sum of £200," & to pay to "my wife such dividends, interest, or annual income," etc., for her life or widowhood. On her death or second marriage, A. was to stand possessed "of the principal or trust money, & the stocks upon which the same shall be invested," in trust for himself & the other brothers & sisters of testator; & as to the residue, "after raising thereout the money sufficient to realise the annuity for my wife," A. was to stand possessed thereof on similar trusts; provided that if testator should die leaving children, the trusts for his brothers & sisters were to be null, & the children were to take the whole. The estate when got in & invested did not produce £200 a year:—*Held*: the widow was not entitled to have the deficiency made good out of the corpus of the estate.

(2) A certain portion of the fund itself had, under the order of the ct. below, been sold to make good the deficiency; the House, on reversing the order, directed the widow to replace that portion.—*BAKER v. BAKER* (1858), 6 H. L. Cas. 616; 31 L. T. O. S. 62; 4 Jur. N. S. 491; 6 W. R. 410; 10 E. R. 1436; *sub nom. Re BAKER'S ESTATE, BAKER v. BAKER*, 27 L. J. Ch. 417, H. L.

*Annotations*:—As to (1) *Distd.* *Bright v. Larcher* (1858), 3 De G. & J. 148. *Consd.* *Stelfox v. Sugden* (1859), John. 234; *Hickman v. Upsall* (1860), 2 Giff. 124; *Upton v. Vanner* (1861), 1 Drew. & Sm. 594. *Apld.* *Tarbottom v. Earle* (1863), 11 W. R. 680. *Distd.* *Prowett v. Prowett* (1864), 10 L. T. 564; *Brayne v. Rees* (1866), 15 L. T. 349. *Apld.* *Salvin v. Weston* (1866), 35 L. J. Ch. 552; *Michell v. Wilton* (1875), L. R. 20 Eq. 269. *Expld.* *Re Mason, Mason v. Robinson* (1878), 8 Ch. D. 411. *Distd.* *Carmichael v. Gee* (1880), 5 App. Cas. 588; *Re Taylor, Illsley v. Randall* (1884), 53 L. J. Ch. 1161. *Refd.* *Perkins v. Cooke* (1862), 2 John. & H. 393; *Re Tootal's Estate, Hankin v. Kilburn* (1876), 2 Ch. D. 628; *Re Howarth, Howarth v. Makinson*, [1909] 1 Ch. 485.

512. —.] — Testator gave the residue of his estate to trustees to pay the income for the benefit of his wife & unmarried daughters & youngest son, & directed that upon the youngest son attaining

the age of twenty-one years the trustees should invest a sufficient sum to secure the receipt of the annual sum of £50, to be paid by instalments as the dividends were received, to his wife for her maintenance, & subject thereto the trustees were to divide the whole of the trust estate amongst his eight children; & on the death of his wife the amount invested to secure her the annual income of £50 was to be divided in like manner amongst his eight children. The youngest son attained twenty-one in 1872. The income arising from the whole of the estate did not amount to £50 a year:—*Held*: the widow was not entitled to be paid any arrears out of the corpus.—*MICHELL v. WILTON* (1875), L. R. 20 Eq. 269; 44 L. J. Ch. 490; 23 W. R. 789.

513. —.] — *CARMICHAEL v. GEE*, No. 436, *ante*.

514. —.] — *Re GRANT, WALKER v. MARTINEAU*, No. 633, *post*.

515. —.] — *Re SMITH, SMITH v. DODSWORTH*, No. 570, *post*.

516. — *Deficiency in fund set apart by court* — *Liability of residue.*—Where annuities & legacies are charged on property, the ct.'s jurisdiction to set apart a fund to answer the annuities & legacies & distribute the rest of the property is based on administration only, & the exercise of the jurisdiction does not release the rest of the property, which, if the fund fails to answer the annuities & legacies, may be followed into the hands of those who take it. Notwithstanding the setting part of the fund, a purchaser of part of the distributed property may validly object to the title in the absence of any release from the annuities & legacies & of an order under Conveyancing & Law of Property Act, 1881 (c. 41), s. 5.—*Re EVANS & BETTELL'S CONTRACT*, [1910] 2 Ch. 438; 79 L. J. Ch. 669; 103 L. T. 181; 54 Sol. Jo. 680.

517. — *Duty to replace* — *Income becoming more than sufficient for annuities.*—Testator bequeathed three annuities charged upon the income & corpus of his residuary estate. The whole of his estate was settled in strict settlement upon his son & grandson. The income was insufficient to keep down the annuities, & £19 4s. 7d. was raised out of capital to satisfy the annuity of the first annuitant, who died in 1911. Sums amounting to £32 3s. 10d. had also been paid out of capital to the two surviving annuitants. It was now anticipated that there would be surplus income in the hands of the tenant for life after satisfying the annuities. On a summons by the trustees of the will to ascertain whether this income should be applied in recouping to capital the sums raised thereout, or either of them:—*Held*: having regard to the fact that the annuities were charged upon capital as well as income, the tenant for life could not be called upon to replace the deficiency raised out of capital.—*Re CROXON, FERRERS v. CROXTON*, [1915] 2 Ch. 290; 84 L. J. Ch. 845; 113 L. T. 1103; 59 Sol. Jo. 693.

*Annotation*:—*Distd.* *Re Strict, Vivers v. Holman* (1922), 67 Sol. Jo. 79.

—.] — *Sec. also*, Part IV., Sect. 2, *ante*; Part VI., Sect. 6, *post*.

—.] — *See EXECUTORS*, Vol. XXIII., pp. 422, 423, Nos. 4927–4937.

518. *Effect of death of one annuitant*—*Right to benefit of funds available*—*As against residuary legatee.*—Testatrix gave several life annuities & directed funds to be invested, producing an income sufficient to meet them. She bequeathed the residue of her estate, "including the fund set apart to answer the said annuities when & so soon as such annuities shall respectively cease,"

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to T. The estate was only sufficient to pay about 5s. in the pound on the legacies & the values of the life annuities, & under an order of the ct. the sums apportioned to the values of the life annuities were invested, & the dividends paid to the annuitants. On the death of one of the annuitants, T. applied for payment to him of the fund of which that annuitant had been receiving the income:—*Held*: T. had only the ordinary rights of a residuary legatee, & could take nothing until the legacies & annuities had all been paid in full, & his application must be dismissed.—*Re Tootal's Estate, HANKIN v. KILBURN* (1876), 2 Ch. D. 628; 24 W. R. 1031. C. A.

*Annotations*.—*Consd.* *Hichens v. Hichens* (1876), 36 L. T. S. *Distd.* *Geor. v. Mahood* (1878), 9 Ch. D. 151. *Reid.* *Macdonald v. Irvine* (1878), 8 Ch. D. 101; *Re Green, Baldoek v. Green* (1888), 40 Ch. D. 610.

**Right to proportionate part of capital value.]—**  
*See EXECUTORS*, Vol. XXIII., pp. 420, 421, Nos. 4915–4924.

**Effect of long continued payment by executor.]—**  
*See EXECUTORS*, Vol. XXIV., pp. 603, 710, Nos. 6895, 7355.

**Construction of wills.]—See WILLS.**

**Abatement of charitable bequests.]—See CHARITIES**, Vol. VIII., p. 303, No. 815.

**Insufficiency of particular estate charged.]—**  
*See Part VI., Sect. 6, post.*

*B. Rights as between Annuitants inter se.*

**Priorities of assets for payment of rentcharges & annuities.]—See Part VI., Sect. 6, sub-sect. 8, post.**

**519. General rule—Annuities abate rateably.]—**  
Annuity to be applied towards the maintenance & education of A., other annuities given by the same will being expressly for life, such annuities to be paid out of the dividends, etc., of the trust funds, with separate gifts of the dividends over, & also of the principal, & directions for the rateable abatement of the annuities, in case the funds applicable to the payment of them become insufficient:—*Held*: (1) the annuity to A. ceased on her attaining twenty-one; (2) the annuities being in arrear, they should abate *pro tanto* for the present, to be recouped out of the interest accruing on the outstanding portions of the trust funds, which when paid, was to be regarded as income for this purpose.—*GARDINER v. BARBER* (1854), 2 Eq. Rep. 888; 23 L. T. O. S. 128; 18 Jur. 508; 2 W. R. 407.

*Annotations*.—*As to* (1) *N.F. Wilkins v. Jodrell* (1879), 13 Ch. D. 564. *Generally, Reid.* *Frewen v. Hamilton* (1877), 47 L. J. Ch. 391.

**520. ——— Apportionment not retrospective.]—**  
Testator by his will devised certain real estate to trustees in fee in trust out of the rents to pay an annuity to A. until he attained twenty-five, when he was to be entitled to the possession of the estates, & an annuity of £400 a year to C. for life, & an annuity of £150 for the maintenance & during the minority of an infant tenant in tail; & “without prejudice to the trusts aforesaid,” & “to any jointure to be created under the power thereafter contained” to pay the surplus rent to the mother of A. until he should be entitled to the possession of the estates; & “subject to the trusts aforesaid”; the trustees were to hold the estates in trust for A. for life, with remainder to his eldest son in tail, with power to A. to appoint a jointure to any wife, with the usual powers of distress & entry, to take effect immediately after his decease. A. having appointed the jointure

died, leaving his widow, who gave birth to a posthumous son, the infant tenant in tail. The income of the estates proving deficient:—*Held*: the annuity of £400, the jointure & the annuity for the maintenance of the infant tenant in tail must abate *pari passu*, but the apportionment was not to be retrospective, so as to affect the amount received by C. previously to the birth of the tenant in tail.—*COORE v. TODD* (1857), 7 De G. M. & G. 520; 44 E. R. 203, L. C.

**521. ——— Annuity to executors.]—**  
T., after appointing three persons exors. of his will, gave & bequeathed all the rest & residue of his leasehold houses & property to them, upon trust to receive the rents, & to pay certain legacies at his death, & annuities during the lives of the annuitants. T. then gave to his exors., & the survivors or survivor of them, an annuity of £65, to be retained by them or him out of the rents, & to be received by them or him in compensation for their or his care & trouble in the performance of the trusts, or to be appropriated by them or him as they or he might think fit. Some of the annuities were continued to the children of the first annuitants; & after the deaths of others of the annuitants, their annuities were given to the exors., & the survivors or survivor of them in like manner as the annuity of £65. The payment of the annuities to some of the annuitants was to commence at the end of six months after T.'s decease, & to others at the end of three years. The property was subject to heavy mtges. The will contained a power of sale. Testator directed, that if there were any surplus after paying the annuitants & the interest, it should be accumulated for the discharge of the incumbrances. The property was insufficient to pay the annuities in full. The exors., out of the rents, paid off several of the incumbrances, & made payments to the annuitants on account, in abatement, but claimed to be paid their own annuity in full in priority:—*Held*: the income of the property applied in discharge of the mtges. must be recouped out of the corpus, & paid to the annuitants; & the annuity to the exors. must abate proportionably with the other annuitants, they not being entitled to any priority, or to be paid in full.—*DEBNEY v. ECKETT* (1858), 4 Jur. N. S. 805.

**522. Right to priority—Necessity for proof of intention of testator—Onus of proof.]—**  
Where several annuities are charged by will upon an estate, the *onus* lies upon those claiming priority to show such an intention on the part of testator; & in the absence of such proof, the annuitants are entitled to take *pari passu*.—*COORE v. TODD* (1856), 23 Beav. 92; 28 L. T. O. S. 154; 2 Jur. N. S. 1079; 53 E. R. 36; *varied* (1857), 7 De G. M. & G. 520, L. C.

**523. ——— Annuities given by will & codicil.]—**  
*GRAVES v. HICKS*, No. 477, *ante*.

**524. ———.]—**  
Testator, by his will, made in 1844, devised his freehold property, called the R. estate, in Ireland, unto G. in tail male, subject nevertheless, & charged & chargeable, with the payment of certain annuities therein mentioned. Testator then directed that the residue of his estates thereafter devised should be considered & made the primary fund for the payment of his debts, & the several legacies given by his will, & that his R. estate thereinbefore devised, subject as aforesaid, to G., & the heirs male of his body, should not be subject or liable to the payment of the debts & legacies, unless the residue of his estates should prove of insufficient value, which turned out to be the case. Testator further devised the residue of his real estates, all situate

in Ireland, to trustees, in trust for sale, & out of the proceeds thereof he directed the payment of the legacies given by his will, & every legacy to be given by any codicil thereto, unless a contrary direction should be expressed in such codicil. By a codicil made in 1845, testator gave an annuity to E. for her life, to be raised out of his estates in Ireland. The residue of testator's estate was insufficient to pay the debts & legacies :—*Held* : (1) the annuities given by the will were a charge upon the R. estate in priority of the debts & legacies ; (2) the annuity given by the codicil was also a charge upon same estate, subject to the annuities.—*PORTARLINGTON (EARL) v. DAMER* (1863), 4 De G. J. & Sm. 161 ; 3 New Rep. 264 ; 9 L. T. 564 ; 10 Jur. N. S. 54 ; 12 W. R. 391 ; 46 E. R. 877, L. C.

**525. — One annuity given out of residuary estate.**—*HAYNES v. HAYNES*, No. 381, *ante*.

**526. Method of distribution—Where all annuitants living.**—*HEATH v. NUGENT* (1860), 29 Beav. 226 ; 54 E. R. 613.

*Annotation* :—*Follid. Re Wilkins, Wilkins v. Rotherham* (1884), 27 Ch. D. 703.

**527. — — — — —**—When testator's estate is insufficient, after payment of his debts, to pay in full annuities given by his will, the fund must, after payment of costs, be apportioned between the annuitants in the proportion which the sums composed of the arrears of the annuity in each case plus the present value of the future payments bear to each other, & this rule applies in a case in which the annuitants are all living at the time of distribution.

Testator gave an annuity of £150 to his widow, an annuity of £100 to a stranger in blood, & he directed that the second annuity should be paid free of legacy duty, which should be paid out of his estate. After payment of his debts, the estate was insufficient to pay the annuities in full :—*Held* : after payment of costs, the fund must be apportioned as above between the two annuitants ; the legacy duty payable on the sum apportioned to the second annuitant must be deducted from the whole fund, & the balance then divided in the same proportion between the two annuitants.—*Re WILKINS, WILKINS v. ROTHERHAM* (1884), 27 Ch. D. 703 ; 54 L. J. Ch. 188 ; 33 W. R. 42.

*Annotation* :—*Consd. Re Turnbull, Skipper v. Wade*, [1905] 1 Ch. 726.

**528. Calculation of value—Where annuitants living.**—*HEATH v. NUGENT* (1860), 29 Beav. 226 ; 54 E. R. 613.

*Annotation* :—*Follid. Re Wilkins, Wilkins v. Rotherham* (1884), 27 Ch. D. 703.

**529. — — — — —**—(1) Where a life annuity is given to persons in succession, & the estate being ascertained to be insufficient at some period after testator's death, the annuity requires to be valued for the purposes of administration, the interests in future of such of the annuitants as may still be living are alone valued, & a prior annuitant is not required to bring into hotchpot sums already paid to him before the date fixed for the valuation to be made.

(2) Where the annuity of a prior annuitant who dies before a valuation is made is in arrear at his death, the arrears must be paid up in full out of the fund applicable to that purpose before a reversionary annuitant is entitled to claim anything, notwithstanding that the fund is thereby entirely exhausted.

(3) Upon the construction of the will, the ct.

held that sums raised out of capital under a power to mortgage, & paid in satisfaction of prior annuities, need not be brought into hotchpot for the benefit of subsequent annuitants.—*Re METCALF, METCALF v. BLENCOWE*, [1903] 2 Ch. 424 ; 72 L. J. Ch. 786 ; 88 L. T. 727 ; 51 W. R. 650.

*Annotation* :—*As to* (1) *Reid. Re West, Denton v. West*, [1921] 1 Ch. 533.

**530. Where annuitants dead.**—*Re METCALF, METCALF v. BLENCOWE*, No. 529, *ante*.

— — — — —*See EXECUTORS*, Vol. XXIII., pp. 421, 422, Nos. 4925, 4926.

**531. Effect of death of one annuitant—Application of annuity released.**—Testator gave several life annuities charged upon a particular fund, the income of which he considered to be equal to them in value ; & he gave the fund itself over to another person for life, upon the respective deaths of the annuitants ; the fund having proved deficient, & the annuitants having suffered a proportional abatement :—*Held* : on the death of one of them, the income from the fund released by the falling in of her annuity went over to the tenant for life, & was not applicable to make good the deficiency of the continuing annuities.—*SCOTT v. SALMOND* (1833), 1 My. & K. 363 ; *Coop. temp. Brough*. 46 ; 39 E. R. 719, L. C.

*Annotation* :—*Distd. Arnold v. Arnold* (1835), 2 My. & K. 365.

**532. — — — — —**—Testator desired that A., B., & C. might each enjoy, during life, the interest of £800 sterling, the principal to devolve eventually to his residuary legatees. He directed the residue of his property to be divided into three equal parts, one part to each of his brothers & his sister ; & if his brothers & sister should not survive him, or have legal issue living at testator's death, then their shares to devolve in equal proportions to the survivors, as well as the shares that might have been devised to their issue. Testator's estate was not sufficient to pay the legacies in full :—*Held* : upon the death of one of the tenants for life, an apportionment of the legacy of £800, set apart to answer her life-interest, fell into the residue, & was not given over to the residuary legatees in their individual character ; & the surviving tenants for life were entitled to have the deficiencies in their annuities satisfied out of the released fund.—*ARNOLD v. ARNOLD* (1835), 2 My. & K. 365 ; 4 L. J. Ch. 79 ; 39 E. R. 983.

*Annotations* :—*Apld. Re Richardson, Richardson v. Richardson*, [1915] 1 Ch. 353. *Reid. Abraham v. Holderness* (1842), 6 Jur. 290 ; *Charitable Donations Comrs. v. Devereux* (1842), 13 Sm. 14 ; *Parker v. Marchant* (1842), 1 Y. & C. Ch. Cas. 290 ; *Thomson v. Advocate-General* (1845), 12 Cl. & Fin. 1 ; *Swinfen v. Swinfen* (No. 4) (1860), 29 Beav. 207. *Mentd. Hertford v. Lowther* (1843), 7 Beav. 1 ; *Gibbs v. Lawrence* (1860), 9 W. R. 93 ; *Guthrie v. Walrond* (1883), 22 Ch. D. 573 ; *Northey v. Paxton* (1888), 60 L. T. 30.

**533. — — — — — To payment of arrears—Former payments not to be brought into hotchpot.**—*Re METCALF, METCALF v. BLENCOWE*, No. 529, *ante*.

**534. Right to arrears of redeemable annuity—As between devisee of annuity & devisee of arrears—Out of redemption.**—Testator was entitled to a redeemable annuity, which was in arrear nearly five years. He gave all his interest in the annuity & in the redemption moneys to his brother. He gave all the five years' arrears to his wife, for the maintenance of two infant children therein named. A sum more than equal to the arrears was received after the death of testator, as the redemption money of the annuity :—*Held* : testator's wife was entitled to the full payment of the five years'

## PART V. SECT. 3, SUB-SECT. 2.—B.

**531 i. Effect of death of one annuitant—Application of annuity released.**—*MACKENZIE v. DICKSON* (1840), 2 Dunl. (Cl. of Sess.) 833 ; 15 Fac. Coll. 866.—*SCOT*.



**Sect. 3.—Insufficiency of assets on death of grantor:**  
**Sub-sect. 2, B. & C.]**

arrears; & the costs must be paid out of the fund; & the brother was only entitled to the residue.—**MITCHELL v. M'ISAAC** (1854), 24 L. T. O. S. 14; 18 Jur. 672.

**C. Rights as between Annuitants and Legatees.**

**535. Whether annuities abate proportionately with legacies.]**—An annuitant for life is not to abate in proportion with pecuniary legatees, upon a defect of assets.—**MAYTIN v. HOPER** (1744), Ridg. temp. H. 206; 27 E. R. 806, L. C.

**536. —.]**—**ALTON v. MEDLICOT** (circa 1717), cited in 2 Ves. Sen. at p. 417; 28 E. R. 266.

**Annotations:—Folld.** **Hume v. Edwards** (1749), 3 Atk. 693. **Reid.** **Lewin v. Lewin** (1752), 2 Ves. Sen. 415; **Creed v. Creed** (1844), 8 Jur. 943.

**537. —.]**—A devisee of an annuity for life charged on the personal estate, where there is a deficiency of assets, shall abate in proportion with the other legatees.—**HUME v. EDWARDS** (1749), 3 Atk. 693; 26 E. R. 1198, L. C.

**Annotation:—Reid.** **Lewin v. Lewin** (1752), Belt's Sup. 372.

**538. —.]**—Testator, by his will, charged a freehold estate with the payment of the yearly sum of £10, to be paid half-yearly to his daughter A. for her life; & on her death, he directed such half-yearly payments to be continued for the maintenance of her children until they should attain twenty-one, & then directed his trustees to pay the sum of £120, equally amongst them. The estate was sold under a decree of the ct., & there remained out of the proceeds, after payment of testator's debts, only the sum of £74 9s. 4d.:—**Held:** the two charges of the yearly sum of £10, & the sum of £120, were equally entitled to the benefit of the corpus, which was directed to be invested, & the income paid to testator's daughter, but without prejudice to any question that might eventually arise as to the right to it.—**TAYLOR v. TAYLOR** (1843), 2 L. T. O. S. 226; 8 Jur. 15.

**539. —.]**—Testator gave his residuary estate to trustees, upon trust, in the first place, to pay two debts due from him on his covenants, & his funeral & testamentary expenses; & then to set apart & invest a sufficient sum to meet some annuities given by his will; & then, after such investment, to pay certain legacies. Testator's estate being insufficient to pay all the annuities & legacies in full:—**Held:** the annuitants were not entitled to priority, but the annuities & legacies must all abate rateably.—**THWAITES v. FOREMAN** (1846), 15 L. J. Ch. 397; 7 L. T. O. S. 297; 10 Jur. 483, L. C.

**Annotations:—Apld.** **Miller v. Huddleston** (1851), 3 Mac. & G. 513. **Refd.** **Coore v. Todd** (1857), 7 De G. M. & G. 520; **Re Wiltshire's Estate** (1859), 6 Jur. N. S. 190. **Mentd.** **Gyett v. Williams** (1862), 2 John. & H. 429; **Re Hardy, Wells v. Borwick** (1881), 17 Ch. D. 798; **Re Harris, Harris v. Harris**, [1912] 2 Ch. 241.

**540. —.]**—Where testator's effects are insufficient to satisfy an annuity bequeathed by the will & the pecuniary legacies:—**Held:** the annuity ought to be valued & the annuitant was entitled at once to the amount of the valuation, subject to an abatement in proportion to the abatement of the pecuniary legacies; & although the annuitant died before the payment of the annuity in full would have equalled the abated amount of the valuation, the other legatees would have no claim to the surplus of that amount.—**WROUGHTON v.**

**COLQUHOUN** (1847), 1 De G. & Sm. 357; 11 Jur. 940; 63 E. R. 1103.

**Annotations:—Apld.** **Daniell v. Daniell** (1849), 3 De G. & Sm. 337. **Consd.** **Todd v. Bielby** (1859), 27 Beav. 353. **Distd.** **Gratrix v. Chambers** (1860), 2 Giff. 321. **Apld.** **Re Sinclair, Allen v. Sinclair, Hodgkins v. Sinclair**, [1897] 1 Ch. 921. **Consd.** **Re Robbins, Robbins v. Legge**, [1906] 2 Ch. 648; **Re Cottrell, Buckland v. Beddingfield**, [1910] 1 Ch. 402. **Refd.** **Re Edwards, Ex p. Shand** (1867), 16 L. T. 208; **Re Ross, Ashton v. Ross** (1899), 69 L. J. Ch. 192.

**541. —.]**—Testator gave legacies to different persons, & an annuity for the personal maintenance & support of his brother, & directed the payment of it to commence on the first half-yearly day after his death, & the legacies to be paid at the expiration of two years after that event, or as much sooner as the circumstances of his estate would permit, but, without interest in the meantime. Testator's property was insufficient to pay the legacies & annuity in full:—**Held:** the annuity was not entitled to priority over the legacies, but must abate, proportionately, with them.—**ASHBURNHAM v. ASHBURNHAM** (1848), 16 Sim. 186; 12 Jur. 299; 60 E. R. 844.

**542. —.]**—**MILLER v. HUDDLESTONE**, No. 455, ante.

**543. —.]**—A., by his will, bequeathed the residue of his estate to trustees, upon trust to sell & convert same, & to stand possessed thereof "upon trust thereout in the first place to pay unto my wife an annuity of £90 sterling during her life, as therein mentioned"; & I direct my trustees, out of my trust moneys, to appropriate a sufficient fund for answering the annuity, & invest same in 3 per cent. Consols; & as to a further sum of £3,000 Consols, upon trust for his son, to pay same, with the accumulations, when he attained twenty-two, with divers other dispositions in the event of that son dying under that age, & he gave other legacies & bequests. On bill filed to declare the trusts of the will:—**Held:** the annuity of £90 to the widow was to be valued, & the widow to prove for the amount, & come in *pari passu* with the other legatees.—**WHITEHOUSE v. INSOLE** (1862), 7 L. T. 400.

**544. —.]**—Testator by his will gave certain annuities & legacies, & directed that if there should not be sufficient assets the several legacies should be proportionately reduced:—**Held:** the annuities & legacies must abate rateably.—**STUTELY v. KEPP** (1869), 20 L. T. 60; 17 W. R. 393.

**545. —.]**—(1) Where both annuities & legacies are charged upon real estate, although the annuitants have power of distress & entry, the annuities will not have priority over the legacies.

(2) Where there is merely a declaration that the widow shall not have the value of her annuity, that goes for nothing; but in order to prevent her having the value there must be a gift over (**MALINS, V.-C.**).

(3) I need not observe that when a man gives an annuity chargeable upon his land, although nothing is said about distress & entry, that would be incidental to the gift (**MALINS, V.-C.**).—**ROPER v. ROPER** (1876), 3 Ch. D. 714; 35 L. T. 155; 24 W. R. 1013.

**Annotations:—As to (1)** **Consd.** **Re Greenwood, Greenwood v. Greenwood**, [1892] 2 Ch. 295. **As to (2)** **Refd.** **Re Mabbett, Pitman v. Holborow**, [1891] 1 Ch. 707. **Generally, Mentd.** **Re Hardy, Wells v. Barwick** (1881), 50 L. J. Ch. 241.

**546. Effect of intention of testator.]**—Annuity by will to wife unprovided on deficiency of assets not abated in proportion with other

**PART V. SECT. 3, SUB-SECT. 2.—C.**

**535 i. Whether annuities abate proportionately with legacies.]**—**GREIG'S TRUSTEES v. GREIG** (1854), 16 Dunl.

(Ct. of Sess.) 899; 26 Sc. Jur. 461.—**SCOT.**

**546 i. — Effect of intention of testator.]**—**WILSON v. DALTON** (1875),

22 Gr. 160.—**CAN.**

**546 ii. —.]**—**Re CUST** (1910),

13 W. L. R. 102.—**CAN.**

**546 iii. —.]**—**BERRY'S**

legatees, upon the intent of testator.—*LEWIN v. LEWIN* (1752), 2 Ves. Sen. 415; 28 E. R. 265, L. C.

*Annotations*.—**Expld.** *Miller v. Huddleston* (1851), 3 Mac. & G. 513. **Refd.** *Creed v. Creed* (1844), 11 Cl. & Fin. 491; *Paget v. Huish* (1863), 1 Hem. & M. 663. **Mentd.** *Blower v. Morret* (1752), 2 Ves. Sen. 420; *Re Hardy, Wells v. Borwick* (1881), 17 Ch. D. 798; *Neill v. Devonshire* (1882), 31 W. R. 622.

**547.** — **Annuity charged on specific real estates.**—By a settlement, A. grants to C. a rentcharge issuing out of certain estates, with a term & powers of distress & entry to recover it. Afterwards, A., by his will, grants to C. out of the same estates a further rentcharge, with the same powers of distress, etc., as are contained in the indenture with respect to the original annuity. Testator, in a subsequent part of his will, devises the estates to trustees for a term, to raise £15,000 for E.:—**Held**: the second annuity takes priority over the £15,000.—*FREEMAN v. BLENCOWE* (1835), 4 L. J. Ch. 247.

**548.** — ———.]—Testator gave his wife his freehold estate of B. & certain specific chattels; & also an annuity for her life, charged upon all his real estates, except B., with power of distress for same, the first payment thereof to be made on May 1 or Nov. 1, which should first happen after his decease. He then charged his debts upon his real estates, except B., in aid of his personal estate; & gave an annuity to his sister, in similar terms to those used respecting that given to his wife. He next gave several pecuniary legacies to nieces & others, to be paid by his trustees, as soon as convenient after his decease, out of the residue of his personal estate, & in deficiency thereof, to be raised & paid by them, as they should think proper, out of his real estates, except B., & he charged same therewith. He lastly gave two annuities to his servants, in similar terms to those used respecting the preceding annuities. The personal estate was insufficient to pay the debts & legacies; the real estate was insufficient to pay the annuities & legacies:—**Held**: (1) upon the true construction of the provisions of the will, as to the real estate, the annuities were entitled to priority over the legacies.

(2) All simple gifts of annuities were held to be pecuniary legacies. . . . This rule, however, has no application to the gift of a rentcharge or annuity issuing out of land; for that is an interest in the land itself & necessarily specific (*LORD COTTENHAM*).—*CREED v. CREED* (1844), 11 Cl. & Fin. 491; 8 Jur. 943; 8 E. R. 1187, H. L.

*Annotations*.—**As to** (1) **Consd.** *Paget v. Huish* (1863), 1 Hem. & M. 663. **Refd.** *Conron v. Conron* (1858), 7 H. L. Cas. 168; *Re Briggs, Briggs v. George* (1881), 45 L. T. 249. **As to** (2) **Consd.** *Poole v. Heron* (1873), 42 L. J. Ch. 348. **Refd.** *Patching v. Barnett* (1881), 51 L. J. Ch. 74; *Re Saunders-Davies, Saunders-Davies v. Saunders-Davies* (1887), 34 Ch. D. 482.

**549.** — ———.]—*PORTARLINGTON (EARL) v. DAMER*, No. 524, ante.

**550.** — ———.]—Testator by his will gave his wife an annuity of £200 a year for life or widowhood, & charged it on his freehold estate at H., & directed that his wife should have all such powers & remedies for obtaining payment of the

annuity & all arrears thereof, as landlords had for obtaining payment of rent, & declared that the benefits thus conferred on his wife should be taken in full satisfaction of all dower & thirds to which she might be entitled in or out of his real & personal estate or either of them. Testator then gave two sums of £8,000 each to trustees upon certain trusts for his daughters, & directed that these sums should be paid out of his personal estate, but, in case his personal estate should be insufficient, he charged his real estate with payment of the deficiency; & testator devised his real estate at H., charged with the payment of the annuity of £200 to his wife, & all other his real estate to his son in fee. The personal estate proved insufficient, & the proceeds of sale of the real estate were insufficient for the payment of the annuity & the two legacies of £8,000 in full:—**Held**: the annuity was in the nature of a demonstrative legacy, & was entitled to priority over the two legacies of £8,000 in respect of the proceeds of sale of the freehold estate at H. on which it was charged.—*Re BRIGGS, BRIGGS v. GEORGE* (1881), 45 L. T. 249; 29 W. R. 925.

**551.** — **Priority over residuary estate.**—*CROLY v. WELD*, No. 380, ante.

**552.** — **Annuity from "funded property."**—Testator gave an annuity of £125 from his "funded property"; his "funded property" was insufficient to answer the annuity:—**Held**: the deficiency must be made up out of testator's residuary personal estate.—*ATTWATER v. ATTWATER* (1853), 18 Beav. 330; 23 L. J. Ch. 692; 22 L. T. O. S. 150; 18 Jur. 50; 2 W. R. 81; 52 E. R. 131.

*Annotations*.—**Mentd.** *Re Macleay* (1875), L. R. 20 Eq. 186; *Homer v. Homer* (1878), 8 Ch. D. 758; *Re Rosher, Rosher v. Rosher* (1884), 26 Ch. D. 801.

**553.** — **Annuity in lieu of dower.**—A widow, dowable out of her husband's lands, having elected to take an annuity given by the will in lieu of her dower, testator's estate being insufficient to pay the legacies in full:—**Held**: entitled to priority over the other legatees.—*STAHLSCMIDT v. LETT* (1853), 1 Sm. & G. 421; 65 E. R. 185.

— ———.]—*See* EXECUTORS, Vol. XXIII., p. 427, Nos. 4975, 4977, 4980, 4981.

**554.** — **Annuity out of residue.**—Testatrix bequeathed the residue of the moneys to arise from her real & personal estate to the children of W., & directed that her trustee should, in the first instance, out of such residue pay an annuity of £20. The assets were insufficient:—**Held**: the pecuniary legatees were entitled to be paid in priority to the annuitant.—*Re WILTSHIRE'S ESTATE* (1859), 6 Jur. N. S. 190; 8 W. R. 133.

**555.** — ———.]—Testator, who died in 1880, after legacies of £100 to four of his children, made several specific devises, freed & discharged from any mtges. there might be thereon at the time of his death, for the benefit of a son & three daughters, & declared that if he should sell any of the houses thereinbefore given for the benefit of his daughters, his trustees should out of his residuary estate stand possessed of a sum equivalent to the price received

*TEES v. COX'S TRUSTEES* (1850), 12 Dunl. (Ct. of Sess.) 1037; 22 Sc. Jur. 455.—**SCOT.**

**547 i.** — **Annuity charged on specific real estates.**—*JACKSON v. HAMILTON* (1846), 9 I. Eq. R. 430; 3 Jo. & Lat. 702.—**IR.**

**547 ii.** — ———.]—*WEIR v. CHAMLEY* (1850), 1 I. Ch. R. 295.—**IR.**

**551 i.** — **Priority over residuary estate.**—In a competition between a testamentary annuitant, & a residuary

legatee:—**Held**: the annuity fell to be paid out of capital if the income of the estate was insufficient to meet it.—*KNOX'S TRUSTEES v. KNOX* (1869), 7 Macph. (Ct. of Sess.) 873; 41 Sc. Jur. 470.—**SCOT.**

**551 ii.** — ———.]—In the absence of expressions indicating a contrary intention, a bequest of an "annuity" is, *primo loco*, an annual charge upon income preferable to the interests of a liferenter of the residue, & if the income should prove insufficient to meet

the annuity, a charge upon capital as a special legacy preferable to residuary or reversionary interests in the capital.—*COLQUHOUN'S TRUSTEES v. COLQUHOUN*, [1926] S. C. 32.—**SCOT.**

**554 i.** — **Annuity out of residue.**—*ROBERTSON v. CORBET* (1885), 11 V. L. R. 36.—**AUS.**

**m.** — **Annuity in lieu of claims under antenuptial settlement.**—*KINMOND'S TRUSTEES v. KINMOND* (1873), 11 Macph. (Ct. of Sess.) 381; 45 Sc. Jur. 255.—**SCOT.**



**Sect. 3.—Insufficiency of assets on death of grantor:**  
**Sub-sect. 2, C. Part VI. Sects. 1, 2 & 3:**  
**Sub-sect. 1.]**

for same upon trusts similar to those declared respecting the house sold: testator then gave all other his real & personal estate upon trust to pay annuities of £250 to each of his sons, & out of the balance of the income thereof to pay the specific incumbrances upon the estate, & after payment off of the incumbrances, upon trust to assign his residuary estate to his two sons equally. Testator sold one of the specifically devised houses for £9,800. The estate proved insufficient for payment in full to all the beneficiaries:—*Held*: (1) that the four pecuniary legacies were charged upon the entire residue, & had priority over all other payments directed to be made to beneficiaries; (2) the annuities were only given to the sons in their capacity of residuary legatees, & were therefore not payable until the sum representing proceeds of sale of realty sold by testator, & the mtge. debts on the specifically devised realty, had been provided for; (3) the £9,800, representing proceeds of sale, was to be treated as an ordinary legacy made payable out of residue; & (4) the rule in *Lutkins v. Leigh* (1734), *Cas. temp. Talb.* 53, that

the pecuniary legatee has priority over the devisee, although the devisee was under the will entitled as against a residuary legatee to have the mtge. debt paid off out of residue, applied, not having been expressly negatived by testator, & the devisees of the mtged. property were not entitled to compete with the legatees.—*Re SMITH, SMITH v. SMITH*, [1899] 1 Ch. 365; 68 L. J. Ch. 333; 80 L. T. 113; 47 W. R. 223.

**556. — How apportionment calculated.]—**Testator left his estate to trustees on trust to convert, & as to one moiety of the proceeds, to hold £2,500 on trust for M. T. for life, & to set aside a sum sufficient to produce an income of £78 *per annum*, & hold the same in trust for A. for life. The moiety of the estate proved insufficient to satisfy the legacy & annuity:—*Held*: the trustees must ascertain what sum invested in 2½ per cent. Consols at one year from testator's death would have been sufficient to produce an income of £78 *per annum*, & apportion the moiety of the estate in the proportion of that sum to £2,500.—*Re McMAHON, WELLS v. TYRER* (1911), 55 Sol. Jo. 552.

—.]—*See EXECUTORS*, Vol. XXIII., pp. 416–427.

## Part VI.—Payment of Rentcharges and Annuities.

### SECT. 1.—IN GENERAL.

*See Apportionment Act, 1870 (c. 35), ss. 2–4, 7.*

**557. Cannot be demanded till due.]—**One grants a rentcharge for life, payable every Lady Day & Michaelmas, grantee dies on Michaelmas Day after sunset, & before twelve at night, yet adjudged he should pay the arrears to the exor. of the grantee, in regard the grantee lived till sunset, which was the legal time to demand it, & it cannot be demanded till due, especially to make a forfeiture of the lease, etc. *Secus*, if the grantee had died on Michaelmas Day & before sunset.—*ROCKINGHAM (LORD) v. PENRICE* (1711), 1 P. Wms. 177; 24 E. R. 345; *sub nom.* *ROCKINGHAM (LORD) v. OXENDEN*, 2 Salk. 578.

*Annotation:—Mentd.* *Leftley v. Mills* (1791), 4 Term Rep. 170.

**558. Time for payment—Annuity given by will.]—***GIBSON v. BOTT*, No. 282, *ante*.

**559. — Partly composed of rents of freeholds—Calculation of rents.]—**H., by her will, directed her trustees, as soon as possible after her decease, to invest such a sum in the funds as would with the rent of certain lands, “at that time payable,” make up the sum of £50 *per annum*, & pay it to J., for his life:—*Held*: the money was not to be invested till one year from testatrix's death, & the amount should be computed with reference to the rent, as it was at testatrix's death, without any deduction for land or any other tax.—*HUES v. JACKSON* (1853), 2 Eq. Rep. 462; 23 L. J. Ch. 51; 22 L. T. O. S. 152; 2 W. R. 83.

**560. — Charged on land.]—**(1) Apportionment Act, 1870 (c. 35), applies to a devise contained in a will dated before the Act to which a codicil was made after the Act. *Semble*:

the result would have been the same without the codicil.

(2) Where testator charges an annuity on land with the ordinary power of distress & entry in the event of the annuity being in arrear, the annuitant must wait for payment of the annuity until the first rent day which occurs after the day fixed by testator for payment of an instalment of the annuity, & is not entitled to require that any prior rent should be kept in hand in order to answer the instalment.—*HASLUCK v. PEDLEY* (1874), L. R. 19 Eq. 271; 44 L. J. Ch. 143; 23 W. R. 155.

*Annotations:—As to (1) Appld.* *Constable v. Constable* (1879), 11 Ch. D. 681. *Refd.* *Re Bridger, Brompton Hospital for Consumption v. Lewis*, [1894] 1 Ch. 297; *Re Meredith, Stone v. Meredith* (1898), 67 L. J. Ch. 409; *Re Ford, Myers v. Molesworth*, [1911] 1 Ch. 455. *Generally, Refd.* *Re Lucas, Parish v. Hudson* (1885), 55 L. J. Ch. 101. *Mentd.* *Re March, Mander v. Harris* (1884), 27 Ch. D. 166.

**— Annuities secured by bond.]—***See BONDS*, Vol. VII., p. 188, Nos. 277–281.

—.]—*See EXECUTORS*, Vol. XXIII., p. 400, Nos. 4708–4711.

**561. Place of payment—Direction to pay to account at bank.]—**Deft. agreed to pay to pltf. during her life a yearly allowance, payable quarterly on the usual quarter days. Before the quarter's allowance became due on Dec. 25 pltf., who was about to go abroad, by a written authority directed deft. to pay the quarter's allowance to her account at a London Bank. Pltf. was abroad when the quarter's allowance became due, & deft., desiring to obtain her indorsement, & thus to ascertain that she was alive, sent to her solrs. a cheque, for the amount drawn to pltf.'s order. The solrs. returned the cheque, & issued a writ for the amount of the quarter's allowance:—

### PART VI. SECT. 1.

**558 i. Time for payment—Annuity given by will.]—**An annuity given out of residue is payable from testator's death.—*CURTIS v. ALLIBAND* (1898), 19 N. S. W. L. R. (Eq.) 34; 14 N. S. W. W. N. 150.—**AUS.**

**558 ii. — — —.]—***HAITLAND (LORD) v. LISTER* (1833), *Hayes & Jo.* 305.—**IR.**

**558 iii. — — —.]—***WEBSTER v. WEBSTER'S TRUSTEES* (1882), 10 L. (Ct. of Sess.) 169; 20 Sc. L. R. 118.—**SCOT.**

**n. — Annuity given by deed.]—***SWEENEY v. SWEENEY* (1888), 16 O. R. 92.—**CAN.**

**o. Personal liability of devisees.]—**Where a devise of real estate is made subject to the payment of an annuity, & the devisee accepts the devise he

**Held:** the direction to pay the amount to pltf.'s account at the bank was a valid direction, it being in effect a direction to pay to her at the bank, & pltf. was entitled to have the amount paid there.—*SHREWSBURY v. SHREWSBURY* (1907), 23 T. L. R. 277.

**Mode of payment.]—See EXECUTORS, Vol. XXIII., p. 400, Nos. 4712-4714.**

**Currency in which payable.]—See CONFLICT OF LAWS, Vol. XI., p. 357, Nos. 397-399, 402.**

## SECT. 2.—RIGHT TO PAYMENT OF CAPITAL.

*See* Part II., Sect. 2, sub-sect. 2; Part IV., Sect. 2, *ante*.

## SECT. 3.—DEDUCTION.

### SUB-SECT. 1.—WHAT MAY BE DEDUCTED.

**562. Expense of repairs — Not allowable.]—***SHELLY v. EARSFIELD (LADY)* (1661), 1 Rep. Ch. 206; 21 E. R. 551.

**563. Taxes — Rentcharge on copyholds — Deduction allowed.]—***LYNES v. BROWN* (1693), 2 Vern. 306; 23 E. R. 798.

**564. — Annuity.]—**If one covenants to pay an annuity to J. the covenantor shall not deduct for taxes; for the charge is on the person of the covenantor, & not the land. So if H. having a term for years, devises an annuity to J. & his heirs, there can be no deduction for taxes, for the term for years is not otherwise chargeable with it, than as it is part of the personal estate; for it cannot be said to issue out of the term, when in point of duration it may continue much longer. So if H. grants an annuity to J. & afterwards secures it out of a real estate, there shall be no deduction for taxes; for the subsequent security cannot lessen the effect of his former grant, which in its creation was tax free (*LORD COWPER, C.*).—*ROBINSON v. STEPHENS* (1709), 2 Salk. 616; 91 E. R. 522, L. C.

**565. — Land tax—Fee farm rent—Right of owner to account.]—***PICKERING'S CASE* (1698), 12 Mod. Rep. 171; 88 E. R. 1242.

**566. — — — — — When land tax redeemed.]—**The owner of lands charged with a fee farm rent, payable to a purchaser from the Crown under 22 Car. 2, c. 6, & 22 & 23 Car. 2, c. 24, having redeemed the land tax chargeable on the lands out of which the fee farm rent issues, is entitled under the Land Tax Acts, to deduct 4s. in the pound from the rent so payable.—*MOODY v. WELLS (DEAN & CHAPTER)* (1856), 1 H. & N. 40; 25 L. J. Ex. 273; 27 L. T. O. S. 82; 20 J. P. 744 156 E. R. 1110.

— — — — —.]—*See* LAND TAX. Vol. XXX., pp. 302, 303, Nos. 25-36.

will be deemed to have assumed a personal liability to pay the amount which will be enforced by the court.—*CARTER v. CARTER* (1879), 26 Gr. 232.—**CAN.**

### PART VI. SECT. 3, SUB-SECT. 1.

**p. Expense of repairs.]—***GALLOWAY (EARL) v. GALLOWAY (DOWAGER COUNTESS)*, [1904] A. C. 50.—**SCOT.**

**q. —.]—***GLOVER'S TRUSTEES v. GLOVER*, [1913] S. C. 115; 50 Sc. L. R. 71; [1912] 2 S. L. T. 357.—**SCOT.**

**r. Taxes—Land tax.]—**Where the owner of land subject to a rentcharge claimed a deduction allowed by Land Tax Act, 1905, on account of mtges. in respect of the capital value of the rentcharge.—**Held:** a rentcharge was not a mtge. within the Act, & deduction

disallowed.—*Re CAMERON* (1906), 2 Tas. L. R. 17.—**AUS.**

**t. —.]—**An annuitant is not liable to have a proportion of the land & income-tax payable in respect of the land or fund out of which the annuity arises deducted from the annuity.—*Re GUNN* (1898), 18 N. Z. L. R. 476.—**N.Z.**

**a. — Mortgage tax.]—***Re STEWART* (1900), 18 N. Z. L. R. 383.—**N.Z.**

**b. — Legacy duty.]—**A party to whom a "free yearly annuity of £50" had been bequeathed, was entitled to claim the full amount without deduction of legacy duty.—*BULLOCH v. BEATON* (1853), 15 Dunl. (Ct. of Sess.) 373; 25 Sc. Jur. 229.—**SCOT.**

**c. — Income tax.]—**Testator left

**567. — Income tax—Arrears of annuity.]—**The arrears of an annuity which accrued due while the income tax was in force, but which were unpaid, in consequence of the rents of the estate on which it was charged being exhausted by prior charges, are payable to the annuitant, without any deduction in respect of the income tax.—*BRAHAM v. STRATHMORE* (1836), 5 L. J. Ch. 165.

— — — — —.]—*See* INCOME TAX, Vol. XXVIII., pp. 50, 51, 65-69, 72-77, Nos. 255-260, 335-367, 381-421.

**Super tax.]—***See* INCOME TAX, Vol. XXVIII., p. 112, Nos. 690-694.

**568. Expense of renewal of lease—Annuity out of tithes leased for years.]—***MOODY v. MATTHEWS*, No. 679, *post*.

**569. Debt due to estate from executrix.]—***SKINNER v. SWEET* (1818), 3 Madd. 244; 56 E. R. 499.

**570. Charges for renewal of licenses.]—**Testator by will, after various specific & pecuniary bequests, gave his real & residuary personal estate to trustees upon trust out of the income thereof to pay to his wife, or permit her to retain during her widowhood, a specified annual sum, & upon her second marriage or death upon trust as to all her estate for his three daughters absolutely.

The estate included three beerhouses with on-licenses, on the renewals of which charges were imposed under Licensing Act, 1904 (c. 23), s. 3, towards a compensation fund for persons, the renewal of whose licenses might be refused under the provisions of that Act; & the tenants of the three beerhouses, by whom the charges were in the first instance paid, made the specified deductions from their rents in respect of the charges, so that the annual income of the estate became insufficient to pay the annuity in full.

On a summons by the widow for the determination of the question whether the whole loss must be borne, by her, or whether she was entitled to have a sum equal to the amount of the deductions or to some, & if so, what part thereof, raised out of capital & paid to her:—**Held:** she was not entitled to have the amount of the deductions or any part thereof raised out of capital & paid to her, as the Licensing Act, 1904 (c. 23), provided the way in which the charge was to be borne, & there was nothing either in that Act, or in testator's will, or in the general law, to relieve her from bearing it.—*Re SMITH, SMITH v. DODSWORTH*, [1906] 1 Ch. 799; 75 L. J. Ch. 442; 94 L. T. 643; 70 J. P. 169; 51 W. R. 449; 22 T. L. R. 412; 50 Sol. Jo. 376.

**571. Fee payable to Public Trustee—Apportionment between annuitants & life tenants of residue.]—**When the Public Trustee is appointed to administer the trusts of a will, which consist in paying a portion of the income of the trust funds to annuitants & the remainder to life tenants of

to his wife an annuity "free from all burdens, taxes & deductions whatsoever" & declared it to be in full of her legal rights:—**Held:** she was entitled to the annuity without deduction of income tax.—*MACKIE'S TRUSTEES v. MACKIE* (1875), 3 R. (Ct. of Sess.) 312; 12 Sc. L. R. 222.—**SCOT.**

**d. — — — — —.]—***DALRYMPLE v. DALRYMPLE* (1902), 4 F. (Ct. of Sess.) 545; 39 Sc. L. R. 318; 9 S. L. T. 415.—**SCOT.**

**e. — — — — —.]—***WILSON'S TRUSTEES v. WILSON*, [1919] S. C. 359; 56 Sc. L. R. 256.—**SCOT.**

**f. — — — — —.]—**A testator directed his trustees to pay out of the "net annual proceeds" of one-half of the residue of his estate the sum of £750 yearly to his niece for her life

**Sect. 3.—Deduction: Sub-sects. 1 & 2.]**

the residue, the income fee payable to him in accordance with Public Trustee Act, 1906 (c. 55), s. 9, must be duly apportioned as between the annuitants & the life tenants, & must not be thrown entirely upon residue.—*Re BENTLEY, PUBLIC TRUSTEE v. BENTLEY*, [1914] 2 Ch. 456; 84 L. J. Ch. 54; 111 L. T. 1097.

**Estate duty.]—See ESTATE DUTY, Vol. XXI., pp. 12–14, 21, 29, 32, 38, 39, 41, 42, Nos. 54, 55, 57, 66, 120, 121, 174, 192, 195, 249–251, 264.**

**Settlement estate duty.]—See ESTATE DUTY, Vol. XXI., pp. 45, 46, Nos. 290–293.**

**Legacy duty.]—See ESTATE DUTY, Vol. XXI., pp. 51–54, 58, 60, 66, 68, 69, 72, 79–82, Nos. 334, 335, 338, 339, 355–357, 377, 392–394, 439, 440, 453–455, 458, 478, 480, 548–569, 572, 573, 575–577.**

**Succession duty.]—See ESTATE DUTY, Vol. XXI., pp. 87, 105, Nos. 634, 635, 773, 774.**

**SUB-SECT. 2.—DIRECTION TO PAY WITHOUT DEDUCTION.**

**572. Devise of annuity “clear.”]—A devise of an annuity clear for A. means free from taxes.—HODGWORTH v. CRAWLEY (1742), 2 Atk. 376; 26 E. R. 628, L. C.**

**573. Application to future taxes—Covenant to pay free of all taxes.]—BREWSTER v. KITCHIN, No.**

**574. Application to income tax—Devise “clear of all taxes & deductions.”]—Testator gave to his wife an annuity or clear yearly rentcharge of £1,800, clear of all taxes & deductions:—Held: the annuity was subject to property-tax.—WALL v. WALL (1847), 15 Sim. 513; 16 L. J. Ch. 305; 11 Jur. 403; 60 E. R. 718.**

**Annotations:—Apld. Sadler v. Rickards (1858), 4 K. & J. 302. Follid. Re Saillard, Pratt v. Gamble, [1917] 2 Ch. 140. Consd. Re Shrewsbury Estate Acts, Shrewsbury v. Shrewsbury, [1924] 1 Ch. 315. Refd. Festing v. Taylor (1862), 3 B. & S. 218; Gleadow v. Leatham (1882), 22 Ch. D. 269. Mentd. Robinson v. Wheelwright (1856), 6 De G. M. & G. 535; Williams v. Mayne (1867), 16 W. R. 173; Re Vardon's Trusts (1884), 51 L. T. 884; Harle v. Jarman, [1895] 2 Ch. 419.**

**575. — Devise clear of legacy duty & other deductions.]—Gift by will of a rentcharge “clear of legacy duty & every other deduction whatsoever”:—Held: it was not to be taken clear of the property or income tax.—LETHBRIDGE v. THURLOW (1851), 15 Beav. 334; 21 L. J. Ch. 538; 51 E. R. 567.**

**Annotations:—Apld. Sadler v. Rickards (1858), 4 K. & J. 302. Consd. Re Shrewsbury Estate Acts, Shrewsbury v. Shrewsbury, [1924] 1 Ch. 315. Refd. Festing v. Taylor (1862), 3 B. & S. 218; Lovatt v. Leeds (No. 1) (1862), 2 Drew. & Sm. 62; Gleadow v. Leatham (1882), 22 Ch. D. 269.**

**576. — — —.]—Testator by his will in 1854, directed his trustees to pay to his widow during her life the annual sum of £500 “free from legacy duty & other deductions”:—Held: the annuity was subject to income tax under 16 & 17 Vict. c. 34, to be paid out of the annuity itself.—**

alimentary use. On a consideration of the settlement as a whole:—Held: the niece was entitled to an annual payment of the sum of £750, without any deduction on account of income-tax.—SMITH'S TRUSTEES v. GAYDON, [1919] S. C. 95; 56 Sc. L. R. 92.—SCOT.

**g. — — —.]—HUDSON'S TRUSTEES v. McINTOSH (1920), 57 Sc. L. R. 571.—SCOT.**

**h. — — —.]—WORDIE'S TRUSTEES v. WORDIE, [1922] S. C. 28.—SCOT.**

**k. — — —.]—SMITH'S TRUSTEES**

**v. SMITH, [1924] S. C. 485.—SCOT.**

**1. Trustees' commission.]—Re MITCHELL (1862), 1 W. & W. (Eq.) 167.—AUS.**

**m. Expense of wire-netting.]—TRUSTEES, EXECUTORS & AGENCY CO., LTD. v. LOGAN (1900), 25 V. L. R. 659.—AUS.**

**PART VI. SECT. 3, SUB-SECT. 2.**

**574i. Application to income tax—Devise “clear of all taxes & deductions.”]—KINLOCH'S TRUSTEES v. KINLOCH (1880), 7 R. (Ct. of Sess.) 596; 17 Sc.**

**SADLER v. RICKARDS (1858), 4 K. & J. 302; 31 L. T. O. S. 396; 6 W. R. 532; 70 E. R. 126.**

**Annotations:—Apld. Gleadow v. Leatham (1882), 22 Ch. D. 269. Consd. Re Shrewsbury Estate Acts, Shrewsbury v. Shrewsbury, [1924] 1 Ch. 315. Refd. Festing v. Taylor (1862), 3 B. & S. 218.**

**577. — — —.]—Testator directed trustees to stand possessed of residuary real & personal estate upon trust to pay thereout to his wife, during her life, such an annual sum as, together with the income of a settled fund of £10,000, should produce to her “a clear annual income of £1,500.” He gave several legacies & annuities, & towards the end of his will declared that “no deduction shall be made from any of the legacies given by this my will, or to be given by any codicil thereto, for legacy tax or any other matter, cause, or thing whatever.” An administration suit having been brought, an order was made in 1861 that the trustees of the will should repay to the widow certain sums which had been deducted from her annuity by mistake for succession duty, & that they should pay her until further order an annuity of £1,500 free of all deductions except income tax; but no express declaration of her rights was made. This order was acted upon until 1882, when a petition was presented by the widow asking that the income tax which had been deducted might be paid to her, & that in future her annuity might be paid free of income tax:—Held: the order of 1861 amounted to a declaration of the right of the widow to receive the annuity free of all deductions except income tax, notwithstanding the words “until further order,” & the matter was *res judicata* & could not now be reconsidered.—PEARRETH v. MARRIOTT (1882), 22 Ch. D. 182; 52 L. J. Ch. 221; 48 L. T. 170; 31 W. R. 68, C. A.**

**Annotations:—Apld. Re Loveless, Farrer v. Loveless, [1918] 2 Ch. 1. Consd. Thompson v. Thompson, [1923] 2 Ch. 205; Re Shrewsbury Estate Acts, Shrewsbury v. Shrewsbury, [1924] 1 Ch. 315. Refd. Badar Boc v. Habib Merican Noordin, [1909] A. C. 615; Hook v. Administrator-General of Bengal (1921), 37 T. L. R. 378.**

**578. — — —.]—Testator, after giving various legacies, directed his trustees, out of the income of his residuary estate, to pay certain annuities, “all the said annuities to be paid clear of all deductions whatsoever except income tax.” By a codicil made five years afterwards, after varying many of the legacies & increasing the amount of one of the annuities, he proceeded: “& I expressly direct that every legacy & other interest as well derivable under my will as any codicil thereto shall be free of legacy duty & every other deduction”:—Held: testator must be taken to have had his will in his mind when he made his codicil, & to have used the word “deductions” in the same sense throughout; & as by his will he had shown that he understood the word to include income tax, the annuities must be paid free of income tax.—Re BUCKLE, WILLIAMS v. MARSON, [1894] 1 Ch. 286; 63 L. J. Ch. 330; 70 L. T. 115; 42 W. R. 229; 38 Sol. Jo. 112; 7 R. 72, C. A.**

**Annotations:—Consd. Re Crawshaw, Crawshaw v. Crawshaw (1915), 60 Sol. Jo. 275. Refd. Re Birks, Kenyon v. Birks,**

**L. R. 444.—SCOT.**

**575i. — Devise clear of legacy duty & other deductions.]—Testator directed that certain annuities given under the will should be paid free from any deduction on account of probate duty or on any other account:—Held: the annuities were not given free from income tax.—MILLER v. SIMPSON (1903), 3 S. R. N. S. W. 386; 20 N. S. W. W. N. 166.—AUS.**

**n. — Bequest of “free” revenue of residue—Subsequent restriction to specific sum.]—MURDOCK'S TRUSTEES v. MURDOCK, [1918] S. C. 738.—SCOT.**

[1899] 1 Ch. 703; *Re Shrewsbury Estate Acts*, *Shrewsbury v. Shrewsbury*, [1924] 1 Ch. 315.

**579. — Devise free from all deductions—**  
**Previous devise free from income tax & other deductions.]**—Testator gave three annuities, the first “free from income or property tax or any other deductions,” the second “free from all deductions,” the third “free from deduction”:—*Held*: all the annuities were free from income tax.—*TURNER v. MULLINEUX* (1861), 1 John. & H. 334; 70 E. R. 775.

*Annotations*:—**Consd.** *Festing v. Taylor* (1862), 3 B. & S. 218. **Distd.** *Abadam v. Abadam* (1864), 33 Beav. 475. **Consd.** *Gleadow v. Leatham* (1882), 22 Ch. D. 269. **Appl.** *Re Buckle, Williams v. Marson*, [1894] 1 Ch. 286. **Consd.** *Re Parker-Jervis, Salt v. Locker*, [1898] 2 Ch. 643. **Distd.** *Re Saillard, Pratt v. Gamble*, [1917] 2 Ch. 401. **Appl.** *Re Shrewsbury Estate Acts, Shrewsbury v. Shrewsbury*, [1924] 1 Ch. 315. **Refd.** *Lovatt v. Leeds* (No. 1) (1862), 2 Drew. & Sm. 62; *Re Birks, Kenyon v. Birks*, [1899] 1 Ch. 703. **Mentd.** *Bowyer v. Griffin* (1869), L. R. 9 Eq. 340; *Re Basham, Hannay v. Basham*, (1883), 23 Ch. D. 195.

**580. —**—*]*—Testator appointed an annuity of £500 a year to his widow for life “to be payable without any deduction whatever”:—*Held*: it was not given free of income tax.—*ABADAM v. ABADAM* (1864), 33 Beav. 475; 33 L. J. Ch. 593; 10 L. T. 53; 10 Jur. N. S. 505; 12 W. R. 615; 55 E. R. 452.

*Annotation*:—**Appl.** *Gleadow v. Leatham* (1882), 22 Ch. D. 269.

**581. —**—*]*—Testator declared that his trustees should stand possessed of his residuary estate & directed them out of the income to pay to his wife “the clear yearly sum of £600” for life if she should remain his widow, but if she should marry again an annuity of £100 in lieu of the annuity of £600, “the said annuities of £600 & £100, as the case may be, to be paid free from all deductions & abatements whatsoever.” By a codicil an annuity of £1,000 was given in lieu of £600:—*Held*: the annuity was not given free from income tax.—*GLEADOW v. LEETHAM* (1882), 22 Ch. D. 269; 52 L. J. Ch. 102; 48 L. T. 264; 31 W. R. 269.

*Annotations*:—**Distd.** *Re Buckle, Williams v. Marson* (1893), 70 L. T. 115. **Appl.** *Re Crawshaw, Crawshaw v. Crawshaw* (1916), 60 Sol. Jo. 275. **Consd.** *Re Musgrave, Machell v. Parry* (1916), 115 L. T. 149. **Appl.** *Re Loveless, Farrer v. Loveless*, [1918] 2 Ch. 1. **Consd.** *Re Shrewsbury Estate Acts, Shrewsbury v. Shrewsbury*, [1924] 1 Ch. 315. **Refd.** *Re Parker-Jervis, Salt v. Locker*, [1898] 2 Ch. 643.

**582. —**—*]*—(1) An annuity given “free of all deductions” does not free the annuitant from liability to pay income tax.

(2) Where an annuity is given “clear of all deductions, including income tax,” the annuitant must herself pay super-tax.—*Re CRAWSHAY, CRAWSHAY v. CRAWSHAY* (1915), 60 Sol. Jo. 275.

*Annotations*:—*As to (2)* **Distd.** *Re Crosse, Oldham v. Crosse*, [1920] 1 Ch. 240; *Re Doxat, Doxat v. Doxat* (1920), 125 L. T. 60. **Refd.** *Re Bates, Selmes v. Bates*, [1925] Ch. 157.

**583. — Devise “free from all deductions in respect of taxes charges,” etc.]**—A. B., in 1846, gave to his wife annuities or clear yearly sums for her life “free from all deductions in respect of any present or future taxes, charges, assessments, or impositions, or other matter, cause, or thing, whatsoever,” & directed the trustees to appropriate & invest a sufficient part of his personal estate as a fund for the purpose of paying them. The trustees, acting upon the advice of counsel, deducted from all the payments to the widow the income tax:—*Held*: the widow was entitled to be paid the annuities in full, free from any deduction; & also entitled to be paid all the sums which had been deducted.—*Re BANNERMAN’S ESTATE, BANNERMAN v. YOUNG* (1882), 21 Ch. D. 105; 51 L. J. Ch. 449.

*Annotations*:—**Distd.** *Gleadow v. Leatham* (1882), 22 Ch. D. 269. **Consd.** *Re Saillard, Pratt v. Gamble*, [1917] 2 Ch.

401. **Apprvd.** *Re Shrewsbury Estate Acts, Shrewsbury v. Shrewsbury*, [1924] 1 Ch. 315. **Refd.** *Re Crosse, Oldham v. Crosse*, [1920] 1 Ch. 240.

**584. — Devise “free of all duties.”]**—Testator directed payment out of the income of his estate of £200 *per annum* “free of all duties” to a solr. trustee for his trouble in acting as a trustee of his will, so long as he should continue to act as such trustee, & also in addition gave him power to charge & be paid for professional & other charges:—*Held*: the sum of £200 was to be paid subject to & not free of income tax.—*Re SAILLARD, PRATT v. GAMBLE*, [1917] 2 Ch. 401; 86 L. J. Ch. 749; 117 L. T. 545, C. A.

*Annotations*:—**Appl.** *Re Loveless, Farrer v. Loveless*, [1918] 2 Ch. 1. **Consd.** *Re Shrewsbury Estate Acts, Shrewsbury v. Shrewsbury*, [1924] 1 Ch. 315. **Refd.** *Re Crosse, Oldham v. Crosse*, [1920] 1 Ch. 240.

**585. — Devise of “clear annuity.”]**—Testator gave his residuary real & personal estate to trustees upon trust, as to a share thereof, to pay to his wife out of the income “a clear annuity of £2,000 during her widowhood,” & in the event of her marrying again, then, during the remainder of her life, a clear reduced annuity of £1,000:—*Held*: the annuity was not given free of income tax.—*Re LOVELESS, FARRER v. LOVELESS*, [1918] 2 Ch. 1; 87 L. J. Ch. 461; 119 L. T. 24; 34 T. L. R. 356; 62 Sol. Jo. 470, C. A.

*Annotations*:—**Distd.** *Re Shrewsbury Estate Acts, Shrewsbury v. Shrewsbury*, [1924] 1 Ch. 315. **Refd.** *Re Cain’s Settlement, Cain v. Cain*, [1919] 2 Ch. 364.

**586. — Appointment “clear of all deductions for taxes or otherwise”—Construction of Private Act.]**—The Shrewsbury Estate Act, 1843 (c. 28), s. 7, empowered any owner in possession of the settled estates by deed to appoint a jointure to his wife for life not exceeding the yearly sum of £3,000, “clear of all deductions whatsoever for taxes or otherwise,” but by sects. 9, 10 the estates were not at any time to be subject to the payment of more than £6,000 in respect of three or more jointures, & there were complicated provisions as to the way the excess should be borne between a second & subsequent jointures, the subsequent jointures up to £1,000 being in this respect placed before the second jointure. By a jointure deed of July 20, 1910, the late Earl of Shrewsbury exercised this power by appointing two jointures of £1,500 to Lady Shrewsbury, “clear of all deductions whatsoever for taxes or otherwise.” On May 5, 1904, another jointure of £1,000 had been appointed to the wife of the Earl’s son & heir-apparent under Shrewsbury Estate Act, 1862 (c. 5), s. 33, which did not contain the words “clear of all deductions,” etc. This became payable on the son’s death on Jan. 8, 1915, but it was not suggested that it was free from income tax. The Earl died on May 17, 1921. The question then arose whether Lady Shrewsbury’s jointures were payable free of income tax:—*Held*: on the authorities, having regard to the provisions of the Income Tax Acts, & on the construction of Shrewsbury Estate Act, 1843 (c. 43), applt. was entitled to have her jointures paid in full free from deduction of income tax.—*Re SHREWSBURY ESTATE ACTS, SHREWSBURY v. SHREWSBURY*, [1924] 1 Ch. 315; 93 L. J. Ch. 171; 130 L. T. 238; 40 T. L. R. 16; 68 Sol. Jo. 79, C. A.

**587. — Right to excess recovered by annuitant.]**—Testator gives an annuity free of income tax & the annuitant, under the provisions of Income Tax Acts, obtains relief by way of repayment of income tax in excess of the amount properly payable by him:—*Held*: the residuary estate of testator is entitled to such proportion of the sum so repaid as the annuity bears to the total income of the annuitant.—*Re PETTIT, LE FEVRE v.*

*Sect. 3.—Deduction: Sub-sect. 2. Sect. 4: Sub-sects. 1 & 2.]*

PETIT, [1922] 2 Ch. 765; 91 L. J. Ch. 732; 127 L. T. 491; 38 T. L. R. 787; 66 Sol. Jo. 667.

—*J.—See INCOME TAX, Vol. XXVIII., pp. 74–77, Nos. 308–421.*

**588. Application to super tax—Devise free of income tax.]—***Re CRAWSHAY, CRAWSHAY v. CRAWSHAY, No. 582, ante.*

**589. ———.]—**By his will made in 1915 testator directed his trustees out of the income of his residuary estate to pay his wife during widowhood the sum requisite to make up her marriage settlement income to “the clear annual sum of £4,000 a year free from income tax.”—*Held: the wife was entitled to the £4,000 a year free from super tax as well as ordinary income tax.—Re CROSSE, OLDHAM v. CROSSE, [1920] 1 Ch. 240; 89 L. J. Ch. 145; 122 L. T. 462; 64 Sol. Jo. 260.*

*Annotations:—Distd. Re Bates, Selmes v. Bates, [1925] Ch. 157. Refd. Davis v. I. R. Comrs., [1922] 2 K. B. 805.*

**590. ———.]—**A bequest of an annuity “free of income tax & of all deductions” is a bequest of an annuity free of super tax.

In such a case as the above the income of the residuary estate must bear such proportion of the total super tax payable by the annuitant, as the annuity with the income tax thereon added thereto bears to the total amount of the income of the annuitant assessed for super tax.—*Re DOXAT, DOXAT v. DOXAT (1920), 125 L. T. 60; 64 Sol. Jo. 651.*

*Annotations:—Distd. Re Bates, Selmes v. Bates, [1925] Ch. 157. Follid. Re Bowen, Paddock v. Bowen (1925), 70 Sol. Jo. 44.*

**591. ———.]—**By his will made in 1923 testator gave to his wife “such a sum in every year as after deduction of the income tax for the time being payable in respect thereof will leave a clear sum of £2,000.”—*Held: the wife was entitled to the £2,000 free of income tax only, & was not entitled to payment of any sum in respect of super tax.—Re BATES, SELMES v. BATES, [1925] Ch. 157; 94 L. J. Ch. 190; 132 L. T. 729.*

**592. ———.]—**A direction for an annuity “to be paid without any deduction by equal quarterly payments free from income tax”: is a direction to pay free from super tax.—*Re BOWEN, PADDOCK v. BOWEN (1925), 70 Sol. Jo. 44.*

**593. ———.]—***Liability of residue of estate—Method of calculation.]—*Testator, who died in Oct. 1915, bequeathed to wife a net annuity of £4,000 free of duty, income tax, super tax, & any similar tax, & directed the trustees of his will to apply the income of the trust fund, in payment of the annuity & the taxes thereon, & in payment of other annual sums. Testator's wife had a separate gross income of £1,637 a year apart from the will:—*Held: the residue of the estate must bear such proportion of the total super tax payable by testator's wife as the £4,000 annuity, with income tax added, bore to the total amount of the assess-*

*ment for purposes of super tax.—Re BOWRING, WIMBLE v. BOWRING (1918), 34 T. L. R. 575; 62 Sol. Jo. 729.*

*Annotations:—Follid. Re Doxat, Doxat v. Doxat (1920), 125 L. T. 60; Re Bowen, Paddock v. Bowen (1925), 70 Sol. Jo. 44. Distd. Re Bates, Selmes v. Bates, [1925] Ch. 157.*

#### SECT. 4.—APPORTIONMENT.

##### SUB-SECT. 1.—IN GENERAL.

*See Apportionment Act, 1870 (c. 35), ss. 2–4, 7; & generally, EQUITY, Vol. XX., pp. 280–285, Nos. 391–435.*

**594. What will be apportioned—Annuity granted by Crown.]—**William IV., by indenture, in pursuance of 1 & 2 Will. 4, c. 11, granted to trustees for his consort Queen Adelaide an annuity of £100,000, to commence on the decease of His Majesty, & “continue” “during the natural life of Her Majesty,” payable out of the Consolidated Fund “at the four most usual days of payment in the year, that is to say Mar. 31, June 30, Sept. 30, & Dec. 31, by even & equal portions, the first payment thereof to be made at such of the days as shall first & next happen after the decease of His Majesty, in case Her Majesty should survive him.” His Majesty died on June 20, 1837. On June 30, the trustees received a full quarter's payment of £25,000. This payment was made after consulting the law officers of the Crown, who advised that the entire sum was due; & Her Majesty was informed of their advice. The quarterly payments were made, up to & on Sept. 30, 1849. Her Majesty died on Dec. 2, 1849. Her trustees applied for a proportionate part of the quarterly payment which would have become due on Dec. 31, 1849, if she had so long lived. On rule *nisi* for a *mandamus* to the Lords of the Treasury to issue a warrant, under stat. 4 & 5 Will. 4, c. 5, s. 13, for this payment:—*Held: (1) if the annuity had been apportionable & the sum due, mandamus was the proper remedy; & the ct. would not in the exercise of its discretion make the refunding of what on that supposition would have been the overpayment on June 30, 1837 a condition to the issuing of the writ; there being no equity to require Her Majesty's representatives to restore a sum received under the bonâ fide belief that it was her own; (2) the annuity was not apportionable.—R. v. TREASURY LORDS, QUEEN DOWAGER'S ANNUITY (1851), 16 Q. B. 357; 20 L. J. Q. B. 305; 16 L. T. O. S. 484; 15 Jur. 767; 117 E. R. 916.*

*Annotations:—As to (1) Consd. Ex p. Napier (1852), 18 Q. B. 692. Apld. R. v. Income Tax Comrs. for Special Purposes (1888), 21 Q. B. D. 313. Refd. R. v. Ambergate, etc. Ry. (1852), 17 Q. B. 957; R. v. Treasury Comrs. (1872), L. R. 7 Q. B. 387; R. v. Joint Stock Cos.' Registrar (1888), 21 Q. B. D. 131; R. v. Lambourn Valley Ry. (1888), 22 Q. B. D. 463; R. v. Incorporated Law Soc., [1895] 2 Q. B. 456.*

—*Covenant to pay annuity to wife.]—See HUSBAND & WIFE, Vol. XXVII., pp. 231, 232, Nos. 2028, 2029.*

#### PART VI. SECT. 4, SUB-SECT. 1.

**a. General rule.]—**Annuities, independently of 4 & 5 Will. 4, c. 22, are not apportionable unless granted for the maintenance of infants, or married women living separately from their husbands.—*LEATHLEY v. TRENCH (1858), 8 I. Ch. R. 401.—IR.*

**b. ———.]—**A terminable annuity is apportionable under 4 & 5 Will. 4, c. 22.—*SUTTON v. ENNIS (1870), 18 W. R. 882.—IR.*

**c. ———.]—**Annuities cannot be apportioned.—*BENNETT'S ESTATE (1884), 7 Nfld. L. R. 36.—NFLD.*

**d. Shares in proportion to legacies**

**& annuity.]—**The surplus from the sale of testator's lands, after payment of legacies, was to be divided amongst the legatees in proportion to the other sums bequeathed to each. One legacy was of \$200, & an annuity; & the legatee died within a year after testator:—*Held: her personal representative was entitled to a proportionate part of the annuity; & her share of the surplus was to be based on the \$200, plus this sum.—WOODSIDE v. LOGAN (1868), 15 Gr. 145.—CAN.*

**e. Apportionment of money due under annuity bond.]—***CUTHBERT v. NORTH AMERICAN LIFE ASSURANCE CO. (1894), 24 O. R. 511.—CAN.*

**a. Right to contribution.]—**If a man grant a rentcharge out of all his lands, & afterwards sell them by parcels to different persons, & the grantee of the rentcharge resort to one only of the purchasers, the latter shall have contribution from the other purchasers.—*EVERALL v. WADE (1835), L. & G. temp. Sugd. 252, 262.—IR.*

**b. Right to apportionment.]—**Where lands are subject to a perpetual rent, & part of them, having a right of indemnity against the rest, is sold to tenants under Land Act, 1896, the rentcharge being apportioned & the apportioned charge being redeemed out of the purchase money, the person who



**595. In whose favour apportionment made—Representative of tenant for life.]**—Interest by will, in the nature of annuity, not apportioned in favour of the exor. of the tenant for life.—*FRANKS v. NOBLE* (1806), 12 Ves. 484; 33 E. R. 183.

**596. ———.]**—By a settlement, £10,000 was directed to be invested by trustees in the Territorial Debt of the East India co. which bore interest at 6 per cent., payable half-yearly. The trusts were declared to be to L. for life, & after his death over. The co. paid off the Territorial Debt & opened another, for which were issued the promissory notes of the 5 per cent. transfer loan, designated the book debt of the — day of —, 1834. The interest was payable half-yearly. The trustees transferred their old fund into the new, & paid the income to the tenant for life until his death, which happened thirteen days before one half-yearly period of payment:—*Held*: the new debt was in the nature of annuities, redeemable at the option of the co., but not at the option of the lender or holder, & the half-yearly income was not apportionable between the representative of the tenant for life & the remainderman, but belonged wholly to the latter.—*WARDEN v. ASHBURNER* (1848), 2 De G. & Sm. 366; 17 L. J. Ch. 440; 11 L. T. O. S. 532; 12 Jur. 784; 64 E. R. 164.

**597. Application of Apportionment Act, 1870 (c. 35)—Grantor dying after passing of Act.]**—Above Act, applies to every kind of income whether made payable under an instrument in writing or otherwise, to which a person may be entitled who dies subsequently to the passing of the above Act.

By an order of the ct. made in 1855, an annuity of £100 was directed to be paid to W. during her life. W. died in 1872:—*Held*: the annuity was apportionable to the day of her death.—*Re THACKER'S TRUSTS* (1873), 28 L. T. 56; 21 W. R. 285.

*Annotation*:—*Reid*. Patching v. Barnett (1880), 43 L. T. 50.

**598. Will made previously—Subsequent codicil.]**—*HASLUCK v. PEDLEY*, No. 560, *ante*.

**599. ——— To annuities payable in advance—Where instalment paid to annuitant.]**—By a separation deed a husband granted to his wife an annuity during their joint lives, if they should so long live separate from each other, the annual sum to be paid by equal half-yearly payments in advance on Mar. 1 & Sept. 1 in every year. The husband & the wife continued to live separate from each other until the death of the husband. After the husband's death his exrix. brought an action against his widow to recover the balance of the last instalment paid by the husband under the deed after deducting an apportioned part in respect of the period between the payment & his death:—*Held*: the annuity was not apportionable, & the exrix. was not entitled to recover.

With regard to above Act, I think that when one of the days mentioned in the deed came round the husband was bound to make the stipulated pay-

ment, & I think that above Act has no application to the matter (*CHITTY*, L.J.).—*TREVALION v. ANDERTON* (1897), 66 L. J. Q. B. 489; 76 L. T. 642; 13 T. L. R. 401, C. A.

#### SUB-SECT. 2.—IN RESPECT OF TIME.

*See* Apportionment Act, 1870 (c. 35), ss. 2-4.

**600. Annuity granted until majority.]**—Testator gave an annuity, payable half-yearly, to his son for his maintenance & education until he attained twenty-one, & another annuity, payable in like manner, to his daughter, who was adult, during the son's minority:—*Held*: as the son was entitled to a proportional part of his annuity from the last half-yearly day of payment up to his attaining twenty-one, the daughter was entitled to a like proportional part of her annuity.—*WEIGALL v. BROME* (1833), 6 Sim. 99; 58 E. R. 532.

**601. Annuity charged on land for certain time—Cesser of charge before time for payment of annuity.]**—An annuity given for maintenance, & charged upon land for a certain time which ceased before the time of the year at which the annuity was payable:—*Held*: the annuitant was entitled to an apportioned part of such annuity for the time between the last payment & the cessation of the charge.—*SHEPPARD v. WILSON* (1845), 4 Hare, 392; 9 Jur. 920; 67 E. R. 701.

*Annotation*:—*Reid*. Marsh v. Keith (1861), 29 Beav. 625.

**602. Annuity for life—Apportionment to day of death.]**—Testator, after directing a fund to be formed by investing the rents of his estates in the purchase of Bank annuities, charged it with the payment of £150 a year to his wife during her life:—*Held*: though the £150 was not a continuing payment, the exors. of the wife who outlived testator between seven & eight years were entitled to a proportionate part of the £150 a year, for the interval between the death of the wife & the last preceding yearly day of payment.—*CARTER v. TAGGART* (1848), 16 Sim. 447; 60 E. R. 947.

**603. ———.]**—*Re THACKER'S TRUSTS*, No. 597, *ante*.

**604. ——— Death before first payment due.]**—Testator gave an annuity to A. B. for life, no period of payment being mentioned. Under a decree of the ct. the first payment was directed to be made at the expiration of one year after testator's death. The annuitant died eight days before the end of the year:—*Held*: the annuity must be apportioned, although it was not continued to any other person after the death of the annuitant.—*TRIMMER v. DANBY* (1854), 2 Eq. Rep. 1276; 23 L. J. Ch. 979; 23 L. T. O. S. 125; 2 W. R. 380.

**605. ———.]**—*WILLIAMS v. WILSON*, No. 285, *ante*.

**606. Annuity granted from day of death—Payable on usual quarter days—Apportionment to first quarter day.]**—*WILLIAMS v. WILSON*, No. 285, *ante*.

pays the redemption price is entitled to an annuity on the indemnifying, i.e. the unsold, lands equal in amount to the portion of the rent which has been redeemed, but ranking subsequent to the unredeemed portion of the rent.—*DE VESCI (VISCOUNTS) v. O'CONNELL* (1908), 77 L. J. P. C. 81, H. L.—*IR*.

**a. Application of 4 & 5 Will. 4, c. 22.]**—The above Act, which provides for apportionment of annuities, does not apply to Newfoundland.—*BEN-*

*NETT'S ESTATE* (1884), 7 Nfld. L. R. 36.—*NFLD*.

**d. ———.]**—The above Act for the apportionment of rents, annuities, & other periodical payments, extends to Scotland.—*FORDYCE v. BRIDGES* (1847), 1 H. L. Cas. 1; 9 E. R. 649.—*SCOT*.

#### PART VI. SECT. 4, SUB-SECT. 2.

**6021. Annuity for life—Apportionment to day of death.]**—*HARVEY v. HARVEY* (1915), 50 I. L. T. 12.—*IR*.

**e. ——— Not apportionable—Death of annuitant during year when payable.]**—An annuity payable annually during annuitant's life is not apportionable, so that his administrator can recover nothing if annuitant die within the year.—*ATSMAN v. MONTGOMERY* (1856), 5 C. P. 361.—*CAN*.

**f. Rentcharge—Death of settlor before first specified payment—Whether Apportionment Act applies.]**—*Re GABBETT'S ESTATE* (1897), 31 I. L. T. 178.—*IR*.

**Sect. 4.—Apportionment: Sub-sect. 3, A. & B.]****SUB-SECT. 3.—IN RESPECT OF LAND CHARGED.****A. In General.**

**607. Land sold to different persons—Liability of one for whole rentcharge.]—**ANON. (undated), Plowd. Queries 47, pl. 255; 75 E. R. 924.

**608. ——— Right to contribution.]—**If a man grant a rentcharge out of all his lands, & afterwards sell his lands by parcels to divers persons, & the grantee of the rent will from time to time levy the whole rent upon one of the purchasers only, he shall be eased in the Chancery by a contribution from the rest of the purchasers; & the grantee shall be restrained by order to charge the same upon him only.—ANON. (undated), Cary, 2; 5 Vin. Abr. 564; 21 E. R. 1.

**Annotation:—**Reid. Wolmershausen v. Gullick, [1893] 2 Ch. 514.

**609. ———.]—**Pltf. seeks relief by way of contribution, for that one of defts. has a rentcharge out of pltf.'s lands, & out of one other of defts.' lands, & yet seeks to lay the whole burden of the rentcharge upon pltf.'s lands; & because deft. would not answer, therefore an injunction is granted for staying of the suits of the rent.—DOLMAN v. VAVASOR (1579), Cary, 92; Ch. Cas. in Ch. 139; 5 Vin. Abr. 562; 21 E. R. 49.

**610. ———.]—**REEVE v. HARWARD (1582), Ch. Cas. in Ch. 152; 21 E. R. 90.

**611. ———.]—**The rentcharge here was laid upon the whole plot of land, but although deft. is the owner & occupier of part only, the vicar is entitled to payment in respect of the whole plot. It is obvious upon the hypothesis that deft. is terre-tenant of part only of the plot, & that if the landlord had gone upon the land & claimed the rent in respect of the whole of the plot, this tenant would have been a disseisor, & the landlord would have been entitled to his writ of assize, under which the tenant would have been put out of possession of the land; for a rentcharge cannot be apportioned, & in order to pay the rentcharge the whole of the land would be taken under the writ. If a distress had been put in, & the tenant's goods upon the land had been seized, then the distress would have been for the whole of the rentcharge. Again, if the distress was not sufficient, the whole of the land would have been seized, & held until the whole of the rentcharge had been paid. If that be so, & now that under Real Property Limitation Act, 1833 (c. 27), an action of debt is maintainable it seems to me to follow that the action lies against deft. for the whole of the rentcharge. It was said that that would work an injustice, because he would be left to pay the debts of others; but that is not so, for I have no doubt that if he is compelled to pay the whole of the rentcharge he would have an action against the co-owners of the land for contribution (BRETT, M.R.).—CHRISTIE v. BARKER (1884), 53 L. J. Q. B. 537, C. A.

**Annotations:—**Reid. Bowman v. Smith (1885), 2 T. L. R. 101; Searle v. Cooke (1890), 43 Ch. D. 519; *Re* Herbage Rents, Greenwich, Charity Comrs. v. Green, [1896] 2 Ch. 811; Pertwee v. Townsend, [1896] 2 Q. B. 129; *Foley's* Charity Trustees v. Dudley Corp'n., [1910] 1 K. B. 317.

**612. ——— Agreement by purchaser to pay whole rentcharge—Sufficiency of indemnity.]—**Estates being sold in lots, under conditions, stating that they were subject to certain perpetual payments to the curate of N. & to an hospital,

which were to be charged on & paid by the purchaser of lot 1 only:—*Held*: a deed, by which the purchaser of lot 1 granted a rentcharge of equal amount to trustees, to indemnify the other purchasers, with a covenant to indemnify them, was a sufficient indemnity.—CASSAMAJOR v. STRODE (1821), Jac. 630; 37 E. R. 988, L. C.

**Annotations:—**Mentd. Croome v. Ludlard (1834), 2 My. & K. 251; *Re* Brettell, *Ex p.* Goren (1838), 7 L. J. Ch. 187.

**613. ——— One portion subject to mortgage—Decree directing inquiries as to value.]—**W. being seized in fee simple of divers parcels of lands & other hereditaments, all subject to an annuity for the life of his mother & to a portion for his brother, mortgaged one parcel & sold others. Under a decree afterwards made against W. for raising the portion, several parcels of the then unsold lands, including the mtgd. premises, were sold in the master's office, subject to the annuity, but the deeds of conveyance to the purchasers did not state whether exclusively subject thereto or rateable with other parcels that still remained unsold. The mtgee.'s representative filed a bill against these purchasers & W. for an indemnity for the mtge. out of the unsold lands, free from the annuity, charging that, by agreement between defts., the parcels sold in the master's office were to be exclusively subject thereto, & on that account produced less by the value of the annuity than if they were sold subject thereto rateably with the parcels, that still remained unsold. There was no proof in the cause of the alleged agreement:—*Held*: a decree directing inquiries as to the value of the parcels sold by the master, was erroneous, as such inquiries were immaterial to the issue between the parties; & the bill ought to have been dismissed, with costs, without prejudice to any bill that might be afterwards filed for apportioning the annuity on all the lands originally charged therewith.—SIREE v. KIRWAN (1813), 9 Cl. & Fin. 716; 8 E. R. 588, H. L.

**614. ——— Effect of release of one portion by rentcharger—Apportionment of liability of other owner.]—**The effect of Law of Property Amendment Act, 1859 (c. 35), s. 10, is that where the owner of land, which is subject to a rentcharge, sells & conveys such land in separate portions to different persons, & the person entitled to the rentcharge joins in the conveyance of one only of such portions & releases it from the rentcharge, without the concurrence of the person to whom the other portion has been conveyed, the whole of such rentcharge is not extinguished, but only a proportionate part of it can be recovered from the person to whom the unreleased portion was conveyed.—BOOTH v. SMITH (1884), 14 Q. B. D. 318; 54 L. J. Q. B. 119; 51 L. T. 742; 33 W. R. 142; 1 T. L. R. 97, C. A.

**Annotation:—**Distd. Price v. John, [1905] 1 Ch. 744.

**615. Devise of portion of land charged to rentcharger—Whether apportionment granted.]—**A. on his marriage settled a rentcharge on his wife for her jointure, & afterwards devises to the wife part of the land charged with the rentcharge. Bill is that the rentcharge might be apportioned. Bill dismissed.—KNIGHT v. CALTHORPE (1685), 1 Vern. 347; 23 E. R. 513.

**Annotations:—**Overd. Powell v. Grigby (1835), 3 Cl. & Fin. 103. *Consd.* Eyre v. Green (1846), 10 Jur. 384. *Reid.* Dennett v. Pass (1834), 1 Bing. N. C. 388.

**616. ———.]—**By indenture of marriage settlement, lands were conveyed in trust after the death of G. the husband to the use & intent that A. the wife should receive an annuity of £1,000



clear of all taxes & deductions for her jointure & in bar of dower, etc., with powers of distress & entry, & a term to secure the payment. By his will G. directed his debts to be paid & devised to his wife during her life, his mansion house, park, etc., at D., & directed that timber should be cut on his estates at H., etc. & sold to pay the expense of repairs, painting, & glazing, which in the opinion of A. should at any time be required for any of the hereditaments devised to her for life, & for insurance of the premises, & he thereby confirmed the settlement made on his marriage. He gave to his nephew P. & his heirs all his real estates in England, including the lands devised to his wife, subject to her life interest & all his lands in Pennsylvania, without any incumbrance or restriction. He directed that the paintings in his house at D. should be enjoyed with the same by his wife for her life, & after her death to go with the house & subject to the payment of his debts. The manor, park, etc., at D. formed part of the premises settled & devised:—*Held*: upon a bill filed by A., she was entitled to enjoy the manor & park, etc., free from all charges, & the annuity of £1,000 ought to be raised & paid to her out of the remainder of the lands demised without contribution from the manor, park, etc.—*POWELL v. GRIGBY* (1835), 9 Bli. N. S. 646; 3 Cl. & Fin. 103; 5 E. R. 1429, H. L.; *affg.* S. C. *sub nom.* *GRIGBY v. POWELL* (1832), 5 Sim. 290.

*Annotation*:—*Apld.* *Eyre v. Green* (1846), 2 Coll. 527.

**617.** ———.]—The owner of estates in the counties of Oxford & Berks covenanted on his marriage to convey such part of them to trustees as should be of the annual value of £900, to the use of himself for life, with remainder to the use & intent that his intended wife should yearly receive for her jointure £800, to be charged upon the same hereditaments. The settlor, not having made any settlement in pursuance of the covenant, by his will, confirming the settlement, devised his estates in the counties of Oxford & Berkshire to his wife for life. He afterwards, by deed, revoked his will as to the estates in Oxfordshire, which, consequently, on his death, descended to his heir-at-law. The jointress insisted that she was entitled to the Berkshire estate for her life, free from any contribution towards her jointure; & that the Oxfordshire estates were exclusively liable to satisfy the covenant:—*Held*: as no intention to benefit the jointress to the extent for which she contended appeared on the face of the will, the two estates were liable to contribute rateably to the satisfaction of the covenant.—*EYRE v. GREEN* (1816), 2 Coll. 527; 7 L. T. O. S. 223; 10 Jur. 381; 63 E. R. 846.

**618. Purchase by rentcharger of part of land charged—Right to apportionment—Effect of ignorance of title to rent.**—If grantee of a rentcharge purchases part of the lands, the rent shall be apportioned in equity; especially if he was ignorant of his title to the rent when he made the purchase.—*SLATER v. BUCK* (1730), Mos. 256; 25 E. R. 382.

*Annotation*:—*Refd.* *Dennett v. Pass* (1834), 1 Bing. N. C. 388.

**619. Right to sell land discharged of annuity—Trustee owner of estate.**—The trustee of a sum of money charged on real estate, who is also owner of the estate subject to the charge, is entitled to sell any portion of the estate discharged from the trust, provided he reserves a portion sufficient to

answer the charge; & the estate so sold cannot be followed into the hands of a purchaser with notice of the trust.—*GRUNDY v. HEATHCOTE* (1863), 1 Hem. & M. 172; 71 E. R. 75.

**620. Part of estate in possession of trustees of annuity—Apportionment over whole estate.**—Certain freehold lands were conveyed to trustees on certain trusts, amongst others, to pay £5 a year to each of the trustees, which payment was charged upon the whole of the property. Part of the estate, consisting of some woodlands, remained in the hands of the trustees, all the rest of the property being let to tenants. If the £5 payable to each trustee was apportioned between the woodlands & the other lands, the trustees had not 40s. per annum each out of the woodlands:—*Held*: assuming each of the trustees could be said to be a *cestui que trust* for life in possession of the woodlands, the charge must be apportioned over the whole estate, & therefore he had not 40s. a year out of the woodlands.—*MILLS v. COBB* (1866), L. R. 2 C. P. 95; Hop. & Ph. 357; 36 L. J. C. P. 75; 15 L. T. 469; 31 J. P. 183; 12 Jur. N. S. 1007; 15 W. R. 224.

*Annotation*:—*Refd.* *Bearn v. Watson* (1881), Colt. 268.

**621. Land purchased for metropolitan road—Apportionment between parishes—Metropolis Roads Act, 1863 (c. 78).**—Comrs. under the powers of a private Act of Parliament purchased land lying partly in two parishes for the purpose of forming a metropolitan road, & charged it with the payment of an annual rent. By Metropolis Roads Act, 1863 (c. 78), s. 4, it was provided that so much of the road as lay within any parish mentioned in a schedule, which included the two parishes in question, should be dealt with as part of the common highways of the parish, & all quit rents & other outgoings payable in respect thereof should be paid as part of the expenses of maintenance:—*Held*: the effect of Metropolis Roads Act, 1863 (c. 78), was to apportion the rent between the two parishes; & the representatives of the person from whom the land was bought were entitled to recover by action from each of the parishes a proportional part of the rent.—*SANSOM v. ST. LEONARD, SHOREDITCH VESTRY* (1869), L. R. 4 C. P. 654; 38 L. J. C. P. 286; 18 W. R. 40.

**622. Settlement of part of estate charged—Concurrence of rentcharger—Liability of unsettled part for whole rentcharge.**—*PRICE v. JOHN*, No. 784, *post*.

**Portion of land purchased under compulsory powers.**—*See* COMPULSORY PURCHASE OF LAND, Vol. XL, p. 276, Nos. 2031, 2034.

**Effect of partition.**—*See* PARTITION, Vol. XXXVI., p. 308, Nos. 68, 69.

**Rentcharge for charitable purposes.**—*See* CHARITIES, Vol. VIII., p. 353, Nos. 1490–1493.

#### B. Basis of Apportionment.

**623. According to value of properties—Not acreage.**—In 1840 A. by deed granted to B. certain land to the use that A. & his heirs should for ever receive thereout a certain rentcharge, & subject & charged as aforesaid to dower uses in favour of B.; & by the same deed B. granted to A. in fee the same rentcharge out of the land thereby granted. In 1898 B.'s successors in title were evicted from part of the land by title paramount, & thereupon claimed an apportionment of the rentcharge; but A.'s successor in title contended that the rentcharge was payable in full out of the

**Sect. 4.—Apportionment: Sub-sect. 3, B. Sect. 5 Sub-sects. 1, 2 & 3.]**

remainder of the land:—*Held*: the deed operated as a reservation of the rentcharge in the first instance to A. in fee; the subsequent grant by B. to A. in fee of the same rentcharge was inoperative; & the rentcharge must be apportioned according to the value of the land.—*HARTLEY v. MADDOCKS*, [1899] 2 Ch. 199; 68 L. J. Ch. 496; 80 L. T. 755; 47 W. R. 573; 43 Sol. Jo. 531.

*Annotation*:—*Consd. Salts v. Battersby*, [1910] 2 K. B. 155.

**624. — Annual value—Not capitalised value.]**

—An annuity was payable out of property, part of which comprised mines, & was settled upon the eldest son, & part was agricultural land, & was settled upon the younger children. The mining property produced a larger income, but being of a fluctuating nature, & liable to great diminution, was valued at seven years' purchase, & the agricultural property at thirty years' purchase:—*Held*: the two properties must contribute to the annuity in proportion to the actual income *de anno in annum*, & not in proportion to the capitalised value.—*LEY v. LAY* (1868), L. R. 6 Eq. 174; 37 L. J. Ch. 328; 18 L. T. 126; 16 W. R. 509.

**SECT. 5.—AS BETWEEN TENANT FOR LIFE AND REMAINDERMAN.**

**SUB-SECT. 1.—IN GENERAL.**

See *EXECUTORS*, Vol. XXIII., pp. 465, 466, Nos. 5364–5371.

**625. Discretion of court to apportion.]**—When it is determined that there shall be some apportionment as between tenant for life & remainderman the method of carrying that out is in the discretion of the ct. (*PARKER, J.*).—*Re POYSER, LONDON v. POYSER*, [1910] 2 Ch. 444; 79 L. J. Ch. 748; 103 L. T. 134.

*Annotation*:—*Mentd. Re Hall, Hope v. Hall*, [1918] 1 Ch. 362.

**626. Application of capital moneys—To payment of interest on rentcharge.]**—*Re SUDELEY'S (LORD) SETTLED ESTATES* (1887), 37 Ch. D. 123; 57 L. J. Ch. 182; 58 L. T. 7; 36 W. R. 162; 4 T. L. R. 139.

*Annotations*:—*N.F. Re Egmont's S. E.* (1890), 45 Ch. D. 395. *Reid. Re Howard's S. E.*, [1892] 2 Ch. 233; *Re Verney's S. E.*, [1898] 1 Ch. 508.

**627. — To redeem terminable rentcharge.]**—By Settled Land Acts (Amendment) Act, 1887 (c. 30), s. 1, the trustees of a settled estate are authorised to apply "capital moneys" in redeeming a terminable rentcharge, granted in consideration of money borrowed for the purpose of effecting improvements on the estate, by paying not only the balance of principal remaining unpaid, but also a reasonable & proper sum by way of bonus to compensate the lender for loss of interest by reason of the redemption.—*Re EGDMONT'S (LORD) SETTLED ESTATES* (1890), 45 Ch. D. 395; 59 L. J. Ch. 768; 63 L. T. 608; 38 W. R. 762; 6 T. L. R. 461, C. A.

*Annotations*:—*Apld. Re Verney's S. E.*, [1898] 1 Ch. 508. *Reid. Re Dullson's S. E.*, [1892] 3 Ch. 522; *Re Howard's S. E.*, [1892] 2 Ch. 233.

**628. — To payment to rentchargers—Consideration for consent to transfer of rentcharge.]**—

(1) The tenant for life of settled estates, in order to obtain a reduction of the rate of interest payable

on money borrowed for improvements & secured by rentcharges under Improvement of Land Act, 1864 (c. 114), caused the rentcharges to be transferred to an insurance society in payment to the original holders of a lump sum in consideration of their consenting to the transfer:—*Held*: the repayment of this sum to the tenant for life would not be an expenditure "in redeeming" the rentcharges, "or otherwise providing for the payment thereof," within Settled Land Act, 1887 (c. 30), s. 1, & therefore ought not to be made out of capital money in the hands of the trustees of the settlement.

(2) The fact that the comrs. under the Act of 1864 sanctioned an improvement, in respect of which a rentcharge was created, as coming within a provision in that Act substantially identical with a provision in Settled Land Act, 1882 (c. 38), was treated by the ct. as evidence that such improvement was within the last-mentioned provision.—*Re VERNEY'S SETTLED ESTATES*, [1898] 1 Ch. 508; 67 L. J. Ch. 243; 78 L. T. 191; 46 W. R. 348; 42 Sol. Jo. 308.

**SUB-SECT. 2.—CONTRIBUTION.**

**629. Charge upon corpus—Tenant for life to keep down interest.]**—A., by several deeds of the same date, granted, for valuable considerations, several annuities or rentcharges for lives, to be issuing & payable out of certain real estates, of which he was the owner, reserving to himself & his heirs, in each case, a power to repurchase the annuity, on payment, at three months' notice, of the original price, together with a half-yearly payment of it in advance. Each annuity was secured by the personal covenant of the grantor, by clauses of distress & entry in case it should be a certain number of days in arrear, & by a warrant of attorney to confess judgment against the grantor for double the original price, & by another deed of even date which recited the annuities as being respectively subject to "a proviso for redemption or repurchase," the real estates on which they were charged, were conveyed to trustees for a term of years, with a power of sale to secure the regular payment of them, & subject thereto on trust for the grantor. The grantor by his will charged his real estates in aid of his personal estate with the payment of his debts, other than mtge. debts, & subject thereto, devised them in strict settlement:—*Held*: the annuities were to be treated as securities for the repayment of loans, & consequently that the value of them, there being no personal assets for their payment, was, by virtue of the will, a charge upon the corpus of the real estates, & the tenant for life of the real estates, as between him & the remainderman, was only liable to keep down the interest on such value.—*BULWER v. ASTLEY* (1844), 1 Ph. 422; 13 L. J. Ch. 329; 3 L. T. O. S. 70; 8 Jur. 523; 41 E. R. 692, L. C.

*Annotations*:—*Consd. Preston v. Neele* (1879), 12 Ch. D. 760. *Expld. Re Grant, Walker v. Martineau* (1883), 52 L. J. Ch. 552. *Apld. Re Muffett, Jones v. Mason* (1888), 39 Ch. D. 531. *Reid. Re Dawson, Arathoon v. Dawson*, [1906] 2 Ch. 211.

—[See *EXECUTORS*, Vol. XXIII., p. 466, Nos. 5365–5367.

**630. Apportionment of sum becoming available—After loss of fund set apart.]**—Gift of an annuity

so devised, with the payment of annuities bequeathed by her will:—*Held*: the freeholds & leaseholds were liable to contribute, in proportion to their respective annual values at the

decease of testatrix, to the payment of the annuities; & the leaseholds were not liable in the first instance.—*YOUNG v. HASSARD* (1844), 1 Jo. & Lat. 466; 7 I. Eq. R. 309.—*IR.*

**PART VI. SECT. 5, SUB-SECT. 1.**

**1. Unapplied income of share falling into residue—Whether becoming corpus of another beneficiary's share.]**—*COCK v. AITKEN* (1908), 6 C. L. R. 290.—*AUS.*

of £300 to testator's three daughters, & the survivors & survivor, with a gift over to the last survivor, of the sum set apart to answer the annuity. After the death of one of the daughters the fund set apart was lost by the misconduct of the trustee, & the annuity remained unpaid for the rest of the lives of the other two; but after their deaths a sum of money forming part of the residue, but of less amount than the original fund, becoming available:—*Held*: as the last survivor had had no opportunity of receiving the capital during her life, the annuity was to be considered as continuing for her benefit, after her sister's death until her own, &, therefore, she was entitled to an apportionment, in respect of the arrears of such annuity during that interval, as well as in respect of the principal fund.—*INNES v. MITCHELL* (1847), 2 Ph. 346; 16 L. J. Ch. 415; 41 E. R. 976, L. C.

*Annotations*:—*Reid*. *Miner v. Baldwin* (1853), 1 Sm. & G. 522; *Street v. Street* (1863), 2 New Rep. 56; *Re Sinclair, Allen v. Sinclair, Hodgkins v. Sinclair*, [1897] 1 Ch. 921.

**631. Calculation of sum sufficient to meet annuity—By accumulation at interest—Division between corpus & income.**—*BEAVAN v. BEAVAN* (1869), 24 Ch. D. 649, n.; 52 L. J. Ch. 961, n.; 49 L. T. 263, n.; 32 W. R. 363, n.

*Annotations*:—*Fold*. *Re Chesterfield's Trusts* (1883), 24 Ch. D. 643. *Apld*. *Re Hobson, Walker v. Appach* (1885), 55 L. J. Ch. 422. *Consd*. *Re Hollebone, Hollebone v. Hollebone*, [1919] 2 Ch. 93. *Reid*. *Re Woods, Gabellini v. Woods*, [1904] 2 Ch. 4; *Re Evans' Will Trusts, Pickering v. Evans*, [1921] 2 Ch. 309.

**632. ————**—Where testator has bequeathed his residuary personal estate to trustees upon trust for conversion, with power to postpone such conversion at their discretion, & to hold the proceeds upon trust for a person for life with remainders over, & such residue includes outstanding personal estate, the conversion of which the trustees, in the exercise of their discretion, postpone for the benefit of the estate, & which eventually falls in some years after testator's death, as for instance a mtge. debt with arrears of interest, or arrears of an annuity with interest, or moneys payable on a life policy, such outstanding personal estate should, on falling in, be apportioned as between capital & income by ascertaining the sum which, put out at interest at 4 per cent. *per annum* on the day of testator's death, & accumulating at compound interest calculated at that rate with yearly rests & deducting income tax, would, with the accumulations of interest, have produced, at the day of receipt, the amount actually received; & the sum so ascertained should be treated as capital, & the residue as income.—*Re CHESTERFIELD'S (EARL) TRUSTS* (1883), 24 Ch. D. 643; 52 L. J. Ch. 958; 49 L. T. 261; 32 W. R. 361.

*Annotations*:—*Apld*. *Re Hobson, Walker v. Appach* (1886), 53 L. T. 27; *Re Flower, Matheson v. Goodwyn* (1890), 62 L. T. 216; *Re Godden, Teague v. Fox*, [1893] 1 Ch. 292; *Re Nash, Sweet v. Nash* (1894), 38 Sol. Jo. 478; *Re Morley Morley v. Maig*, [1895] 2 Ch. 738; *Re Hollebone, Hollebone v. Hollebone*, [1919] 2 Ch. 93; *Re Baker, Baker v. Public Trustee*, [1924] 2 Ch. 271. *Reid*. *Re Cleveland's Estate, Hay v. Wolmer* (1895), 13 L. T. 715; *Re Goodenough, Marland v. Williams*, [1895] 2 Ch. 537; *Re Hubbuck, Hart v. Stone* (1895), 73 L. T. 738; *Re Searle, Searle v. Baker*, [1900] 2 Ch. 829; *Re Whiteford, Ingils v. Whiteford*, [1903] 1 Ch. 889; *Re Davy, Hollingsworth v. Davy*, [1908] 1 Ch. 61. *Mentd*. *Re Woods, Gabellini v. Woods*, [1904] 2 Ch. 4.

—See EXECUTORS, Vol. XXIII., pp. 466, 467, Nos. 5369–5371.

**633. Payment out of income—Deficiency supplied from capital.**—Testatrix, by her will, bequeathed pecuniary legacies & annuities; & subject to the bequests thereinbefore contained, she gave the residue to A. for life, with remainders over. The estate was not sufficient to satisfy the annuities & pay the pecuniary legacies; but if govt. annuities were purchased for the annuitants out of the

corpus there would be enough left to pay the pecuniary legacies & leave a small surplus:—*Held*: as between the tenant for life & the remaindermen, the tenant for life was not entitled to have govt. annuities purchased to satisfy the annuitants; but the income must be applied, so far as it would extend, in paying the annuities, recourse being had from time to time to the capital to make up the deficiency.—*Re GRANT, WALKER v. MARTINEAU* (1883), 52 L. J. Ch. 552; 48 L. T. 937; 31 W. R. 703.

*Annotations*:—*Fold*. *Re Croxon, Ferrers v. Croxon*, [1915] 2 Ch. 290. *Reid*. *Re Cottrell, Buckland v. Bedingfield*, [1910] 1 Ch. 402; *Re Hawkins, White v. White*, [1916] 2 Ch. 570.

**634. Sum set aside out of capital & income—Sufficient to pay annuities.**—It was clear that the obligation to pay the annuities was imposed on the exors., & consequently they were bound to retain in their hands an amount of personal estate sufficient to make it practically certain that the annuities would be fully paid, & not necessarily out of income alone. The exors. must retain such a sum as would, partly by means of income & partly by means of capital, be sufficient to provide for payment of the annuities (*STIRLING, J.*).—*Re LEEDS (DUCHESS), MOWBRAY v. CAERMARTHEN* (1895), 39 Sol. Jo. 381.

**Payment in proportion to respective interests—Calculation of actuarial values of interests at testator's death—Proportion fixed.**—See EXECUTORS, Vol. XXIII., pp. 465, 466, No. 5364, 5368.

#### SUB-SECT. 3.—PAYMENT OUT OF ONE FUND.

**635. Payment out of income only—Although annuities charged on realty—In aid of personalty.**—Though annuities are expressly charged on the real estate in aid of the personalty, they will not be ordered to be raised out of it, by the purchase of the annuities with a sum borrowed thereon, but they must be paid by the life tenant of the estates.—*RADBURN v. JERVIS* (1845), 4 L. T. O. S. 432.

**636. ————**—*SCHOLEFIELD v. REDFERN*, No. 60, *ante*.

**637. ————**—**No covenant by settlor as to liability.**—By a marriage settlement certain property was settled subject to a jointure rentcharge. By a later settlement the property comprised in the marriage settlement was, with other property, settled ultimately upon such trusts as the settlor should by will or codicil appoint. By his will settlor appointed the property comprised in the later settlement, subject to the incumbrances thereon & subject as therein mentioned, to trustees in trust for his brother for life, with remainders as therein mentioned:—*Held*: there being no covenant on the part of settlor rendering him or his estate liable for payment of the rentcharge, the rentcharge was not apportionable between the capital & income of the settlor's estate, & must be borne by the tenant for life of the property charged therewith.—*Re POPHAM, BUTLER v. POPHAM* (1914), 111 L. T. 524; 58 Sol. Jo. 673.

**638. Payment out of capital only.**—H. by his will, after giving his personal estate & a freehold house to his wife absolutely, gave all his residuary real estate to his said wife for her life or widowhood, & subject thereto he devised part thereof to his son R., subject to & charged with the payment of an annuity or yearly rentcharge of £30, to his daughter for her life. Then, after a gift of certain real estate to his son A., he gave all his real estate to R., subject to the life interest of testator's widow.

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Testator then continued: I direct that the said annuity or rentcharge of £30 to my said daughter shall be paid by equal half-yearly payments . . . & that the first half-yearly payment thereof shall become due & be made at the expiration of half a year from my decease:—*Held*: the annuity commenced at the death of testator, & was payable from that time, but was chargeable only on the reversionary interest devised to R. after the death or second marriage of testator's widow.—*Re WILLIAMS, WILLIAMS v. WILLIAMS* (1895), 64 L. J. Ch. 349; 72 L. T. 324; 43 W. R. 375; 39 Sol. Jo. 285; 13 R. 316.

**639.** — Without prejudice to question of ultimate incidence of liability.]—Arrears of a jointure rentcharge, which was limited & secured by powers of entry & distress & by a term of years & trusts thereof in the usual way, are an incumbrance affecting the inheritance of the settled land within Settled Land Act, 1882 (c. 38), s. 21 (2), & may in a proper case, where their discharge would be the wisest course for all concerned, be discharged by the trustees of the settlement out of capital moneys in their hands, but conditionally upon the tenant for life agreeing that such payment shall be without prejudice to the question, should it arise, of the ultimate incidence of the liability for the arrears as between himself & the remainderman.—*Re MANCHESTER'S (DUKE) SETTLEMENT*, [1910] 1 Ch. 106; 79 L. J. Ch. 48; 101 L. T. 892; 26 T. L. R. 5; 53 Sol. Jo. 868.

## SECT. 6.—ORDER OF APPLICATION OF ASSETS.

### SUB-SECT. 1.—PERSONALTY PRIMARILY LIABLE.

*See, generally, EXECUTORS, Vol. XXIII., pp. 473 et seq.; Vol. XXIV., pp. 798, 799.*

*See Administration of Estates Act, 1925 (c. 23), ss. 35, 56, sched. II.*

**640. General rule.]**—Testator, after giving an annuity to his wife, devised his real estates to trustees in trust to pay the annuity thereout, & gave his wife powers of distress & entry on his estates. He then devised his estates in strict settlement subject, expressly, to the annuity & to the powers of distress & entry:—*Held*: nevertheless, taking the whole of the will together, testator's personal estate was primarily liable to pay the annuity.

The rule of law is that *prima facie* debts & legacies are payable out of the personal estate; & if an annuity or a legacy is given out of a mixed fund consisting of realty & personalty the personalty is primarily liable to the payment of it unless it is exempted from that liability either by express words or by the manifest intention of testator to be collected from the context of his will (*SHADWELL, V.-C.*).—*ROBERTS v. ROBERTS* (1843), 13 Sim. 336; 7 Jur. 315; 60 E. R. 130.

**641.** —.]—*PATERSON v. SCOTT*, No. 687, *post*.

**642. Payment out of personalty — Annuity charged on realty—By will—Later annuity given by codicil insufficiently attested.]**—*WRIGHT v. CADOGAN (LORD)*, No. 466, *ante*.

**643.** —.]—Where an annuity is given by will, & a general charge on the real estate,

the personal is first liable.—*A.-G. v. DOWNING (LADY)* (1769), Amb. 571; 2 Dick. 414; 27 E. R. 368, L. C.

*Annotations:—Refd. Pigott v. Waller* (1802), 7 Ves. 98. *Mentd. White v. White* (1778), 1 Bro. C. C. 12; *Coppin v. Penryhough* (1788), 2 Bro. C. C. 291; *A.-G. v. Green* (1789), 2 Bro. C. C. 492; *Barnes v. Crow* (1792), 4 Bro. C. C. 2; *Mogridge v. Thackwell* (1803), 7 Ves. 36; *Henshaw v. Atkinson* (1818), 3 Madd. 306; *Giblett v. Hobson* (1834), 3 My. & K. 517; *Tyre v. Gloucester Corpn.* (1851), 14 Beav. 173; *Philpott v. St. George's Hospital* (1857), 6 H. L. Cas. 338; *Ite Smith, Blke v. Roper* (1890), 45 Ch. D. 632.

**644.** —.]—*ROBERTS v. ROBERTS*, No. 640, *ante*.

**645.** —.]—Testator being entitled for life to the dividends & interest of certain stock standing in the names of trustees, & to a beneficial interest on remainder as to one moiety, the whole being subject to a charge of £500, & being also entitled to certain copyhold estates, covenanted on his marriage, to provide an annuity for his wife: & by his will he made this disposition: "I confirm the settlement made on my marriage, securing £200 a year to my wife, & I do hereby charge & make liable all & every my freehold hereditaments & estate in the county of S. & moneys standing in my name in the public funds, with the payment of the said annuity to my wife; & subject to the payment thereof "I give, devise, & bequeath the same freehold hereditaments & estates, & moneys in the funds, to my niece S. her heirs, exors., administrators, & assigns" with remainder to her two sisters in case of her death leaving them surviving. "All the rest & residue of my real & personal estate, subject, as to my personal, to payments of my debts, funeral expenses, & the legacies hereinafter bequeathed, I give, devise, & bequeath to my wife, her heirs," etc., absolutely:—*Held*: the personal estate was the primary fund for payment of the annuity, & was not exonerated by the charge on the freeholds.—*QUENNEIL v. TURNER* (1851), 13 Beav. 240; 20 L. J. Ch. 237; 17 L. T. O. S. 101; 15 Jur. 547; 51 E. R. 92.

**646.** —.]—By deed.]—Under a covenant that if the covenantor's wife survived him, he, his heirs, exors. or administrators would pay her a specified annuity for life, & that for better securing it, he or his heirs would grant & secure the same out of a sufficient part of the real estates devised to him by a particular will:—*Held*: the real estates were only secondarily liable, & the personal estate of the covenantor was the primary fund.—*FIELD v. MOORE, FIELD v. BROWN* (1855), 7 De G. M. & G. 691; 25 L. J. Ch. 66; 26 L. T. O. S. 207; 2 Jur. N. S. 145; 4 W. R. 187; 44 E. R. 269, L. J.J.

*Annotations:—Mentd. Campbell v. Ingilby* (1856), 21 Beav. 567; *Barrow v. Barrow* (1858), 4 K. & J. 409; *Head v. Godlee, Reynolds v. Godlee* (1859), John. 536; *Re Howarth* (1873), 8 Ch. App. 416, n.; *Cahill v. Cahill* (1883), 8 App. Cas. 420; *Dye v. Dye* (1884), 13 Q. B. D. 147; *Re Sampson & Wall* (1884), 25 Ch. D. 482; *Buckmaster v. Buckmaster* (1887), 35 Ch. D. 21.

**647.** —.]—*MONYPENNY v. MONYPENNY*, No. 485, *ante*.

**648.** —.]—*PAGET v. HUISH*, No. 662, *post*.

**649.** — No charge on realty—Realty & personalty given separately.]—Testatrix, who died in 1782, gave an annuity to A. B. & devised her real estates to M. & his sons, in strict settlement, & bequeathed her personal estate to M. absolutely. Down to 1821, the annuity was paid by the persons in possession of the real estates, & no fund for

payment thereof was ever set apart out of testatrix's personal estate, although that estate was administered in a suit instituted by her legatees, to which A. was a party, & in which the annuity was erroneously considered as not primarily charged upon testatrix's personal estate. M. bequeathed his personal estate to L. & died. L. afterwards died, & one of defts. was her extrix. :—*Held*: A. had no claim, upon L.'s estate, in respect of his annuity.—*BROWN v. CLAXTON* (1829), 3 Sim. 225; 57 E. R. 983.

**650. — Annuity given in lieu of dower.]**—A. mortgaged an estate in 1774; he left by his will, in 1775, an annuity to his widow in lieu of dower. W., the original mtgee., subsequently mortgaged his interest in this estate to Messrs. R. & Co. In 1786, Messrs. R. & Co. filed a bill against W. & the real & personal representatives of A. for the purpose of obtaining a foreclosure. By a decree in this suit in 1791, a declaration was made that the widow, having relinquished her title to dower became a *bond fide* purchaser of the annuity, & was entitled to be paid it out of the mtged. estate. This suit not having been prosecuted, & the widow having died in 1794, her representatives, in 1822, filed a bill against the heir of W. & other persons claiming under him, & the heirs & devisees of A., for the payment of the arrears of the annuity during her lifetime, or that the estate should be sold, & the arrears be paid out of the proceeds :—*Held*: (1) the annuity, having not been expressly charged on the real estate of A., was a mere pecuniary legacy, & the decree of 1791 was erroneous, in declaring that the widow was entitled to be paid it out of the mtged. estate; (2) the remedies for the recovery of the arrears of such an annuity were held to have been lost by length of time.

If the decree of 1791 had been in a suit instituted by the annuitant, & had ascertained what was due for the annuity we might have had to consider whether, as nothing had been done on that decree from 1791 to 1822, we ought not to presume that the debt so ascertained was satisfied (*LORD WYNFORD*).—*WHITE v. PARTNER* (1829), 1 Knapp, 179; 12 E. R. 288, P. C.

**651. — Realty & personalty given together—No direction for sale of realty—Or for discharge of personalty.]**—Under a bequest of real & personal estates, upon trust to receive the rents & profits, & to pay legacies & annuities, & vest the surplus rents, etc., for other purposes, the personal estate is the primary fund liable to the payments, there being no direction to discharge it, or to sell the real estate, so as to constitute a mixed fund.—*BOUGHTON v. BOUGHTON*, *BOUGHTON v. JAMES* (1848), 1 H. L. Cas. 406; 10 L. T. O. S. 497; 9 E. R. 815, H. L.; *varying* (1844), 1 Coll. 26.

*Annotations*:—*Fold*. Blann v. Bell (1852), 5 De G. & Sm. 658. *Expld*. Robinson v. London Hospital (1853), 10 Hare, 19. *Apld*. Tidd v. Lister (1854), 3 De G. M. & G. 857. *Fold*. Trench v. Cheese (1855), 6 De G. M. & G. 453. *Apld*. Meller v. Stanley (1864), 2 De G. J. & Sm. 183. *Distd*. Disney v. Crosse, Eyre v. Parker (1866), L. R. 2 Eq. 592. *Consd*. Allan v. Gott (1872), 7 Ch. App. 439. *Distd*. Howard v. Dryland (1877), 38 L. T. 24; Patching v. Barnett (1881), 45 L. T. 292. *Refd*. Cradock v. Owen (1854), 2 Sm. & G. 241; Simmons v. Rose (1856), 6 De G. M. & G. 411; Bellairs v. Bellairs (1874), L. R. 18 Eq. 510; Wells v. Row (1879), 48 L. J. Ch. 476; *Re Dumble*. Williams v. Murrell (1883), 23 Ch. D. 360. *Mentd*. Early v. Benbow (1846), 2 Coll. 342; Greenwood v. Roberts (1851), 15 Beav. 92; Bentley v. Oldfield (1854), 19 Beav. 225; *Re Finch*, Abbiss v. Burney (1881), 17 Ch. D. 211; *Re Roberts*, Repington v. Roberts-Gawen (1881), 19 Ch. D. 520; Wainwright v. Miller, [1897] 2 Ch. 255; *Re Gage*, Hill v. Gage, [1898] 1 Ch. 498; *Re Oliver*, Wilson v. Oliver, [1908] 2 Ch. 74.

**652. — — — — —.]**—Testator commenced his will with a desire that all his debts, funeral & probate expenses, should be paid; &, after some

legacies, he gave all the residue of his estate & effects "whether consisting of freehold, leasehold, or copyhold estates, money in the public stocks or funds, & all other moneys or securities for money" upon trust to pay the dividends of £1,500 stock to S. for life, & then to be equally divided between E. & F. & the survivor of them; & after giving other annuities, with a similar ultimate interest in each to E. & F., as to all the rest, residue, & remainder of his freehold, copyhold, & leasehold estates, & all other his estate & effects, testator declared the trust to be to pay the dividends, interest, rents, profits, & annual produce thereof to E. for life, & then upon the further trusts in the will mentioned :—*Held*: the personal estate was primarily liable to pay the annuities.—*BLANN v. BELL* (1852), 2 De G. M. & G. 775; 22 L. J. Ch. 236; 20 L. T. O. S. 162; 16 Jur. 1103; 42 E. R. 1075, L. JJ.

*Annotations*:—*Mentd*. Wisden v. Wisden (1854), 2 W. R. 616; *Re Tandy*, Tandy v. Tandy (1886), 34 W. R. 748; *Coward v. Larkman* (1888), 60 L. T. 1; *Re Wareham*, Wareham v. Brewin, [1912] 2 Ch. 312.

**653. — — — — —.]**—Testator gave his real & personal estate to trustees, in trust to pay an annuity to M. & if she should have children to raise £4,000 for the younger children, & he gave the residue "with the accumulation thereof which I hereby direct my said trustee or trustees to place out on mtges. or in govt. securities in the public funds" upon trust for the eldest son of M. on his attaining twenty-one & taking testator's name, & if there should be no child of M. then on trust for E., upon attaining twenty-five & taking testator's name; at the expiration of twenty-one years from testator's death M. had no child :—*Held*: the annuity to M. was primarily payable out of the personal estate.—*TENCH v. CHEESE* (1855), 6 De G. M. & G. 453; 3 Eq. Rep. 971; 24 L. J. Ch. 716; 25 L. T. O. S. 189, 261; 1 Jur. N. S. 689; 3 W. R. 582; 43 E. R. 1309, L. C. & L. JJ.; *on appeal* from (1854), 19 Beav. 3.

*Annotations*:—*Apld*. Meller v. Stanley (1864), 2 De G. J. & Sm. 183. *Consd*. Allan v. Gott (1872), 7 Ch. App. 439. *Distd*. Howard v. Dryland (1877), 38 L. T. 24. *Refd*. Bentley v. Oldfield (1854), 19 Beav. 225; Simmons v. Rose (1856), 6 De G. M. & G. 411; Bellairs v. Bellairs (1874), L. R. 18 Eq. 510; Luckcraft v. Pridham (1879), 48 L. J. Ch. 636; *Re Dumble*, Williams v. Murrell (1883), 23 Ch. D. 360. *Mentd*. Higginson v. Blockley (1855), 4 W. R. 60; Mathews v. Keble (1868), 3 Ch. App. 691; *Re Oliver*, Wilson v. Oliver, [1908] 2 Ch. 74.

**654. — Direction for sale of realty—No direction for payment out of mixed fund.]**—When testator bequeaths legacies & then bequeaths the residue of his real & personal estate, the legacies are charged upon the real estate or its proceeds, but they are payable primarily out of the personalty, unless testator directs that they are to be paid out of the mixed fund, in which case they are payable rateably out of realty & personalty.

The annuity is not directed to be paid out of a mixed fund arising from the conversion of the real & personal estates, but out of a sum for which provision has to be made out of the personal estate. . . . The annuity fund is primarily payable out of the personal estate, & is charged on the real estate only in aid of the personal estate (*NORTH, J.*).—*RE BOARDS*, *KNIGHT v. KNIGHT*, [1895] 1 Ch. 499; 64 L. J. Ch. 305; 72 L. T. 220; 43 W. R. 472; 13 R. 278.

**655. — Annuity charged on personalty—Debts charged on realty.]**—A suit was instituted by exors. for the administration of their testator's estate. Testator had charged his debts, funeral & testamentary expenses, but, as was held by the ct., not exclusively, on his real estate, & had given certain legacies & an annuity, which latter he



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charged on his personal estate. The personal estate being the primary fund for payment of the debts was first applied, & the whole of it was thereby exhausted. The annuitant whose annuity had been paid by the exors. for several years after testator's death, but was afterwards discontinued, filed a claim against the exors. for payment of his annuity, insisting that he was not bound by the decree in the suit, not having been made a party thereto:—*Held*: though he was not named a party, he was bound by the decree, & the claim was dismissed with costs.—*JENNINGS v. PATERSON* (1851), 15 Beav. 28; 18 L. T. O. S. 82; 51 E. R. 446.

**656. — Chief clerk's certificate deciding against conversion of realty—Annuities cease to be charges on personality—From date of chief clerk's certificate.]**—Testator devised his real estate to trustees to sell, whenever it should appear to them advantageous. He directed annuities to be paid to charities out of his personal estate until his real estate should be sold, when he gave the produce to charities. But if the charity bequests should be defeated, he gave the principal money to plffs. No sale of the realty took place, the infant plffs. having, under the chief clerk's certificate finding it for their benefit, elected to take the land in lieu of the produce:—*Held*: the charity annuities ceased to be charges on the personal estate from the date of the chief clerk's certificate.—*ROBINSON v. ROBINSON* (1854), 19 Beav. 494; 52 E. R. 442.

*Annotation*.—*Reid. Re Hotchkys, Freke v Calmady* (1886), 34 W. R. 569.

**657. — Land purchased in consideration of annuity—Annuity secured by charge on purchased land.]**—A. purchased an estate in consideration of an annuity. It was thereupon charged upon the purchased & also on another estate, & A. covenanted to pay it. On A.'s death:—*Held*: his personal estate was the primary fund for payment of the annuity.—*YONGE v. FURSE* (1855), 20 Beav. 380; 24 L. J. Ch. 643; 25 L. T. O. S. 113; 3 W. R. 383; 52 E. R. 649.

*Annotations*.—*Consd. Re Muffett, Jones v. Mason* (1888), 39 Ch. D. 534. *Reid. Re Dawson, Arathoon v. Dawson*, [1906] 2 Ch. 211.

**658. Liability of personality not specifically bequeathed—Annuities charged on realty & personality.]**—Testator, being possessed of leasehold property, & Long Annuities, by his will charged certain annuities upon all his real & personal estate, & then gave all his real & personal estate to trustees, upon certain trusts for the benefit of a tenant for life & certain persons in remainder, & empowered his trustees, notwithstanding the previous gift & bequest to sell the freehold & leasehold estates:—*Held*: the tenant for life was entitled to the income from the leasehold & the Long Annuities, without their being converted.

The question is, whether the charges of this description, "debts & expenses" are not to fall rateably upon the proportions of property. Charges of that description, for raising of which the consols were sold, ought to fall rateably upon the different descriptions of property. The leaseholds are specifically bequeathed in the very strict sense of the term; perhaps the Long Annuities are not specifically bequeathed in the strict sense of the term. There is a distinction. As to the permanent property, there ought to be an apportionment. Debts & charges of this description ought to be apportioned between the several portions of testator's personal estate not specifically bequeathed & that for this purpose the leasehold

estate ought to be considered as specifically bequeathed, & the Long Annuities as not specifically bequeathed (*KNIGHT BRUCE, V.-C.*).—*BURTON v. MOUNT* (1848), 2 De G. & Sm. 383; 11 L. T. O. S. 492; 12 Jur. 934; 64 E. R. 171.

*Annotations*.—*Distd. Hood v. Clapham* (1854), 19 Beav. 90. *Reid. Morgan v. Morgan* (1851), 14 Beav. 72; *Blann v. Bell* (1852), 2 De G. M. & G. 775; *Thursby v. Thursby* (1875), L. R. 19 Eq. 395; *Re Pitcairn, Brandreth v. Colvin*, [1896] 2 Ch. 199; *Re Wareham, Wareham v. Brewin* (1912), 81 L. J. Ch. 578.

**659. — In priority to personality specifically bequeathed.]**—Testator gave various annuities for lives with bequests over of them & charged them upon his freehold & leasehold estates. He gave all his real & personal property to trustees in trust to pay the rents of his freehold, copyhold & leasehold estates, & the interest of all his stock in the public funds, with the interest of all mtges., annuities & other securities of which he might die possessed, to his son for life, with a disposition in favour of the son's children, & after his death without any, which happened, testator gave his freehold, leasehold & copyhold estates to one daughter & her issue, & all his funded property & other personal estate to another daughter & her issue:—*Held*: the gift of the leasehold estates to the one daughter was specific, but that the gift of the funded property to the other was not, & the latter was consequently chargeable with the annuities in priority to the former.—*FIELDING v. PRESTON* (1857), 1 De G. & J. 438; 29 L. T. O. S. 337; 5 W. R. 851; 44 E. R. 793, L. C.; *varying S. C. sub nom. FIELDING v. PRESTON, SMITH v. SMITH* (1856), 27 L. T. O. S. 257.

*Annotations*.—*Consd. Cook v. Drew* (1863), 2 New Rep. 437; *Re Green, Baldock v. Green* (1888), 40 Ch. D. 610. *Mentd. Bothamley v. Sherson* (1875), L. R. 20 Eq. 304.

**Order of application of assets of deceased person, generally.]**—See *EXECUTORS*, Vol. XXIII., pp. 473 *et seq.*

**SUB-SECT. 2.—LIABILITY OF PERSONALTY ON DEFICIENCY OF REALTY.**

See Administration of Estates Act, 1925 (c. 23), ss. 35, 56, sched. II.

**660. Under marriage settlement.]**—*GRIFFITH v. ANVILL* (1698), Colles, 52; 1 E. R. 170, H. L.

**661. —**—It appears that the real estate falls very short of answering all the charges upon it; & therefore plff.'s counsel insist, she is entitled to have these deficiencies turned upon the personal & copyhold estates belonging to the late Mr. Lanoy, her father; because there is a covenant in the marriage settlement, that in case his wife should survive her husband, then his heirs, exors., etc., should pay the £500 *per annum* to his wife, clear of everything except the land tax. But though there is this covenant, it is truly said by deft.'s counsel, that the personal assets are not the original fund charged, & in that respect differs from a mtge., or any other incumbrance, for there being a borrowing & a lending in the case of a mtge., the real estate is considered only as a pledge; & the personal estate, which is the natural fund, is liable in the first place; but this rule has never been carried so far as to extend it to a provision upon a settlement (*LORD HARDWICKE, C.*).—*LANOY v. ATHOL (DUKE & DUCHESS)* (1742), 2 Atk. 444; 9 Mod. Rep. 398; 26 E. R. 668, L. C.

*Annotations*.—*Apld. Loosemore v. Knapman* (1853), Kay, 123. *Reid. Sykes v. Meynal* (1763), 1 Dick. 368; *Lechmere v. Charlton* (1808), 15 Ves. 193; *Graves v. Hicks* (1833), 6 Sim. 391; *Barnes v. Raester* (1842), 1 Y. & C. Ch. Cas. 401; *Bugden v. Bignold* (1843), 2 Y. & C. Ch. Cas. 377; *Hickling v. Boyer* (1851), 3 Mac. & G. 635; *Gibson v. Seagrims* (1855), 20 Beav. 614; *Filint v. Howard*, [1893] 2 Ch. 51.

**662. Demonstrative bequest of annuities.]—**Gift by will of annuities followed by a declaration that they should be paid by the trustees out of the rents of real estate thereby devised. Gift of all real & residuary personal estate on trust, out of the rents of the realty, to pay the annuities, & subject thereto, to apply the real & residuary personal estate on certain trusts:—*Held*: the bequest of the annuities was demonstrative; & the rents having proved insufficient, the annuities were payable out of the residuary personal estate.

The authorities may be ranged under three heads, the distinctions being perfectly clear, though there is often much difficulty in applying them to a particular will.

The first class is where you have a simple gift of a legacy or annuity, with a mere charge upon real estate; & there the personal estate is not only not exonerated, but remains primarily liable; just as in the case of a charge of debts.

Another class is where the legacy or annuity is a specific gift out of real estate, which is assumed to be sufficient to cover the amount. There the personal estate is in no way liable, & if the specific fund fails, the gift must fail with it.

The third class is intermediate to these, where a legacy or annuity is, as it is termed, demonstrative, there being a clear general gift, but a particular fund pointed out as that which is to be primarily liable, on failure of which the general personal estate remains liable (PAGE WOOD, V.-C.).—*PAGET v. HUISEN* (1863), 1 Hem. & M. 663; 2 New Rep. 104; 32 L. J. Ch. 468; 8 L. T. 445; 9 Jur. N. S. 906; 11 W. R. 636; 71 E. R. 291.

*Annotations: Consd. Re Trenchard, Trenchard v. Trenchard*, [1905] 1 Ch. 82. *Reid. Patching v. Barnett* (1881), 51 L. J. Ch. 74.

**Order of application of assets of deceased person generally.]—***See* EXECUTORS, Vol. XXIII., pp. 473 *et seq.*

### SUB-SECT. 3.—EXONERATION OF PERSONALTY.

*See* Administration of Estates Act, 1925 (c. 23), ss. 35, 56, sched. II.

**663. Gift of life estate in realty & personality—Personalty exonerated during life of tenant for life—Realty continues charged with annuity.]—**Testator by will, duly attested, gave an annuity to his daughter, charged on his real estate in aid of his personal: by codicil, not attested, he gave his real & personal estate to his mother for life; during her life the personal estate is discharged from the annuity; but it remains a charge on the real.—*BUCKERIDGE v. INGRAM* (1795), 2 Ves. 652; 30 E. R. 824.

*Annotations:—Apld. Sheddon v. Goodrich* (1803), 8 Ves. 481. *Reid. Playters v. Abbott* (1833), 3 L. J. Ch. 57; *Bligh v. Brent* (1837), 6 L. J. Ex. Eq. 58; *Re Bute, Bute v. Ryder* (1884), 27 Ch. D. 196; *Hastings v. N. E. Ry.*, [1898] 2 Ch. 674. *Mentd. R. v. Bates* (1816), 3 Price, 341; *Portmore v. Bunn* (1823), 1 B. & C. 694; *R. v. Avon Navigation Co.* (1829), 4 Man. & Ry. K. B. 23.

**664. Annuity charged on personality & produce of realty—Different disposition by codicil—Failure as to realty.]—**Legacies & annuities charged upon a mixed fund of the personal estate & the produce of real estate under a direction for sale. A different disposition of the whole by a codicil failing as to the real estate, for want of a due execution, the charge remains upon the real estate.—*SHEDDON v. GOODRICH* (1803), 8 Ves. 481; 32 E. R. 441, L. C.

*Annotations:—Reid. Hooper v. Goodwin* (1811), 18 Ves. 156; *Kermode v. Macdonald* (1868), 3 Ch. App. 584. *Mentd. Thellusson v. Woodford* (1806), 13 Ves. 209; *Collins v. Johnson* (1835), 4 L. J. Ch. 226; *Smith v. Newbould* (1853), 1 W. R. 230; *Coverdale v. Lewis* (1862), 30 Beav. 409; *Re Anderson, Pegler v. Gillatt*, [1905] 2 Ch. 70.

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**665. Annuity charged on realty—Personalty subject to debts—Realty & personality given separately.]—**Testator bequeathed all his personal estate to A., subject to the payment of his debts & funeral & testamentary expenses, & after charging his real estates with the payment of certain legacies & annuities, he devised them to B.:—*Held*: he had not exempted his personal estate from the payment of the legacies & annuities.—*DAVIES v. ASHFORD* (1845), 15 Sim. 42; 14 L. J. Ch. 473; 6 L. T. O. S. 30; 9 Jur. 612; 60 E. R. 531.

*Annotations:—Expld. Poole v. Heron* (1873), 42 L. J. Ch. 348. *Reid. Ion v. Ashton* (1860), 2 L. T. 686; *Brown v. Brown* (1864), 10 Jur. N. S. 461; *Parker v. Williams* (1867), 15 W. R. 1006.

**666. ——— Realty & personality given to same persons.]—**Testator gave to his wife an annuity of £60, issuing & payable out of his real estate thereafter devised to his three sons. He then gave to his daughter A. a legacy of £500, & to each of his sons H. & S., & to each of his daughters M. & E., a legacy of £1,600 to be paid, with interest, two years after his death; & he thereby charged & made chargeable his real estate, thereafter devised to his three sons, J., T., & F., with the payment of the legacies & the interest thereon. He gave his personal estate, charged with the payment of debts, funeral & testamentary expenses, & expenses of proving his will, unto his sons J., T., & F., & gave all his residuary real estate, subject to mtges., & subject to & charged with the payment of the annuity of £60, & the legacies to his sons H. & S. & his daughters M. & E., & also the legacy of £500 to his daughter A., & subject also, in aid of his personal estate, to the payment of his debts, funeral & testamentary expenses & the expenses of proving his will, equally between his sons J., T., & F.:—*Held*: the legacies were charged on the real estate exclusively in exoneration of the personal estate.—*Re NEEDHAM, ROBINSON v. NEEDHAM* (1884), 54 L. J. Ch. 75.

**667. ——— Personality liable unless clear intention to contrary is shown.]—***DAVIES v. ASHFORD*, No. 665, *ante*.

**668. ———]**—Personal estate held exonerated from the payment of the legacies & annuities bequeathed by a will.

Testator bequeathed legacies, & devised & bequeathed annuities or rentcharges, & he charged them on a real estate, & subject thereto, he devised that real estate to A. He dealt similarly with another real estate; & he bequeathed his personal estate in trust to pay his debts & certain specified expenses, & to pay the rest to a charity:—*Held*: the annuities & legacies were charged on the real estate, & the personal estate was exonerated.

The general principle undoubtedly is, that, as testator is presumed to know that his personal estate is the primary fund for the payment of legacies & annuities, the *ct.* requires clear & distinct words to exonerate the primary fund (*ROMILLY, M.R.*).—*ION v. ASHTON* (1860), 28 Beav. 379; 2 L. T. 686; 6 Jur. N. S. 879; 8 W. R. 573; 54 E. R. 411.

*Annotations:—Apld. Sinnett v. Herbert* (1871), L. R. 12 Eq. 201. *Consd. Poole v. Heron* (1873), 42 L. J. Ch. 348. *Follid. Re Needham, Robinson v. Needham* (1884), 54 L. J. Ch. 75. *Reid. Chandler v. Howell* (1876), 4 Ch. D. 651. *Mentd. Re Christmas, Martin v. Lacon* (1886), 33 Ch. D. 332.

**669. ——— As a debt.]—***MONEYPENNY v. MASCALL*, No. 165, *ante*.

**670. ——— Charge on particular estate.]—**Testator directed his exors. to pay his funeral expenses & debts, except a mtge. thereafter provided for, out of certain parts of his personal estate; & in a subsequent part of his will he recited, that his T.



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estate was subject to a mtge. of £6,000, which he was intending to pay off; & he directed any balance of the debt which should remain unpaid at his death to be paid by sale of timber on other property, & also of part of the timber on the T. estate. Testator also gave certain annuities, which he charged on his N. estate, giving to one annuitant £10 a year, or £5 & his tenement at the lodge on the N. estate. Testator did not pay off any part of the £6,000 mtge. :—*Held*: his personal estate was not exonerated from payment of the mtge. debt, but it was exonerated from payment of the annuities.—*LOMAX v. LOMAX* (1849), 12 Beav. 285; 19 L. J. Ch. 137; 14 L. T. O. S. 482; 13 Jur. 1064; 50 E. R. 1070.

*Annotations*:—*Refd.* Phillips v. Parry (1856), 22 Beav. 279; *Re* Trenchard, Trenchard v. Trenchard, [1905] 1 Ch. 82.

**671.** — — —.] — *PAGET v. IJUSHI*, No. 662, *ante*.

**672.** — — —.] — *PATCHING v. BARNETT*, No. 5, *ante*.

**673.** — — — **Power of distress given to annuitant.]**—*SINNETT v. HERBERT* (1871), as reported in L. R. 12 Eq. 201; 24 L. T. 778; *on appeal* (1872), 7 Ch. App. 232, L. C.

*Annotations*:—*Mentd.* Chamberlayne v. Brockett (1872), 8 Ch. App. 206; Littledale v. Bickersteth (1876), 24 W. R. 507; *Re* Williams (1877), 25 W. R. 689; *Champney v. Davy* (1879), 11 Ch. D. 949; *Re* Jackson, Biscoe v. Jackson (1882), 46 L. T. 355; *Re* Holburne, Countess v. Mackillop (1885), 53 L. T. 212; *Re* Gyde, Ward v. Little (1898), 78 L. T. 449; *Hunter v. A.-G.*, [1899] A. C. 309.

**674.** — — —.] — **Where testator bequeathed annuities & immediately afterwards devised an estate, subject to the payment of the annuities, & gave the annuitants a power of distress:—Held**: the personality was exonerated from being the primary fund for payment of the annuities. *Qu.*: whether the personality was altogether exonerated.—*POOLE v. HERON* (1873), 42 L. J. Ch. 348.

*Annotation*:—*Distd.* Patching v. Barnett (1880), 49 L. J. Ch. 665.

**Liability of real estate generally.]—See EXECUTORS**, Vol. XXIII., pp. 496 *et seq.*

**SUB-SECT. 4.—ANNUITIES CHARGED ON REALTY.**

*See, now*, Administration of Estates Act, 1925 (c. 23), ss. 35, 56, sched. II.

**What constitutes charge on realty—Appointment of devisee as executor.]—See EXECUTORS**, Vol. XXIII., p. 511, Nos. 5763–5770.

**675.** — — — **Express charge.]—TORRE v. BROWNE**, No. 399, *ante*.

**676.** — — — **Coupled with gift of residue of realty & personality.]—The principle of the decisions in reference to the question whether a charge on real estate is affected by reason of a residuary devise is the same in the case of legacies as in that of debts, & is this, that where residuary real & personal property is given in one mixed fund to the exor., who is to pay debts & legacies, there legacies as well as debts are charged upon the real estate.**

Testator, after bequeathing a legacy, & expressly charging part of his real estate with an annuity to the legatee, devised & bequeathed all the rest, residue, & remainder of all & singular his real & personal estate, subject to his debts, funeral & testamentary expenses to trustees, whom he also appointed exors., upon certain trusts:—*Held*: the legacy was well charged upon the real estate.—

*WHEELER v. HOWELL* (1857), 3 K. & J. 198; 69 E. R. 1079.

*Annotations*:—*Apld.* Greville v. Browne (1859), 7 H. L. Cas. 689. *Refd.* Smith v. Hill (1878), 9 Ch. D. 143; *Re* Lloyd, Lloyd v. Lloyd (1902), 87 L. T. 541.

— — — **Effect of wasting of personality.]—See EXECUTORS**, Vol. XXIII., pp. 515, 516, Nos. 5810–5817.

**677.** — — — **Power to sell realty—For payment of annuities.]—Testator after giving legacies & annuities, proceeded to say: my exors. may realise such part of my estate as they think right & in their judgment to pay the aforementioned legacies. He then directed his business to be carried on till his son attained the age of thirty, but did not dispose of the profits, nor did his will contain any further disposition of his real or personal estate, except a gift of a particular house. Testator carried on his business in a freehold mill which was his own property:—Held**: the legacies were not charged on the real estate, for the direction to the exors. to realise such parts of his estate as they thought right to pay the legacies was satisfied by holding it to apply to property which they took as exors.—*Re CAMERON, NIXON v. CAMERON* (1884), 26 Ch. D. 19; 53 L. J. Ch. 1139; 50 L. T. 339; 32 W. R. 834, C. A.

**678.** — — — **Covenant to charge sufficient part of realty of which covenantor dies seised—Subsequent bequest not treated as satisfaction.]—A father on the marriage of his second son, by deed of settlement covenanted to pay him an annuity of £1,000 a year for life, & to charge the annuity on a sufficient part of the real estate he might die seised of, provided that nothing in the settlement should prevent his dealing with his real estate during his life, or, so only that sufficient real estate were left charged with the annuity, by will. The father subsequently made his will by which he devised his real estate, subject to the charges & incumbrances thereon, in strict settlement on his first & other sons in tail male; he bequeathed the greater part of his personal estate among his children, giving his second son legacies, the income of which when invested would be considerably more than £1,000 a year. He died, leaving three sons:—Held**: (1) the settlement operated not only as a covenant by the father, but also as a charge upon all the real estate of which he should die seised; (2) the words “subject to the charges & incumbrances thereon” were too general to rebut the presumption against double portions, & the second son was not entitled both to the annuity & to the bequests under the will.—*MONTAGU v. SANDWICH (EARL)* (1886), 32 Ch. D. 525; 55 L. J. Ch. 925; 54 L. T. 502; 2 T. L. R. 392, C. A.

**679.** **Effect of charge on realty—Annuity out of tithes leased for years—Renewal of term.]—Grant of an annuity for life out of tithes leased for years, with covenant for further assurance. The lessee afterwards renewed the lease; married; & died. Her husband administered; & renewed with his own money. The annuity is a charge upon the renewed term generally; & the grantee is not bound to contribute to the expense of renewal.—MOODY v. MATTHEWS** (1802), 7 Ves. 174; 32 E. R. 71.

*Annotation*:—*Apld.* Webb v. Lugar (1836), 2 Y. & C. Ex. 247.

**680.** — — — **Where intention to transfer charge to personality is doubtful.]—DENNETT v. PASS**, No. 800, *post*.

**681.** — — — **Voluntary covenant—Realty chargeable in hands of devisees—Arrears accruing after death.]—Where a party enters into a voluntary covenant to pay an annuity, his real estates will be chargeable, in the hands of his devisees, with**

the arrears of the annuity, although such arrears did not accrue till after his death.—*JENKINS v. BRIANT* (1836), Donnelly, 101; 6 Sim. p. 606; 5 L. J. Ch. 348; 47 E. R. 254.

*Annotations*.—*Consd.* *Morse v. Tucker* (1846), 5 Hare. 79. *Apld.* *Coope v. Cresswell* (1866), L. R. 2 Eq. 106. *Refd.* *Patch v. Shore* (1862), 11 W. R. 142. *Mentd.* *Jenkins v. Briant*, *Jenkins v. Cross* (1845), 6 L. T. O. S. 273.

**682. — Realty & personalty devised to grantor—Liability of personalty.**—Testator after giving certain specific & pecuniary legacies, devised all the residue of his real & personal estate & effects to trustees. J., testator's eldest son by his second wife, who survived his father, & died leaving a son, by his will charged all & every his lands, etc., whatsoever & wheresoever situate, with an annuity of £100 to his widow in lieu of dower:—*Held*: this annuity was not chargeable upon the share of J. in the freehold & leasehold lands so devised by the will & codicil of his father, but the same was chargeable upon his share in the residuary personal property, rents, profits, & accumulations.—*RADLEY v. LEES* (1841), 3 Man. & G. 327; 3 Scott, N. R. 665; 133 E. R. 1169.

**683. — Realty primarily liable.**—Testator after directing his debts, funeral, & testamentary expenses to be paid as soon as conveniently might be after his death, bequeathed several annuities & pecuniary legacies to various persons, directing the legacies, except one which was given to a person under twenty-one, to be paid within twelve calendar months after his death. He then declared that the several annuities thereinbefore bequeathed should be charged upon his real estates. By a subsequent clause he charged all his real estate with the payment of all his debts, funeral & testamentary expenses, & legacies, or of such part thereof as his personal estate not specifically bequeathed should be insufficient to pay & satisfy:—*Held*: the annuities were primarily, if not solely, charged upon testator's real estate; & under the term legacies, he did not mean to comprise annuities.—*SHIPPERDSON v. TOWER* (1842), 1 Y. & C. Ch. Cas. 441; 6 Jur. 658; 62 E. R. 961.

*Annotations*.—*Distd.* *Re Trenchard*, *Trenchard v. Trenchard*, [1905] 1 Ch. 82. *Refd.* *Wheeler v. Tootel* (1867), L. R. 3 Eq. 571. *Donaldson v. Donaldson* (1870), L. R. 10 Eq. 635; *Clive v. Clive* (1872), 7 Ch. App. 433. *Mentd.* *Newman v. Lade* (1842), 1 Y. & C. Ch. Cas. 680; *St. Aubyn v. St. Aubyn* (1861), 1 Drew. & Sm. 611.

**684. — Jointure secured by demise of term & by covenant.**—Where by a marriage settlement the intended husband conveyed freehold estate to trustees for a term, & covenanted to pay an annuity to his intended wife, if she should survive him, in bar of her dower, & the trusts of the term were declared to be, in case the annuity should be in arrear, to raise the same by leasing, selling, or mortgaging:—*Held*: the annuity was primarily charged upon the real estate comprised in the settlement.—*LOOSEMORE v. KNAPMAN* (1853), Kay, 123; 2 Eq. Rep. 710; 23 L. J. Ch. 174; 24 L. T. O. S. 21; 2 W. R. 664; 69 E. R. 52.

*Annotation*.—*Distd.* *Field v. Moore*, *Field v. Brown* (1855), 7 De G. M. & G. 691.

**685. — Demise of term—Proviso for cesser on investment of amount sufficient to secure annuity—Direction by will for payment out of personalty.**—Testator had, before his marriage, limited lands to trustees for a term, to secure a debt, & subject thereto, to other trustees for another term, to secure an annuity of £100 *per annum* to his intended wife for life, with a proviso for determining the latter term, on his investing

a sufficient amount to secure an equal annuity. He died without having made such an investment, having by his will directed payment out of his personal estate of his debts, including what might be charged upon the settled lands; & he bequeathed his residuary estate to his widow. Before his death he had paid off the debt secured by the first of the above-mentioned terms, which had consequently determined, & the annuity was the only charge upon the estates:—*Held*: the tenant of the estates was not entitled to have them exonerated as against the widow out of the residue.—*REEVE v. REEVE* (1850), 3 De G. & Sm. 714; 14 L. T. O. S. 544; 14 Jur. 264; 64 E. R. 674.

**686. — Executors having power to appropriate moneys out of mixed fund—Deficiency to be supplied from specific devises—Specifically devised estates primarily liable.**—Testator gave an annuity, & declared that it should be yearly issuing out of his lands & hereditaments, & empowered his exors., at their discretion, out of his personal estate or his real estate, to appropriate sufficient moneys to answer the annuity, declaring that thereupon the hereditaments should be discharged; & he proceeded to devise certain parts of his freehold & leasehold property specifically, & to devise the residue of both, but as to the whole real estate charged in aid of his personal estate with his pecuniary legacies; & he declared that, if the funeral & testamentary expenses, debts & pecuniary legacies, & any money appropriated to answer the annuity should absorb the whole residuary real & personal estate, the deficiency should be made good out of the specific devises; & that the whole of the annuity, or so much thereof as should not be provided for by any such appropriation, should be charged upon the specific devises rateably. The exors. did not appropriate any fund to answer the annuity:—*Held*: it was primarily payable out of the specifically devised estates.—*WOODHEAD v. TURNER* (1851), 4 De G. & Sm. 429; 64 E. R. 899.

**687. — Right to marshal—Satisfaction out of personalty.**—Testator directed his debts to be paid out of a fund after provided; he directed his real estate to be sold, & out of the produce his debts & funeral expenses to be paid, the residue to be held by the trustees upon certain trusts, he afterwards gave certain legacies & annuities; & he then bequeathed his personal estate, "after & subject to the payment of his debts, funeral expenses, legacies & annuities" to the party chiefly interested under those trusts, absolutely:—*Held*: (1) the personal estate was the primary fund for the payment of the debts; (2) the doctrine of marshalling was applicable in favour of legatees & annuitants, who were, therefore, decreed to stand in the place of the specialty & simple contract creditors as against the real estate devised in trust for sale, & payment of debts.

There is nothing in this will to take the case out of the ordinary rule, by which in the absence of intention, either express or implied on the part of testator, to exonerate his personalty, that personalty is the primary fund for the payment of the debts (*CRANWORTH, L.J.*).—*PATERSON v. SCOTT* (1852), 1 De G. M. & G. 531; 21 L. J. Ch. 346; 18 L. T. O. S. 343; 16 Jur. 898; 42 E. R. 658, L. JJ.

*Annotation*.—*As to (2)* *Consd.* *Re Stokes*, *Parsons v. Miller* (1892), 67 L. T. 223.

**688. — Rentcharge charged on land subject to mortgage—Mortgage thrown on personalty.**—Testator devised property, which was

## PART VI. SECT. 6, SUB-SECT. 4.

**683 i. Effect of charge on realty—Realty primarily liable.**—*HARROLD v. WALLIS* (1863), 10 Gr. 197.—*CAN.*

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subject to mtges. at the date of his will & death, on trust for sale, rentcharges of specified amounts to be created & reserved thereout for the benefit of daughters & their families. The property was insufficient for creation of the rentcharges & payment of the mtge. debts. There was no contrary or other intention signified by testator within Real Estate Charges Act, 1854 (c. 113):—*Held*: on the principle of marshalling, the rentcharges were entitled to have the property sold, reserving the rentcharges, any deficiency of the proceeds for satisfaction of the mtge. debts to be made good out of the general personal estate.—*Re Fry, Fry v. Fry*, [1912] 2 Ch. 86; 81 L. J. Ch. 640; 106 L. T. 999; 56 Sol. Jo. 518.

Marshalling, generally, *see* EQUITY, Vol. XX., pp. 499 *et seq.*; EXECUTORS, Vol. XXIII., pp. 525 *et seq.*

**689. — Annuitant has equitable interest in land charged.]—***Re Sharland, Kemp v. Rozey* (1896), 74 L. T. 604; 40 Sol. Jo. 514, C. A.

**— Under Scottish law—Burden on personality under English law.]—***See* CONFLICT OF LAWS, Vol. XI., p. 356, No. 392.

**—.]—***See* EXECUTORS, Vol. XXIII., pp. 511–515, Nos. 5775–5809.

**Rents of realty insufficient—Trust for conversion with power of postponement—Time for conversion.]—***See* EQUITY, Vol. XX., p. 368, No. 1060.

**Order of application of assets of deceased person, generally.]—***See* EXECUTORS, Vol. XXIII., pp. 473 *et seq.*

**Exoneration of personality.]—***See* Sub-sect. 3, *ante*.

**SUB-SECT. 5.—REALTY CHARGED IN AID OF PERSONALTY.**

*See* Administration of Estates Act, 1925 (c. 23), ss. 35, 56, sched. II.

**690. Where personality insufficient.]—**MATTHEWS *v.* MATTHEWS (1772), 2 Dick. 470; 21 E. R. 352, L. C.

**691. Where realty is included in general devise of residue.]—**JOYCE'S CASE (1689), Nels. 155; 21 E. R. 814.

**692. —.]—**Testator by his will directs, that, with the money arising from the personal estate bequeathed to his trustees, which is to be first so applied, & from the sale or mtge. of certain real estates devised to the same trustees for a term of years, the annuities & legacies therein after given are to be paid; & he afterwards gives, among other things, an annuity secured by powers of distress & entry on the real estates: by a codicil he bequeaths his personality & the residue of his real estates for a term of years to other trustees upon the trusts in his will & codicils mentioned: & he then gives to A. an annuity which he charged on the residue of his real estate, & secures by a power of distress:—*Held*: the personality was the primary fund for the payment of A.'s annuity, & the real estate was charged only as an auxiliary fund.—FITZGERALD *v.* FIELD (1826), 1 Russ. 416; 4 L. J. O. S. Ch. 170; 38 E. R. 162.

*Annotations:—Mentd.* Fry *v.* Sherborne (1829), 3 Sim. 243; Whatford *v.* Moore (1837), 3 My. & Cr. 270; Swallow *v.* Binns (1855), 1 K. & J. 417; Pickford *v.* Brown, Brown *v.* Brown (1856), 2 K. & J. 426.

**693. —.]—**Real estate, when included in a general devise of a residue, is liable to make good a deficiency in the personal estate for the payment of annuities bequeathed by the will.—FARNAM *v.* WIGGINS (1847), 9 L. T. O. S. 243.

**694. —.]—**Testator by his will devised &

bequeathed all his real & personal estate to trustees upon trust to convert his personal estate into money, & thereout to pay his debts & a legacy of £10 to A., & to be possessed of the residue of his money & his real estate, upon trust out of the rents of his real estate to pay such debts as his personal estate might be insufficient to satisfy, & subject thereto, to stand possessed of all the residue of his estate for his grandchildren. Testator made a codicil to his will, & thereby directed that the trustees or trustee acting under his will should pay a further legacy of £40 to A. & an annuity of £100 to B.:—*Held*: the legacy & annuity given by the codicil were charged on testator's real estate.—GALLIMORE *v.* GILL (1854), 2 Sm. & G. 158; 23 L. J. Ch. 604; 18 Jur. 480; 65 E. R. 346; *affd.* (1856), 8 De G. M. & G. 567, L. JJ.

**695. Right of person entitled to income of realty—Must prove annuity properly secured.]—**Where realty is charged in aid with annuities primarily payable out of personality, the person who would, but for the annuities, be entitled to the income of the realty, must prove that the annuities are properly secured before she can call for payment to her of the income of the realty.—*Re Earle, Tucker v. Donne* (1923), 131 L. T. 383; 68 Sol. Jo. 386.

**Order of application of assets of deceased person generally.]—***See* EXECUTORS, Vol. XXIII., pp. 473 *et seq.*

**SUB-SECT. 6.—REALTY AND PERSONALTY APPLICABLE RATEABLY.**

Creation of mixed fund of realty & personality, generally, *see* EXECUTORS, Vol. XXIII., pp. 480 *et seq.*

*See* Administration of Estates Act, 1925 (c. 23), ss. 35, 56, sched. II.

**696. Effect of creation of mixed fund.]—**Testator by his will devises all his real estate to his exors. for the purposes thereafter stated; & after empowering them either to continue his business or to dispose of it, he gives the profits of it in the one case, & the interest of the moneys arising from the sale in the other, & also the interest of the securities on which the rest of his capital should be invested, to his daughter for life, her receipt to be a discharge. He then gives her the rents & profits of all his real estates during her life; & at her decease he devises & bequeaths to her heirs all his estates real & personal as tenants in common; if his daughter has but one child, such child is to possess the whole; but if she should die without issue, then at her decease he gives certain legacies. He next directs all his goods & effects to be sold, his said legacies to be paid, & a sum invested sufficient to purchase £150 a year, which is to be paid to the husband of the daughter. He then orders his real estates to be sold at the decease of his daughter or at the decease of his brothers & sisters, according as a particular event may turn out; & he gives over to certain persons all the residue of his personal estate, including the proceeds of the sale of the real estates when sold, & the rents of them until they are sold. The daughter dies without having had issue:—*Held*: the annuities & legacies given at her decease were charged both on the real & personal estate, & were to be borne proportionally by the two funds.—DUNK *v.* FENNER (1831), 2 Russ. & M. 557; 39 E. R. 506.

*Annotations:—Refd.* Boughton *v.* Boughton, Boughton *v.* James (1848), 1 H. L. Cas. 406; *Ex p.* Wynch (1854), 5 De G. M. & G. 188; Herrick *v.* Franklin (1868), L. R. 6 Eq. 593. *Mentd.* Garratt *v.* Cockrell (1842), 1 Y. & C. Ch. Cas. 494; Toller *v.* Attwood (1850), 15 Q. B. 929; Parker *v.* Birks (1854), 1 K. & J. 156.

**697. — Intention to create deduced from terms of will.]**—In order that legacies charged upon real estate may be payable out of the real & personal estate *pro rata*, it is not necessary that testator should have directed an absolute conversion of the real estate. It is sufficient that he has shown an intention of creating a mixed fund of realty & personalty out of which the legacies are to be paid. Therefore, where testator had empowered his trustees to sell his real & personal estate in case & as often as they should think fit, & had directed them to pay certain legacies out of the residue of his real & personal estate, & the moneys arising from the sale thereof:—*Held*: upon the construction of the whole will, the legacies were payable *pro rata* out of the real & personal estate.—*ALLAN v. GOTT* (1872), 7 Ch. App. 439; 41 L. J. Ch. 571; 26 L. T. 412; 20 W. R. 427, L. J.

*Annotations*:—*Consd.* *Howard v. Dryland* (1877), 38 L. T. 21; *Luckcraft v. Pridham* (1879), 48 L. J. Ch. 636. *Apld.* *Re Spencer Cooper, Poe v. Spencer Cooper*, [1908] 1 Ch. 130. *Consd.* *Re Smith, Smith v. Smith*, [1913] 2 Ch. 216. *Refd.* *Wells v. Row* (1879), 48 L. J. Ch. 476; *Re Stephens, Warburton v. Stephens* (1889), 43 Ch. D. 39; *Re Raggl, Brass v. Young*, [1913] 2 Ch. 206. *Mentd.* *Bentnick v. Portland* (1877), 38 L. T. 58; *Penny v. Penny* (1879), 11 Ch. D. 440.

**698. —**]—An annuity bequeathed by will, & directed to be paid out of a moiety of the rents, issues, profits, dividends, interest, & proceeds of the real & personal estate of testator, after the expiration of a life interest therein:—*Held*: not to be primarily payable out of the personal estate of testator, but to be apportionable between the real & personal estates.—*FALKNER v. GRACE* (1851), 9 Hare, 280; 22 L. J. Ch. 153; 68 E. R. 509.

*Annotations*:—*Distd.* *Howard v. Dryland* (1877), 38 L. T. 21. *Refd.* *Tench v. Cheese* (1855), 6 De G. M. & G. 453; *Allan v. Gott* (1872), 7 Ch. App. 439.

**699. —**]—D. by will directed payment of his just debts out of his Irish estate, & exonerated his personalty therefrom. He then devised the Irish estate to trustees to sell, & by sale or mtgc. or out of the rents & profits to pay specific debts & legacies; & out of the rents & profits to pay two annuitants, with devises over in strict settlement, & all the residue to E. Upon the question, out of what property the annuities & costs were payable:—*Held*: they were payable rateably.—*BARNARD v. ROBERTS* (1853), 1 W. R. 222.

**700. —**]—Testator seized of real estate, & entitled to some personal estate including a leasehold colliery & canal shares, appointed a settled real estate to his son, & gave all his real & personal property to trustees, upon trust, at some convenient & proper period, with the approbation of the son, to sell & convert the same, & to invest & apply £1,000 upon certain trusts, & to pay two life annuities, & subject as aforesaid, for the purpose of paying to pltf. an annuity of £200, besides half the income of his real & personal estates, except the estate given to his son, provided that her annuity should in no case exceed the sum of £800 a year. He directed that the profit of his mines should not be deemed income, but only so much as should remain after laying by £10 per cent. for repairs, etc. Subject to the above legacy & annuities, testator gave all his real & personal estate to his son, & appointed his son & the two trustees exors.; & empowered the trustees to let the son into possession of all the property, upon his securing the legacy & annuities. Testator died, leaving personal estate insufficient to pay his debts, unless the colliery was resorted to. The trustees disclaimed &

renounced. The son proved the will, entered into possession of the whole property, & worked out the colliery, which yielded, in the whole, profits amounting to £27,000. He paid testator's debts out of his own moneys, & claimed to be allowed interest upon them:—*Held*: (1) the £1,000 legacy was payable out of the real & personal estate *pro rata*; (2) pltf. was not entitled to interest on the arrears, if any, of her annuity.—*LORD v. WIGHTWICK* (1854), 4 De G. M. & G. 803; 2 Eq. Rep. 349; 23 L. J. Ch. 235; 22 L. T. O. S. 249; 43 E. R. 721, L. J.J.; *on appeal, sub nom. WIGHTWICK v. LORD* (1857), 6 H. L. Cas. 217, H. L.

**701. —**]—*BRIGHT v. LARCHER*, No. 394, *ante*.

**702. —**]—Testator gave his real & personal estate to trustees upon trust, out of the rents & produce or by a sale or other disposition thereof, to raise an annuity for his wife & certain legacies & to invest the surplus. He directed a sale of his real estate after the death of his wife & gave his residue to his children:—*Held*: the personal estate was not primarily charged with the annuity, but the real & personal estate formed one common fund for its payment.—*BEDFORD v. BEDFORD* (1865), 35 Beav. 584; 55 E. R. 1023.

*Annotation*:—*Refd.* *Allan v. Gott* (1872), 7 Ch. App. 439.

**703. — Whether absolute conversion of realty necessary.]**—*ALLAN v. GOTT*, No. 697, *ante*.

**704. —**]—Testator devised & bequeathed the residue of his real & personal estate to trustees upon trust to convert his personal estate into money, & to take the rents & profits of such real & personal estate to pay certain annuities mentioned in his will, at various times & in various manners; & “subject as aforesaid,” his trustees were to stand possessed of the real & personal estate upon trust as to one moiety, to pay the rents, etc., to his wife for life; & as to the other moiety during the life of testator's wife, & as to the whole after his death, out of the rents, etc., to pay the annuities, & out of his personal estate to pay the legacies left by his will, & on insufficiency of personal estate testator charged such legacies on real estate; & after making provision for a grand-niece & others, testator directed that, “subject as aforesaid,” his trustees should stand possessed of the residue of his real & personal estate upon trust, after the death of his wife, so long during the then residue of the life of his nephew, R., until he should have a son who should arrive at the age of twenty-one years, or die under that age leaving lawful issue, upon trust to pay certain sums therein mentioned, & “subject as aforesaid,” testator directed that his trustee should stand seized of the residue of his said real estates upon trusts for the eldest or only son of R. & the heirs of his body in strict settlement. The entail was barred, & R.'s son became owner in fee simple of the real estate. The question was how the annuities were to be borne, whether, on the son of R. attaining twenty-one, the real estate was exonerated, or the annuities were to be paid rateably out of the rents & proceeds of the whole real & personal estate treated as one fund:—*Held*: although there was no absolute conversion of real estate, the annuities were to be paid rateably out of the whole income as one fund.—*HOWARD v. DRYLAND* (1877), 38 L. T. 24.

**705. —**]—*Re BOARDS, KNIGHT v. KNIGHT*, No. 654, *ante*.

—*See EXECUTORS*, Vol. XXIII., pp. 483–486, Nos. 5511–5534.

**706. Special direction of testator.]**—Testator, entitled to freehold estates & to a leasehold for years,

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**706 I. Special direction of testator.]**—Where testator directs an annuity to be

paid out of the rents & profits of his real estate & charges it later on all his real property, freehold & leasehold, &

refers to the sale of part of his freehold & leasehold property, “but subject to the annuity,” the annuity is a charge

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determinable on lives, charged by his will annuity on both rateably, & directed that in the event of his interest in the leasehold expiring before the annuity, the proportion of the annuity charged on the leasehold should thenceforth issue out of a designated freehold estate. Subject to the annuity, he devised & bequeathed the freeholds & leasehold to different persons. The legatee of the leasehold surrendered the lease & took a new one determinable on different lives:—*Held*: the new lease was not for the purpose of the annuity substituted for the old, but on the death of the last *cestui que vie* named in the surrendered lease, the leasehold ceased to be charged with the annuity, & the part apportioned to the leasehold became charged on the designated freehold.—*KEMPE v. KEMPE* (1854), 5 De G. M. & G. 346; 43 E. R. 904, L. J.

**707. Effect of residuary devise.]—CLARK v. CLARK** (1865), 4 Giff. 902; 6 New Rep. 86; 34 L. J. Ch. 477; 12 L. T. 485; 11 Jur. N. S. 820; 13 W. R. 735; 66 E. R. 889.

**SUB-SECT. 7.—LIABILITY OF GENERAL ASSETS.**

*See Administration of Estates Act, 1925 (c. 23), ss. 35, 58, sched. II.*

**708. Where particular fund fails.]—**Upon the words of the will, legacy decreed, though the fund out of which it was directed to be paid, failed.—*MANN v. COPLAND* (1817), 2 Madd. 223; 56 E. R. 317.

*Annotations:—Expld. Creed v. Creed* (1814), 11 Cl. & Fin. 491. *Apld. Paget v. Huish* (1863), 1 Hem. & M. 663. *Refd. Dickinson v. Edwards* (1844), 4 Hare, 273; *Williams v. Hughes* (1857), 24 Beav. 474.

**709. —.]—COLBY v. COLBY** (1837), 1 Jur. 890.

**710. —.]—**Testatrix devised all her real & personal estate to A. & B., to get in & sell the same on trust, to pay debts, & then to discharge the following legacies, naming two. I also give & bequeath to T. £2,000, in which sum or thereabouts, he now stands indebted to me, subject to, & I charge the same with the payment of the following life annuities & sums of money; that is to say. She then gave to her sister £40, to her sister's husband, W., if he survived his wife, £20, & to her sister, M., £20, which annuities were to be paid when they became due by T.; the first payments to the two sisters at the end of six months after the death of testatrix; & to W. at the end of six months after the death of his wife. Testatrix then gave four legacies of £50 each to nephews & nieces; £40 to the only child of a nephew, & £50 between the two children of a deceased nephew, & directed these legacies to be paid within twelve months after the death of her sister, M., & to be paid by T. Then followed a proviso, that she did not intend the legacy of £2,000 to T. to exonerate him from the debt due to herself, but whatever should be due at her decease was to be taken in part or in satisfaction,

upon his freehold & leasehold lands.—*PERRY v. SAFFERY* (1884), 3 N. Z. L. R. 297 (S. C.).—**N.Z.**

**PART VI. SECT. 6, SUB-SECT. 7.**

**708 i. Where particular fund fails.]—**Where testator directed his exors. to invest in good securities such a sum as would pay an annuity thereby bequeathed, & the income of the fund was insufficient to pay the annuity:—*Held*: annuitant was entitled to be paid the deficiency out of the corpus or capital.—*ANDERSON v. DOUGALL* (1868),

15 Gr. 405.—**CAN.**

**708 ii. —.]—KIMBALL v. COONEY** (1900), 27 A. R. 453; 20 C. L. T. 346.—**CAN.**

**708 iii. —.]—Re MCKENZIE** (1902), 23 C. L. T. 15; 4 O. L. R. 707; 2 O. W. R. 1076.—**CAN.**

**708 iv. —.]—**Where there is a gift of a specific annuity to an annuitant, a subsequent direction as to where the funds are to be found to pay the same does not limit the annuity to the income of such funds.—*Re MCKENZIE* (1913), 24 O. W. R. 678; 4

as the case might be, of the legacy; & then came a general direction that the several & respective legacies hereinbefore bequeathed should be paid to the respective legatees within twelve calendar months after her decease, or so soon afterwards as her real & personal estates could be collected & converted into money. There was also a direction that the legacies payable to the children of the nephews should be vested interests in them at twenty-one, & in the meantime the money should be invested by the trustees for the benefit of the children. T. never paid any part of the debt, & became utterly insolvent:—*Held*: the annuities & legacies charged on that debt were intended to be payable, if the particular fund, the debt, failed out of the general assets.—*VICKERS v. POUND* (1858), 6 H. L. Cas. 885; 28 L. J. Ch. 16; 31 L. T. O. S. 372; 4 Jur. N. S. 543; 6 W. R. 580; 10 E. R. 1543, H. L.

**711. —.]—**Testator gave his real & personal estate to trustees, in trust to convert his personal estate, except his leaseholds, & out of the produce to appropriate a sufficient portion to pay an annuity which he had agreed to pay on the marriage of his daughter. He gave his trustees a discretionary power to sell his real & leasehold estates, & they were to hold the produce in the manner directed concerning the money arising from his residuary personal estate. The debts exhausted the personal estate, but the realty & leaseholds were sufficient to pay the annuity. A bill having been filed, before the annuity was in arrear, to have a fund set apart to secure it:—*Held*: the trustees were not bound to sell, & the ct. only made a declaration that the annuity constituted a charge on the whole estate, & made plffs. pay the costs up to the hearing.—*BURRELL v. DELEVANTE* (1862), 30 Beav. 550; 31 L. J. Ch. 365; 8 Jur. N. S. 204; 10 W. R. 362; 54 E. R. 1003.

*Annotations:—Distd. Woolaston v. Woolaston* (1877), 37 L. T. 631. *Refd. Fane v. Fane* (1879), 13 Ch. D. 228.

**712. Where legacy is specific.]—**Testatrix, by her will, gave to a legatee the sum of £2,000 Long Annuities, standing in my name in the books of the governor & co. of the Bank of England. At the date of her will, & at her death, she was possessed of £300 Long Annuities & no more, but of considerable other personal estate:—*Held*: the legacy was specific & not demonstrative, & the legatee was not entitled to have the deficiency made up out of testatrix's general assets.—*GORDON v. DUFF, Re WARD* (1861), 3 De G. F. & J. 662; 4 L. T. 598; 7 Jur. N. S. 746; 9 W. R. 643; 45 E. R. 1035, L. C.

*Annotation:—Consd. Re Pratt, Pratt v. Pratt*, [1894] 1 Ch. 491.

**Order of application of assets of deceased person, generally.]—See EXECUTORS, Vol. XXIII., pp. 473 et seq.**

**SUB-SECT. 8.—PRIORITY OF ANNUITANTS.**

*See Administration of Estates Act, 1925 (c. 23), ss. 35, 58, sched. II.*

**713. Voluntary annuitant—Postponement to**

O. W. N. 1392; 11 D. L. R. 818.—**CAN.**

**708 v. —.]—OLDHAM v. OLDHAM** (1880), 5 L. R. Ir. 577.—**IR.**

**o. Annuity to husband—Whether continuing charge—On total income received from trustees of wife's father's estate.]—RIDDELL v. SPEEDY**, [1925] N. Z. L. R. 354.—**N.Z.**

**PART VI. SECT. 6, SUB-SECT. 8.**

**p. Annuity charged on benefice—Priority over judgment creditor.]—A party claiming under an annuity**



**creditors.]**—The ct. of late years has established this rule to postpone voluntary bonds or debts to those for valuable consideration. . . . But this rule has never been extended beyond that case of payment out of legal assets by an exor. or administrator, & so does not come up to the present case; for these are not demands of debts out of legal assets, but of rentcharges granted by deed out of the land (LORD HARDWICKE, C.).—BEDFORD v. GIBSON (1743), 9 Mod. Rep. 412; 88 E. R. 541, L. C.

**714.** ———.]—J. had in his lifetime granted two annuities, or rentcharges, to A., resp., stated to be in consideration of services; after his death his representatives applied the whole of his property in discharge of incumbrances & debts, to the exclusion of resp.'s demands. A sum of about £11,000 had been applied in discharge of incumbrances, subsequent to the date of her annuity deeds, & she filed her bill against the representatives of J., to compel them to discharge her claims, upon the ground that they were answerable to the extent of the above sum, which she stated to have been misapplied. The representatives (appls.), answered, that the grant of the annuities was voluntary, & ought to be postponed to all just debts, or *pro turpi causa*, & therefore void. The only evidence as to the consideration was that of a servant in J.'s family, who said, he believed that resp. & J. cohabited as man & wife—his wife being alive at the time. The Master of the Rolls directed an inquiry as to the consideration, but the Chancellor on appeal altered this decree, thinking probably that there was no sufficient evidence upon which to found an order for inquiry. This decision of the Chancellor was, however, reversed by the House of Lords.—HUNT v. MAUNSELL (1813), 1 Dow, 211; 3 E. R. 676, H. L.

**715. Annuitant proves pari passim with other legatees.—Although will directs prior payment.]**—Testator by his will, bequeathed an annuity to his wife for her life, & made it a primary charge. In preference to all other legacies, on a leasehold estate, which was, together with certain policies of insurance on the life of testator, subject to two mtges.; & he directed that, if the rents & profits of such leasehold estate should be insufficient to pay the wife's annuity, then the same should be paid out of his [other] personal estate. The mtges. were paid off by the exors. out of the produce of the policies, & the general personal estate:—*Held*: (1) the wife's annuity, so far as it fell upon the personal estate, other than the leasehold estate specifically charged, was not entitled to priority over the other legacies; (2) the mtge. debts, to which the leasehold estate specifically charged with the annuity was subject, should be apportioned rateably upon the leasehold estate & the policies of insurance, according to their respective value & amount; & the legatees, other than the wife, were entitled to have the assets marshalled, & to stand in the place of the mtgees. of the leasehold estate, to the extent of that part of the mtge.

debts which should be apportioned thereupon.—JOHNSON v. CHILD (1844), 4 Hare, 87; 67 E. R. 572.

*Annotations*:—As to (1) **Consd.** *Re Smith, Smith v. Smith*, [1899] 1 Ch. 365. As to (2) **Refd.** *Birds v. Askey* (No. 2) (1858), 24 Beav. 618.

**716.** ———.]—WHITEHOUSE v. INSOLE, No. 543, ante.

**717. Annuity secured on life estate—Grantor entitled to prior charge on estate.]**—B., being tenant for life in possession, & also absolutely entitled in remainder, after the death of his mother, to a sum of £9,560, which was the first charge on the estate, granted an annuity secured on his life estate. & by the grant he covenanted against all charges. After the death of his mother, held, as against B., that the annuity had priority over the interest of the £9,560, but that it was not a charge on the corpus of that fund, for interest paid on it after the death of his mother, to the detriment of the annuitant.—KNIGHT v. BOWYER (1857), 23 Beav. 609; 26 L. J. Ch. 769; 30 L. T. O. S. 95; 3 Jur. N. S. 968; 6 W. R. 28; 53 E. R. 239; *on appeal* (1858), 2 De G. & J. 421, L. JJ.; *subsequent proceedings* (1859), 4 De G. & J. 619, L. JJ.

*Annotations*:—**Refd.** *Re Jordison, Itaine v. Jordison*, [1922] 1 Ch. 440. **Mentd.** *Radcliffe v. Anderson* (1860), 3 B. & E. 819; *Dickinson v. Burrell, Dickinson v. Burrell, Stourton v. Burrell* (1866), L. R. 1 Eq. 337; *Bagnall v. Carlton* (1877), 6 Ch. D. 371; *East Stenhouse U. C. v. Willoughby*, [1902] 2 K. B. 318; *Hunt v. Luck*, [1902] 1 Ch. 428.

**Order of application of assets of deceased person generally.]**—See EXECUTORS, Vol. XXIII., pp. 473 *et seq.*

## SECT. 7.—INTEREST ON ARREARS.

### SUB-SECT. 1.—IN GENERAL.

Interest on legacies, *generally*, see EXECUTORS, Vol. XXIII., pp. 405 *et seq.*

**718. Discretion of court to allow.]**—LITTON v. LITTON, No. 744, *post*.

**719.** ———.]—The question of interest is in some degree discretionary in the ct. (STRANGE, M.R.).—MORRIS v. DILLINGHAM (1750), 2 Ves. Sen. 170; 28 E. R. 110.

**720. Interest allowed—Up to time of redemption of annuity.]**—A *junctim* annuity decreed to be redeemed on clearing the arrears, & paying the whole principal sum advanced, & interest to the time only; *plff.* having offered to redeem.—STANHOPE v. COPE (1741), 2 Atk. 231; 9 Mod. Rep. 358; 26 E. R. 543, L. C.

**721. No interest allowed—Except in special circumstances.]**—No interest given on arrears of a voluntary annuity. Nor without a very special case on arrears of annuities in general.—BEDFORD (DUKE) v. COKE (1751), 2 Ves. Sen. 116; 1 Dick. 178; 28 E. R. 76, L. C.

*Annotations*:—**Appld.** *Creuze v. Lowth* (1793), 4 Bro. C. C. 316; *Booth v. Leicester* (1838), 3 My. & Cr. 459. **Refd.** *Booth v. Coulton* (1861), 2 Giff. 514.

**722.** ———.]—MANSFIELD (EARL) v. OGLE, No. 759, *post*.

charged on a rectory & vicarage by the incumbent, is entitled to priority over a judgment creditor of incumbent, although prior in point of time, who has not obtained a sequestration until after the date of the charge.—WISE v. BRERFORD (1843), 5 I. Eq. R. 407; 3 Dr. & War. 276; 2 Con. & Law. 282.—IR.

**g.** ———.]—Priority by covenant creating annuity.]—BATTERSBY v. HOMAN (1850), 16 L. T. O. S. 67.—IR.

**r.** Priority of charges for younger children.]—MILLS v. MILLS (1846), 9 I. Eq. R. 299; 3 Jo. & Lat. 242.—IR.

**t.** Priority over mortgage or charge.]—WALCOTT v. CONDON (1852), 3 I. Ch.

R. 1; 5 Ir. Jur. 49.—IR.

**a.** ———.]—PHILLOTT v. KNOX (1868), 16 W. R. 817.—IR.

**b.** ———.]—*Re BAGOT'S ESTATE*, WHITE v. BAGOT, [1901] 1 I. R. 529.—IR.

**c.** Whether registration gives priority.]—RICHARDS v. BRERETON (1853), 5 Ir. Jur. 336.—IR.

**d.** Direction given to set apart & invest fund—Whether priority given.] The mere direction to set apart & invest a fund to answer an annuity is not sufficient to give priority to annuitant.—*Re HOOPER* (1886), 4 N. Z. L. R. 54 (S. C.).—N.Z.

## PART VI. SECT. 7, SUB-SECT. 1.

**721i. No interest allowed—Except in special circumstances.]**—Except under extraordinary circumstances upon particular grounds suggested of hardship or peculiarity, interest is not to be allowed upon the arrears of an annuity.—SNARR v. BADENACH (1855), 10 O. R. 131.—CAN.

**e.** ———.]—No interest is allowable in respect of arrears of an annuity.—GOLDSMITH v. GOLDSMITH (1870), 17 Gr. 213.—CAN.

**f.** ———.]—Interest will not be allowed on arrears of annuity.—CRONE v. CRONE (1880), 27 Gr. 425.—CAN.

**g.** ———.]—Interest on the arrear



*Sect. 7.—Interest on arrears: Sub-sects. 1 & 2, A. & B.; sub-sects. 3, 4 & 5.]*

**723. — On arrears of voluntary annuity.]—**BEDFORD (DUKE) *v.* COKE, No. 721, *ante*.

**724. — On principal & interest due on annuities.]—**Interest not to be given on the principal & interest, reported due on annuities, by the master. Nor on arrears of an annuity in lieu of dower.—CREUZE *v.* LOWTH (1793), 4 Bro. C. C. 316; 29 E. R. 911; *sub nom.* CREUZE *v.* HUNTER, 2 Ves. 157, L. C.

*Annotations:—***Apld.** Booth *v.* Leicester (1838), 3 My. & Cr. 459; Mansfield *v.* Ogle (1859), 4 De G. & J. 38. **Refd.** Bradbury *v.* Hunter (1796), 3 Ves. 260; Parker *v.* Hutchinson (1796), 3 Ves. 133; Bruere *v.* Pemberton (1806), 12 Ves. 386; Turner *v.* Turner (1819), 1 Jac. & W. 39; Wharton *v.* Cradock (1836), 1 Keen, 267; Hollingsworth *v.* Shakeshaft (1851), 14 Beav. 492. **Mentd.** Tucker *v.* Tucker (1833), 2 L. J. K. B. 143.

**725. Resolution of corporation to pay interest—Whether valid within Municipal Corporations Act, 1835 (c. 76).]**—Under above Act, ss. 66, 67, a corp. executed a bond for payment of an annuity to a person removed from office, & also for payment, on demand, of arrears due before the date. The obligee consenting not to press for the arrears, the council passed a resolution to pay him interest thereon:—**Held:** such resolution, & orders of the council for payment of the interest, were unsanctioned by above Act, s. 92, & were liable to be quashed on being brought up by *certiorari*.—*R. v. WARWICK CORPN.* (1846), 8 Q. B. 926; 15 L. J. Q. B. 306; 7 L. T. O. S. 137; 10 J. P. 789; 10 Jur. 962; 115 E. R. 1123.

*Annotations:—***Mentd.** *R. v. Tamworth Corp.*, *Ex p. Tamworth Corp.* (1868), 19 L. T. 433; *J' v. Sheffield Corp.* (1871), L. R. 6 Q. B. 652.

**726. Annuity secured by term—Whether claim for interest affected—Where annuitant's title so doubtful as to require direction of court.]—**Interest not given on the arrears of an annuity unpaid for several years during the progress of the cause, although the suit was instituted by, & a receiver appointed on the application of, the residuary legatee, & the surplus income out of which the annuity was payable was brought into ct., & made productive.

In order to entitle an annuitant, whose annuity is payable from a fund which has been brought into ct., to any profit which may have been made by the investment of the arrears of his annuity, he should procure the arrears to be set apart & distinguished from the general estate.—TAYLOR *v.* TAYLOR (1849), 8 Hare, 120; 68 E. R. 298.

*Annotations:—***Apld.** Edwards *v.* Warden (1876), 1 App. Cas. 281; *Re Hiscoc*, Hiscoc *v.* Waite (1902), 71 L. J. Ch. 347. **Refd.** Lainsan *v.* Lainsan (1853), 18 Beav. 7; Booth *v.* Coulton (1861), 30 L. J. Ch. 378.

**727. Right of annuitant to interest—Annuity payable from fund brought into court—Arrears must be set apart from general estate.]—**TAYLOR *v.* TAYLOR, No. 726; *ante*.

**728. Validity of provision for interest.]—**A clause giving interest on arrears of an annuity held not objectionable.—TYNTE *v.* HODGE, TYNTE *v.* BEAVAN (1864), as reported in 2 Hem. & M. 287; 13 W. R. 172; 71 E. R. 474.

of an annuity bequeathed to a married woman for her sole & separate use, not given, though the fund was productive, & though there was a large residuum.—ANDERSON *v.* DWYER (1864), 1 Sch. & Lef. 301.—**IR.**

**h. —.**—The ct. cannot give interest on the arrears of an annuity.—AYLMER *v.* AYLMER (1828), 1 Mol. 87.—**IR.**

**k. —.**—The established rule of this ct. (which, however, is only general & not inflexible) is, that

interest cannot be recovered upon the arrears of an annuity.—MARTYN *v.* BLAKE (1842), 3 Dr. & War. 125; 5 L. Eq. It. 72; 2 Con. & Law. 65.—**IR.**

**l. —.**—**BEAMISH v. FARMER** (1867), 1 L. R. Eq. 466.—**IR.**

**m. —.**—**FORBES v. ELLIOTT** (1830), 8 Sh. (Ct. of Sess.) 825.—**SCOT.**

**n. Interest allowed.]—**A son, tenant in tail in remainder, joined his father tenant for life in suffering a recovery, & then they mtgd. the land,

**729. —.]—**A provision for payment of interest on arrears of an annuity is not invalid.—FORD *v.* TYNTE (1864), 3 New Rep. 559; 10 L. T. 93.

## SUB-SECT. 2.—CLAIMS AGAINST GENERAL ASSETS.

### A. Annuity under Will.

**730. No interest allowed—Unless arrears are great.]—**BATTEN *v.* EARNLEY (1723), 2 P. Wms. 163; 24 E. R. 683.

*Annotation:—***Fold.** *Re Hiscoc*, Hiscoc *v.* Waite (1902), 71 L. J. Ch. 347.

**731. —.]—**LORD *v.* WIGHTWICK, No. 700, *ante*.

**732. —.]—**Annuity under a will are not entitled to interest on the arrears of their annuities.—BOOTH *v.* COULTON (1861), 2 Giff. 514; 30 L. J. Ch. 378; 3 L. T. 770; 7 Jur. N. S. 207; 9 W. R. 330; 66 E. R. 216.

*Annotation:—***Apld.** Wheatly *v.* Davies (1876), 35 L. T. 306.

**733. — Whether annuity charged on corpus or income.]—**An annuitant under a will of personal estate is not entitled to interest on the arrears of his annuity, whether the annuity be charged on corpus or income.—WHEATLY *v.* DAVIES (1876), 35 L. T. 306; 24 W. R. 818.

**734. —.]—**Arrears of an annuity given by a will do not as a rule carry interest.—*Re HISCOC v. WAITE* (1902), 71 L. J. Ch. 347.

*Annotation:—***Distd.** *Re Salvin*, Worsley *v.* Marshall, [1912] 1 Ch. 332.

### B. Annuity under Deed.

*See, now*, R. S. C., Ord. 55, rr. 62, 63; Judgments Act, 1838 (c. 110), s. 17.

**735. No interest allowed—Annuity secured by judgment.]—**BEDFORD (DUKE) *v.* COKE, No. 721, *ante*.

**736. — Arrears accruing after death of grantor—Unless absence for misconduct of grantor is shown.]—**An owner of real estates in England & Ireland granted a number of annuities, some of which were specifically charged by the deeds upon the grantor's English estates, with powers of distress & entry for recovering the amount, & all costs, losses, charges, damages, & expenses occasioned by the same not being duly paid; others were secured by the covenant of the grantor & a surety, with a proviso for redemption on payment of a certain sum, & all costs, charges, & expenses; all of them were further secured by warrants of attorney to confess judgment, upon which judgments were entered up. Upon a bill filed by an assignee of these annuities, after the death of the grantor, for payment of the arrears of the annuities, together with interest:—**Held:** he was not entitled to interest upon the arrears of any of the annuities, there being no proof that he had been delayed by the absence or conduct of the grantor.—BOOTH *v.* LEYCESTER (1838), 3 My. & Cr. 459; 8 L. J. Ch. 49; 2 Jur. 935; 40 E. R. 1004, L. C.; *affg.* S. C. *sub nom.* BOOTH *v.*

whereupon the mtgee executed a bond conditioned for performance of covenants in a deed to secure an annuity to the son:—**Held:** as damages may be recovered at law for a breach not exceeding the penalty, equity will give interest upon the arrears of such an annuity.—GAY *v.* COX (1784), 1 Ridg. Parl. Rep. 153.—**IR.**

**o. —.]—**POWER *v.* BENNIS (1790), 2 Ridg. Parl. Rep. 256.—**IR.**

**p. —.]—**O'DONNELL *v.* BROWN (1810), 2 Mol. 519.—**IR.**

LEYCESTER, PALMER v. LEYCESTER (1836), 1 Keen, 247.

*Annotations* :—**Folld.** Jenkins v. Briant (1848), 16 Sim. 272 ; *Re Powell's Trust* (1852), 10 Harc. 134 ; Lainsou v. Lainsou (1853), 18 Beav. 7 ; Mansfield v. Ogle (1859), 4 De G. & J. 38 ; Wheatly v. Davies (1876), 35 L. T. 306. **Refd.** L. C. & D. Ry. v. S. E. Ry. (1891), 61 L. J. Ch. 294. **Mentd.** Wedderburn v. Wedderburn (1840), 2 Beav. 208.

**737.** ———.] —After the death of a person who had covenanted to pay an annuity, a suit was instituted for the administration of his assets, pending which, the annuity became in arrear. The ct. refused to allow interest on the arrears.—JENKINS v. BRIANT (1848), 16 Sim. 272 ; 11 L. T. O. S. 392 ; 60 E. R. 879.

*Annotation* :—**Refd.** *Re Powell's Trust* (1852), 10 Harc. 134.

**738.** ——— **Annuity under mortgage deed.**]—A mtge. deed provided, that so long as the mtgor. paid the mtgee. the sum of £3,000 *per annum*, it should be lawful for the mtgor. to receive the rents of the mtged. estates :—**Held** : the £3,000 must be treated as an annuity, & no interest was payable on the arrears.—BYRE v. BURMESTER (1864), 3 New Rep. 400 ; 33 L. J. Ch. 655, n. ; 10 L. T. 10 ; 10 Jur. N. S. 379 ; 12 W. R. 542 ; *revid.* on other grounds, 4 De G. J. & Sm. 435, L. C.

*See, now*, R. S. C., Ord. 55, rr. 62, 63.

**739.** **Interest allowed—From date of judgment.**]—By a settlement made in 1897 on the marriage of his brother, testator covenanted to pay to the trustees thereof an annuity of £400 during the joint lives of the brother & his wife. The annuity was paid down to the quarter preceding testator's death, which took place in Oct. 1902. After his death an administration action was commenced by the residuary legatees under his will, & accounts & various inquiries were directed. By a certificate of the master, dated Apr. 30, 1908, the arrears of the annuity were found to be £2,158 0s. 6d., & the whole arrears were not finally paid until Aug. 24, 1910 :—**Held** : interest was payable at 4 per cent. upon the arrears of the annuity from the date of the judgment, in accordance with the provisions of R. S. C., Ord. 55, rr. 62, 63, & on such parts as accrued due subsequently to the judgment, from the dates when they respectively accrued due down to actual date of payment in all cases.—*Re* SALVIN, WORSLEY v. MARSHALL, [1912] 1 Ch. 332 ; 81 L. J. Ch. 248 ; 28 T. L. R. 190 ; 56 Sol. Jo. 241 ; *sub nom.* *Re* SELVIN, WORSLEY v. MARSHALL, 106 L. T. 35.

### SUB-SECT. 3.—ANNUITY GIVEN AS JOINTURE.

**740.** **No interest allowed—Except in special case.**]—Interest not allowed on arrears of jointure, except on a very special case indeed.—BICKNEILL v. BRERETON (OR ANON.) (1755), 2 Ves. Sen. 661 ; 28 E. R. 421 ; *sub nom.* BIGNAL v. BRERETON, 1 Dick. 278, L. C.

*Annotation* :—**Consd.** Creuze v. Lowth, Michel v. Hunter (1793), 4 Bro. C. C. 316.

**741.** ———.]—The ct. will not give interest on the arrears of an annuity, secured by a bond in bar of dower.—TEW v. WINTERTON (EARL) (1792), 3 Bro. C. C. 489 ; 1 Ves. 451 ; 29 E. R. 660.

*Annotations* :—**Consd.** Torre v. Browne (1855), 5 H. L. Cas. 556. **Refd.** Booth v. Leycester (1838), 3 My. & Cr. 459 ; Lainsou v. Lainsou (1853), 22 L. T. O. S. 150. **Mentd.** Knight v. Maclean (1792), 3 Bro. C. C. 496 ; Hovey v. Blakeman (1799), 4 Ves. 596 ; Clarke v. Seton (1801), 6 Ves. 411 ; *It. v. Mainwaring* (1815), 2 Price, 67 ; Mackintosh v. G. W. Ily. (1865), 4 Giff. 683 ; Hill v. South Staffordshire Ry. (1874), L. R. 18 Eq. 154.

**742.** ———.]—CREUZE v. LOWTH, No. 724, *ante*.

**743.** ———.]—Interest not given upon arrears of maintenance any more than upon arrears of a jointure.—MELLISH v. MELLISH (1808), 14 Ves. 516 ; 33 E. R. 619.

### SUB-SECT. 4.—ANNUITY FOR MAINTENANCE.

**744.** **Whether interest allowed.**]—Interest for the arrears of an annuity, from what time.

Interest is a thing pretty much in the discretion of the ct. (LORD PARKER, C.).—LITTON v. LITTON (1719), 1 P. Wms. 541 ; 2 Eq. Cas. Abr. 530, pl. 8 ; 24 E. R. 508, L. C.

**745.** ———.]—In respect to arrears of an annuity, there is no certain rule of giving interest ; the most frequent instances are where it was the bread of a wife or child. The ct. gave interest on the arrears of an annuity, from the time a master's report was confirmed, which was twenty-eight years, in favour of the representative of the annuitant only.—DRAPERS CO. v. DAVIS (1741), 2 Atk. 211 ; 26 E. R. 531, L. C.

**746.** ———.]—A bill for the arrears of an annuity of £30 secured by bond in the penalty of £500, an account decreed of the arrears due since the year 1741, & interest at 4 per cent. to be computed at the end of each half year.

As this was given by way of maintenance, & a bond to secure the payment, pltf. is clearly entitled to interest, for the ct. have gone further in an annuity given for maintenance, & decreed interest, though it was only a bare simple grant of an annuity, without any power of entering, if in arrear.—NEWMAN v. AULING (1747), 3 Atk. 579 ; 26 E. R. 1134, L. C.

*Annotations* :—**Refd.** Booth v. Leycester (1838), 3 My. & Cr. 459 ; Torre v. Browne (1855), 5 H. L. Cas. 556.

**747.** ———.]—BEDFORD (DUKE) v. COKE, No. 721, *ante*.

**748.** ———.]—MELLISH v. MELLISH, No. 743, *ante*.

**749.** ———.]—TORRE v. BROWNE, No. 399, *ante*.

### SUB-SECT. 5.—ANNUITY SECURED BY BOND.

**750.** **Whether interest allowed.**]—LEGATT v. SHEWELL (1717), Gilb. Ch. 141 ; 25 E. R. 99.

**751.** ——— **When application for relief from penalty is necessary.**]—Where there is either a clause of entry, or *nomine poenæ*, or some penalty upon the grantor which he must undergo, if the grantee sued at law, & which would oblige him to come into this ct. for relief ; which the ct. will not grant but upon equal terms ; & there can be no other but decreeing the grantor to pay the arrears, with interest for the time, during which the payment was withheld (LORD TALBOT, C.).—FERRERS (COUNTESS) v. FERRERS (EARL) (1733), Cas. temp. Talb. 2 ; 25 E. R. 627, L. C.

*Annotations* :—**Consd.** Drapers Co. v. Davis (1741), 2 Atk. 211 ; Robinson v. Cumming (1742), 2 Atk. 409.

**752.** ——— **Annuity for maintenance.**]—NEWMAN v. AULING, No. 746, *ante*.

**753.** **Time from which interest allowed—When payments fall due.**]—LEGATT v. SHEWELL (1717), Gilb. Ch. 141 ; 25 E. R. 99.

**754.** ——— **Death of grantor.**]—(1) In 1795 an annuity was granted for the grantor's life, & was secured by a bond & by a warrant of attorney, on which judgment was entered up. The grantor died intestate in 1810, at which time the annuity was greatly in arrear. The grantor's assets consisted solely of a fund in ct. which had been accumulating from the grantor's death. No administration was taken out to the grantor until 1834 :—**Held** : the grantee was entitled to be paid the arrears of the annuity, with interest at 5 per cent. from the death of the grantor.

(2) Many of the provisions of Civil Procedure Act, 1833 (c. 42), though made with reference to proceedings at law, will be adopted by this ct.—

**Sect. 7.—Interest on arrears: Sub-sects. 5, 6, 7 & 8.**  
**Sect. 8.]**

**HYDE v. PRICE, HART v. CRADOCK** (1837), 8 Sim. 578; Coop. Pr. Cas. 193; 6 L. J. Ch. 358; 1 Jur. 735; 59 E. R. 229.

**Annotations:—**As to (1) **Consd.** *Re Powell's Trust* (1852), 10 Hare, 134. As to (2) **Refd.** *A.-G. v. Ludlow Corp.* (1849), 1 H. & Tw. 216. **Generally.** **Mentd.** *Morse v. Tucker* (1846), 5 Hare, 79.

**755. — Date of decree.]—**Upon a bond with a penalty for securing an annuity:—**Held:** interest was not payable on the arrears, except from the date of the decree, as directed by the General Orders.

A creditor is not entitled, under the General Order 46 of Aug. 1841, to interest from the date of the decree, on a debt which accrues due subsequently.—**LAINSON v. LAINSON** (1853), 18 Beav. 7; 23 L. J. Ch. 170; 22 L. T. O. S. 150; 17 Jur. 1044; 52 E. R. 3; *sub nom.* **LAINSON v. LAINSON, LAINSON v. EDE**, 2 W. R. 82.

**Annotation:—****Refd.** *Re Salvin, Worseley v. Marshall*, [1912] 1 Ch. 332.

**Whether interest is recoverable beyond penalty.]—**See **BONDS**, Vol. VII., p. 217, Nos. 585, 590.

#### SUB-SECT. 6.—CLAIM AGAINST LAND CHARGED.

**756. Annuitant in possession of estate charged with annuity—Need not quit possession—Until interest given by grantor.]—**Where an annuitant has entered, & is in possession of the estate charged with it, the ct. will not oblige him to quit the possession, till the grantor allows him interest for the arrears of his annuity.—**ROBINSON v. CUMMING** (1742), 2 Atk. 409; 26 E. R. 646, L. C.

**Annotations:—****Apld.** *Booth v. Leicester* (1838), 3 My. & Cr. 459. **Consd.** *Jacobs v. Davis*, [1917] 2 K. B. 532. **Refd.** *Re Stevens, Cooke v. Stevens*, [1898] 1 Ch. 162. **Mentd.** *Webber v. Hunt* (1815), 1 Madd. 13; *Cohen v. Sellar*, [1926] 1 K. B. 536.

#### SUB-SECT. 7.—EFFECT OF DELAY.

**757. No interest allowed—Unless delay caused by conduct of grantor.]—**Interest sometimes given for the arrears of an annuity where frequent demand made.—**STAPLETON v. CONWAY** (1750), 3 Atk. 727; 1 Ves. Sen. 427; 26 E. R. 1217.

**Annotations:—****Mentd.** *Malcolm v. Martin* (1790), 3 Bro. C. C. 50; *Bourke v. Ricketts* (1801), 10 Ves. 330.

**758. — — —.]—****BOOTH v. LEYCESTER**, No. 736, *ante*.

**759. — — —.]—**P. carried in a claim as an incumbrancer upon real estate in respect of an annuity, & in Nov. 1855, the chief clerk certified £1,002 to be due to him for arrears. The cause did not come on for further consideration till July, 1858. P. then claimed interest on the £1,002 from the date of the certificate as against subsequent incumbrancers:—**Held:** (1) as the payment of the arrears had been delayed merely through hindrances in the prosecution of the suit, & not in consequence of misconduct or improper attempts to evade payment, interest ought not to be allowed, & Civil Procedure Act, 1833 (c. 42), s. 28, did not alter the case.

(2) The chief clerk's certificate, though adopted by the judge, was not an order for payment of money within Judgments Act, 1838 (c. 110), s. 18, so as to make the sum found due carry interest.

Interest on arrears of an annuity will not be given, except under special circumstances.—**MANSFIELD (EARL) v. OGLE** (1859), 4 De G. & J. 38; 28 L. J. Ch. 422; 33 L. T. O. S. 84; 5 Jur. N. S. 419; 7 W. R. 423; 45 E. R. 15, L. J.

**Annotations:—**As to (1) **Foll.** *Blogg v. Johnson* (1867), 36 L. J. Ch. 859. **Refd.** *Re Salvin, Worseley v. Marshall*, [1912] 1 Ch. 332.

**760. — During period of non-enforcement.]—**Interest directed to be computed on the arrears of an annuity, from the time of filing the bill; till which time the non-payment was attributed to the neglect of the annuitant in not using means to enforce payment, the fund being effective.—**MORGAN v. MORGAN** (1784), 2 Dick. 643; 21 E. R. 421.

**Annotations:—****Consd.** *Brown v. Newall* (1837), 2 My. & Cr. 558. **Refd.** *East India Co. v. Campion* (1837), 11 Bll. 158; *Small v. Attwood* (1838), 3 Y. & C. Ex. 105.

**761. — — —.]—**The ct. will not charge an exor. who has been guilty of delay in accounting, with interest on arrears of income unpaid by him.

I. was entitled to a life income from the estate of her husband, & died in 1861. A bill was filed by her exor., in 1862, against the exor. of her husband's will, who had been his partner in business, for an account of income due to her estate: in 1863 accounts were directed. In 1866 a certificate was made, finding that a large sum was due from the husband's exor.:—**Held:** he was not chargeable with interest before the date of the certificate.—**BLOGG v. JOHNSON** (1867), 2 Ch. App. 225; 36 L. J. Ch. 859; 16 L. T. 306; 15 W. R. 626, L. C.

**762. — — —.]—**(1) A fund was established at Bombay by the covenanted civil servants of the East India co. serving in that Presidency, for granting pensions & annuities to members, their widows & children. By the original arts. certain persons were appointed managers, & they were declared to be "the trustees of the Fund," & the property was vested in them:—**Held:** they were not mere trustees for the assocn., but "trustees" properly so called, & the members of the fund were the beneficiaries, so the defence of Stat. Limitations could not be set up against a claimant on the fund, merely on account of lapse of time.

(2) Payments were to be made annually to certain persons who were entitled to annuities chargeable on the fund:—**Held:** where such persons had, by their own conduct, occasioned the non-payment of the annual sums, they were not entitled to interest on those sums for the time during which they had so occasioned the non-payment.—**EDWARDS v. WARDEN** (1876), 1 App. Cas. 281; 45 L. J. Ch. 713; 35 L. T. 174, H. L.

**Annotations:—**As to (1) **Refd.** *Hughes v. Coles* (1884), 27 Ch. D. 231; *Re Turner, Klaffenberger v. Groombridge*, [1917] 1 Ch. 422.

**763. — Where progress of suit delayed—Suit instituted by residuary legatee.]—****TAYLOR v. TAYLOR**, No. 726, *ante*.

**764. — — — Delay not caused by debtor.]—****MANSFIELD (EARL) v. OGLE**, No. 759, *ante*.

#### SUB-SECT. 8.—STATUTORY PROVISIONS.

See Civil Procedure Act, 1833 (c. 42), s. 28; Judgments Act, 1838 (c. 110), s. 17.

**765. Civil Procedure Act, 1833 (c. 42)—Whether applicable—Adoption by courts of equity.]—****HYDE v. PRICE, HART v. CRADOCK**, No. 754, *ante*.

#### PART VI. SECT. 7, SUB-SECT. 6.

q. No interest payable.]—*Re USSHER'S ESTATE*, [1918] 1 I. R. 259.—**IR.**

#### PART VI. SECT. 7, SUB-SECT. 8.

r. Whether from date of court's decree.]—**GREGG v. MERCHANT CO. OF EDINBURGH**, [1921] S. C. 76.—**SCOT.**

**766. — Action on bond.]—**Above Act, s. 28, giving interest on debts or sums certain does not apply to such a case.—*CROSSE v. BEDINGFIELD* (1841), 12 Sim. 35; 10 L. J. Ch. 219; 5 Jur. 836; 59 E. R. 1043.

*Annotation:—***Consd.** *Re Powell's Trust* (1852), 10 Hare, 134.

**767. — Discretion of court not affected.]—**Interest not allowed on the arrears of an annuity, & the discretion of this ct. on the question is not affected by above Act, s. 28.—*Re POWELL'S TRUST* (1852), 10 Hare, 134; 68 E. R. 870.

*Annotation:—***Refd.** *Mansfield v. Ogle* (1859), 4 De G. & J. 38.

**768. — Payment not delayed through misconduct of grantor.]—***MANSFIELD (EARL) v. OGLE*, No. 759, *ante*.

**769. Judgments Act, 1838 (c. 110) — Whether applicable—**Chief clerk's certificate not order for payment of money.]—*MANSFIELD (EARL) v. OGLE*, No. 759, *ante*.

**770. — Judgment given for securing annuity.]—***KNIGHT v. BOWYER*, No. 497, *ante*.

#### SECT. 8.—RIGHTS AND LIABILITIES OF SURETIES.

*See, generally,* GUARANTEE, Vol. XXVI., pp. 9 *et seq.*

**771. Principal or surety—Depends on terms of instrument.]—**(1) By deed of annuity in consideration of £9,000 therein stated to be paid to L., E., M., & M., L. granted to D. & H. an annuity or clear yearly rent of £1,800 for three lives, charged upon his estate: & L., E., M., & M. covenanted to pay the annuity or yearly rent, with a proviso for repurchase by them, or any or either of them. They executed their joint & several bond & warrant of attorney to confess judgment on the bond, the judgment to be as a further security for the annuity, & to be entered forthwith against L. & E. but not against M. & M. until default of payment, & execution not to be entered on the judgment against L. & E. until the annuity should be forty days in arrear; & E. for further securing the annuity, agreed, in the event of not becoming the purchaser of L.'s estate in twelve months, to assign, at L.'s expense, a mtge. which E. held on it, & also to procure the guarantee of a competent person for payment of the annuity:—*Held: E.* was a principal grantor of the annuity, & not a surety.

(2) The question, whether a person is principal or surety in the grant of annuity, is to be determined on the terms of the instruments; no extraneous evidence is admissible for that purpose.

(3) Any equities between grantors of an annuity are not to affect the grantees, unless they have notice of them at the time of the grant.—*MOLLIER v. EYRE* (1840), 9 Cl. & Fin. 1; 8 E. R. 313, H. L. *Annotations:—*As to (2) **Consd.** *Poolley v. Harradine* (1857), 7 E. & B. 431; *Greenough v. McClelland* (1860), 2 E. & E. 424. As to (2) **Refd.** *Strong v. Foster* (1855), 17 C. B. 201. As to (3) **Consd.** *Poolley v. Harradine* (1857), 7 E. & B. 431; *Rouse v. Bradford Banking Co.*, [1894] 2 Ch. 32. **Refd.** *Wythes v. Labouchere* (1859), 3 De G. & J. 593. *Generally, Mentd.* *Ewin v. Lancaster* (1865), 6 B. & S. 571; *Holme v. Brunskill* (1878), 3 Q. B. D. 495.

**772. Liability of surety—Indemnity against rentcharge—Whether binding on heir.]—***RAMSDEN v. OLDFIELD & APLEYARD* (1720), 2 Eq. Cas. Abr. 390; 22 E. R. 333, L. C.

**773. — Effect of default of annuitant.]—**The Prince of Wales having granted an annuity for his own life, payable by the treasurer of his privy purse, which annuity was assigned by the grantee to another, with the prince's assent; & a surety having given bond to the assignee of the annuity, conditioned to pay it, if the prince, or the treasurer of his privy purse, or any other person

for the prince, did not pay it at the respective quarter days:—*Held: the* surety was bound at all events at law by the terms of the obligation to pay it, if the prince, etc., did not at the stipulated times of payment; whether or not the grantee or assignee of the annuity had the right or means of compelling payment against the principal or his funds, by reason of any default of such grantee or assignee in not presenting a particular of his demand to the prince's treasurer as required in all cases within 35 Geo. 3, c. 125, s. 7, on pain of being foreclosed of such demand; whatever equitable claim might be founded by the surety on such neglect.—*O'KELLY v. SPARKES* (1808), 10 East, 369; 103 E. R. 815.

**774. — To executor of one of annuitants.]—**By deed distinct annuities to A. & B. during the lives of grantors & the survivor, it was witnessed that 'ed with A. & B. & their exors. to pay t s, or either of them, when the grantors make default in payment. A. died:— the interest in the annuities being several, &

maintain

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K. B. 106; 3 L. J. O. S. R. D. 30, 101. *Annotations:—***Mentd.** *Palmer v. Sparshott* (1842), 4 Man. & G. 137; *Sorsbie v. Park* (1843), 12 M. & W. 146.

**775. — Contribution to co-sureties—Effect of bankruptcy.]—**(1) One of three co-sureties for the payment of this annuity, paid money on account of the annuity after the bkpy. of a co-surety:— *Held: the* matter was liable to contribution for contribution, although he had obtained

the annuity, although the surety insolvent at the time of such

The grantor of an annuity assigned it, together with all securities, for a valuable consideration to A., but part of the consideration money belonged to B., one of the co-sureties for payment of the

been paid principal the

& D. having paid money the other sureties were liable

(3) although the stock assigned for the annuity would ultimately revert in B., by the deed made between him & A. that did not discharge

M.

v. Hawes

*Thomas* (1840), 6 M. & W. 733.

—.]—*See* GUARANTEE, Vol. XXVI., p. 64, Nos. 453, 455.

**776. Rights of surety against grantor—On of principal—Redemption of annuity by**

**Sect. 8.—Rights and liabilities of sureties. Part VII.****Sect. 1: Sub-sects. 1 & 2, A. & B. (a).]**

& to proceed by action against the grantor, who had obtained his certificate, for the arrears of the annuity subsequent to the commission.—*WATKINS v. FLANNAGAN* (1827), 3 Russ. 421; 38 E. R. 633.

*Annotation*:—*Reid*. *Re Parker, Morgan v. Hill* (1894), 7 R. 590.

— — — — —.]—*See* GUARANTEE, Vol. XXVI., pp. 133, 134, Nos. 966, 967, 970, 971.

**777. — Effect of agreement with third party.]**—An annuity bond was executed by two brothers, one as principal, the other as surety. By agreement afterwards, between them & a third brother, for the settlement of their several claims & debts, & for the apportionment of property to meet the latter, the annuity bond was included. The surety in that bond was afterwards compelled to pay; & his representative brought an action against their principal to be reimbursed:—*Held*: the agreement was an accord, in respect of the annuity bond; & as third parties were bound by that agreement, the surety was also bound, & the action could not be maintained.—*CARTWRIGHT v. COOKE* (1832), 3 B. & Ad. 701; 1 L. J. K. B. 261; 110 E. R. 256.

*Annotation*:—*Mentd.* *Ford v. Beech* (1848), 11 Q. B. 852.

— **Damages recoverable.]**—*See* GUARANTEE, Vol. XXVI., p. 136, No. 997.

**Rights of surety against creditor.]**—*See* GUARANTEE, Vol. XXVI., p. 108, No. 745.

**Discharge of surety—Payment into court.]**—*See* GUARANTEE, Vol. XXVI., p. 15', No. 1173.

— **Giving time to principal.]**—*See* GUARANTEE, Vol. XXVI., p. 180, No. 1372.

— **Discharge of co-surety by creditor.]**—*See* GUARANTEE, Vol. XXVI., p. 203, No. 1588.

— **Death of principal.]**—*See* GUARANTEE, Vol. XXVI., p. 207, No. 1618.

**778. — Bankruptcy of principal.]**—By 7 Geo. 4, c. 57, s. 51, it is enacted that the discharge of any prisoner under the Act "shall & may extend to any sum & sums of money which shall be payable, by way of annuity or otherwise, at any future time or times, by virtue of any bond, covenant, or other securities of any nature whatsoever; & that every person & persons who would be a creditor or creditors of such prisoner for such sum or sums of money, if the same were presently due, shall be admissible as a creditor or creditors of such prisoner for the value of such sum or sums of money so payable as aforesaid, which value the said ct. shall ascertain, etc.; & such creditor or creditors shall be entitled in respect of such value to the benefit of all the provisions made for creditors by the Act, without prejudice nevertheless to the respective securities of such creditor or creditors, excepting as respects such prisoner's discharge under the Act":—*Held*: the discharge of the grantor of an annuity under the Act, did not release one who had as surety for the grantor executed a joint & several warrant of attorney to secure the instalments of the annuity.

*Semle*: the grantor was not discharged from liability to his surety for payments made by the latter in respect of the annuity subsequently to the grantor's discharge under the Act.—*HOCKEN v. BROWNE* (1838), 4 Bing. N. C. 400; 6 Dowl. 634; 6 Scott, 194; 7 L. J. C. P. 197; 2 Jur. 350; 132 E. R. 841.

*Annotation*:—*Apld.* *Abbott v. Bruere* (1839), 5 Bing. N. C. 598.

— — — — —.]—*See* GUARANTEE, Vol. XXVI., p. 193, No. 1508.

— **Bankruptcy of surety.]**—*See* GUARANTEE, Vol. XXVI., p. 209, Nos. 1647, 1648; BANKRUPTCY, Vol. IV., pp. 267, 268, Nos. 2515-2519.

## Part VII.—Forfeiture and Extinguishment of Rentcharges and Annuities.

### SECT. 1.—RENTCHARGES.

#### SUB-SECT. 1.—FORFEITURE.

**779. Proviso for cesser on annuitant interfering with management of estate—F frivolous action against trustees.]**—Testator devised real estate to trustees upon trust out of the rents to pay certain annuities to his wife & son respectively for life, & after the death of the survivor upon trust for the son's sons in fee, with limitations over; with a proviso that, if his son should in any way intermeddle with or interfere, or attempt to intermeddle with or interfere, in the management of testator's real or personal estate, the annuities to him should immediately cease. He gave, devised, & bequeathed unto his daughter absolutely all his residuary real & personal estate, & appointed the trustees his exors. The son brought an action against the trustees alleging that his annuities had not been paid, & making charges of waste & other improper conduct in the management of the estate, none of which allegations or charges were established:—*Held*: the action, being in fact frivolous & vexatious, was in breach of the proviso, & the annuities had, in consequence, ceased.—*ADAMS v. ADAMS*, [1892] 1 Ch. 369; 61 L. J. Ch.

237; 66 L. T. 98; 40 W. R. 261; 8 T. L. R. 236; 36 Sol. Jo. 215, C. A.

*Annotations*:—*Reid*. *Re Sax, Barned v. Sax* (1893), 62 L. J. Ch. 688. *Mentd.* *Re Williams, Williams v. Williams*, [1912] 1 Ch. 399.

*See, also*, Sect. 2, sub-sect. 1, *post*.

#### SUB-SECT. 2.—EXTINGUISHMENT.

##### A. By Act of Rentcharger.

**780. Release—Necessity for deed.]**—A declaration on a promise in consideration of relinquishing a rent must show that the relinquishment was by deed.—*GREGORY v. NEVILL* (1593), Cro. Eliz. 292; 78 E. R. 546.

**781. — To patron while living vacant—Rentcharge charged on parsonage.]**—A release in the time of vacation to the patron discharges an annuity with which the parson is charged in respect of the parsonage.—*HOE'S CASE* (1592), 5 Co. Rep. 70 b; 77 E. R. 161.

*Annotations*:—*Mentd.* *Hancock v. Field* (1607), Cro. Jac. 170; *Altham's Case* (1610), 8 Co. Rep. 150 b; *Lampet's Case* (1612), 10 Co. Rep. 46 b; *Harrison v. Hucksley* (1616), Cro. Jac. 401; *Whitton v. Bye* (1618), Cro. Jac.

486; *Porter v. Philipps* (1622), *Palm*, 218; *Henn v. Hanson* (1663), 1 Sid. 141; *Phillips v. Bury* (1694), *Skin.* 447; *Gage v. Acton* (1699), *Freem. K. B.* 512; *Thorp v. Thorp* (1701), 12 Mod. Rep. 455.

**782. — To owner of land charged—Not binding as against execution creditor.]—**A. & his wife, & B. & his wife, were seised of the rectory of L. in fee, & levied a fine thereof to C. & D. & the heirs of C., who granted & rendered a rentcharge of £30 *per annum* out of the rectory to A. for his life to begin after the death of his wife, with a proviso that the rent should not extend to charge the persons of C. & D. but only the rectory; & rendered the rectory to A. & his wife, during the life of the wife; remainder to B. & his wife in tail, remainder to B. in fee; A. acknowledged a recognisance in nature of a statute staple to E.; the wife of A. died, B. & his wife entered into the rectory, & were thereof seised in tail, remainder to B. in fee. A. released to B. & his heirs the rent. E. sued a *certiorari* to the clerk of the statutes, etc.; & the recognisance was certified; & E. sued out an extent, by which the rent was extended & *liberate* delivered to E. E. for arrears of the rent during six years & a half, brought debt against B. who all that time was tenant of the land, & averred the life of A.:—*Held*: as against E. the rent was not extinct by the release of A.—*LILLINGSTON'S CASE* (1607), 7 Co. Rep. 38 a; 77 E. R. 466; *sub nom.* ANON., 4 Leon. 235.

*Annotations*:—*Refd.* *Re Herbage Rents*, *Greenwich Charity Comrs. v. Green*, [1896] 2 Ch. 811. *Mentd.* *Winchcombe v. Winchester* (13p.) & *Pulleston* (1616), *Hob.* 165; *Robins v. Warwick* (1661), 1 Keb. 71; *Nurse v. Yeworth* (1674), 3 Swan. 608; *Barker v. Keate* (1678), *Freem. K. B.* 249; *Le Neve v. Le Neve* (1747), *Amb.* 436; *Aspden v. Seddon*, *Preston* (1876), 1 Ex. D. 496.

**783. — Presumption of release—Rents permitted to run largely in arrear.]—**Owner of a charge not to be presumed to have released it by permitting it to run largely into arrear; nor without proof, to be suspected of so doing to prejudice those in remainder.—*ASTON v. ASTON* (1749), 1 Ves. Sen. 264; 27 E. R. 1021, L. C.

*Annotations*:—*Refd.* *Stackhouse v. Barnston* (1805), 10 Ves. 453. *Mentd.* *Chamberlyne v. Dummer* (1792), 3 Bro. C. C. 549.

**784. — Settlement operating to release moiety—Concurrence of owners of other moiety—Unsettled moiety subject to entire charge.]—**By a voluntary settlement of 1868 a husband & wife & each of them did "grant, release, dispose of & confirm" a moiety of the wife's hereditaments " & all the estate right title interest property claim & demand " of either of them in, to, & out of the same to trustees & their heirs on certain trusts.

The husband was entitled to a rentcharge issuing out of the hereditaments, but it was not mentioned in the settlement. The settlement contained no covenants for title:—*Held*: the settlement operated by way of release & not by way of grant of the rentcharge, & as the husband & wife, the owners of the unsettled moiety of the hereditaments, had concurred, that moiety, by virtue of Law of Property (Amendment) Act, 1859 (c. 35), s. 10, remained subject to the entire charge.—*PRICE v. JOHN*, [1905] 1 Ch. 744; 74 L. J. Ch. 469; 92 L. T. 768; 53 W. R. 456.

**785. Rentcharge payable while tenant in possession—Effect of disentail.]—**By his will dated June 16, 1910, testator settled the B. estates

to the same uses as were limited by a settlement of July 21, 1893, of other estates under which they stood limited at testator's death to the use of his daughter V. in tail male with remainder to his sister F. in tail male with divers remainders over. He also devised other property to the use that his trustees should receive a rentcharge " during such period or periods continuous or discontinuous " as either of them, V. & F., " shall be tenant for life in possession or tenant in tail male or in tail in possession under this my will " of the B. estates & pay the same to such one of them, V. & F., " as shall for the time being be tenant for life in possession or tenant in tail male or in tail in possession under this my will " of the B. estates. By a disentailing assurance dated July 22, 1918, V. disentailed the B. estates & resettled them to such uses as she should appoint or in default of & until & subject to any such appointment to the uses which immediately before the execution of the disentailing assurance were subsisting or capable of taking effect:—*Held*: V. did not as a result of the disentailing assurance cease to be tenant in tail male in possession of the B. estates under testator's will, & therefore, the rentcharge given to her by the same will had not been determined by the execution of the disentailing assurance.—*Re MEEKING, MEEKING v. MEEKING*, [1922] 2 Ch. 523; 92 L. J. Ch. 68; 128 L. T. 585.

#### B. By Operation of Law.

##### (a) In General.

**786. Grant by co-owner—Partition.]—**ANON. (1572), *Moore*, K. B. 95; *Plowd. Queries* 2; 72 E. R. 464.

**787. — Release to co-owner by grantor.]—**ABERGAVENNY'S (LORD) CASE, No. 82, *ante*.

**788. Rentcharge for term of years to lessor—Grant of reversion by lessor to lessee.]—**Lessee for ten years granted a rentcharge unto his lessor for the years; afterwards the lessor granted the remainder in fee to the lessee. It was the opinion of the whole ct. that the rent was gone & extinct, because the lessor who had the rent, is a party to the destruction of the lease, which is the ground of the rent.—*BUCKHURST'S CASE* (1589), *Godb.* 137; 4 Leon. 2; 78 E. R. 83.

**789. Effect of possession by Crown—Rentcharge not extinguished—Distress suspended.]—***BUSDEN'S CASE* (1590), *Sav.* 125; 123 E. R. 1049.

**790. Recovery of & eviction from manors—Whether rentcharge extinguished.]—***BUTT'S CASE*, No. 6, *ante*.

**791. Grant by lessee to stranger—Surrender by lessee to lessor.]—***DAVENPORT'S CASE*, No. 263, *ante*.

**792. Grant to charity—Successive sales of land without notice.]—***EAST-GREENSTED'S CASE* (1634), as reported in *Duke*, 64.

**793. Land charged becoming highway.]—**A rentcharge issuing from lands adjoining certain roads, & granted at a time when the roads were private occupation roads, in respect of the use of such roads & the use of a sewer laid down in one of them, is not determined by the roads becoming highways repairable by the inhabitants at large, & the sewer becoming vested in, & discontinued

#### PART VII. SECT. 1, SUB-SECT. 2.—A.

**7851. Rentcharge payable while tenant in possession—Effect of disentail.]—***Re FRANKS'S ESTATE*, [1915] 1 I. R. 387.—*IR.*

*t.* *Subsequent conveyance to devisee of rentcharge.]—*If a testator devise an annuity to B. & thereby charge

it on certain premises, & subsequently convey a portion of the premises charged to the devisee of the rentcharge, the rentcharge is thereby extinguished.—*HEWSON v. CAROLIN* (1851), 17 L. T. O. S. 296.—*IR.*

*a.* *Divorce decree.]—*A husband executed a trust deed *inter vivos* in which he provided an annuity for his

wife should she survive him. Six weeks after he raised an action of divorce against her & subsequently obtained decree of divorce:—*Held*: the wife's right to the annuity was extinguished by the decree of divorce.—*ITCHIE v. RITCHIE'S TRUSTEES* (1874), 1 R. (Ct. of Sess.) 987; 11 Sc. L. R. 569.—*SCOT.*



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by, the local authority; & it matters not that the grantor of the rentcharge had covenanted in the grant to keep the roads & sewers in repair.—**MERRETT v. BRIDGES** (1883), 47 J. P. 775.

**Grant pur autre vie—Effect of death of grantor.]**

—*See* DESCENT, Vol. XVIII., p. 14, Nos. 132, 133.

**Effect of death of grantee.]—See** Nos.

264–270, *ante*.

**Lapse of time.]—See** LIMITATION OF ACTIONS, Vol. XXXII., p. 408, Nos. 863, 864.

(b) *Merger.*

*See, generally,* EQUITY, Vol. XX., pp. 503–514, Nos. 2329–2423.

**794. Acquisition by rentcharger of land charged—Estate in fee simple.]—Where** £100 is charged upon a real estate, which estate itself comes to the person entitled to the money, if in fee, the charge is merged; but where the £100 charged is secured by a term or other legal estate in a third person, there the charge is not merged, nor if the estate which comes to the person entitled to the money be only an estate tail.—**CHANDOS (DUKE) v. TALBOT** (1731), 2 P. Wms. 601; Kel. W. 25; 24 E. R. 877, L. C.

*Annotations:—Refd.* Hall v. Terry (1738), West temp. Hard. 500; Nicholls v. Judson (1742), 2 Atk. 300; A.-G. v. Milner (1744), 3 Atk. 112; Basset v. Basset (1744), 3 Atk. 203; Chester v. Willes (1754), Amb. 246; Pearce v. Loman (1796), 3 Ves. 135; Astley v. Miles (1827), 1 Sim. 298; Horton v. Smith (1858), 27 L. J. Ch. 773; Henty v. Wrey (1882), 21 Ch. D. 332. **Mentd.** Prowse v. Abingdon (1738), 1 Atk. 482; Honner v. Morton (1823), 3 Russ. 65; Remnant v. Hood (1859), 27 Beav. 74.

**795. —Purchase of part—Crown having rentcharge.]—BRIDGEWATER'S (EAIL) CASE** (1583), Sav. 69; 123 E. R. 1017.

**796. ———.]—BUTT'S CASE**, No. 6, *ante*.

**797. —Lease for long term—Rentcharge revives on surrender.]—A** rentcharge for life is suspended by the acceptance of a lease for years of the land; & revives again by a surrender of the lease.—**PETO v. PEMBERTON** (1628), Cro. Car. 101; Hut. 94; 79 E. R. 689; *sub nom.* PEITO v. PEMBERTON, Het. 50, 71; Litt. 58, 82.

*Annotations:—Refd.* Thompson v. Leach (1690), 2 Vent. 198; Cage v. Acton (1699), 1 Ld. Raym. 515.

**798. —As tenant in tail.]—CHANDOS (DUKE) v. TALBOT**, No. 794, *ante*.

**799. —Charge secured by legal estate in third person.]—CHANDOS (DUKE) v. TALBOT**, No. 794, *ante*.

**800. —Devise of part—Devise over & above rentcharge.]—(1)** A rentcharge is extinguished by a devise, to the grantee, of part of the land out of which the rentcharge issues, notwithstanding the devise is expressly made over & above the rentcharge.

(2) When a charge on the land is clear, & upon the construction of a will it is doubtful whether or not testator meant to transfer the charge from the realty to the personality, it will be held to continue a charge on the land.—**DENNETT v. PASS** (1834), 1 Bing. N. C. 388; 1 Scott, 218; 4 L. J. C. P. 70; 131 E. R. 1167.

**801. ———.]—FREEMAN v. EDWARDS**, No. 489, *ante*.

**802. Owner of estate becoming entitled to charge.]—Testatrix** devised to L., a married woman, certain real estate for her life in remainder, & subsequently charged the property with an annuity for her life, commencing immediately, which was to be for her separate use, & also with

another annuity. L.'s life estate fell into possession, & she entered into the receipt of the rents. The husband of L. died. Subsequently the income of the estate became insufficient to pay her annuity & the other annuity charged upon the property by the will of testatrix:—**Held:** in the absence of any act showing an intention on the part of L., after she became *feme sole*, to merge the annuity in her life estate, & it being against the interest of L. so to do, the ct. would not presume a merger by operation of law after the death of her husband.—**BYAM v. SUTTON** (1854), 19 Beav. 556; 24 L. T. O. S. 64; 18 Jur. 847; 2 W. R. 684; 52 E. R. 467.

**803. ———.]—Testator** was owner in fee of an estate on which there was a charge of £6,000, to which he was absolutely entitled, & a subsequent charge of a jointure in favour of B. Testator devised the estate in fee to B.:—**Held:** she took discharged of the mtge.—**SWINFEN v. SWINFEN** (No. 3) (1860), 29 Beav. 199; 4 L. T. 104; 7 Jur. N. S. 89; 9 W. R. 175; 54 E. R. 603.

**804. ———.]—Where** by the conveyance to a purchaser in fee of freehold property certain outstanding rentcharges were conveyed to a trustee in trust for the purchaser, his heirs, & assigns the fee being conveyed to the purchaser to uses to bar dower, & afterwards the purchaser specifically devised the property, but without mention of the rentcharges:—**Held:** the property was devised free from the rentcharges, & the trustee was ordered to convey them so that they be legally extinguished in the inheritance.—**VALLANCE v. VALLANCE** (1863), 2 New Rep. 229.

**Rentcharge in favour of owner redeeming land tax.]—See** LAND TAX, Vol. XXX., p. 311, Nos. 115–118.

*C. By Redemption.*

**805. Provision for redemption—Payment of lump sum on marriage—Rentcharge not extinguished until money paid.]—A** man devises a rentcharge to his sister for life, & if she marries, that his exor. pay her £100 & the rent shall cease, & return to the exor.:—**Held:** the rentcharge shall not cease till the £100 be paid.—**OSBORNE v. WICKENDEN** (1670), 2 Saund. 197; 2 Keb. 712; 85 E. R. 962; *sub nom.* OSBORNE v. WALLEEDEN, 1 Mod. Rep. 272.

*Annotation:—Mentd.* Gravenor v. Woodhouse (1824), 2 Bing. 71.

**806. —Notice of intention to redeem.]—C.**, by indentures, dated in 1800, for the consideration of two sums of £2,000 & £2,000, granted unto G. two annuities of £300 each, charged on his freehold lands at T.; & the indentures contained powers of re-purchase by C., his heirs & assigns, on giving notice in writing under his or their hands, & paying all arrears. In 1812, C. agreed to sell all his lands, including those at T., to W. for £90,528, & to convey free from incumbrances, except certain mtges., & in pursuance of the agreement W. was let into possession, & paid large sums. The annuities to G. being in arrear, in 1818 C. granted to him all his lands on trust to sell them, & out of the proceeds, to retain costs & pay incumbrances; & in 1824, C. assigned to G. the unpaid balance of the said purchase-money, subject to prior charges, to apply the same in payment of what was stated in account to be due to G. Nothing was done on these deeds. W. filed a bill in 1825 for specific performance of the agreement with C. & for re-purchase of G.'s annuities, alleging

PART VII. SECT. 1, SUB-SECT. 2.—C.

b. *Proviso for redemption—Whether void for remoteness.]—SWITZER & Co. v. ROCHFORD*, [1906] 1 I. R. 399.—IR.

that C., at W.'s request, gave G. such notice as was required to enable C., or W. in his place, to re-purchase the annuities, & that on the day in the notice mentioned, the agents of C. & W. went to G.'s residence, to pay the principal & arrears with costs, & to tender deeds of transfer for his execution, & G. being from home, they left a notice that the money & deeds would remain for ten days at the office of one of them. The bill prayed for a declaration that the annuities had ceased from that day. G. by his answer, admitted the service of a notice, signed C., by E. & P., his attorneys, but insisted that they had no authority from C., & that the notice was irregular & of no avail, as not being in pursuance of the powers of re-purchase:—*Held*: the annuities had not ceased, the notice of repurchase was not in strict pursuance of the power in the deeds, & was also defective in not naming a place for payment of the money.—*JOY v. BIRCH* (1836), 10 Bli. N. S. 201; 4 Cl. & Fin. 57; 6 E. R. 77, H. L.

*Annotations*:—*Refd.* Hall v. Hawkins (1837), 1 Jur. 235; Secretary of State in Council of India v. British Empire Mutual Life Assco. (1892), 67 L. T. 434.

**807. — By transfer of annuities—Right to substitute annuities.**—*Re DEVON'S (EARL) SETTLED ESTATES, WHITE v. DEVON (EARL)* (1891), 36 Sol. Jo. 139.

**808. — — — — —**—*Pltfs.*, by a deed executed in 1871, created a perpetual rentcharge of £10,000 a year for the benefit of first deft. The deed provided that *pltfs.* should be entitled at any time to redeem the rentcharge by transferring to the trustees thereof a specified amount of 3 per cent. annuities. In 1888 National Debt Conversion Act, 1888 (c. 2), was passed:—*Held*: by virtue of sect. 25 (2) of that Act, *pltfs.* were entitled to redeem a rentcharge by transferring to the trustees the specified amount of 2½ per cent. stock created under that Act.—*NORTHUMBERLAND (DUKE) v. PERCY*, [1893] 1 Ch. 298; 62 L. J. Ch. 331; 68 L. T. 45; 41 W. R. 597; 9 T. L. R. 86; 37 Sol. Jo. 80; 3 R. 156.

*Annotation*:—*Refd.* *Re* Howell-Shepherd, Churchill v. St. George's Hospital, [1894] 3 Ch. 649.

**809. What payment necessary.**—*FAWCET v. BOWERS* (1693), 2 Vern. 287; 23 E. R. 785.

**810. Annuity granted for life—No redemption after death of grantee.**—One sells his estate of £14 *per annum* for an annuity of £26 *per annum* during his life, with clause of re-entry for non-payment; & the annuity being in arrear, & the purchaser being unable to pay it any longer, the grantee re-enters, & devises these lands to deft., & dies about a year after; & *pltf.* having an assignment from the purchaser of all his interest, brought this bill to redeem, on pretence of its being in nature of a mtge., but was dismissed, no redemption being sought during the life of the grantee, whilst it was uncertain whether the bargain would be a good or a bad one; & it was only a conditional purchase, & not a mtge.—*CARY v. PULFORD* (1699), Prec. Ch. 95; 24 E. R. 46.

#### D. Under Statutory Powers.

See Law of Property Act, 1925 (c. 20), ss. 50, 191; Settled Land Act, 1925 (c. 18), ss. 69, 73 (1); Redemption of Rents Rules, 1925, Sched., Part II.

**811. Sale of land charged—Jurisdiction of court to order redemption—Where cost of redemption exceeds purchase price.**—The ct. will not, under the power given to it by Conveyancing & Law of Property Act, 1881 (c. 41), s. 5, compel a vendor of land to pay money into ct. for the purpose of discharging an incumbrance upon the land, when the result of so doing would be to inflict a great

hardship on him, as for instance, if the incumbrance is a perpetual rentcharge & the sum necessary to procure its discharge would far exceed the amount of the purchase-money payable to the vendor. A railway co. contracted to sell some superfluous land free from incumbrances for £868. The contract provided that, if the purchaser should decline to waive any valid objection to the title the co. might at any time rescind the contract without paying the purchaser any costs or compensation. The abstract of title showed that the land was subject to a perpetual rentcharge of £63 issuing out of it, this being the consideration for which the co. had purchased it under their statutory powers for the making of a railway which by a subsequent Act they were authorised to abandon. The purchaser required the co. to procure the release of the land from the rentcharge. This they declined to do, but offered to indemnify him against it. He declined to waive his requisition:—*Held*: the co. were entitled to rescind the contract under the condition & they were not bound to apply to the ct. under Conveyancing & Law of Property Act, 1881 (c. 41), s. 5, to declare the land freed from the rentcharge or to take any other steps to procure the release of the rentcharge.—*Re GREAT NORTHERN RY. CO. & SANDERSON* (1884), 25 Ch. D. 788; 53 L. J. Ch. 445; 50 L. T. 87; 32 W. R. 519.

*Annotations*:—*Refd.* *Re* Simpson & Moy's Contract (1909), 53 Sol. Jo. 376. *Mentd.* *Re* Monckton & Gilzeau (1884), 27 Ch. D. 555.

**812. — — — — —**—*Though involving decision as to future interests in land.*—(1) For the purpose of declaring land freed from a charge under Conveyancing & Law of Property Act, 1881 (c. 41), s. 5, the ct. will determine a question of construction as to the amount of the charge notwithstanding that there is a possibility of other persons acquiring an interest in the charge in future.

(2) Testator by his will gave an annuity of £300 a year to his granddaughter A., & after her death he directed that the sum should be raised & paid among her children as she should appoint, & in default of appointment in equal shares during their respective lives; & he gave to his granddaughter E. a like annuity to be paid to her & her children in the same manner as the annuity thereinbefore given to his granddaughter A. By a codicil he revoked the devises of the several annuities, & instead thereof gave to each of his granddaughters A. & E. an annuity of £150 to be payable in the same manner as the annuities of £300:—*Held*: the substitution of the smaller annuities extended to the interests of the children of the granddaughters.—*Re FREME'S CONTRACT*, [1895] 2 Ch. 778; *sub nom.* *Re FREME'S ESTATE, Re FREME'S CONTRACT, FREME v. HALL*, 64 L. J. Ch. 862; 73 L. T. 366; 44 W. R. 164, C. A.

*Annotation*:—*As to* (1) *Refd.* *Re* Staples, Owen v. Owen, [1916] 1 Ch. 322.

**813. — — — — —**—*Re* EVANS & BETTELL'S CONTRACT, No. 516, *ante*.

**814. — — — — —**—*Payment to trustees of compound settlement.*—By a disentailing deed of 1924 the property sold was assured to the use of the vendor in fee simple subject to all charges & incumbrances affecting the same. When Settled Land Act, 1925 (c. 18), came into operation the property was vested in the vendor in fee but subject to two family charges which were interests vested in possession, namely, a sum of £8,750 secured by a term of two hundred years, limited by a settlement of 1880, & a jointure rentcharge of £4,000 imposed upon the property by a deed of 1925. Before the disentailing deed of 1924 the property had been subject to a compound settlement constituted by the documents, including a disentailing

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deed of 1914, or some of them, mentioned in an order of the Ch. Div. dated Mar. 1, 1920, under which the trustees of the 1880 settlement were appointed trustees, for the purposes of Settled Land Acts, 1882 to 1890, of the compound settlement. By a vesting deed of 1926 it was declared that the property was vested in the vendor in fee simple & that the trustees of the 1880 settlement were trustees of the compound settlement for the purposes of Settled Land Act, 1925 (c. 18). In these circumstances the question arose whether, if the purchase price of the property was paid to the existing trustees, the purchaser got a good title discharged from all claims in respect of the £8,750 & the £4,000 jointure rentcharge:—*Held*: immediately before Settled Land Act, 1925 (c. 18), came into operation the property was not settled land, but as it had been subject to a compound settlement under which the £8,750 was still a subsisting charge by Settled Land Act, 1925 (c. 18), s. 3, the settlement was deemed to be subsisting for the purposes of that Act; & under sects. 31 & 33 the trustees of the settlement were trustees of it for the purposes of Settled Land Act, 1925 (c. 18), & a receipt by them of the purchase money would free the land sold from the £8,750; as under sect. 31 the trustees of the compound settlement were the trustees of any settlement constituted by the compound settlement & any instrument subsequent in date or operation, therefore the property was subject to a compound settlement constituted by the settlement of 1880, the disentailing deeds of 1914 & 1924, & the deed of 1925 which imposed the jointure of £4,000 & on the receipt by the trustees of the purchase-money the property in the hands of the purchaser would be free also from the £4,000 rentcharge.—*Re ALINGTON (LORD) & LONDON COUNTY COUNCIL'S CONTRACT*, [1927] 2 Ch. 253; 96 L. J. Ch. 465; 71 Sol. Jo. 695.

**815. Rentcharger absolutely entitled in fee simple in possession.]**—Where a rentcharge owner is absolutely entitled thereto in fee simple in possession or is empowered to dispose thereof absolutely or to give an absolute discharge for the capital value thereof the landowner wishing to redeem may obtain a certificate of the requisite redemption money under Conveyancing & Law of Property Act, 1881 (c. 41), s. 45. Local comrs. of sewers were entitled to perpetual rentcharges for which the landowners' liabilities to repair sea walls had been commuted under a local Act, which transferred those liabilities & imposed various duties to & on the comrs.:—*Held*: the comrs., notwithstanding their statutory liabilities & duties in respect of the rentcharges, were absolutely entitled thereto in fee simple in possession within Conveyancing & Law of Property Act, 1881 (c. 41), s. 45.—*Re CALDICOT & WENTLOOGE ACT, 1884, ETON COLLEGE v. SEWERS COMRS.*, [1920] 2 Ch. 463; 89 L. J. Ch. 618; 64 Sol. Jo. 668; *sub nom.* ETON COLLEGE v. CALDICOTT & WENTLOOG COMRS., 124 L. T. 18; 85 J. P. 21; 18 L. G. R. 626.

**Land improvement charges.]**—*See* LAND IMPROVEMENT, Vol. XXX., pp. 281, 294, Nos. 66, 67, 205.

## SECT. 2.—ANNUITIES.

### SUB-SECT. 1.—FORFEITURE.

**816. "Any act with a view to charge annuity"—Sale of new annuity—Authority to retain from settled annuity.]**—By a marriage settlement an annuity for the life of the wife's mother was assigned to trustees, for the wife for life, remainder for the husband for life, remainder for the issue of the marriage. Provided that if the husband should, during the life of the wife or of her mother, become bkpt., compound with, or assign his effects for the benefit of his creditors, or should do any act with a view to charge the annuity, his interests should be for the benefit of the issue. The husband, after his wife's death, sold an annuity to one of the trustees of the settlement, & signed an unstamped agreement to deposit the settlement with him, & authorising him to retain the annuity so sold out of the settled annuity:—*Held*: the husband had forfeited his interest in the settled annuity.—*STEPHENS v. JAMES* (1831), 4 Sim. 499; 58 E. R. 186.

**817. "Become liable to be vested in another person"—Revocable authority to trustees—To pay annuity to creditors.]**—Under a settlement, O. was entitled to a life interest in an annuity, with a clause of forfeiture if he should enter into a composition with his creditors, or charge, assign, or in any manner by way of anticipation dispose of the annuity, or until anything should happen whereby it should vest or become liable to be vested in another person. O., being indebted to his bankers to a large amount, in pursuance of an agreement with them, gave the trustees a written authority to pay the annuity, as it should become due, to his bankers, who were to apply it partly in payment of interest & in reduction of the debt. It was alleged that there was an agreement with the bankers that the authority should be revocable:—*Held*: this occasioned a forfeiture of the life interest.—*OLDHAM v. OLDHAM* (1867), L. R. 3 Eq. 404; 36 L. J. Ch. 205; 15 W. R. 300.

*Annotation:—Mentd. Re Swannell, Morice v. Swannell* (1909), 101 L. T. 76.

**818. Proviso for cesser on association with named person.]**—Proviso that an annuity should cease if a lady should associate, continue to keep company with, or cohabit or criminally correspond with F. All intercourse whatever, though the most innocent, is within the terms of the deed.—*DORMER (LORD) v. KNIGHT* (1809), 1 Taunt. 417; 127 E. R. 895.

*Annotation:—Reid. Denny's Trustee v. Denny & Warr*, [1919] 1 K. B. 583.

**819. Proviso for cesser on remarriage.]**—An agreement that "In the event of the contemplated marriage taking place between M., the only daughter of L., & my son W., G. promise to pay my son W., or, in the event of his decease, to M. his wife, during her life, £100 sterling *per annum* in half-yearly payments of £50 & for which sum he or she is authorised to draw on me, through my bankers, Messrs. etc. of B. on Dec. 31 & June 30 of each year; this payment to commence from Dec. 31, 1839. In case circumstances induce me to change my bankers, I promise to nominate some other person who will honour the above-mentioned draught of £50 half-yearly in favour of my son W., or his wife M. I, however, beg to stipulate that I shall consider this arrangement

## PART VII. SECT. 2, SUB-SECT. 1.

**a. Annuity dependent on ownership or possession—Whether statute can work forfeiture.]**—*Re MACKLEM &*

*NIAGARA FALLS PARK COMRS.* (1887), 14 A. R. 20.—*CAN.*

**d. — Whether temporary absence works forfeiture.]**—*MACKLEM v. MACKLEM* (1890), 19 O. R. 482.—*CAN.*

**e. Forfeiture of one's rentcharge—Whether other rentcharger's interest enlarged thereby.]**—*BREADALBANE'S TRUSTEES v. PRINGLE* (1841), 3 Dunl. (Ct. of Sess.) 357.—*SCOT.*

null & void should M., the widow of my son W., at any future time remarry. This settlement of £100 *per annum* will cease from the day of any such remarriage." The marriage took place; & M. survived W. G. paid the annuity to M. up to her, G.'s, death, & on her death her exors. refused to continue the payment:—*Held*: M. was entitled to the annuity during her widowhood.—*GREENE v. BROUGHTON* (1854), 22 L. T. O. S. 311, L. C. & L. JJ.

**820. Proviso for cesser on separation of husband & wife.**—A proviso annexed to the grant of an annuity for its cesser on the annuitant, a married man, living apart from his wife, is void.—*NICHOLL v. JONES* (1866), L. R. 3 Eq. 696; 36 L. J. Ch. 554; 15 W. R. 393.

*Annotation*:—*Mentd.* Williams v. Mayne (1867), 16 W. R. 173.

**821. —.**—By a post-nuptial settlement the husband assigned certain leaseholds to trustees upon trust to pay the rents to his wife for life, or so long as she should continue the cohabiting wife or the widow of the settlor, for her separate use, & upon the determination of the trust in favour of the wife the husband took an interest in the settled property. Some years after the date of the settlement the husband & wife separated by mutual consent, & they had not since cohabited:—*Held*: the restriction of the wife's enjoyment of the rents to the period of cohabitation was not void as against the policy of the law, & the trust in her favour determined upon her ceasing to live with her husband.—*Re HOPE-JOHNSTONE, HOPE-JOHNSTONE v. HOPE-JOHNSTONE*, [1904] 1 Ch. 470; 73 L. J. Ch. 321; 90 L. T. 253; 20 T. L. R. 282.

**Bankruptcy of annuitant.**—See *BANKRUPTCY*, Vol. V., pp. 659, 663–666, 669, Nos. 5871, 5872, 5891, 5899, 5903, 5911, 5932.

**Effect of writ of sequestration.**—See *EXECUTION*, Vol. XXI., pp. 598, 599, No. 1836.

**Effect of garnishee order.**—See *EXECUTION*, Vol. XXI., p. 640, No. 2195.

**Annuitant subject to restraint on anticipation.**—See *HUSBAND & WIFE*, Vol. XXVII., p. 116, Nos. 929, 930.

**Duration of annuity.**—See Part IV., Sect. 1, sub-sect. 2, B., *ante*.

**Construction of will.**—See *WILLS*.

## SUB-SECT. 2.—EXTINGUISHMENT.

### A. Redemption.

#### (a) When No Provision in Contract.

**822. General rule.—Not redeemable.**—By a public Act, the Waterloo Bridge co. were authorised to raise money for the purpose of completing their undertaking, either among themselves, or by the admission of new members, or by granting annuities for term of years, or for life. The Act did not contain any provision that the annuities should or should not be redeemable. The co., however, in the original grant, reserved to themselves a power of redemption:—*Held*: under these circumstances, that an auctioneer putting up to sale one of these annuities, was bound, in his particulars of sale, to describe it as a redeemable annuity.

It is true that an annuity may be redeemable but it is not necessarily so; & it is not redeemable, unless there be a special provision to that effect in the deed granting it (*ABBOT, C.J.*).—*COVERLEY v. BURRELL* (1821), 5 B. & Ald. 257; 106 E. R. 1186.

*Annotation*:—*Mentd.* Grosvenor v. Green (1858), 28 L. J. Ch. 173.

**823. Parol evidence not admissible.—To prove J.—VOL. XXXIX.**

**right to redeem.**—Grant of annuity bill filed to redeem, suggesting that it was part of the agreement that it should be redeemable, but the agreement left out of the deed, on the idea that if inserted the transaction would be usurious; parol evidence offered to this, but not admitted to contradict the deed, not being charged to have been omitted by fraud.—*IRNHAM v. CHILD* (1781), 1 Bro. C. C. 92; 2 Dick. 554; 28 E. R. 1006, L. C.

*Annotations*:—*Consd.* Townshend v. Stangroom (1801), 6 Ves. 328; *Re* Marlborough, Davis v. Whitehead, [1894] 2 Ch. 133. *Mentd.* Cripps v. Jee (1793), 4 Bro. C. C. 472; Bonnett v. Sadler (1808), 14 Ves. 526; Squire v. Campbell (1836), 1 My. & Cr. 459; Fowler v. Fowler (1859), 4 De G. & J. 250; Jervis v. Berridge (1873), 8 Ch. App. 351; Jacobs v. Batavia & General Plantations Trust, [1924] 1 Ch. 287.

**824. —.**—Parol evidence that it was part of the agreement for an annuity, that it should be redeemable, although not made part of the contract in writing, refused to be admitted.—*PORTMORE (LORD) v. MORRIS* (1787), 2 Bro. C. C. 219; 29 E. R. 122.

*Annotations*:—*Consd.* Haynes v. Hare (1791), 1 Hy. Bl. 659; Townshend v. Stangroom (1801), 6 Ves. 328.

**825. —.**—Parol evidence to prove that an annuity was intended to be redeemable, no such covenant being in the deed, is inadmissible.—*HARE v. SHEARWOOD* (1790), 3 Bro. C. C. 168; 1 Ves. 241; 29 E. R. 470.

*Annotation*:—*Consd.* Townshend v. Stangroom (1801), 6 Ves. 328.

**826. —.**—A. grants an annuity for his own life to B., to secure which, a bond & warrant are given, & judgment entered. B. dies. After his death, the ct. will not admit evidence of a parol agreement between the parties that A. should be at liberty to redeem the annuity on certain terms, especially if it be the evidence of the attorney concerned, as a ground to order the securities to be given up, & satisfaction entered on the judgment.—*HAYNES v. HARE* (1791), 1 Hy. Bl. 659; 126 E. R. 376.

**Duration of annuity.**—See Part IV., Sect. 1, sub-sect. 2, B., *ante*.

#### (b) By Order of Court.

**827. Default in payment after decree.—Annuity becomes irredeemable.—Loss of right to set aside.**—A decree in a suit to redeem an annuity having been made, that, in default of payment by plff., the annuity should be irredeemable, plff. was restrained from proceeding at law to set aside the annuity deed.—*FLIGHT v. CHAMBRE* (1849), 14 Jur. 123.

**828. Ascertainment of value.—Amount of 2½ per cent. government stock.**—Where an annuitant, entitled to a perpetual annuity properly secured, is willing to receive a present payment of cash in lieu of his annuity, the amount of such cash payment ought to be such a sum as, at the price of the day, will purchase 2½ per cent. govt. stock sufficient to produce the annuity, excluding any charge for brokerage.—*HICKS v. ROSS*, [1891] 3 Ch. 499; 60 L. J. Ch. 853; 65 L. T. 200; 40 W. R. 172.

*Annotation*:—*Refd.* *Re* Hollins, Hollins v. Hollins, [1918] 1 Ch. 503.

#### (c) By Agreement.

**829. Agreement by third party to redeem.—Absence of consideration.**—The son granted an annuity secured upon a living, of which he was incumbent & his father patron. The annuitant having proceeded to a sequestration of the living, for payment of his arrears, the father assured him, that he would sell the advowson & redeem the annuity out of the proceeds of the sale; & the annuitant, relying on that assurance, withdrew

**Sect. 2.—Annuities: Sub-sect. 2, A. (c) & (d), B. & C. (a).]**

the sequestration; subsequently the advowson was sold, & the son vacated the living, so as to defeat the annuitant's security:—*Held*: the annuitant could not compel the father to perform his agreement to redeem, inasmuch as that agreement was an agreement without consideration.—*SIMPSON v. HILL* (1823), 2 L. J. O. S. Ch. 32.

**830. Payment to third party—With whom annuitant living—By authority of annuitant.]—**By a separation deed dated Apr. 22, 1797, A. the husband, covenanted with C., to pay B. the wife, during her life, into her proper hands, for her separate use, or to such persons as she should by any note in writing signed with her proper hand appoint, notwithstanding coverture, the yearly sum of £163 16s., by weekly payments of £3 3s. The deed contained a proviso for redemption of the annuity, on payment by A. to his wife, "to & for her separate use," of £1,000, & all arrears of the annuity then due. In Nov. 1797, A. gave D., with whom B. lived, a bond & warrant of attorney for £1,400, & interest, payable in 1799; & in his answer to a bill filed by A. in 1800, to restrain proceedings at law upon those securities, C. admitted, that as to £1,000, the consideration was the sum agreed to be paid by A. for the redemption of the annuity; & upon A.'s death the bond & warrant of attorney were found amongst his papers. In covenant by E., the administrator of C., against F. the exor. of A., to recover thirty-nine years' arrears of the annuity, F. pleaded that A. had, under the proviso, paid to B. for her separate use, £1,000 & all arrears. At the trial, the judge told the jury that the absence of any payment or claim for thirty-nine years, though not conclusive was evidence for their consideration, whether the annuity had been extinguished by payment of the £1,000 & arrears, under the proviso; & that, if the bond & warrant of attorney were given to D. by the authority of A. & for her use, for the £1,000, & the money thereby secured was actually paid to D. or to his personal representative, such payment was a payment to B., within the issue:—*Held*: the direction was correct.—*BOSTOCK v. HUME* (1844), 7 Man. & G. 893; 8 Scott, N. R. 590; 13 L. J. C. P. 225; 135 E. R. 362, Ex. Ch.

**831. Offer to redeem made in pleadings—Whether court will enforce.]—**The persons entitled to three annuities offered by their bill to redeem the six prior annuitants:—*Held*: it was in the discretion of the ct. whether it would enforce against pltf. an offer made by his bill, & under the circumstances of the present case, the offer ought not to be so enforced.—*KNIGHT v. BOWYER* (1858), 2 De G. & J. 421; 27 L. J. Ch. 520; 31 L. T. O. S. 287; 4 Jur. N. S. 569; 6 W. R. 565; 44 E. R. 1053, L. J.J.; *subsequent proceedings* (1859), 4 De G. & J. 619, L. J.J.

*Annotations:—*Consid. Hunt v. Luck, [1901] 1 Ch. 45; *Re* Jordison, Raine v. Jordison, [1922] 1 Ch. 440. *Re* East Stonehouse U. C. v. Willoughby, [1902] 2 K. B. 318. *Ment*d. Radcliffe v. Anderson (1860), E. B. & E. 819; *Dickinson v. Burrell*, *Dickinson v. Burrell*, *Stourton v. Burrell* (1866), L. R. 1 Eq. 337; *Bagnall v. Carlton* (1877), 6 Ch. D. 371.

**832. Notice of intention to redeem—Payment to agent of annuitant—Waiver of notice.]—**By the deed securing an annuity which A. had granted to B., who resided abroad, power was given to A. to redeem the annuity upon paying a certain sum of money, & giving B. six months' notice in writing.

C., who was B.'s general agent in this country, received the redemption money from A., & delivered up to him the annuity deed without the notice required by the deed, & B., in fact, had no notice whatever that the money was about to be paid. C. had a general authority to invest & also to receive principal moneys as well as interest for B.:—*Held*: C. had, therefore, authority to waive the stipulation as to notice, & to receive the redemption money as he did for B.—*WEBBER v. GRANVILLE* (1860), 30 L. J. C. P. 92; 7 Jur. N. S. 420.

**833. Construction of agreement—Grant of second annuity—Variation of right to redeem first annuity—Revival of right on cesser of second annuity.]—**In 1838 pltf., then a widow, in consideration of £4,990, agreed to grant to C. an annuity of £538 during her life, & by the deed of grant, C. covenanted that if pltf. should at any time be desirous of repurchasing the annuity, C. would, on receiving all arrears on the annuity of £538, accept £4,990 in full for such repurchase. Pltf. afterwards married K., & in 1845 K., in consideration of £1,000, granted to C. another annuity of £133 5s. during the joint lives of pltf. & himself; & at the same time it was agreed between K. & C. that C. would accept the reduced sum of £480 instead of £538 on the first annuity, provided K. would not redeem one of the annuities without redeeming both. The reduced sum of £480 was paid & received up to K.'s death in 1861. Pltf. then gave notice to C. of her desire to redeem the first annuity:—*Held*: upon the construction of the agreement, upon the death of K. the right of C. to the full amount of £538 revived; upon each transaction, when the reduced sum was paid & received, all question of arrears was concluded; & hence pltf. was entitled to repurchase the annuity on payment of £4,990 & arrears since the death of K. at the rate of £538; but without paying arrears in respect of the difference between £538 & £480 during the joint lives of herself & K.—*KING v. CHAPLIN* (1863), 9 L. T. 45; 9 Jur. N. S. 984.

**Mortgage by way of annuity deed.]—**See MORTGAGE, Vol. XXXV., pp. 271, 272, Nos. 285–291.

**Right to policy to secure annuity.]—**See INSURANCE, Vol. XXIX., pp. 380, 381, Nos. 3047–3053.

**Presumption from non-payment.]—**See No. 830, *ante*.

**Duration of annuity.]—**See Part IV., Sect. 1, sub-sect. 2, B., *ante*.

*(d) Application of Redemption Money.*

**834. Consolidated Fund Permanent Charges Redemption Act, 1873 (c. 44)—Annuity granted by statute—Purchase of land in City of London.]—***Re MARLBOROUGH'S (DUKE) PENSION* (1894), 10 T. L. R. 402.

*B. Release.*

**835. General release—Of all actions—Affects arrears only.]—**ANON. (1582), Godb. 11, pl. 17; 78 E. R. 7.

**836. ———.]—**A release of all actions shall not discharge the growing arrears of an annuity.—*TUKE v. CHEEK & CASTREL* (1602), Cro. Eliz. 897; 78 E. R. 1120.

**837. Release by parol—Annuity created by deed.]—**CUPIT v. JACKSON, No. 979, *post*.

**838. Right to obtain release—When sequestration issued against annuitant.]—**The ct. has no

**PART VII. SECT. 2, SUB-SECT. 2.—B.**

**1. Release obtained by fraud—Whether committee of lunatic may impeach**

*release.]—**It*e McSHERRY (1861), 10 Gr. 390.—CAN.

**g. Release by letter—Of annuity under settlement—Effect of.]—**LANGLEY

v. LANGLEY (1840), 2 I. Eq. R. 313.—IR.

**h. Release given by illiterate person—Whether set aside when consideration**



jurisdiction to order, upon motion, a person not a party to the cause, to pay into ct. the arrears of an annuity granted by him to deft. against whom a sequestration has issued for want of a sufficient answer, unless the grantor has, by his conduct, waived the objection to the jurisdiction. But he may, notwithstanding, & without applying for the leave of the ct. obtain from the grantee a release of the annuity.—*JOHNSON v. CHIPPINDALE* (1828), 2 Sim. 55; 57 E. R. 711.

*Annotations*:—*Reid*. *Wilson v. Metcalfe* (1839), 8 L. J. Ch. 331; *Ward v. Booth* (1872), L. J. 14 Eq. 195; *Re Slade*, *Slade v. Hulme* (1881), 18 Ch. D. 653; *Craig v. Craig & Hamp*, [1896] F. 171.

**839. What amounts to release—Deed not necessary.**—A. having, in 1835, granted to B. an annuity of £150, for twenty-one years, with certain allowances to B. on the sale by him of spirits made by A., by a deed containing a proviso that when the allowances should exceed £400 a year, the annuity should not be payable so long as those allowances exceeded £400 a year, by a memorandum in writing, in 1836, without deed, it was agreed that in consideration of B.'s relinquishing the annuity, A. should pay to B. £300 a year, from a certain day, for seven years, in lieu thereof. In a letter addressed by A. to B., in 1838, & assented to by B., A. declared that B. was entitled under the deed to certain specified allowances, not to be less than £400 a year, or to be made up to that amount, & that B. was to receive £300 a year over & above all other allowances under the agreement of 1836, so as to yield him together not less than £700 a year:—*Held*: (1) that B. was entitled under the agreement of 1836, taken by itself, to the £300 a year, irrespectively of the amount of allowances receivable by him; (2) no release of the annuity by deed was necessary; & abstaining from demanding or receiving the annuity was a sufficient relinquishment.—*HOME v. BOOTH* (1842), 3 Man. & G. 709; 4 Scott, N. R. 526; 11 L. J. C. P. 74; 133 E. R. 1325.

**840. — Annuity not paid or received—After agreement substituting new annuity.**—*HOME v. BOOTH*, No. 839, *ante*.

**841. Release executed by mistake—Transaction set aside.**—A. executed a bond to B. & C., conditioned for payment of an annuity of £100 to D. for life, & assigned an annuity of £120 for the life of M. & a policy of insurance for £700 on M.'s life, to B. & C., upon certain trusts for further securing the annuity of £100. M. died, & A. died shortly afterwards, having, as was then believed, received the £700 & applied it to his own use. Shortly afterwards D., in consideration of £500, released A.'s personal representative & B. & C. from the annuity of £100 & the securities for it. Some years afterwards it was discovered that A. had placed the £700 in a bank, in the names of B. & C., where it still remained:—*Held*: the release having been executed under a mistake was inoperative, & the £700 remained impressed with the trusts for securing the annuity of £100.—*HOKE v. BECHER* (1842), 12 Sim. 465; 11 L. J. Ch. 153; 6 Jur. 93; 59 E. R. 1211.

*Annotations*:—*Reid*. *Fitzgerald v. Fitzgerald* (1868), L. R. 2 P. C. 83. *Mentl*. *Rogers v. Acaster* (1851), 14 Beav. 445; *Widgery v. Tepper* (1877), 5 Ch. D. 516.

**842. Release obtained by fraud—Agent of grantor withholding purchase-money—Release left in possession of agent.**—The grantor of an annuity entrusted T. with a sum of money for the purpose of redeeming it. T., without paying the money,

obtained from the grantee a deed of release of the annuity. The grantee, however, did not sign any receipt for the money. T., who acted in the whole transaction as the agent of both parties, retained the money, & for the purpose of concealing his fraud, continued the payment of the annuity. He afterwards died insolvent:—*Held*: under the particular circumstances of the case the grantor was not discharged.—*VANDELEUR v. BLAGRAVE* (1847), 17 L. J. Ch. 45; 10 L. T. O. S. 261; 11 Jur. 935, L. C.

*Annotation*:—*Consd*. *Wall v. Cockerell* (1860), 29 L. J. Ch. 816.

**843. — Annuity deed delivered to grantor.**—In 1842, pltf. granted an annuity, & one solr., C., acted on behalf of both parties. In July, 1845, an arrangement was made between pltf.'s solr. & C., who was supposed by him to be still acting as the solr. of the annuitant, that £9,850 was to be paid to C., as the agent of the parties entitled to the annuity, & thereupon a release was to be executed of the annuity. On Sept. 24 following, pltf.'s solr. paid to C. part of the £9,850, but C. not having possessed himself of the securities which were on that occasion to be delivered up, a new arrangement was made for a temporary delay; & on Oct. 4 following, the two solrs. met to complete the transaction, when the residue of the £9,850 was paid by pltf.'s solr. to C., & the annuity deed, which had been previously given by the annuitant to C., and the memorandum of the judgment which had been entered up were delivered up by C., but no release of the annuity was executed by the annuitant. In May, 1846, the annuitant employed another solr., who made application for payment of the annuity, as if nothing had transpired touching the redemption or re-purchase of it. On bill filed by pltf. to restrain proceedings at law to obtain the payment of arrears of the annuity, notwithstanding the denial by the annuitant in his answer of C. having any authority to enter into any arrangement for the purchase of the annuity, the proceedings at law were restrained upon pltf. paying into ct. the amount of the annuity due & to become due from time to time, & undertaking forthwith to bring an action at law against the annuitant to try the question of C.'s authority to make the arrangement for the purchase of the annuity, the annuitant admitting the tender by pltf. of a release of the annuity.—*TEESDALE v. SWINDALL* (1847), 16 L. J. Ch. 165.

**Presumption from non-payment.**—*See* No. 879, *post*.

**Duration of annuity.**—*See* Part IV., Sect. 1, sub-sect. 2, B., *ante*.

### C. Rescission.

#### (a) In What Cases Set Aside.

**844. Inadequacy of price.**—An annuity being purchased for four years' purchase, on a life of thirty, subject slightly to the gout, set aside for inadequacy of price.—*HEATHCOTE v. PAIGNON* (1787), 2 Bro. C. C. 167; 29 E. R. 96, L. C.

*Annotations*:—*Consd*. *Griffith v. Spratley* (1787), 1 Cox, Eq. Cas. 383; *Gibson v. Jeyes* (1801), 6 Ves. 266; *Low v. Barchard* (1803), 8 Ves. 133; *Ware v. Horwood* (1807), 14 Ves. 28; *Ex p. Thistlewood* (1812), 19 Ves. 236. *Apud*. *Douglas v. Culverwell* (1861), 3 Giff. 251. *Reid*. *Day v. Newman* (1788), 2 Cox, Eq. Cas. 77; *Hoffman v. Cooke* (1800), 5 Ves. 623; *Underhill v. Horwood* (1804), 10 Ves. 209; *Pennell v. Millar* (1857), 23 Beav. 172; *Falcke v. Gray* (1859), 4 Drew. 651.

*inadequate.*—A release of an annuity, given by an illiterate person without professional assistance, & for inadequate consideration, was set aside after several years; the release being held inadequate as to deft., by whose covenant the annuity was secured, although, considering the nature of

the security, it might not have been so from a stranger.—*GARVEY v. M'MINN* (1846), 9 I. Eq. R. 526.—*IR*.



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**845.** —.—.]—**BARNARD v. FLINT** (1793), 3 Anst. 733, n.; 145 E. R. 1022, n.

**846.** —.—.]—Mere inadequacy of value is not a sufficient ground to set aside an annuity.—**SPEED v. PHILIPS** (1796), 3 Anst. 732; 145 E. R. 1022.

**847.** —.—.]—An annuity cannot be set aside upon mere inadequacy of price; which can be applied only as evidence of fraud. The notion of a market price, ascertained in the usual way upon the principle of calculation at an insurance office, is not a just criterion of the value. Therefore a bill to set aside an annuity, the circumstances not amounting to fraud, was dismissed with costs.—**Low v. BARCHARD** (1803), 8 Ves. 133; 32 E. R. 303, L. C.

**848.** —.—.]—**Onus on grantor to prove transaction fair.**—If a legatee agrees to sell to the exor. of the will his legacy for an annuity, the burden will lie on the exor. to show that there was no unfairness in the transaction.—**Re BIELS' ESTATE, GRAY v. WARNER** (1873), L. R. 16 Eq. 577; 42 L. J. Ch. 556; 28 L. T. 835; 21 W. R. 808.

*Annotation:—Mentd.* Harloe v. Harloe (1875), 41 L. J. Ch. 512.

**849. Sale by solicitor to client.**—Sale of an annuity by an attorney to his client set aside under the circumstances.—**GIBSON v. JEVES** (1801), 6 Ves. 266; 31 E. R. 1044, L. C.

*Annotations:—Consd.* Holman v. Lornes (1854), 4 De G. M. & G. 270; *Moody v. Cox & Hatt*, [1917] 2 Ch. 71. *Reid.* Morse v. Royal (1806), 12 Ves. 355; *Cane v. Allen* (1814), 2 Dow. 289; *Adamson v. Ewitt* (1830), 9 L. J. O. S. Ch. 1; *Hunter v. Atkins* (1834), *Coop. temp. Brough.* 464; *Dent v. Bennett* (1839), 4 My. & Cr. 269; *Edwards v. Meyrick* (1842), 2 Hare, 60; *Cooke v. Lamotte* (1851), 15 Beav. 234; *Hoghton v. Hoghton* (1852), 15 Beav. 278; *Barnard v. Hunter* (1856), 25 L. T. O. S. 152; *Savery v. King* (1856), 5 H. L. Cas. 627; *Waters v. Thorn* (1856), 22 Beav. 547; *Johnson v. Fesemeyer* (1858), 3 De G. & J. 13; *Gresley v. Mousley* (1859), 4 De G. & J. 78; *Smith v. Kay* (1859), 7 H. L. Cas. 751; *King v. Anderson* (1874), 23 W. R. 186; *Fisani v. A.-G. for Gibraltar* (1874), L. R. 5 P. C. 516; *Widgery v. Tepper* (1877), 38 L. T. 434; *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218; *Ward v. Sharp* (1884), 53 L. J. Ch. 313; *Plowright v. Lambert* (1885), 52 L. T. 646; *Luddy's Trustee v. Peard* (1886), 33 Ch. D. 500; *Ready v. Prendergast* (1886), 55 L. T. 767; *Liles v. Terry* (1895), 12 T. L. R. 26; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392; *Re Rogerstone Brick & Stone Co., Southall v. Wescomb*, [1919] 1 Ch. 110. *Mentd.* Lovesey v. Smith (1880), 49 L. J. Ch. 809; *Bischoff's Trustee v. Frank* (1903), 89 L. T. 188.

**850. Retention of part of consideration money—By agent for both parties.**—If the person employed by the grantor of an annuity to raise money, & by the grantee to pay the consideration, retain any part of it for a debt due to himself from the grantor, & for the expenses of deeds, the ct. will set aside the annuity on payment of principal & interest, though the grantee is not privy to the retainer.—**CALTON v. PORTER** (1824), 2 Bing. 370; 9 Moore, C. P. 703; 3 L. J. O. S. C. P. 43; 130 E. R. 348.

*Annotations:—Distd.* Barber v. Thomas (1849), 7 C. B. 612. *Reid.* Jones v. Silberschildt (1826), 4 Bing. 26; *Aberdein v. Jerdan* (1850), 20 L. J. Q. B. 111.

**851. — Payment to agent of grantee.**—To induce the ct. to set aside a warrant of attorney given to secure an annuity, on the ground of an improper returning or retaining of part of the consideration money, the fact of such returning or retaining must be distinctly & unequivocally sworn to.

At the time of executing an annuity deed, the grantor, an attorney, received the full amount of the consideration money, £170, & immediately paid thereout £8 6s. 6d. for the costs of preparing the securities & enrolling the memorial, & £20 to the grantee's agent, in satisfaction of a liability to him, the agent, upon a bill of exchange drawn

by the grantor upon & accepted by his father, & which was within a week of maturity:—*Held*: this was not such a transaction as would warrant the ct. in setting aside the securities eleven years after the date of the grant.—**BARBER v. THOMAS** (1849), 7 C. B. 612; 137 E. R. 243.

**852. Grant obtained by undue influence.**—Grant of an annuity fraudulently obtained by a person having a spiritual ascendancy over a woman, who was under a state of religious delusion, set aside upon principles of public policy.—**NORTON v. RELLY** (1764), 2 Eden, 286; 28 E. R. 908, L. C. *Annotations:—Reid.* Nottidge v. Prince (1860), 2 Giff. 246; *Allcard v. Skinner* (1887), 36 Ch. D. 145.

**Undue influence generally.**—See CONTRACT, Vol. XII., pp. 98 *et seq.*

**Failure of consideration.**—See CONTRACT, Vol. XII., p. 224, Nos. 1859, 1860.

*(b) Recovery of Purchase Price.*

**853. When recoverable—Contract executed.**—Where A. purchased an annuity for his life, which was regularly paid up to the time of his death, but no memorial of the grant of annuity was enrolled:—*Held*: A's extrix. could not, on that ground, insist that the contract was void, & recover back the consideration money paid for the annuity.

Where the grantor of an annuity avoids it on the ground of non-compliance with the statute, the grantee also has a right to treat it as void & to recover back his money, & there is a great difference also where the grantee still has power to avoid the annuity. But here the contract has been fully executed as in *Andree v. Fletcher* (1789), 3 Term Rep. 266, & there are many strong cases respecting illegal wagers, where it has been held that money actually paid over cannot be recovered back (*HOLROYD, J.*).—**DAVIS v. BRYAN** (1827), 6 B. & C. 651; 9 Dow. & Ry. K. B. 726; 5 L. J. O. S. K. B. 237; 108 E. R. 591.

*Annotations:—Reid.* Molton v. Camroux (1849), 4 Exch. 17; *Re London Celluloid Co.* (1888), 39 Ch. D. 190.

**854. What amount recoverable—Whole amount.**—Where an annuity is rescinded after it has been paid for some time, the purchaser is entitled to receive back his whole purchase-money.—**BEAUCHAMP v. BORRET** (1792), Peake, 148; 170 E. R. 110, N. P.

*Annotations:—Dbtd.* Hicks v. Hicks (1802), 3 East, 16. *Reid.* Bromley v. Holland (1802), 7 Ves. 3.

**855. — Less payments by grantor.**—Where an annuity is set aside & an action brought for the money an account is always taken of all money received under the annuity.—**BYNE v. VIVIAN** (1800), 5 Ves. 604; 31 E. R. 762, L. C.

*Annotations:—Distd.* Bromley v. Holland (1800), 5 Ves. 610. *Fold.* Holbrook v. Sharpey (1812), 19 Ves. 131. *Reid.* Simpson v. Howden (1837), 3 My. & Cr. 97; *Mansfield v. Ogle* (1855), 1 Jur. N. S. 415.

**856. — — — — —**—Where the grantee of an annuity, set aside for a defective registry, brings an action for money had & received to recover back the consideration money paid for it, the grantor may set off the payments made in respect of such annuity, though for more than six years unless pltf. reply the Statute of Limitations.—**HICKS v. HICKS** (1802), 3 East, 16; 102 E. R. 502.

*Annotations:—Consd.* Holbrook v. Sharpey (1812), 19 Ves. 131. *Distd.* Davis v. Bryan (1827), 6 B. & C. 651. *Consd.* Cowper v. Godmond (1833), 3 Moo. & S. 219.

**857. — — — — —**—The Ct. of Ch. has jurisdiction, even after the grantor of an annuity has twice failed at law in his attempts to set aside the annuity, to declare it void & order the securities to be delivered up, & the payments of the annuity from the date of it to be deducted from the

consideration paid for it. The price paid by the grantee, & not that by the assignee, is to be taken in the account.—*BROMLEY v. HOLLAND, TYRRELL & OAKDEN* (1802), *Coop. G. 9*; *7 Ves. 3*; *35 E. R. 458, L. C.*

*Annotations*:—*Consd.* *Low v. Barchard* (1803), *8 Ves. 133*. *Apld.* *Ware v. Horwood* (1807), *14 Ves. 28*. *Consd.* *Augell v. Hadden* (1817), *2 Mer. 164*; *Hawkins v. Hall* (1837), *Donnelly, 236*. *Refd.* *Duff v. Atkinson* (1803), *8 Ves. 577*; *Holbrook v. Sharpey* (1812), *19 Ves. 131*; *Simpson v. Howden* (1837), *3 My. & Cr. 97*; *Irving v. Thompson* (1839), *9 Sim. 17*; *Mansfield v. Ogle* (1855), *24 L. J. Ch. 450*. *Mentd.* *Brisbane v. Dacres* (1813), *5 Taunt. 143*; *Luke v. South Kensington Hotel Co.* (1877), *7 Ch. D. 789*; *Brooking v. Maudslay & Field* (1888), *38 Ch. D. 636*.

**858.** ————.]—Decree on setting aside an annuity, for want of a memorial registered, an account of the consideration, with interest & costs, & of all the annual payments: the balance on either side to be paid: the securities delivered up; & a reconveyance.—*HOLBROOK v. SHARPEY* (1812), *19 Ves. 131*; *34 E. R. 467*.

**859.** ———— *Price paid by grantee—Not by transferee.*—*BROMLEY v. HOLLAND, TYRRELL & OAKDEN*, No. 857, *ante*.

**860.** ———— *Cost of conveyances—Allowed.*—Where an annuity was ordered to be set aside on the terms of an account being taken before the prothonotary, who was to ascertain what sum might be due from the grantor to the grantee in respect of principal & interest:—*Held*: the latter was entitled to be allowed the fair & reasonable disbursements for the conveyances, by which the annuity was secured, but he could not claim sums paid by him for insuring the life of the grantor, unless there had been a special provision in the deed to that effect.—*WILLIAMSON v. GOOLD* (1823), *1 Bing. 316*; *8 Moore, C. P. 324*; *130 E. R. 128*.

**861.** ———— *Cost of insuring life of grantor—Not allowed—In absence of special provision.*—*WILLIAMSON v. GOOLD*, No. 860, *ante*.

**862.** *Nature of remedy—Money had & received—When available.*—The Stat. Limitations is no bar to an action brought to recover back the consideration paid for an annuity, notwithstanding more than six years have elapsed since the date of the grant, where the grantor, having for some years paid the annuity without objection, has, within six years from the commencement of the action, elected to avoid the annuity by reason of a defective memorial. Money had & received is the proper form of action in such a case.—*COWPER v. GODMOND* (1833), *9 Bing. 748*; *3 Moo. & S. 219*; *2 L. J. C. P. 162*; *131 E. R. 795*.

*Annotations*:—*Apld.* *Churchill v. Bertrand* (1842), *3 Q. B. 568*; *Huggins v. Coates* (1843), *5 Q. B. 432*; *Molton v. Camroux* (1849), *4 Exch. 17*.

**863.** ———— *Tender of old deeds unnecessary.*—The grantee of a void annuity, on account of an informality in the deeds, cannot maintain an action for money had & received to recover back the money, until he has demanded fresh deeds from the grantor. But it is not necessary for the grantee to tender back the old deeds previous to the commencement of such action.—*WIDDLE v. LYNAM* (1795), *Peake, Add. Cas. 30*; *170 E. R. 183*; *sub nom.* *WEDDEL v. LYNAM & JONES*, *1 Esp. 309, N. P.*

*Annotations*:—*Consd.* *Waters v. Mansell* (1810), *3 Taunt. 56*. *Apld.* *Cowper v. Godmond* (1833), *3 Moo. & S. 219*.

**864.** ————.]—To entitle the grantee of an annuity to recover back the price, as money had & received, it is sufficient if the grantor has communicated to the grantee that there are defects in the memorial, & has treated for a compromise on the ground of the annuity being void, although the grantee neither demands payment of the arrears, nor tenders new securities, nor delivers up the old

ones, before he sues; & although the grantor has taken no active measures to set aside the securities.—*WATERS v. MANSELL* (1810), *3 Taunt. 56*; *128 E. R. 23*.

*Annotation*:—*Apld.* *Cowper v. Godmond* (1833), *9 Bing. 748*.

**865.** ———— *Not on avoidance by administrator of grantor.*—Intestate granted an annuity to pltf. After his death, his administratrix caused the annuity to be vacated for a defect in the memorial. Pltf., to recover the balance of consideration money, brought *indebitatus assumpsit* against the administratrix for money had & received by the intestate to pltf.'s use, stating promises by intestate & by deft.:—*Held*: although a right to recover the consideration money became vested in pltf. on the refusal to continue the annuity, such right did not go back, by relation, to the time when that money was originally paid: & therefore counts in the above forms were not applicable.—*CHURCHILL v. BERTRAND* (1842), *3 Q. B. 568*; *2 Gal. & Dav. 548*; *11 L. J. Q. B. 270*; *6 Jur. 855*; *114 E. R. 625*.

*Annotation*:—*Refd.* *Molton v. Camroux* (1849), *4 Exch. 17*.

**866.** ———— *Security set aside—Validity of annuity not affected.*—If any one of the securities for an annuity be set aside, the grantee may recover back the purchase money in an action for money had & received, for failure of consideration. Though it does not appear on what ground the security was set aside, nor whether the objection to it affects the validity of the annuity. As, where a rule was obtained by the grantor to set aside the warrant of attorney & proceedings thereon, on grounds some of which would, & some would not, affect the validity of the annuity; & the rule was made absolute in terms not showing which objection prevailed; & no evidence was given on the point.—*HUGGINS v. COATES* (1843), *5 Q. B. 432*; *1 Dav. & Mer. 433*; *13 L. J. Q. B. 46*; *2 L. T. O. S. 227*; *8 Jur. 334*; *114 E. R. 1313*; *previous proceedings* (1842), *1 Dowl. N. S. 827*.

**867.** ———— *Lien.*—*BAZZELGETTI v. BATTINE, BATTINE v. BAZZELGETTI* (1818), *2 Swan. 156, n.*; *36 E. R. 576*; *sub nom.* *BOSALQUET v. BATTIE*, cited in *2 Wils. Ch. at p. 151, L. C.*

*Annotations*:—*Distd.* *Davis v. Marlborough* (1819), *2 Wils. Ch. 130*. *Consd.* *Knight v. Bowyer* (1858), *2 De G. & J. 421*. *Refd.* *Pelly v. Wathen* (1849), *7 Hare, 351*.

**868.** ————.]—*Qu.*: where an estate " & all woods " upon it are demised for a term, without express words making the tennor dispunishable of waste, upon trust by different specified ways & means, including " felling timber," to raise & pay an annuity when in arrear, whether this gives the annuitant any interest in the timber, or operates as a mere personal agreement.

It has been decided in the ct., that though at law, when an annuity is set aside, the annuitant may, on giving credit for the payments of the annuity which he has received, recover back the price of the annuity, & notwithstanding a party cannot on general principles be relieved in this ct., unless he does what is equitable, yet that when an annuity is set aside in this ct. for non-compliance with the Act, the annuitant has no lien on the estate for the price of the annuity (*LORD ELDON, C.*)—*DAVIS v. MARLBOROUGH (DUKE)* (1819), *2 Wils. Ch. 130*; *2 Swan. 108*; *37 E. R. 258, L. C.*

*Annotations*:—*Refd.* *Pelly v. Wathen* (1849), *7 Hare, 351*; *Mansfield v. Ogle* (1855), *24 L. J. Ch. 450*. *Mentd.* *Cooper v. Reilly* (1829), *2 Sim. 560*; *Portmore v. Taylor* (1831), *4 Sim. 182*; *King v. Hamlet* (1835), *9 Bli. N. S. 575*; *Paynter v. Carew* (1854), *Kay, App. XXXVI.*; *Bromley v. Smith, Boustead v. Bromley, Smith v. Bromley* (1859), *26 Beav. 644*; *Webster v. Cooke* (1867), *36 L. J. Ch. 753*; *O'Rorke v. Bollingbroke* (1877), *2 App. Cas. 814*; *Fry v. Lane, Re Fry, Whittet v. Bush* (1888), *40 Ch. D. 312*.

*Sect. 2.—Annuities: Sub-sect. 2, C. (b) & (c), D. & E. Part VIII. Sect. 1: Sub-sect. 1, A.]*

**Effect of Statutes of Limitation.]—See LIMITATION OF ACTIONS, Vol. XXXII., pp. 335, 336, Nos. 197-200.**

(c) *Practice.*

**869. Claim by trustees for creditors—Necessity of affidavit of circumstances from grantor—Illegality of consideration.]—**Where an annuity is sought to be set aside for an illegality in the payment of the consideration, there must be an affidavit of the circumstances from the grantor himself.—*DARTNALL v. WELLESLEY (MARQUIS) (1822)*, 3 Brod. & Bing. 255; 7 Moore, C. P. 63; 129 E. R. 1282.

*D. Presumption from Non-Payment.*

**870. General rule—Limits as in Statute of Limitations.]—**To a bill filed for payment of a rentcharge, one of debts. pleaded twenty-six years' possession without accounting for or paying over to pltf. any part of the rents & profits. Plea allowed; but, under the circumstances, ordered to stand over till a co-deft. had answered, pleaded, or demurred.

Cts. of equity will presume a release within the same limits of time, within which juries will be directed to presume it; whether any statute of limitations is applicable to the case or not.—*BALDWIN v. PEACH (1835)*, 1 Y. & C. Ex. 453; 160 E. R. 185.

**871. — Long interval—Annuity maintained by party liable.]—**Interest & an annuity payable by a brother to a sister presumed, after a long interval, to have been satisfied, she having lived with & been maintained & clothed by her brother.—*SHADBOLT v. VANDERPLANK (1861)*, 29 Beav. 405; 54 E. R. 684.

**872. What period sufficient—Over forty years.]—***SOUTHCOT v. SOUTHCOT (1636)*, 1 Rep. Ch. 108; 21 E. R. 521.

**873. — Over twenty years—Lands sold in period.]—***BALDWIN v. PROCTER (1636)*, 1 Rep. Ch. 102; 21 E. R. 520.

**874. — Purchaser with notice.]—**Account of arrears of an annuity decreed against a purchaser with notice; the length of time not being sufficient to raise a presumption of satisfaction.—*WYNN v. WILLIAMS (1799)*, 5 Ves. 130; 31 E. R. 507.

**875. — Over thirty years—Lands sold in period.]—***BALES v. PROCTER (1639)*, 1 Rep. Ch. 144; 21 E. R. 532.

**876. —.]—**L. gives D. an annuity for life, she dies in 1718, & in 1740 a bill is brought by her representative for the arrears from 1708 to the death of D., the ct., from the length of time, presumed it to be paid, & dismissed the bill with costs.

Though it is a rule, that the statute of limitations

will not run as to a legacy, yet it will not hold as to an annuity.—*SMALLMAN v. HAMILTON (LORD) (1760)*, 2 Atk. 71; 26 E. R. 443.

**877. —.]—***WHITE v. PARNTHER, No. 650, ante.*

**878. —.]—**Decree dismissing a bill for arrears of an annuity, on the ground of presumed satisfaction & lapse of time; varied by directing the bill to be retained for twelve months, pltf. to be at liberty to establish her claim in an action at law.—*HAWORTH v. BOSTOCK (1842)*, 9 Cl. & Fin. 59; 8 E. R. 337, H. L.

**879. — Seventeen years—Presumption of lost release.]—**If, in an action of covenant for arrears of an annuity, deft. plead a release, lost by time & accident, &, to induce the jury to presume a release, show that the annuity was not paid for seventeen years, & that pltf. had borrowed money of the grantor of the annuity, & regularly paid him interest, without setting off the annuity. The jury ought not to find for deft., unless they are satisfied that there is fair ground for supposing, that, at some particular period during the seventeen years, pltf. actually executed a release of the annuity; &, to rebut the presumption of such a release, the jury may look at the situation of the parties, & take into their consideration the circumstances of pltf. being a near relative of the grantor of the annuity, having large expectations from him, & of the grantor being a very old man, peremptory with his relatives, & very attentive to his pecuniary concerns.—*BIGG v. ROBERTS (1827)*, 3 C. & P. 43; 172 E. R. 315, N. P.

**880. — Five years.]—**A married woman being entitled to an annuity, charged on a plantation & residuary estate in Jamaica, devised to A., her husband, under an authority from A., received the produce of the estate from 1811 to 1816, & never accounted for it: during that period she never applied for any arrears of her annuity:—*Held*: the annuity must be presumed to have been satisfied.—*CARTER v. ANDERSON (1830)*, 3 Sim. 370; 8 L. J. O. S. Ch. 91; 57 E. R. 1036.

**881. — Twenty-six years.]—***BALDWIN v. PEACH, No. 870, ante.*

**882. — Thirty-nine years—Evidence of redemption.]—***BOSTOCK v. HUME, No. 830, ante.*

**883. Presumption of lost release—When raised—Grounds for supposing release executed.]—***BIGG v. ROBERTS, No. 879, ante.*

**884. — Circumstances rebutting presumption.]—***BIGG v. ROBERTS, No. 879, ante.*

**Effect of Statutes of Limitation.]—See Part IX., post.**

**Effect of laches.]—See Part VIII., Sect. 3, post.**

*E. Other Cases*

**885. Death of grantee.]—**If the grantee of an annuity die before the money becomes due, the payment is discharged.—*PRICE v. WILLIAMS (1595)*, Cro. Eliz. 380; 78 E. R. 627.

**886. Death of grantor.]—**An annuity *pro*

**PART VII. SECT. 2, SUB-SECT. 2.—E.**

**k. Merger—Conveyance to annuitant of part of land—On which annuity charged.]—***MACLENNAN v. GRAY (1888)*, 18 O. R. 321; *Aff'd.*, 18 S. C. R. 553.—**CAN.**

**l. — By estoppel.]—***RADHEY LAL v. MAHESH-PRASAD (1885)*, 1 L. R. 7 All. 864.—**IND.**

**m. — Annuity given by mortgage deed—Mortgagee becoming purchaser of equity of redemption.]—***LACHMI NARAIN v. SAJJADI BEGAM (1917)*, 1 L. R. 39 All. 700.—**IND.**

**n. —.]—**A., by will, granted an annuity chargeable on ten houses, three of which he afterwards conveyed to annuitant:—*Held*: an extinguishment of the annuity; either by analogy to the common law, which holds that a purchase by a grantee of a rentcharge of a portion of the land out of which it issues extinguishes the rent; or because the grant of the three houses revoked the will.—*HEWSON v. CAROLIN (1852)*, 4 Ir. Jur. 214.—**IR.**

**o. Eviction of lessee for purposes of extinguishment of annuity—Whether annuity extinguished.]—***JONES v. KEAR-*

*NEY (1841)*, 4 I. Eq. R. 74.—**IR.**

**p. Annuity to nephew of testatrix—Power of annuitant to appoint to sons—Failure to exercise appointment—Effect of.]—***Re SMITH'S ESTATE, WHITESTONE & HARRISON, PETITIONERS, [1905]* 1 L. R. 453.—**IR.**

**q. Gift of annuity to daughter until marriage—Proviso for ceasing of the annuity on marriage.]—***Re BARKLIE, M'CALMONT v. BARKLIE, [1917]* 1 L. R. 1.—**IR.**

**r. Charge on life estate—Death of life tenant—Whether annuity discharged.]**

*concilio*, etc., to the grantee for his life not determined by the death of the grantor.—*WARNEFORD v. GILES* (1597), as reported in Noy, 70; 74 E. R. 1038.

**Disclaimer by annuitant subject to restraint on anticipation.]—***See HUSBAND & WIFE*, Vol. XXVII., p. 107, No. 834.

**Presumption of gift from wife to husband.]—**

*See HUSBAND & WIFE*, Vol. XXVII., p. 172, Nos. 1402, 1403.

**Adultery of wife as defence to claim for arrears.]—***See HUSBAND & WIFE*, Vol. XXVII., pp. 236, 237, Nos. 2069–2080.

**Annuity payable to infant under settlement—Repudiation of settlement by infant.]—***See INFANTS*, Vol. XXVIII., p. 158, No. 181.

## Part VIII.—Recovery of Rentcharges and Annuities.

### SECT. 1.—RENTCHARGES.

#### SUB-SECT. 1.—ENTRY.

##### A. Power to Enter and Hold Land until Satisfaction.

*See Law of Property Act, 1925 (c. 20), ss. 121, 146.*

**887. Power incidental to grant.]—***ROPER v. ROPER*, No. 545, *ante*.

**888. Power conferred by instrument—Limited by way of use—Nature of estate.]—**If a rentcharge be granted in fee with a clause of distress, & a fine be levied of the lands to the use & intent that if the yearly rent should be behind, & no sufficient distress, the grantee, his heirs or assigns, may enter till the rent be paid: on half a year's rent becoming arrear, the grantee may enter; for this is not a condition, but a limitation to the use & shall be construed according to the intent of the parties.

A fine levied to the grantee of a rentcharge, with a power limited by way of use, to enter on non-payment of the rent, “& retain until he be fully satisfied,” conveys to him on entry an estate in possession, of which his lessee may maintain ejectment; for it is quasi a conditional inheritance until the rent be paid.

*Qu.*: If a man grant a rentcharge in fee, & covenant to levy a fine to the uses, intents, & purposes, that if the rent be behind, the grantee then & from thenceforth may enter, etc., & afterward the fine is levied, whether he can enter for rent arrear, due & demanded before the fine was levied.—*HAVERGILL v. HARE* (1618), Cro. Jac. 510; 3 Bulst. 250; 2 Roll. Rep. 12; 79 E. R. 435.

*Annotations*:—*Apld.* *Jemmot v. Cooley* (1666), 1 Lev. 170. *Refd.* *Pateson v. Danges*, *Salisbury Case* (1662), 1 Keb. 287. *Mentd.* *Tewkesbury v. Diston* (1805), 2 Smith, K. B. 508.

**889. — Executor of owner of rentcharge—Whether entitled to enter.]—***HASELL d. HODGSON v. GOWTHWAITE*, No. 39, *ante*.

**890. — — — — —.]—**If an annuity be granted out of land, with power to the grantee, & his assigns, in case the annuity be in arrear, to enter & retain possession of the land until payment, & the grantee enter for non-payment, of the annuity, & die in possession of the land, the arrears being still unpaid. *Semble*: the exor. of the grantee took such an interest in the land as would entitle him to maintain an ejectment.—*DOE d. SUGDEN v. WEAVER* (1848), 2 Car. & Kir. 754.

**891. — Right of annuitant to bring ejectment—Without making demand.]—**Lands were devised in fee, charged with an annuity; & power was given

to the annuitant to distrain, if the annuity were in arrear for twenty days after the day of payment, being lawfully demanded; power was also given, if it should be in arrear for forty days, to enter & enjoy the lands, & to take the profits, until the annuitant should be thereby paid & satisfied all the arrears, with all costs, or until the person entitled to immediate possession should pay all the arrears & costs:—*Held*: upon the annuity being forty days in arrear, the annuitant might bring ejectment, without making any demand.—*DOE d. BIAS v. HORSLEY* (1834), 1 Ad. & El. 766; 3 Nev. & M. K. B. 567; 3 L. J. K. B. 183; 110 E. R. 1400.

*Annotation*:—*Refd.* *Doe d. Chawner v. Boulter* (1837), 6 Ad. & El. 675.

**892. — Devolution of power—Chattel interest.]—***DOE d. SUGDEN v. WEAVER*, No. 890, *ante*.

**893. — Sale to railway company—Validity of power against receiver.]—**When lands are sold to a railway co. in consideration of a rentcharge, the parties may agree for its being secured by a power of entry; & a conveyance made upon such an agreement, whereby the land was conveyed to uses that the grantor should take the rentcharge, & if it fell into arrear should enter until satisfaction, was held to entitle him to leave to enter against a receiver of the undertaking appointed by the ct.—*FORSTER v. MANCHESTER & MILFORD RY. CO., Re MANCHESTER & MILFORD RY. CO.* (1880), 49 L. J. Ch. 454.

**894. Powers of grantee in possession—To grant lease.]—***HAVERGILL v. HARE*, No. 888, *ante*.

**895. — — — — —.]—***JEMMOT v. COOLEY* (1666), 1 Lev. 170; 2 Keb. 270; 83 E. R. 353; *sub nom.* *JEMOT v. COOLEY*, T. Raym. 158; 1 Saund. 112; 1 Sid. 344, Ex. Ch.

*Annotations*:—*Consd.* *Parkhurst v. Smith* (1741), Willes, 327. *Refd.* *Hassell d. Hodgson v. Gowthwaite* (1744), Willes, 500; *Doe d. Bias v. Horsley* (1834), 1 Ad. & El. 766; *Doe d. Butler & Howard v. Kensington* (1846), 10 Jur. 305. *Mentd.* *Doe d. Parsley v. Day* (1842), 2 Q. B. 147; *Doe d. Darke v. Bowditch* (1846), 8 Q. B. 973.

**896. — Recovery of unpaid rent—From tenant in possession—Action for use & occupation.]—**An action for use & occupation may be maintained by a grantee of an annuity after a recovery in ejectment against a tenant, who was in possession under a demise from year to year, for all rent in his hands at the time of notice by the grantee, & down to the day of the demise in the ejectment; but not afterwards.—*BIRCH v. WRIGHT* (1786), 1 Term Rep. 378; 99 E. R. 1148.

*Annotations*:—*Refd.* *Re Brindley, Ex p. Hankey* (1829), Mont. & M. 247; *Standes v. Christmas* (1847), 9 L. T. O. S. 169; *Blundell v. Drummond* (1848), 14 Jur. 573, n.; *R. v. Paulson*, [1921] 1 A. C. 271. *Mentd.* *Pulteney v.*

—*Re SHAW'S WILL* (1892), 10 N. Z. L. R. 625.—N.Z.

t. *Annuity payable conditionally on partnership being continued—Dissolu-*

*tion of partnership—Effect on annuity.]—**MENZIES'S TRUSTEES v. BLACK'S TRUSTEES*, [1909] S. C. 239; 46 So. L. R. 205; 16 S. L. T. 580.—*SCOT.*

a. *Alimentary annuities unprotected by continuing trust—Effect of.]—**FORBES'S TRUSTEES v. TENNANT*, [1926] S. C. 294.—*SCOT.*

**Sect. 1.—Rentcharges: Sub-sect. 1, A. & B.; sub-sects. 2, 3 & 4, A.]**

Warren (1801), 6 Ves. 73; Denn d. Jacklin v. Cartwright (1803), 4 East, 29; Cholmondeley v. Clinton (1820), 2 Jac. & W. 1; R. v. Herstonoeaux (1827), 7 B. & C. 551; Doe d. Fisher v. Giles (1829), 5 Bing. 421; Buckworth v. Simpson (1835), 5 Tyr. 344; Doe d. Chadborn v. Green (1839), 9 Ad. & El. 658; Brydges v. Lewis (1842), 3 Q. B. 603; Doe d. Clark v. Smaridge (1845), 7 Q. B. 957; Cattle v. Arnold, Banks v. Arnold (1859), 1 John. & H. 651; R. v. St. Giles without Cripplegate (1863), 4 B. & S. 509; Willesden Overseers v. Paddington Overseers (1863), 3 B. & S. 593; De Nicols v. Saunders (1870), 22 L. T. 661; Phillips v. Homfray (1883), 24 Ch. D. 439; Horn v. Beard, [1912] 3 K. B. 181; A.-G. v. De Keyser's Royal Hotel, [1920] A. C. 508; Wheeler v. Keeble (1914), Ltd., [1920] 1 Ch. 57.

**897. To charge cost of repairs.]—Pltfs.** were entitled to a rentcharge, created by a deed of 1778, which contained a power on non-payment to enter upon the premises charged, & receive the rents, etc., until satisfaction of all arrears of the rentcharge, "together with all such costs, etc., as should be laid out, etc., by or by reason of the non-payment thereof." In 1844, the rentcharge being in arrear, & the property so dilapidated as to be unproductive, pltfs. entered into possession & expended money in repairs, etc.:—**Held:** they had no lien on the land for the moneys so expended, whether defts., the owners of a subsequent rentcharge, had notice of such repairs & had acquiesced in the making thereof or not, & the remedy of pltfs., if any, was at law. & depended on the construction of the deed of 1778.—**HOOPER v. COOKE** (1856), 25 L. J. Ch. 467; 27 L. T. O. S. 178; 2 Jur. N. S. 527, L. C.

**898. Land subject to two rentcharges—Entry by one grantee—Right of other to account—Moiety of profits.]—A** man devised a rentcharge of £10 *per annum* to A. issuable out of B.; with a clause, that if it should be behind, it should be lawful for him to enter, & hold till he was satisfied; & by the same will devised a like rentcharge of £10 *per annum* to B. issuable out of the same land, with like clause of entry, etc., the land was not of sufficient value to answer both the rents; & they were both in arrear, & both devisees had brought several ejectments, & had recovered; & deft. being in possession, the other grantee brought his bill to have an account of the profits, & that one moiety might be applied to satisfy the arrears of his £10 *per annum* & it was decreed accordingly.—**EURE v. EURE** (1697), 1 Eq. Cas. Abr. 115, pl. 15; 21 E. R. 922.

**899. On what terms possession restored—Trustees in possession—Term limited by instrument.]—Where** a trustee of a term of years, upon the usual trusts for securing annuities, has taken possession of the estates under the trusts, the etc., although all arrears of the annuities may afterwards be paid will not order possession to be given up to the grantor, except upon such terms as will enable the trustee to resume it, & to receive the rents the moment the annuities are again in arrear.—**JENKINS v. MILFORD** (1820), 1 Jac. & W. 629; 37 E. R. 508, L. C.

**Annotations:—****Reid.** Knight v. Bowyer (1858), 2 De G. & J. 421. **Mentd.** Baylies v. Baylies (1844), 1 Coll. 537.

**900. Effect of failure to enter—Action by subsequent incumbrancer.]—Deft.** made cognisance in replevin, under a power of distress for an annuity granted by G. to H. in Sept. 1806. Pltf. pleaded that in May, 1806, G., for securing another annuity, & in consideration of £3,000, granted, bargained, sold, & demised the premises in which, etc., to F. for ninety-nine years:—**Held:** no bar, without alleging entry by F., or that F. elected that the deed should enure by way of bargain & sale.—**MILLER v. GREEN** (1831), 8 Bing. 92; 2 Cr. & J.

142; 1 Moo. & S. 199; 2 Tyr. 1; 1 L. J. Ex. 51; 131 E. R. 330, Ex. Ch.

**Annotations:—****Consd.** Johnson v. Faulkner (1842), 2 Q. B. 925. **Reid.** Hogan v. Hand (1861), 14 Moo. P. C. C. 310. **Mentd.** Haigh v. Jagger (1847), 16 M. & W. 525; Doe d. Agar v. Brown (1853), 1 C. L. R. 1048; Mann, Crossman & Paulin v. Land Registry (Registrar), [1918] 1 Ch. 202.

**901. —By trustees of term—Possession recovered by landlord—Removal of mining plant.]—In 1824, A. leased to B. for twenty-one years, a colliery, with the right of putting up steam engines, etc., etc., for working it, subject to a proviso for re-entry on non-payment of rent or insolvency. B. erected on the colliery several steam engines affixed in the ordinary way to the soil, & afterwards, in 1827, assigned the colliery, with the engines, implements, etc., in use upon it, to trustees, in trust to permit B. to enjoy them until default in payment of an annuity granted by him; & on such default to take possession, & sell them & pay the arrears. In June, 1829, A. recovered possession of the premises in ejectment brought in pursuance of the proviso for re-entry. In Nov. 1829, the engines & other articles on the colliery were seized under a *fi. fa.* at the suit of an execution creditor of B.:—**Held:** the omission of the trustees to take possession on B.'s default in payment of the annuity, did not avoid the assignment.—**MINSHALL v. LLOYD** (1837), 2 M. & W. 450; Murp. & H. 125; 6 L. J. Ex. 115; 1 Jur. 336; 150 E. R. 834.**

**Annotations:—****Mentd.** Mackintosh v. Trotter (1838), 3 M. & W. 184; Vecton v. Woodcock (1840), 7 M. & W. 14; Elliott v. Bishop (1854), 10 Exch. 496; Wilde v. Waters (1855), 16 C. B. 637; Walmsley v. Milne (1859), 7 C. B. N. S. 115; *Re Trevelyan* (1866), 14 L. T. 193; *Re Roberts, Ex p. Brook* (1878), 10 Ch. D. 100; Gough v. Wood, [1894] 1 Q. B. 713; *Re De Falbe, Ward v. Taylor*, [1901] 1 Ch. 523.

**902. —Rentcharge by life tenant—Not entitled to apportioned rents—For current quarter.]—A** mtgee. who is not in possession is not an assign of the mtgor. within Apportionment Act, 1834 (c. 22), s. 2. M., the tenant for life of real estate, granted to W., in consideration of an antecedent debt of £3,000, a yearly rentcharge of £960, to be issuing out of the estate for a term of one hundred years, if M. should so long live, with powers of entry & distress in the event of the rentcharge falling into arrear; & M. also demised the estate for a term of two hundred years, if he should so long live, to a trustee upon trust for the better securing the rentcharge. M. died when the rentcharge was in arrear, but before W. or the trustee had entered on the estate:—**Held:** W. was not entitled to be paid the arrears of the rentcharge out of the apportioned part of the rents for the period which elapsed between the quarter-day last preceding M.'s death & the day on which he died.—**Re ANGLESEY'S (MARQUIS) ESTATE, PAGET v. ANGLESEY** (1874), L. R. 17 Eq. 283; 22 W. R. 507; *sub nom.* **PAGET v. ANGLESEA (MARQUIS), WATKINS' CLAIM**, 43 L. J. Ch. 437; *sub nom.* **PAGET v. ANGLESEY (MARQUIS), Ex p. WATKINS**, 29 L. T. 721.

**903. Account against annuitant in possession—Whether offer to redeem necessary.]—A** bill for an account of the rents & profits received by the grantee of an annuity in possession of the premises demised to secure the annuity, must contain an offer by pltf., either to redeem in the terms of the deed, or to repurchase upon equitable terms, to be settled by the ct.—**KNEBEL v. WHITE** (1836), 2 Y. & C. Ex. 15; 5 L. J. Ex. Eq. 98; 160 E. R. 293.

**Annotation:—****Reid.** Knight v. Bowyer (1858), 2 De G. & J. 421.

**904. ———.]—Annuitant in possession of lands demised to secure his annuity, decreed to**



account bill not filed to repurchase.—*OLIVER v. HARRISON* (1837), 1 Jur. 918.

**905. Terms to secure annuity—Right of entry not lost—Unless premises mortgaged by grantee of term.]—**In an annuity deed, the grantor charged the annuity upon certain lands, & gave to the grantee power to enter & distrain after default of fourteen days after any quarterly payment & if it should be in arrear for twenty-one days, power to enter & hold possession till all arrears were paid. The grantor, for further securing the annuity, with the consent & approbation of the grantee, created a term for ninety-nine years in favour of C. upon trust, to permit the grantor to receive the profits until default in payment of the annuity for thirty days, & upon such default after demand, out of the rents, or by demise sale, lease, or mtge., to raise & pay off the arrears; the surplus rents to be received by the grantors; & on satisfaction or ceasing of the annuity, the term to be void:—*Held*: notwithstanding this term, the right of entry remained in the grantee of the annuity, & he could bring ejectment. *Qu.*: whether this would have been so had the right to lease or mtge. been exercised?—*DOE d. BUTLER v. KENSINGTON (LORD)* (1846), 8 Q. B. 429; 15 L. J. Q. B. 153; 6 L. T. O. S. 390; 10 Jur. 305; 115 E. R. 937.

#### B. Forfeiture.

*See* Law of Property Act, 1925 (c. 20), ss. 121, 116.

#### SUB-SECT. 2.—DISTRESS.

*See* DISTRESS, Vol. XVIII., pp. 260 *et seq.*

#### SUB-SECT. 3.—LIMITATION UNDER SPECIAL POWER OF TERM OR TRUST TO RAISE ARREARS.

*See* Law of Property Act, 1925 (c. 20), s. 121.

**Term limited by instrument—Rights & liabilities as to entry.]—***See* Nos. 899–905, *ante*.

#### SUB-SECT. 4.—ACTION ON COVENANT.

##### A. Effect of Assignment of Land or Rentcharge.

*See* Law of Property Act, 1925 (c. 20), s. 79 (1).

**906. Burden of covenant—Does not run with land.]—**(1) A covenant to pay a rentcharge without deducting for any taxes, shall extend to all taxes of a similar nature, & for like purposes with any before imposed, though not then subsisting.

(2) A covenant to pay a rentcharge does not bind an assignee of the estate of the covenantor.

This is a covenant by the grantor of the rent, who was seised in fee of the manor. Now, who this terre-tenant is does not appear, whether he be heir or assignee; or if he be assignee, I do not think him chargeable in law; for this covenant does not run with the land (*HOLT, C.J.*).—*BREWSTER v. KITCHIN* (1697), 1 Ld. Raym. 317; Carth. 438; Comb. 424, 466; 5 Mod. Rep. 368; 12 Mod. Rep. 166; 1 Salk. 198; 3 Salk. 340; 91 E. R. 1108.

*Annotations*:—As to (1) *Appld.* *Bradbury v. Wright* (1781), 2 Doug. K. B. 624. *Consd.* *Louch v. Peters* (1834), 1 My. & K. 489. *Refd.* *Hopwood v. Barefoot* (1709), 11 Mod. Rep. 237; *Blandford v. Marlborough* (1743), 2 Atk. 542; *Festing v. Taylor* (1862), 26 J. P. 261. As to (2) *Consd.* *Milnes v. Branch* (1816), 5 M. & S. 411; *Austerberry v. Oldham Corp'n.* (1885), 29 Ch. D. 750. *Refd.* *Bally v.*

*Wells* (1769), Wilm. 341. *Generally, Refd.* *Doe d. Anglesen v. Kugeley* (1844), 6 Q. B. 107; *Baily v. De Crespigny* (1869), L. R. 4 Q. B. 180. *Mentd.* *Bank of England v. Morris* (1736), *Lee temp. Hard.* 219; *Coxe v. Phillips* (1736), *Lee temp. Hard.* 237; *Good v. Elliott* (1790), 3 Term Rep. 693; *Furtado v. Rogers* (1802), 3 Bos. & P. 191; *Tonteng v. Hubbard* (1802), 3 Bos. & P. 291; *Palmer v. Earle* (1845), 14 M. & W. 428; *Moore v. Durden* (1848), 2 Exch. 22; *Tidswell v. Whitworth* (1867), 15 L. T. 574; *Newby v. Sharpe* (1878), 8 Ch. D. 39; *Newington L. B. v. Cottotham L. B.* (1879), 12 Ch. D. 725; *Re Shipton, Anderson & Harrison*, [1915] 3 K. B. 676; *Blackburn Bobbin Co. v. Allen*, [1918] 1 K. B. 540; *Ertel Bieber v. Rio Tinto Co.*, *Dynamit Act. v. Same*, *Verenigte Koenigs & Laurahütte Act. v. Same*, [1918] A. C. 260; *Metropolitan Water Board v. Dick, Kerr*, [1918] A. C. 119.

**907. ———.]—**Lands were enfeoffed to R. H. & deft., to the use, intent, & purpose that pltf., his heirs & assigns for ever, should receive & take out of the lands a yearly rent of £63 payable half-yearly; & deft. covenanted with pltf. that R. H. & deft., their exors., etc., or some or one of them, would pay or cause to be paid to pltf., his heirs & assigns, the said yearly rent at the terms appointed for payment thereof:—*Held*: pltf. could not sue deft. in debt for arrears of the annuity.

No doubt this covenant is collateral or in gross in one sense, that it does not run with the land or rent (*PARKE, B.*).—*RANDALL v. RIGBY* (1838), 4 M. & W. 130; 6 Dowl. 650; 1 Horn & H. 231; 7 L. J. Ex. 240; 150 E. R. 1372.

*Annotations*:—*Consd.* *Haywood v. Brunswick Bldg. Soc.* (1881), 8 Q. B. D. 403. *Refd.* *Evans v. Jones* (1839), 7 Dowl. 482; *Sison v. Kidman* (1842), 3 Man. & G. 810; *Marshall v. Wilson* (1866), 14 W. R. 699.

**908. ———.]—**Where land has been granted in fee in consideration of a rentcharge & a covenant to build & repair buildings, the assignee of the grantee of the land is not liable, either at law or in equity, on the ground of notice, to the assignee of the grantee of the rentcharge on the covenant to repair.

As mtgees. they took the land subject to the rentcharge no doubt, so far as the liability to distress & re-entry were concerned. I do not think that either covenant runs with the land (*LINDLEY, L.J.*).—*HAYWOOD v. BRUNSWICK BUILDING SOCIETY* (1881), 8 Q. B. D. 403; 51 L. J. Q. B. 73; 45 L. T. 699; 46 J. P. 356; 30 W. R. 299, C. A.

*Annotations*:—*Consd.* *L. & S. W. Ry. v. Gomm* (1882), 20 Ch. D. 562; *Austerberry v. Oldham Corp'n.* (1885), 29 Ch. D. 750; *Hall v. Edwin* (1887), 37 Ch. D. 74. *Expld.* *Clegg v. Hands* (1890), 44 Ch. D. 503. *Consd.* *Torbay Hotel v. Jenkins*, [1927] 2 Ch. 225. *Refd.* *Andrew v. Aitken* (1882), 31 W. R. 425; *Re Nisbet & Potts Contract*, [1906] 1 Ch. 386; *L. C. C. v. Allen*, [1914] 3 K. B. 642; *Smith v. Colbourne*, [1914] 2 Ch. 533; *Lord Strathearn S.S. Co. v. Dominion Coal Co.*, [1926] A. C. 108. *Mentd.* *Barker v. Stickney*, [1919] 1 K. B. 121.

**909. ———.]—***Re* BLACKBURN & DISTRICT BENEFIT BUILDING SOCIETY, *Ex p. GRAHAM*, No. 964, *post*.

**910. ———.]—**Personal liability of covenantor—*After assignment.]—**MILLAR v. SMALL* (1853), 1 W. R. 538, H. L.

*Annotation*:—*Appld.* *Royal Bank v. Gardyne* (1853), 1 W. R. 539.

**911. Benefit of covenant—Does not run with rent.]—**Where J. B., being seised in fee, conveyed to deft. & T. J. their heirs & assigns, to the use that J. B., his heirs & assigns, might have & take to his use a rent certain to be issuing out of the premises, & subject to the said rent, to the use of deft., his heirs & assigns, & deft. covenanted with J. B., his heirs & assigns, to pay to him, his heirs & assigns, the said rent, & to build, within one year, one or more messuages on the premises, for better

#### PART VIII. SECT. 1, SUB-SECT. 4.—A.

**906 i. Burden of covenant—Does not run with land.]—**A covenant by the

grantor to pay a rentcharge does not pass to the assignee of the rentcharge.—*KENNEDY v. STEWART* (1836), 4 Ir. L. Rec. N. S. 160; 7 I. L. R. 421, n.—*IR.*

**906 ii. ———.]—***BUTLER v. ARCHER* (1860), 12 I. C. L. R. 104; 12 Ir. Jur. 276.—*IR.*



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securing the said rent, & J. B. within one year demised the said rent to plffs. for 1,000 years:—**Held:** covenant would not lie for plffs. for non-payment of the rent, or for not building the messuages, for the covenant was personal to J. B.—**MILNES v. BRANCH** (1816), 5 M. & S. 411; 105 E. R. 1101.

*Annotations:—Apld. Randall v. Rigby* (1838), 4 M. & W. 130; *Haywood v. Brunswick Bldg. Soc.* (1881), 8 Q. B. D. 403. **Refd.** *Doe d. Egremont v. Hellings* (1842), 6 Jur. 821; *Magnay v. Edwards* (1853), 1 W. R. 331.

**912.** ———.]—**RANDALL v. RIGBY**, No. 907, *ante*.

#### B. Other Cases.

**913. Grantor not selsed of land—Liability on covenant.]—NEWTON v. WEEKES** (1648), Aleyn, 79; 82 E. R. 925.

**914. Rentcharge limited to grantee—To use of party entitled to payment.]—A.** grants a rentcharge to B. for the life of C. *habendum* to B. his heirs & assigns, to the use of C. with a covenant in the indenture to pay it to the use of C. If the rent be not paid to B. to the use of C., B. may maintain covenant against A.; for though the rentcharge is executed in C. by the Statute of Uses, yet a covenant being collateral remains undischarged with.—**BASCAWIN & HERLE v. COOK** (1676), 1 Mod. Rep. 223; 86 E. R. 843; *sub nom. COOK v. HERLE*, 2 Mod. Rep. 138.

**915. Enforcement—Security of land insufficient.]—A.** for £2,100 grants an annuity for his own life of £300 a year to B. & charges it upon an estate represented to be of the clear yearly value of £1,000 & B. agrees, that A. shall be at liberty to redeem the annuity at six months' notice, on payment of the purchase-money, & all arrears. A. suffers the annuity to run greatly in arrear; & the estate turns out to be subject to prior incumbrances, exceeding its annual income. On a bill filed against A. for a specific performance of his covenant to pay this annuity, the ct. decreed accordingly; & held, that B. was not obliged to resort to his remedy at law, or to the insufficient security of the estate.—**CARBERY (LORD) v. WESTON** (1757), 1 Bro. Parl. Cas. 429; 1 E. R. 668, H. L.

**916. Covenant for quiet enjoyment—What amounts to breach.]—Covenant**, by deft., to permit & suffer the covenantee peaceably, & quietly to enjoy, etc., an annuity secured on premises demised by deft. for a term to trustees, for the purpose of such security, & for raising thereout by mtge. or sale, a sum of money to be paid to the annuitant: & that the covenantor would not hinder, molest or disturb him in the peaceable enjoyment, etc., & would do all such further & other lawful & reasonable acts & things, devices, conveyances & assurances in the law, for the further & better granting & securing, etc., as should be required:—Breaches—that, an arrear of annuity having accrued, deft. did not suffer pltf., the covenantee, peaceably to enjoy, etc.; but on the contrary, hindered, molested, & disturbed him in this, to wit, that although requested to do a reasonable act for the further securing, etc., that is to say, that deft., the covenantor, should direct the trustees to raise, levy, & pay to pltf., the arrears, & sum of money, etc., yet he would not, etc.; & that although requested to direct the trustees to take up money on mtge. of the premises, for the purpose of paying, etc., & to join therein & deliver up the deeds, would not, etc.:—**Held:** to be ill assigned, the refusal to

direct, not being an act of molestation; for the covenant not being personal in that respect, & it not being shown that the act required to be done by deft., was such a necessary act, as that the annuity could not be enjoyed without its being done on his part, & he was consequently under an obligation to give such direction, it was not broken by such refusal.—**WARN v. BICKFORD** (1821), 9 Price, 43; 147 E. R. 15.

*Annotation:—Refd. Falmouth v. Thomas* (1832), 3 Tyr. 26.

**917. Agreement to purchase land—Rentcharge to vendor as consideration—Vendor entitled to covenant.]—BOWER v. COOPER**, No. 119, *ante*.

**918. Avoidance of rentcharge—Grantor liable on covenant.]—A** declaration in covenant stated that deft. had granted an annuity to pltf., & for the better securing the annuity demised a rectory & prebendal stall to certain trustees, & covenanted for payment of the annuity; & alleged as a breach the non-payment thereof. To this declaration deft., being under terms of pleading issuably, pleaded that the indenture was made with the view of charging, & was a charge upon, the rectory, the same being a benefice with a cure of souls, contrary to 13 Eliz. c. 20, & that the indenture & security were made to evade 13 Eliz. c. 20:—**Held:** the plea was not an issuable one, as it stated no new fact upon which pltf. could go to the jury; & 13 Eliz. c. 20, avoided the charge upon the benefice only, but not the covenant in the deed containing it.—**SLOANE v. PACKMAN** (1843), 11 M. & W. 770; 1 Dow. & L. 332; 12 L. J. Ex. 423; 1 L. T. O. S. 316; 152 E. R. 1015.

*Annotation:—Consd. Phillpotts v. Phillpotts* (1850), 10 C. B. 85.

**919. Rentcharge created by life tenant—Declaring himself entitled to fee simple—Declaration treated as covenant—Estate of grantor liable.]—MONYPENNY v. MONYPENNY**, No. 485, *ante*.

#### SUB-SECT. 5.—SALE OR MORTGAGE OF LAND CHARGED.

*A. By Order of Court.*

*(a) Discretion of Court.*

**920. General rule—Exercise of jurisdiction discretionary.]—When** an annuity charged upon the corpus of settled real estate is in arrear the ct. has power to order the arrears to be raised by sale or mtge. of the estate, though the making of such an order is a matter, not of course, but of discretion.—**Re TUCKER, TUCKER v. TUCKER**, [1893] 2 Ch. 323; 62 L. J. Ch. 442; 69 L. T. 85; 41 W. R. 505; 37 Sol. Jo. 325; 3 R. 436.

*Annotations:—Consd. Hambro v. Hambro*, [1894] 2 Ch. 561; *Blackburne v. Hope-Edwards*, [1901] 1 Ch. 419.

**921. ———.]—There** is equitable jurisdiction to order a sale or mtge. of land to raise arrears of a jointure rentcharge issuing out of the rents & profits of the land, though there is no express charge on the land. The exercise of such jurisdiction is discretionary.—**HAMBRO v. HAMBRO**, [1894] 2 Ch. 564; 63 L. J. Ch. 627; 70 L. T. 684; 43 W. R. 92; 8 R. 413.

*Annotations:—Consd. Re Young, Brown v. Hodgson*, [1912] 2 Ch. 479. **Refd.** *Re Herbage Rents, Greenwich, Charity Comrs. v. Green*, [1896] 2 Ch. 811; *Re Jordison, Raine v. Jordison*, [1922] 1 Ch. 440.

**922. Grounds for refusing order—Sale not necessary for other purpose.]—Unless** the ct. finds it necessary to make a decree for the sale of the estate for some other purpose, there is no ground whatever for making a direction that the amount of those arrears, which, it is true, are now ascertained, but which will be liable, very probably, in the course of a succession of years, to fluctuate,

shall be raised in the manner proposed (*SHADWELL, V.-C.*).—*GRAVES v. HICKS* (1841), 11 Sim. 536; 10 L. J. Ch. 185; 5 Jur. 674.

*Annotations*.—*Consd.* *Harrison v. Mason* (1849), 12 L. T. O. S. 478; *White v. James* (1858), 26 Beav. 191; *Hall v. Hurt* (1861), 2 John. & H. 76. *Distd.* *Scottish Widows' Fund v. Craig* (1882), 20 Ch. D. 208. *Consd.* *Re Tucker, Tucker v. Tucker*, [1893] 2 Ch. 323. *Distd.* *Hambro v. Hambro*, [1894] 2 Ch. 564. *Consd.* *Blackburne v. Hope-Edwardes*, [1901] 1 Ch. 419. *Refd.* *Joel v. Mills* (1857), 3 K. & J. 458; *Taylor v. Taylor, Re Taylor's Estate Act* (1874), L. R. 17 Eq. 324.

**923.** ———.]—Where a rentcharge is charged on the fee simple, but a term of years is vested in trustees upon trust that when the rentcharge is in arrear the trustees shall out of the rents & profits, or by mortgaging or demising the term, raise & pay the rentcharge, the owner of the rentcharge must resort to the term, & is not entitled to an order for sale of the fee simple to raise arrears of the rentcharge.

Subject to the discretion of the ct. the owner of a rentcharge is entitled to an order for sale of the inheritance, but the ct. will refuse to make the order in certain cases, for instance, where a sale is not necessary for any other purpose & it is advisable to wait for a time (*BUCKLEY, J.*).

Here I find a rentcharge issuing out of land which is secured by a term. There is express power to raise the arrears of a rentcharge by mtge. of the term. Having regard to the term & to what is said in *Hall v. Hurt*, No. 937, *post*, I do not see how I can make the order which is asked for (*BUCKLEY, J.*).—*BLACKBURN v. HOPE-EDWARDES*, [1901] 1 Ch. 419; 70 L. J. Ch. 99; 83 L. T. 370; 48 W. R. 701; 44 Sol. Jo. 645.

*Annotation*.—*Refd.* *Re Manchester's Settltmt.*, [1910] 1 Ch. 106.

**924.** ——— *Postponement advisable.*]—*BLACKBURN v. HOPE-EDWARDES*, No. 923, *ante*.

#### (b) When Order Made.

**925. Rentcharge charged on fee simple—With power of distress.**]—*CUPIT v. JACKSON*, No. 979, *post*.

**926.** ——— *No sufficient distress—Other concurrent rentcharges.*]—(1) A sale of lands decreed to raise arrears of a rentcharge granted with powers of distress & entry, there being nothing to distrain on, & there being twenty other concurrent rentcharges with like remedies.

(2) Suit by a grantee of a rentcharge, on behalf of himself & twenty others, to raise the arrears by sale sanctioned.—*WHITE v. JAMES* (No. 2) (1858), 26 Beav. 191; 28 L. J. Ch. 179; 4 Jur. N. S. 1214; 7 W. R. 35; 53 E. R. 870; *sub nom.* *WHITE v. BARNES*, 32 L. T. O. S. 113.

*Annotations*.—*As to* (1) *Fold.* *Horton v. Hall* (1874), L. R. 17 Eq. 437. *Consd.* *Scottish Widows' Fund v. Craig* (1882), 20 Ch. D. 208; *Hambro v. Hambro*, [1894] 2 Ch. 564. *Refd.* *Hall v. Hurt* (1861), 2 John. & H. 76; *Dawson v. Robins* (1876), 2 C. P. D. 38; *Sandeman v. Rushton* (1891), 61 L. J. Ch. 136; *Re Tucker, Tucker v. Tucker*, [1893] 2 Ch. 323.

**927.** ———.]—A rentcharge for a certain period of time, in arrear, charged by an order made by the inclosure comrs. upon the inheritance of the glebe lands of a rectory, under the provisions of a private Act was, under the provisions of the same Act ordered to be raised by a sale of the glebe lands. In an action by the owners of a rentcharge in arrear, charged on glebe lands, for a declaration that they were entitled under the order made by the inclosure comrs. to a charge on the lands for the sums due & to become due of the rentcharge, & asking for a sale of the lands, the Ecclesiastical Comrs. were made defts.:—*Held*: they were not necessary parties.

I am not aware of any authority which states

that because there are powers of distress & entry upon the property belonging to an ecclesiastical corp., & because the payments which are to be made in respect of the rentcharge are not to be perpetual, but will be determined in a certain time, the owner of the rentcharge shall not be entitled to the ordinary remedies of having it raised by a sale or mtge. (*HALL, V.-C.*).—*SCOTTISH WIDOWS' FUND v. CRAIG* (1882), 20 Ch. D. 208; 51 L. J. Ch. 363; 30 W. R. 463.

*Annotations*.—*Apld.* *Northern Assee. v. Harrison*, [1889] W. N. 74. *Consd.* *Hambro v. Hambro*, [1894] 2 Ch. 564. *Refd.* *Bailey v. Badham* (1885), 54 L. J. Ch. 1067; *Hornsey District Council v. Smith*, [1897] 1 Ch. 843; *Blackburne v. Hope-Edwardes*, [1901] 1 Ch. 419.

**928.** ———.]—*Re TUCKER, TUCKER v. TUCKER*, No. 920, *ante*.

**929.** ——— *Estate in remainder—Subject to life interest.*]—*PICARD v. MITCHELL*, No. 402, *ante*.

**930.** ———.]—*PETTINGER v. AMBLER*, No. 281, *ante*.

**931.** ——— *Charge kept down by remainder-man.*]—Testator gave all his real & personal estate to his son upon trust to pay thereout weekly & every week to testator's wife during her life the sum of £1 10s. & subject thereto, upon trust for his son absolutely. Testator had been dead four years, & the weekly payment had been regularly made during all that period. The widow now asked that its future payment should be secured by the sale of the property & the investment of the proceeds. The estate consisted substantially of a leasehold public-house, & the business carried on there, & the total amount of it, if realised, would not have been equal to the amount of the capitalised value of the annuity:—*Held*: the property was given to the son absolutely, subject only to the payment of the annuity, & so long as he paid that he was entitled the quiet possession of his property, & the widow was not entitled to have it sold.—*Re POTTER, POTTER v. POTTER* (1883), 50 L. T. 8.

*Annotation*.—*Apld.* *Re Parry, Scott v. Leak* (1889), 42 Ch. D. 570.

**932.** ——— *Not perpetual.*]—*SCOTTISH WIDOWS' FUND v. CRAIG*, No. 927, *ante*.

**933.** ——— *Reserved by former vendor.*]—Land, on which an improved chief rent, which was purchased by pltf.'s testator in 1853, had been reserved by a former vendor of the land, was ordered to be sold to pay the arrears of the chief rent which had accrued due since that date.—*HORTON v. HALL*, (1874), L. R. 17 Eq. 437; 22 W. R. 391.

*Annotations*.—*Consd.* *Hambro v. Hambro* (1894), 63 L. J. Ch. 637. *Refd.* *Kelsey v. Kelsey* (1874), 22 W. R. 433; *Re Tucker, Tucker v. Tucker*, [1893] 2 Ch. 323; *Re Young, Brown v. Hodgson*, [1912] 2 Ch. 479.

**934. Rentcharge on rents & profits.**]—Testator devised his real estates to trustees in fee, on trust, "out of the rents, issues, & profits," to pay certain life annuities, & by sale or mtge. to raise money for payment of his debts, etc., & then to settle the estates, to the use that the annuitants should receive their annuities out of the same premises with powers of distress & entry, & subject thereto, to one for life, with remainder over:—*Held*: the annuitants were not entitled to be paid the arrears out of the corpus, though the rents were insufficient to keep down all the incumbrances.

The annuitants are entitled to be paid their arrears out of the rents, accruing due from time to time, & they have that right at law, notwithstanding the tenant for life may have received the rents applicable to the payment of the annuities & may not have kept them down. . . . It is next contended, that the persons who have that legal right, are, in addition entitled to come & ask a ct. of equity for a sale & mtge. to satisfy these

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arrears. . . . There is, however, in this case, a great difference in both the situation of the parties & of the estate from that which existed in *Cupit v. Jackson*, No. 979, *post* (LANGDALE, M.R.).—*PHILIPPS v. PHILIPPS* (1844), 8 Beav. 193; 50 E. R. 76.

*Annotation*.—*Reid. Lambert v. Turner* (1862), 7 L. T. 521.

**935. — If personalty insufficient.]**—Testator directed his trustees to sell his personal estate, & after payment of his debts, etc., to invest the residue, & out of the produce thereof, or if need be, by the sale & conversion, from time to time, of a sufficient part of the principal, to pay two annuities; & he directed his trustees if occasion should be, from time to time to pay out of the rents & profits of his freehold & copyhold estates so much of the annuities as his personal trust estate should be insufficient for discharging. The personal estate being exhausted, & the annual rents of the real estate being insufficient to keep down the annuities:—*Held*: the arrears were to be raised by sale or mtge.—*FENTIMAN v. FENTIMAN* (1847), 16 L. J. Ch. 436.

**936. —**]—*HAMBRO v. HAMBRO*, No. 921, *ante*.

**937. Charge secured by term.]**—Where, by a testamentary appointment under a power in a settlement, a charge was created & a term vested in trustees to raise the same by sale thereof: *Semble*: the money could not be raised by a sale of the fee though the term was insufficient for the purpose. But a life annuity being granted in the same settlement by way of rentcharge, & it appearing that arrears which had accrued could not be otherwise satisfied, a decree was made for sale of the fee.—*HALL v. HUIR* (1861), 2 John. & H. 76; 70 E. R. 977.

*Annotations*.—*Consol. Scottish Widows' Fund v. Craig* (1882), 20 Ch. D. 208; *Hambro v. Hambro*, [1894] 2 Ch. 564. *Fold. Blackburne v. Hope-Edwards*, [1901] 1 Ch. 419. *Reid. Re Tucker, Tucker v. Tucker*, [1893] 2 Ch. 323; *Re Manchester's Settlement*, [1910] 1 Ch. 106.

**938. —**]—When testator bequeaths legacies & annuities, & then gives the residue of his property, after payment of his debts, funeral & testamentary expenses, legacies & annuities, the annuitants are not entitled as a matter of right to have the estate converted, & a sum sufficient to answer the annuity invested in such securities as the ct. would approve for the investment of funds under its control; but they are entitled to have the annuities sufficiently secured, for instance, by a mtge. of real estate of testator.

Testator, after bequeathing £100 to each of his two exors., directed his exors. to pay to his father & his sisters life annuities amounting together to £700, & he declared that the residue of his property, after payment of his debts & funeral & testamentary expenses, & the legacies & annuities thereinbefore directed to be paid, should be divided amongst his next of kin & heiresses, as though he had died intestate with respect thereto. Testator's estate consisted mainly of two freehold theatres & two leasehold theatres. The freehold theatres were respectively let on lease, at rents respectively of £700 & £1,317, & produced respectively, after deducting outgoings, net incomes of £629 & £888. Testator was the original lessee of the leasehold theatres at the respective rents of £750 & £25, for the respective terms of eighty years & seventy-one years. Of the eighty years nine years had expired, & of the seventy-one years twenty-six years had expired. Both these theatres were underlet at largely improved rents, & they respectively produced net profit incomes of £2,109

& £186. Each of the leasehold theatres, & one of the freehold theatres, was subject to a mtge., the mtge. debts together amounting to £12,500. Testator's debts, other than the mtge. debts on the theatres, & his funeral & testamentary expenses & pecuniary legacies had been all paid out of his personal estate, & there remained a balance of £2,000 in the hands of the surviving exor. The annuities had been punctually paid since testator's death. The annuitants claimed to be entitled to have the leasehold theatres sold, & the mtge. debts paid out of the proceeds of sale, & that a sufficient sum should then be invested in the mode in which cash under the control of the ct. would be invested, to provide for the payment of the annuities. The residuary legatees proposed that the exors. should raise by mtge. of one of the leasehold theatres such a sum, as with the £2,000 in the exors.' hands, would be sufficient to discharge testator's mtge. debts, & that the annuities should be secured by a first mtge. on the two freehold theatres, the charge of the annuities on the residue of testator's estate, subject to the new mtge. to be created, remaining undisturbed, with liberty to the annuitants to apply to the ct. for additional or other security, in case the annuities or any of them, should fall into arrear; & that, after payment of the interest on the new mtge. & the annuities, the residue of the income of the estate should be divided between the residuary legatees:—*Held*: the annuitants were not entitled to have the leasehold theatres sold, but, the estate having been cleared by the payment of testator's debts, & funeral & testamentary expenses, the annuitants were only entitled to have the annuities sufficiently secured, & the proposed security would be sufficient.—*Re PARRY, SCOTT v. LEAK* (1889), 42 Ch. D. 570; 61 L. T. 380; 38 W. R. 226.

*Annotations*.—*Consol. Harbin v. Masterman*, [1896] 1 Ch. 351. *Reid. Re Leeds, Mowbray v. Caermarthen* (1895), 39 Sol. Jo. 381; *Re Evans' & Bettell's Contract*, [1910] 2 Ch. 438; *Re Earle, Tucker v. Donne* (1923), 131 L. T. 383.

**939. —**]—*BLACKBURNE v. HOPE-EDWARDES*, No. 923, *ante*.

**940. Rentcharge charged on glebe land—Necessity for notice to patron.]**—*NORTHERN ASSURANCE Co. v. HARRISON*, [1889] W. N. 74.

**Enforcement of land improvement charge.]**—*See LAND IMPROVEMENT*, Vol. XXX., p. 296, No. 221.

(c) *Practice and Procedure.*

**941. Form of action—Action by one grantee—On behalf of himself & others.]**—*WHITE v. JAMES* (No. 2), No. 926, *ante*.

**942. Parties—Charge on land of ecclesiastical corporation—Ecclesiastical Commissioners.]**—*SCOTTISH WIDOWS' FUND v. CRAIG*, No. 927, *ante*.

B. *Under Express Power.*

**943. Rentcharges on separate estates—Rents insufficient.]**—Testator gave one estate to J., upon trust to pay to testator's wife £18 a year for life, & after her decease he gave the estate to T. Testator also gave a second estate to J. upon trust to pay testator's wife £28 a year for life, & after her decease he gave this estate absolutely to J.; & he declared, that if J. should neglect or refuse to pay the annuities from either of the said estates when they became due, that his wife should have power of selling the estates, & to appropriate the money to her own use. The rents being insufficient to pay the annuities:—*Held*: the widow had a right to sell unless J. paid the full amount of the annuities, but he was not personally bound

to pay them.—*BUTTON v. BUTTON* (1840), 2 Beav. 256; 4 Jur. 82; 48 E. R. 1178.

**944. Position of annuitant as trustee—May not purchase.]**—Where the sale of property takes place under a power contained in an annuity deed, the annuitant is a trustee for the purpose of the sale, & neither he nor his attorney or agent is qualified to become the purchaser.—*RE BLOYE'S TRUST* (1849), 1 Mac. & G. 488; 2 H. & Tw. 140; 15 L. T. O. S. 517; 47 E. R. 1630; *sub nom.* *RE BLOYE'S TRUST, Ex p. LEWIS*, 19 L. J. Ch. 89; 14 Jur. 49, L. C.; *affd.* *sub nom.* *LEWIS v. HILLMAN* (1852), 3 H. L. Cas. 607, H. L.

*Annotations* :—*Reid*, *Guest v. Smythe* (1870), 5 Ch. App. 553, n.; *Re Postlethwaite*, *Postlethwaite v. Rickman* (1888), 59 L. T. 58; *Bath v. Standard Land Co.*, [1911] 1 Ch. 618. *Mentd.* *Re Hodge's Settlement*, (1857), 3 K. & J. 213; *Re Barber's Trusts* (1863), 2 New Rep. 571; *Re Bird's Trusts* (1876), 3 Ch. D. 214; *McPherson v. Watt* (1877), 3 App. Cas. 254; *De Pereda v. De Mancha* (1881), 19 Ch. D. 451; *Luddy's Trustee v. Peard* (1886), 33 Ch. D. 500; *Re Parker's Will* (1888), 39 Ch. D. 303; *Nutt v. Easton* (1899), 68 L. J. Ch. 367; *Re Hoffe's Estate Act*, 1885 (1900), 82 L. T. 556; *Hodson v. Deans*, [1903] 2 Ch. 647.

**945. Solicitor may not purchase.]**—*RE BLOYE'S TRUST*, No. 944, *ante*.

**946. Application of proceeds of sale—Costs of trustees.]**—The grantor of an annuity which was the third incumbrance on his real estates, executed a trust deed, to which the annuitant was not a party, whereby the estates were conveyed to trustees on trusts for sale to discharge the incumbrances according to their priorities; & the first trust of that deed was to pay the costs of the trustees in the conduct of the sale. After the execution of the trust deed the trustees applied to the annuitant for his consent to the sale. In answer to that application the solrs. of the annuitant offered to facilitate the sale, but asked for a copy of the trust deed; adding, "When we have seen the deed we shall be better able to inform you whether our clients will have any difficulty in joining in the conveyances" &, in answer to a subsequent application, they assented to the appropriation of a part of the rents towards rendering the property more eligible for sale. Part of the property was sold, the annuitant concurring in the sale, whereby a sufficient sum was realised to pay the prior incumbrances; but it being apprehended that the residue of the property would not realise enough to pay both the costs of the trustees & to redeem the annuity the trustees applied to the annuitant for leave to retain in the first place out of the future proceeds of sale, a sum sufficient to pay their costs. This being refused & a bill being filed to compel the annuitant to join in the conveyances:—*Held*: in the circumstances, he was not bound to do so, except upon the terms of having the annuity redeemed.—*CROSSE v. GENERAL REVERSIONARY & INVESTMENT CO.* (1853), 3 De G. M. & G. 698; 2 Eq. Rep. 579; 22 L. T. O. S. 229; 43 E. R. 274, L. C.

#### SUB-SECT. 6.—APPOINTMENT OF RECEIVER.

*See RECEIVERS*, pp. 36, 37, Nos. 429–443, *ante*.

#### SUB-SECT. 7.—ACTION FOR DEBT.

##### A. When Action will lie.

**947. General rule—Rentcharge in fee.]**—By a local Act of Parliament overseers of a parish were authorised to grant the fee simple of certain plots of land to certain parties, subject to the payment to the said overseers & their successors of certain yearly chief rents, & also subject to certain

covenants, amongst which covenants were, that the grantee, for himself, his heirs, etc., covenanted with the said overseers & their successors, "that he would duly pay the said yearly chief rent to the said overseers," etc. In an action of debt brought by the overseers against a grantee holding under a conveyance containing such covenant, for arrears of rent:—*Held*: on general demurrer, debt would lie. *Qu.*: whether since the passing of Real Property Limitation Act, 1833 (c. 27), s. 36, an action of debt lies for the recovery of the arrears of a rent in fee.—*VARLEY v. LEIGH* (1848), 2 Exch. 446; 17 L. J. Ex. 289; 154 E. R. 567.

*Annotations* :—*Reid*, *Thomas v. Sylvester* (1873), L. R. 8 Q. B. 368; *Christie v. Barker* (1884), 53 L. J. Q. B. 537; *Re Herbage Rents, Greenwich, Charity Comrs. v. Green*, [1896] 2 Ch. 811.

**948. ———.]**—Since the abolition of real actions by Real Property Limitation Act, 1833 (c. 27), s. 36, an action of debt will lie for the recovery of a rentcharge in fee.—*THOMAS v. SYLVESTER* (1873), L. R. 8 Q. B. 368; 42 L. J. Q. B. 237; 29 L. T. 290; 21 W. R. 912.

*Annotations* :—*Distd.* *Whitaker v. Forbes* (1875), L. R. 10 C. P. 583. *Fold.* *Booth v. Smith* (1883), 51 L. T. 395. *Apld.* *Christie v. Barker* (1884), 53 L. J. Q. B. 537; *Bowman v. Smith* (1885), 2 T. L. R. 101. *Expld.* *Re Blackburn & District Benefit Bldg. Soc., Ex p. Graham* (1889), 42 Ch. D. 343. *Apprvd.* *Searle v. Cooke* (1890), 43 Ch. D. 519. *Consd.* *Re Herbage Rents, Greenwich, Charity Comrs. v. Green*, [1896] 2 Ch. 811. *Expld.* *Pertwee v. Townsend*, [1896] 2 Q. B. 129. *Reid.* *Adnam v. Sandwich* (1877), 2 Q. B. D. 485; *Jones v. Withers* (1896), 74 L. T. 572; *Jonas v. St. Dunstan's Overseers* (1908), 98 L. T. 691; *Foley's Charity Trustees v. Dudley Corpn.*, [1910] 1 K. B. 317. *Mentd.* *Dawson v. Robins* (1876), 46 L. J. Q. B. 62; *Wenlock v. River Dee Co.* (1888), 57 L. J. Ch. 946; *Darlow v. Shuttleworth*, [1902] 1 K. B. 721.

**949. ———.]**—An action of debt will lie to recover arrears of a rentcharge in fee created by deed.—*BOWMAN v. SMITH* (1885), 2 T. L. R. 101.

**950. Rentcharge upon condition—Annuitant not observing condition.]**—A man devises an annuity charged on his real estate to his sister & heir-at-law, who is a *feme covert*, & a portion for her daughter, & by codicil says, on condition that they release all right, etc. Debt cannot be maintained for the arrears of the annuity incurred during the coverture, the sister being dead, & not having released.—*ACHERLEY v. VERNON* (1739), 2 Com. 513; *Fortes. Rep.* 188; *Willes*, 153; 92 E. R. 1184.

*Annotations* :—*Mentd.* *Duddy v. Gresham* (1878), 39 L. T. 48; *Re Greenwood*, *Goodhart v. Woodhead*, [1902] 2 Ch. 198.

**951. Rentcharge secured by covenant.]**—*RANDALL v. RIGBY*, No. 907, *ante*.

**952. ———.]**—*VARLEY v. LEIGH*, No. 947, *ante*.

**953. Rentcharge on land situated abroad.]**—An action of debt having been brought for arrears of a rentcharge upon lands in Australia prior to the commencement of Jud. Act, 1873 (c. 66):—*Held*: the venue in such action was local, & it could not therefore be maintained in this country.—*WHITAKER v. FORBES* (1875), 1 C. P. D. 51; 45 L. J. Q. B. 140; 33 L. T. 582; 40 J. P. 436; 24 W. R. 241, C. A.

*Annotations* :—*Apld.* *Re Blackburn & District Benefit Bldg. Soc., Ex p. Graham* (1889), 42 Ch. D. 343. *Reid.* *British South Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602.

**954. Effect of Copyhold Act, 1852 (c. 79), s. 16—Remedy not excluded.]**—Copyhold lands were compulsorily enfranchised at the instance of the lord in 1880, in consideration of the payment of annual rentcharges. At that date the boundaries of the copyholds lands were, & had been for some time previously, confused & incapable of identification, but no proceedings were taken on the enfranchisement, either by lord or tenant, under above Act to identify the parcels charged. The rentcharges were paid down to Feb. 1887, since which time no

**Sect. 1.—Rentcharges : Sub-sect. 7, A., B., C. & D.; sub-sects. 8 & 9.]**

payment had been made :—*Held* : the enfranchisement, while it put an end to the relationship of copyhold tenant & lord, & to all incidents of copyhold tenure in the future, did not relieve the former copyhold tenant from liability for any past breach or neglect of his duty as such ; accordingly, he remained liable in respect of the confusion of boundaries which had occurred during the subsistence of the copyhold tenure ; & S., the owner of the rentcharges by purchase from the former lord, was entitled to a personal judgment for payment of the rentcharges & arrears, & to an inquiry to ascertain the parcels subject to the rentcharges, & in the event of the non-ascertainment of such parcels, to substitution of other lands of deft. equal in value to the enfranchised lands ; & the fact that the enfranchisement was compulsory, & at the instance of the lord, & that the lord had not availed himself of the statutory means of having the parcels identified, was no bar to the granting of such relief.—*SEARLE v. COOKE* (1890), 43 Ch. D. 519 ; 59 L. J. Ch. 259 ; 62 L. T. 211, C. A.

*Annotations* :—*Reid*. *Re Herbage Rents, Greenwich, Charity Comrs. v. Green*, [1896] 2 Ch. 811 ; *Pertwee v. Townsend*, [1896] 2 Q. B. 129.

**Colonial lands.**—*See* CONFLICT OF LAWS, Vol. XI., p. 346, No. 331.

**Land sold to different persons.**—*See* Part VI., Sect. 4, sub-sect. 3, A., *ante*.

**B. Who may Sue.**

*See* Real Property Limitation Act, 1833 (c. 27), s. 36.

**955. Executor.**—*LORINGE'S CASE* (1352), 4 Co. Rep. 49 b ; 76 E. R. 1002 ; *sub nom.* *LEVING'S CASE*, Fitz. Nat. Brev. 121.

*Annotations* :—*Apprvd.* *Thomas v. Sylvester* (1873), L. R. 8 Q. B. 368. *Reid*. *Ornet's Case* (1587), 4 Co. Rep. 48 b ; *Christie v. Barker* (1884), 53 L. J. Q. B. 537 ; *Pertwee v. Townsend*, [1896] 2 Q. B. 129.

**C. Who may be Sued.**

*See* Real Property Limitation Act, 1833 (c. 27), s. 36.

**956. Grantor with no interest in land.**—*ANON.* (1584), Owen, 3 ; 74 E. R. 857.

**957. Whether occupier.**—*DUNSH v. SMITH* (1648), Aleyn, 62 ; 82 E. R. 916.

*Annotation* :—*Reid*. *Re Herbage Rents, Greenwich, Charity Comrs. v. Green*, [1896] 2 Ch. 811.

**958. Pernors.**—*Debt for arrears of a rentcharge ought regularly to be brought against all the pernors of the profits of the lands liable ; but if he be not, deft. can only take advantage of it by plea.*—*DUPPA v. MAYO* (1669), 1 Saund. 282 ; 2 Keb. 576 ; 85 E. R. 366 ; *sub nom.* *DUPPER v. BASKERVILL*, cited 5 Mod. Rep. at p. 214.

*Annotations* :—*Reid*. *Doe d. Saye & Sele v. Guy* (1802), 3 East. 120. *Mentd.* *Incedon v. Crips* (1702), 2 Salk. 658 ; *Strafford v. Wentworth* (1720), Prec. Ch. 555 ; *Mentney v. Petty* (1722), Prec. Ch. 593 ; *Jones v. Meredith* (1739), 2 Com. 661 ; *Cutting v. Derby* (1776), 2 Wm. Bl. 1075 ; *Harry v. Jones* (1817), 4 Price, 89 ; *Smith v. Doe d. Jersey* (1819), 7 Price, 379 ; *Partington v. Woodcock* (1835), 5 Nev. & M. K. B. 672 ; *Marston v. Roe* (1837), 2 Nev. & P. K. B. 504 ; *Webb v. Baker* (1838), 7 Ad. & El. 841 ; *Simmons v. Wood* (1843), 5 Q. B. 170 ; *Startup v. Macdonald* (1843), 6 Man. & G. 593 ; *Thibault v. Gibson* (1843), 13 L. J. Ex. 2 ; *Doe d. Phillips v. Rollings* (1847), 4 C. B. 188 ; *Croft v. Lumley* (1858), 6 H. L. Cas. 672 ; *Accocks v. Phillips* (1860), 5 H. & N. 183 ; *Cotesworth v. Spokes* (1861), 30 L. J. C. P. 220 ; *Stephenson v. Thompson*, [1924] 2 K. B. 240.

**959. Mortgagees of undivided shares**—*By demise of term.*—*Testator devised lands in fee,*

*after the determination of certain life estates, to A., B. & C. as tenants in common, subject to & charged with the payment of £200, which he thereby bequeathed to & to be equally divided among the children of his niece. A. & B., during the life of one of the tenants for life, granted their reversion in two undivided third parts of the lands, to mtgees. for 500 years :—Held : an action of debt could not be maintained against the tennors for a share of the £200 so bequeathed.*—*BRAITHWAITE v. SKINNER* (1839), 5 M. & W. 313 ; 8 L. J. Ex. 240 ; 3 Jur. 1054.

**960. Assignee of land**—*Portion of land charged.*—*Where a portion of lands that are charged with the payment of a rentcharge is assigned to a purchaser, an action at law for the recovery of the arrears of the rentcharge is maintainable against the assignee of such portion, whether the charge was created by deed or by will.*—*BOOTH v. SMITH* (1883), 51 L. T. 395 ; 47 J. P. 759, D. C.

*Annotation* :—*Reid*. *Pertwee v. Townsend*, [1896] 2 Q. B. 129.

**961. — Profits not equal to rentcharge.**—*Where an ecclesiastical augmentation by way of rentcharge which has been granted to a vicar & his successors under 29 Car. 2, c. 8, as extended by Augmentation of Benefices Act, 1831 (c. 45), is in arrear, the whole amount in arrear is recoverable as a debt for which the assignee of the land so charged is personally liable, & is not limited to the extent of any profits which he may have received from the land.*—*PERTWEE v. TOWNSEND*, [1896] 2 Q. B. 129 ; 65 L. J. Q. B. 659 ; 75 L. T. 104.

*Annotations* :—*Consd.* *Re Herbage Rents, Greenwich, Charity Comrs. v. Green*, [1896] 2 Ch. 811. *Reid*. *Foley's Charity Trustees v. Dudley Corpn.*, [1910] 1 K. B. 317.

**962. Terre-tenant of part.**—*CHRISTIE v. BARKER*, No. 611, *ante*.

**963. Liquidator.**—*An order having been made for the winding up of an unregistered co. under Cos. Act, 1862 (c. 89), directed under sect. 203 of the Act that certain land which was vested in trustees for the co., subject to a rentcharge should vest in the official liquidators, appointed for the purposes of the winding up by their official name. Pltfs., the owners of the rentcharge upon such land, sued the liquidators in their personal capacity to recover arrears of the rentcharge from them as terre-tenants :—Held : such action ought to be stayed as being manifestly groundless.*

*The property is vested in him [the liquidator] by the order of the ct. & he does not seem to have any election in the matter ; & therefore he cannot be personally liable on the ground that he has made an election (ESHER, M.R.).*—*GRAHAM v. EDGE* (1888), 20 Q. B. D. 683 ; 57 L. J. Q. B. 406 ; 58 L. T. 913 ; 36 W. R. 529 ; 4 T. L. R. 442, C. A.

*Annotation* :—*Appld.* *Re Ebsworth & Tidy's Contract* (1889), 42 Ch. D. 23.

**964. After repudiation.**—*An unregistered co. were mtgees. in possession of land subject to a rentcharge created by deed. The co. was wound up under Cos. Act, 1862 (c. 89), s. 203, & the liquidators for some time paid the rentcharge. Then, finding that the annual value of the property was not equal to the rentcharge, they obtained leave from the ct. to get rid of the land, & gave notice to the tenant in occupation of the land & to the owner of the rentcharge that they repudiated the land. The owner of the rentcharge claimed to prove in the winding-up for arrears which had accrued since the repudiation :—Held : the co.*

**PART VIII. SECT. 1, SUB-SECT. 7.—C.**

**b. Liability of terre-tenant in possession.**—*SWIFT v. KELLY* (1889), 24 L. R. Ir. 107, 478.—*IR.*

**c. Pernor of the profits.**—*ODLUM v. THOMPSON* (1893), 31 L. R. Ir. 394.—*IR.*



were only liable so long as they were owners of the land; the liquidators had sufficiently repudiated the ownership of the land, & no subsequent claim could be made for the rentcharge.

Another point put to the ct. was that the covenant to pay the rentcharge run with the land. The decision in *Thomas v. Sylvester*, No. 948, *ante*, is against that contention: for there the judges evidently did not think that the covenant ran with the land, for they decided the case upon the question whether the owner of the rentcharge could sue the assignee as terre-tenant in an action for debt (COTTON, L.J.).—*Re BLACKBURN & DISTRICT BENEFIT BUILDING SOCIETY, Ex p. GRAHAM* (1889), 42 Ch. D. 343; 59 L. J. Ch. 183; 61 L. T. 745; 38 W. R. 178; 5 T. L. R. 565; 2 Meg. 1, C. A.

*Annotations*.—*Consd.* Cundiff v. Fitzsimmons, [1911] 1 K. B. 513. *Refd.* *Re* Herbage Rents, Greenwich, Charity Comrs. v. Green, [1896] 2 Ch. 811.

**965. Tenant of copyholds.—In whose occupancy arrears accrued.**—*SEARLE v. COOKE*, No. 954, *ante*.

**966. Tenant for years.**—A tenant for years is not liable in an action of debt for non-payment of a rentcharge issuing out of the land of which he is in occupation nor in the case of a rentcharge created for charitable purposes is he liable in an action in the Ch. Div. at the instance of the A.-G. or the Charity Comrs.—*Re HERBAGE RENTS, GREENWICH, CHARITY COMRS. v. GREEN*, [1896] 2 Ch. 811; 65 L. J. Ch. 871; 75 L. T. 148; 45 W. R. 74; 12 T. L. R. 621; 40 Sol. Jo. 716.

*Annotations*.—*Refd.* *Foley's Charity Trustees v. Dudley Corpn.*, [1910] 1 K. B. 317; Cundiff v. Fitzsimmons, [1911] 1 K. B. 513.

**967. Highway authority.**—For more than one hundred years a fee farm rent had been paid to certain charity trustees in respect of a piece of land acquired for the widening of a turnpike road & since forming part of the road, but no conveyance to the turnpike trustees was forthcoming. The rentcharge was paid, first, by the turnpike trustees, who had statutory power to buy land for widening the roads under their control, & on the expiration of the turnpike trust in 1871 by virtue of 33 & 34 Vict. c. 73, by deft. corp., in whom as the highway authority the road had become vested under Public Health Act, 1848 (c. 63). The corp. having refused to make any further payments, the charity trustees brought an action against them in the county ct. for arrears of the rentcharge:—*Held*: the ct. ought to presume that the land had been granted to the turnpike trustees as land subject to a perpetual rentcharge, & deft. corp. were liable as terre-tenants for the payment of the rentcharge.—*FOLEY'S CHARITY TRUSTEES v. DUDLEY CORPN.*, [1910] 1 K. B. 317; 79 L. J. K. B. 410; 102 L. T. 1; 74 J. P. 41; 8 L. G. R. 320, C. A.

**968. Freeholder with immediate right to possession.**—A mtgee. in fee of land which is subject to a rentcharge is personally liable to pay the rentcharge although he has never been in possession.

So long as the freeholder has an immediate right to take possession, he has sufficient pernanacy of the profits to render him liable for a chief rent issuing out of the land (DARLING, J.).—*CUNDIFF v. FITZSIMMONS*, [1911] 1 K. B. 513; 80 L. J. K. B. 422; 103 L. T. 811, D. C.

#### D. Necessity for Demand.

See Real Property Limitation Act, 1833 (c. 27), s. 36.

**969. "To be paid if demanded"—Demand**

necessary.]—*SANDS v. LEA* (1622), Palm. 320; 81 E. R. 1103.

#### SUB-SECT. 8.—RECOVERY BY CHARITIES.

See CHARITIES, Vol. VIII., pp. 352, 353, Nos. 1488-1497.

#### SUB-SECT. 9.—OTHER CASES.

**970. Relief in equity—Confusion of boundaries—Distress impossible.**—*HARDING v. SUFFOLK (COUNTRESS)* (1632), 1 Rep. Ch. 61; 21 E. R. 507. *Annotation*.—*Refd.* *Basingstoke Corpn. v. Bolton* (1852), 1 Drew. 270.

**971. — Legal remedy insufficient.**—*THORNDIKE v. ALLINGTON* (1667), 1 Cas. in Ch. 79; 22 E. R. 704.

*Annotation*.—*Apld.* *Re* Alms Corn Charity, Charity Comrs. v. Bode, [1901] 2 Ch. 750.

**972. — Remedy in personam.**—*PALMER v. WHETTENHALL* (1670), 1 Cas. in Ch. 184; 22 E. R. 753.

**973. — Heir-at-law of purchaser.**—Lands are sold to A. subject to an annuity of £15 a year to the sister of the vendor; the lands are afterwards mortgaged & otherwise charged by A. & thus charged, descend to his heir-at-law. A ct. of equity will make a personal decree against the heir, for the arrears & growing payments of this annuity.—*CHAMPERNOWNE v. HILLERSDON* (1708), 4 Bro. Parl. Cas. 330; 2 E. R. 224, H. L.

**974. — Lands subject to charge sold—Charge directed against other lands.**—Lands out of which an annuity is issuing sold for payment of debts, it was decreed to be paid out of other lands unsold.—*KENNOULE (LORD) v. BEDFORD (EARL)* (1676), 1 Cas. in Ch. 295; 22 E. R. 808.

*Annotation*.—*Refd.* *Salisbury v. Bugott* (1677), 2 Swan. 603.

**975. — Charge against purchase-money.**—Testator bequeathed to C., the daughter of W., £10 *per annum* during her natural life, & if she should die before her mother, W., the same sum during her natural life, to be paid from the house, No. 1, Park Lane, St. Marylebone parish, to commence at my death. The daughter died before the mother; & the owner of the house subject to the annuity, paid the annuity to the mother for several years after the daughter's death, & then sold the house without notice of the charge to the purchaser. Thereupon the mother filed a plaint in the county ct. against the owner, seeking to obtain a provision for the annuity out of the purchase-money.—*Held*: (1) upon the construction of the will pltf. was entitled to the annuity; (2) she had a right to confirm the sale of the house, & was entitled to be indemnified out of the purchase-money.—*WILLIAMS v. SMITH* (1870), 21 L. T. 745; 18 W. R. 420.

**976. Foreclosure—No right.**—An annuity is granted out of lands, & made redeemable on payment of a sum of money. The grantor cannot be foreclosed of the land, though he may of the redemption of the annuity.—*CARNESEW v. ARSCOTT* (1683), 1 Vern. 209; 23 E. R. 419.

*Annotation*.—*Refd.* *Shipton v. Casson* (1826), 4 L. J. O. S. K. B. 199.

**977. Recovery from corporation—When lands sequestrated.**—A.-G. v. COVENTRY CORPN. (1715), 2 Vern. 713; 1 P. Wms. 306; 23 E. R. 1069, L. C. *Annotations*.—*Refd.* *Walker v. Bell* (1816), 2 Madd. 21; *Russell v. East Anglian Ry.* (1850), 3 Mac. & G. 104.

(1848), 12 L. Eq. R. 273.—*IR.*

e. — *Non-existence of legal remedies.*—*HARRISON v. MASON* (1849), 12 L. T. O. S. 478.—*IR.*

**PART VIII. SECT. 1, SUB-SECT. 9.**  
a. *Relief in equity—Legal remedies useless or very difficult.*—A bill in equity does not lie to recover the arrears

of a rentcharge, unless it be proved that there are circumstances which render the legal remedies useless or very difficult.—*BRADY v. FITZGERALD*



*Sect. 1.—Rentcharges: Sub-sect. 9. Sect. 2: Sub-sect. 1, A., B. & C.]*

**978. Lien on title deeds—Deposited as security.]**—*RICHARDS v. BORRETT*, No. 17, *ante*.

**979. Corpus & arrears—No distinction between remedies.]**—(1) Arrears of an annuity chargeable by deed, a marriage settlement, on land, or a rentcharge, held to be recoverable by bill in equity filed by the personal representative of the grantee against the son of the grantor, the devisee of the estate, although powers of entry & distress, & a right to pernaney of the rents, issues, & profits, in satisfaction of the annuity when in arrear, were expressly given & reserved to the grantee by the deed; & although the right to those remedies may have devolved on the representative, or he might have other legal remedies, by statute or otherwise, on the principle that the proceeding in equity may be the better & safer course; or may be more effectual & comprehensive than the remedies at law; or that there may be difficulties surrounding the legal remedy which the equitable course might obviate, in aid & furtherance of the proceedings at law; or that the ct. of equity might give further & more satisfactory relief, which it would be beyond the jurisdiction of a ct. of law to provide for. All these considerations afford ground sufficient to justify applications to cts. of equity by bill for relief, where & notwithstanding pltf. may possibly have concurrent, but not commensurate remedies at law. It is competent to pltf. in such a bill to pray that the ct. will decree the amount of the arrears claimed & found due, to be raised by sale or mtge. of the estate; as cts. of equity have jurisdiction to decree estates with such incumbrances to be sold or mortgaged to satisfy them, where necessary.

(2) A charge on land created by deed cannot be discharged but by deed, or at least, *semble*, by some formal act of release. Parol refusal to accept payment on the part of the grantee, is not such a sufficient indication of evidence even of an intention to disclaim the subject-matter, or acquit the party even in equity, as to support a defence on that ground against a demand set up by a personal representative.

(3) A gross sum, the arrears of an annuity chargeable on land, is a debt, of the same nature as the annuity itself, & capable of the same remedies for the recovery of it; although the sum claimed for such arrears be due to the representative of the grantee, & claimed as such by the suit in equity.—*CUPIT v. JACKSON* (1824), *M'Cle.* 495; 13 *Price*, 721; 148 *E. R.* 207, *Ex. Ch.*

*Annotations:—As to (1) Distd. Philipps v. Philipps* (1844), 8 *Beav.* 193. *Apld. Harrison v. Mason* (1849), 12 *L. T. O. S.* 478; *White v. Barnes* (1858), 32 *L. T. O. S.* 113. *Consd. Hall v. Hurt* (1861), 2 *John. & H.* 76; *Kelsey v. Kelsey* (1874), *L. R.* 17 *Eq.* 495. *Apld. Horton v. Hall* (1874), *L. R.* 17 *Eq.* 437. *Distd. Taylor v. Taylor, Re Taylor's Estate Act* (1874), *L. R.* 17 *Eq.* 324. *Consd. Scottish Widows' Fund v. Craig* (1882), 20 *Ch. D.* 208. *Distd. Sandeman v. Rushton* (1891), 61 *L. J. Ch.* 136. *Apld. Re Tucker, Tucker v. Tucker*, [1893] 2 *Ch.* 323. *Consd. Hambro v. Hambro*, [1894] 2 *Ch.* 564; *Blackburne v. Hope-Edwards*, [1901] 1 *Ch.* 419. *Reid. Graves v. Hicks* (1841), 11 *Sim.* 536; *Re Herbage Rents, Greenwich, Charity Comrs. v. Green*, [1896] 2 *Ch.* 811.

**980. Execution—Amount recoverable—When sums advanced by receiver.]**—Where an agent who had negotiated an annuity between the grantor & grantee, & was appointed receiver of the rents of the estate on which it was charged advanced money to the grantee in anticipation of the receipt of arrears, receiving from the grantor, on the money thus advanced, the usual & ordinary commission of 2½ per cent. on annuity payments; but no assignment of the arrears was taken, nor was any stipulation made for the payment of interest:—

*Held*: such advances must be considered as payments made in liquidation of the arrears of the annuity; & notwithstanding the estates proved insufficient to pay the annuity, or reimburse the agent the money he had advanced, the grantee could not issue execution for more than was due, after deducting the money received from the agent.—*CARROLL v. GOOLD* (1823), 1 *Bing.* 190; 7 *Moore*, C. P. 621; 1 *L. J. O. S. C. P.* 46; 130 *E. R.* 77.

—*Writ of elegit.]—See EXECUTION*, Vol. XXI., pp. 565, 566, Nos. 1411–1414.

**981. House destroyed by fire—Insurance by devisee of grantor—Insurance money paid into court.]**—Testator charged his real estate with an annuity to his widow, & subject thereto, devised it to S. in fee, & appointed her his extrix. Testator had insured a house. Policy expired a few months after his death & was then renewed by S. Soon afterwards the house, which was the whole of his real estate, was burnt down. The insurance money was ordered to be paid into ct. on a motion by the widow, in a suit instituted by her against S. for the administration of testator's estate.—*PARRY v. ASHLEY* (1829), 3 *Sim.* 97; 57 *E. R.* 936.

*Annotation:—Reid. Warwieker v. Bretnall* (1882), 23 *Ch. D.* 188.

**982. Attornment of tenant of grantor—Right of rentcharger.]**—T. being tenant by the curtesy, demised to C. for ninety-nine years if he T. should so long live, at a peppercorn rent, to the intent that C. should re-demise as next mentioned; & immediately after, C. re-demised to T., for ninety-eight years, if T. should so long live, at a rent of £55, with a proviso that, if the rent should be in arrear, C. might enter on the premises, & have hold, use, occupy, etc., the messuages, lands, etc., & take the rents & profits, until, by perception of the rents & profits, or otherwise, he should be satisfied. Afterwards T. demised to deft. for sixty years. Before the sixty years expired, the £55, rent being in arrear, C. brought ejectment, & T. defended as landlord. C. recovered; & deft., to prevent a writ of possession being executed, attorned to C., & thenceforward paid rent to him. Afterwards, & during the sixty years' term, deft. was served with notice of an award, reciting a submission to reference by one H. & by T. & C. & that H. was entitled to an annuity, charged on the lands with the usual powers of distress, as trustee, under a grant by T. prior to T.'s demise to C.; & the award adjudged that H.'s rentcharge was in arrear, that H. was entitled to priority over C., & that H. should receive the rents. Deft. then signed a memorandum that he attorned to & became tenant of H.: & afterwards he paid rent to him:—*Held*: deft., by attorning to C. became tenant to him from year to year, C. having a right to enter & suspend his term of sixty years till C.'s rentcharge was satisfied; & afterwards deft., by attorning to H. upon notice of the award, became tenant to H. from year to year; & H. could maintain ejectment against deft. after giving him six months' notice.—*DOE d. CHAWNER v. BOULTER* (1837), 6 *Ad. & El.* 675; 1 *Nev. & P. K. B.* 650; *Will. Woll. & Dav.* 333; 6 *L. J. K. B.* 179; 112 *E. R.* 260.

*Annotation:—Consd. Doe d. Butler v. Kensington* (1816), 8 *Q. B.* 429.

**Right against compensation money on compulsory purchase.]—See COMPULSORY PURCHASE OF LAND**, Vol. XI., p. 237, No. 1283.

**Recovery on enfranchisement of copyholds.]—See COPYHOLDS**, Vol. XIII., p. 157, No. 2027.

**Recovery in county court.]—See COUNTY COURTS**, Vol. XIII., pp. 480, 544, Nos. 297, 993.

## SECT. 2.—ANNUITIES.

## SUB-SECT. 1.—PROCEEDINGS FOR RECOVERY.

## A. Administration Action.

**Right of annuitant to bring.**—See EXECUTORS, Vol. XXIV., pp. 752, 753, 807, Nos. 7806, 7807, 8360.

**Annuitant necessary** —See EXECUTORS, Vol. XXIV., p. 763, No. 7920.

**Order for administration—Provision for annuities.**—See EXECUTORS, Vol. XXIV., pp. 798, 799, Nos. 8281–8286.

**Effect on pending proceedings.**—See EXECUTORS, Vol. XXIV., p. 775, Nos. 8055, 8056.

## B. Action for Debt.

**983. When action will lie—Annuity by deed.**—Debt will lie for the arrears of annuity by deed as a contract; & *adhuc aretro existit*, is well enough to show it was in arrear.—BROWNE v. PENDLEBURY (1592), Cro. Eliz. 268; 78 E. R. 523.

**984. — Not before time for payment.**—DIGGS' CASE (1583), Moore, K. B. 133; 72 E. R. 488.

**985. — — — — —**—In debt for an annuity payable at the Annunciation, or within twenty days after, the writ was brought Apr. 8, & held bad; for no cause of action had then arisen.—BLUNDEN'S CASE (1598), Cro. Eliz. 565; 78 E. R. 810.

**986. Necessity for demand—Action by executors—No demand by annuitant.**—SANDS v. LEA (1622), Palm. 320; 81 E. R. 1103.

**987. Against whom maintainable—Executors.**—*Assumpsit* cannot be maintained for the arrears of an annuity against exors., because there is no personal privity.—ANON. (1673), 1 Mod. Rep. 163; 86 E. R. 802.

**988. Sufficiency of consideration.**—*Assumpsit* will lie on a promise to pay an annuity in consideration that lands are not charged with it.—ROCKWOOD'S CASE (1589), Cro. Eliz. 164; 1 Leon. 192; 78 E. R. 421.

**Annotation.**—*Refd.* Dutton v. Pole (1677), 3 Keb. 814.

—*See* CONTRACT, Vol. XII., pp. 200, 265, Nos. 1600, 2167.

**989. Discovery.**—An annuity deed, of which there was no counterpart, was placed in the hands of R., as agent for grantor & grantee. R. received the annuity for grantee. The grantor redeemed the annuity by paying the amount of the purchase-money to R., who, without express authority from the grantee, delivered the deed to grantor to be cancelled. R. having absconded without paying the grantee, & the grantee having sued grantor for arrears:—*Held*: he was entitled to call for an inspection of the deed.—DEVENOG (OR DEVERNER v. BOUVERIE (1831), 8 Bing. 1; 1 Moo. & S. 29; 1 L. J. C. P. 1; 131 E. R. 300.

## C. Action on Covenant

**990. When action lies.**—When there is a bond & also a deed of covenant to secure an annuity, although the bond is forfeited before discharge under 16 Geo. 3, c. 38, the party may be sued upon the covenant, for payments becoming due after

the discharge.—COTTEREL v. HOOKE (1779), 1 Doug. K. B. 97; 99 E. R. 68.

**Annotation.**—*Mentd.* Davies v. Arnott (1825), 10 Moore, C. P. 539.

**991. Who may sue—Failure of some parties to execute deed.**—Where, in covenant against the exors. of A., pltf. declared that A. covenanted with him & two others, that his exors., etc., should pay to them an annuity for the use of a third person, & averred that the other two never sealed the deed:—*Held*: all joint covenantees who may sue must sue, & the declaration was bad, inasmuch as it did not appear that any of the covenantees had not assented to the deed although they did not seal it. *Qu.*: whether the declaration would have been sufficient if it had averred that the two covenantees not joined, had refused to assent to the deed.—PETRIE v. BURY (1824), 3 B. & C. 353; 5 Dow. & Ry. K. B. 152; 3 L. J. O. S. K. B. 29; 107 E. R. 764.

**Annotations.**—*Appld.* Wetherell v. Langston (1847), 1 Exch. 634. *Refd.* Foley v. Addenbrooke (1843), 4 Q. B. 197. *Mentd.* Dewhirst v. Jones (1864), 4 New Rep. 343.

**992. — — — — — Whether amounting to failure of consideration.**—By an indenture between A., & B. & his wife, & C. of one part, & D., & E. & the same C. of another part, it was recited, that F., also party to the deed, had requested to have a certain farm given up to him, in which B.'s wife was interested, he F. giving sureties, namely D., E. & C., for payment of an annuity to B.'s wife; & it was thereupon witnessed that, in consideration of the covenants thereafter entered into by A., B. & his wife, & C. & of 10s., D., E. & C. & each & every of them, covenanted with A., B. & his wife & C. to pay the annuity. There followed covenants by A., B. for himself & his wife, & C., severally, for quiet enjoyment, & for executing an assignment to F. when required. The deed was signed & sealed by D., E. & C., & by F., but not by A. or B. In an action brought by A. & B. after the death of C. for breach of the covenant to pay the annuity:—*Held*: (1) the omission of A. & B. to execute the deed did not disable them from suing upon it; such omission did not amount to a total failure of consideration for the covenant sued upon, supposing such total failure to be an answer to the action, & the covenant to pay the annuity, & those for quiet enjoyment & for assigning, were not mutual & dependent; (2) at least after C.'s death, A. & B. might sue D.'s exors., D. & E. being also dead, for non-payment of the annuity, though the covenant for such payment was entered into both by & to C.—ROSE v. POULTON (1831), 2 B. & Ad. 822; 1 L. J. K. B. 5; 109 E. R. 1348.

**Annotations.**—*As to* (2) *Expld.* Ellis v. Kerr (1910), 79 L. J. Ch. 291. *Generally, Mentd.* Hume v. Bolland (1832), 2 Tyr. 575; Cardwell v. Lucas (1836), 2 M. & W. 111; Cooch v. Goodman (1842), 2 Q. B. 580; Dewhirst v. Jones (1864), 3 H. & C. 60.

**993. Joint covenant.**—In consideration of the sum of £300, T. & R. by deed, severally & respectively, & for their several & respective heirs, exors., & administrators, granted, covenanted, & agreed, to & with L. & B. their heirs, exors., administrators, & assigns, to pay to L. & B. their exors., etc., one annuity, or clear yearly sum of £30 in the shares & proportions following, viz.

## PART VIII. SECT. 2, SUB-SECT. 1.—B.

**1. Whether action will lie to recover purchase-money of annuity.**—In an action to recover the purchase-money for the arrears of an annuity, the fund out of which the arrears were to have been paid having proved deficient, the circumstances of there having been only an equitable assign-

ment of the arrears, will not *per se* entitle pltf. to treat the transaction as a loan, & to recover the purchase-money.—JOHNSTON v. COTTINGHAM (1840), Arm. M. & O. 11.—*IR.*

**g. Arrears of freehold annuity.**—An action of debt:—*Held*: not to lie for the arrears of a freehold annuity.—(1842), Arm.

## PART VIII. SECT. 2, SUB-SECT. 1.—C.

**h. Who may be sued—Whether purchaser for value without notice.**—RYKENT v. MILLER (1867), 14 Gr. 25.—*CAN.*

**k. When action lies—Against purchasers from mortgagees.**—MATTHEWS v. MEARS (1874), 21 Gr. 643.—*CAN.*

**1. Deed of farm from father to son**

**Sect. 2.—Annuities: Sub-sect. 1, C., D. & E.; sub-sect. 2. Sects.**

the sum of £15 being one moiety of the annuity, unto L. his exors., etc., & the sum of £15 the remaining moiety, unto B. his exors., etc., to be respectively paid quarterly. The powers for better securing the payment of the annuity contained in the deed were all given to L. & B. jointly, & the deed also contained a joint power of attorney to them to enter up a joint judgment; & a joint power was granted to them to dispose of the reversion of a close of land, with a joint power of attorney to sell certain stock; & the annuity was redeemable, on seven days' notice in writing being given, by the payment to L. & B. of the sum of £307 10s. & all arrears of the annuity. In an action brought by L. against T. to recover arrears of the annuity:—*Held*: the covenant was a joint covenant, & the interest in the annuity was joint, & L. could not sue alone.—*LANE v. DRINKWATER* (1834), 1 Cr. M. & R. 599; 3 Dowl. 223; 5 Tyr. 40; 4 L. J. Ex. 32; 149 E. R. 1220.

*Annulment*:—*Apld.* *Byrne v. Fitzhugh* (1834), 5 Tyr. 54.

994. — Assignee—Set-off of payments before notice of assignment.]—*LAWRANCE v. BELL*, No. 251, *ante*.

995. Consideration for annuity—Assignment of real property—With covenants for quiet enjoyment & to assign—Whether covenants mutual & dependent on covenant to pay annuity.]—*ROSE v. POULTON*, No. 992, *ante*.

— Covenant in marriage settlement.]—*See CONTRACT*, Vol. XII., p. 431, No. 3488.

Fraud of grantor—Defendants estopped from pleading.]—*See ESTOPPEL*, Vol. XXI., p. 279, No. 958.

**D. Annuity secured by Bond.**

*See, generally*, BONDS, Vol. VII., pp. 164 *et seq.*

Impossibility of performance—By act of law.]—*See BONDS*, Vol. VII., p. 213, No. 549.

Lost bond.]—*See BONDS*, Vol. VII., p. 240, No. 820.

Amount recoverable.]—*See BONDS*, Vol. VII., pp. 214, 219, Nos. 558, 559, 617.

Pleading.]—*See BONDS*, Vol. VII., pp. 243, 245, Nos. 865, 885–887.

Execution.]—*See BONDS*, Vol. VII., p. 255, Nos. 907, 968.

**E. Other Cases.**

996. Enforcement against agent.]—Where consignments have been made from abroad to answer an annuity which the owner of the property consigned is liable to pay & a consignee in England gives notice of the arrangement to the annuitant & makes payments in pursuance of it, the consignee is not afterwards at liberty to discontinue such payments so long as he has any proceeds of the consignments in his hands. The circumstances of such a transaction constitute an implied trust which the ct. will enforce against the consignee for the benefit of the annuitant.—*FITZGERALD v.*

*STEWART* (1831), 2 Russ. & M. 457; 39 E. R. 467, L. C.

*Annotations*:—*Apld.* *Kirwan v. Daniel* (1847), 5 Hare, 493. *Mentd.* *Burn v. Carvalho* (1839), 4 My. & Cr. 690; *Rodick v. Gandell* (1852), 1 De G. M. & G. 763.

997. —.]—Pltf. being entitled to an annuity of £300 charged upon plantations in the West Indies, belonging to K., entered, as agent for K., into an agreement with D., by which D. in consideration of having the produce consigned to him until his advances were satisfied, was to ship supplies to the plantations, & honour bills drawn upon him D. by K. for the expenses of management, & also to pay pltf.'s annuity. The consignments were made, & D. paid pltf.'s annuity for one year, & then discontinued the payment, although he received subsequent consignments. The bill prayed that D. might be ordered to pay the annuity so long as he continued to receive the consignments:—*Held*: on demurrer, without deciding whether pltf. could sustain a suit to enforce the agreement as against D., D. could not, after the payment of the annuity which he had made under the contract, withhold from pltf. the benefit of the contract for the further payment of the annuity.—*KIRWAN v. DANIEL* (1847), 5 Hare, 493; 16 L. J. Ch. 191; 8 L. T. O. S. 554; 11 Jur. 235; 67 E. R. 1006.

*Annotations*:—*Mentd.* *Harland v. Binks* (1850), 15 Q. B. 713; *Siggers v. Evans* (1855), 5 E. & B. 367; *Cochrane v. Willis* (1864), 9 L. T. 792.

998. Specific performance.]—Specific performance of an agreement to grant a personal annuity, & to provide a house of a certain value for a party to live in, will be decreed in equity.

A. for certain considerations mentioned in a deed & also for other considerations not inconsistent with the former, agreed to grant to B. an annuity for his life, & to provide him a house of the value of £10 a year to live in. Upon a bill being filed by B. for specific performance:—*Held*: the ct. could grant the relief prayed, although no security on land was agreed to be given for the performance of the agreement.—*CLIFFORD v. TURRELL* (1845), 14 L. J. Ch. 390; 5 L. T. O. S. 281; 9 Jur. 633, L. C.

*Annotations*:—*Apld.* *Keenan v. Handley* (1864), 10 L. T. 683. *Mentd.* *Kelson v. Kelson* (1853), 1 W. R. 143; *Re British & Foreign Cork Co. Leffohilds' Case* (1865), L. R. 1 Eq. 231; *Jervis v. Berridge* (1873), 8 Ch. App. 351; *Re Barnstaple Second Annuitant Soc.* (1884), 50 L. T. 424; *Frith v. Frith*, [1906] A. C. 254.

999. Re-entry.]—*DOE d. BUTLER v. KENSINGTON (LORD)*, No. 905, *ante*.

1000. Account—As against prior annuitant.]—The grantee of an annuity is not entitled as a matter of course to an account as against prior annuitants; the ct. must be satisfied that upon the taking of the accounts there would be a balance coming to the subsequent annuitant.—*ILES v. FOWLER* (1862), 6 L. T. 843, L. C.

Recovery where charitable intention.]—*See CHARITIES*, Vol. VIII., p. 332, No. 1179.

Mandamus to Lords of Treasury.]—*See CROWN PRACTICE*, Vol. XVI., p. 304, No. 1188.

—Son covenanting to pay sister annuity  
—Death of father—Repudiation of covenant by son—Whether action lies by sister to recover upon deed.]—*DAWSON v. DAWSON* (1911), 18 O. W. R. 6; 2 O. W. N. 526; 23 O. L. R. 1.—*CAN.*

**PART VIII. SECT. 2, SUB-SECT. 1.—E.**

m. Sale of land to realise charge.]—When A. conveys land to B., in consideration of B.'s agreement to pay an annuity to C., the ct. will, upon default in payment, declare the annuity to be a charge upon the land, although

no express charge has been created, & decree a sale of the land to realise the charge.—*SPENCER v. SPENCER (Man.)* (1913), 24 W. L. R. 420; 4 W. W. R. 785; 11 D. L. R. 801.—*CAN.*

n. Equitable rentcharge.—Not recoverable unless granted by deed.]—Where land had been informally divided & part given to a person with a stipulation for an annual payment to another, the stipulation not being evidenced by deed:—*Held*: the annuity could not be recovered at law.

—*RADFORD v. MURRAY* (1852), 3 Nfld. L. R. 312.—*NFLD.*

o. Jurisdiction of Court of Chancery.—To entertain suit for arrears of annuity.]—*MANLY v. HAWKINS* (1838), 1 Dr. & Wal. 363.—*IR.*

p. Annuitant in possession—Whether entitled to powers of receiver.]—The powers of a receiver for the recovery of rents will be given to an annuitant put into possession by the ct. He will, if necessary, be allowed to proceed against the tenants on the covenants contained in the leases previously made

**Grant of administration.]—**See **EXECUTORS**, Vol. XXIII., p. 216, No. 2567.

**Equitable lien.]—**See **LIEN**, Vol. XXXII., p. 282, Nos. 591–595.

**Appointment of receiver.]—**See **RECEIVERS**, p. 36, *ante*.

#### SUB-SECT. 2.—PRACTICE.

**1001. Presumption of death of annuitant.]—**A sum of money was set apart in 1815 to answer an annuity to a woman then supposed to be resident in India but who was never afterwards heard of. In 1837 the master having certified upon presumption that she was dead but without finding when she died the ct. ordered payment of the principal money to the party entitled to it subject to the annuity. In 1842 the master having certified upon presumption that she died in 1822 & that no personal representative had been heard of the ct. ordered immediate payment to the same party of the accumulations since that time, & in 1847 it ordered payment of the rest of the fund to the same party though resident abroad upon his giving personal security to refund in case the annuitant or her personal representative should ever establish a claim.—**CUTHBERT v. PURRIER** (1847), 2 Ph. 199; 41 E. R. 918, L. C.

**1002. Proof of continuance of life of annuitant—Jurisdiction of court to order—On originating summons.]—**The ct. has no jurisdiction on an originating summons, under R. S. C., Ord. 54A, to declare what evidence ought to be furnished to a person, who has covenanted by deed to pay an annuity, is entitled to have produced as to the continuance of the life of the annuitant.—**HUNT v. MAW** (1907), 52 Sol. Jo. 58, C. A.

**1003. — Form of master's certificate.]—**It is not for a master, on an inquiry before him whether an annuitant is living or dead, either to presume the death or to state that there is no evidence before him to show whether the annuitant is living or dead. His certificate should take the form of finding that the only evidence on the point before him is the evidence mentioned in the certificate & submitting to the ct. the question whether the annuitant ought to be presumed to be living or dead, & if dead, on what date the death ought to be presumed to have taken place.—**Re LONG, MEDLICOTT v. LONG** (1915), 60 Sol. Jo. 59.

#### SECT. 3.—LACHES AND ACQUIESCENCE.

*See, generally, EQUITY*, Vol. XX., pp. 524–541.

**1004. What amounts to—Acceptance of smaller sum.]—****MILLS v. DREWITT**, No. 426, *ante*.

**1005. — — —.]—**By a separation deed the husband covenanted to pay £1,000 to a trustee

upon trust to pay the income thereof to the wife for her separate use without power of anticipation, & to pay him a further annual sum upon the same trusts. Afterwards the husband sued for a divorce. The proceedings were compromised by a deed whereby the wife & the trustee purported to release the husband from his covenant to pay the further annual sum, & the wife & a surety jointly & severally covenanted with the husband that she or any person on her behalf would not commence proceedings for compelling the husband to allow her any support, maintenance, alimony, or additional income other than the income of the £1,000. The wife lived ten years after the execution of the deed, & on each successive quarter day she received from the trustee a cheque for £10 representing the income of the £1,000 & made no claim for any additional sum. The £1,000 was not in fact invested, & the quarterly payments of £10 were found by the husband. The wife made a will directing payment of her debts & giving all her property to an adopted daughter. The legal personal representative of the wife brought this action against the husband & the trustee for the arrears of the annuity. The husband counter-claimed for damages for breach of the wife's covenant in the deed of release:—*Held*: the release of the husband's covenant being admittedly void, the conduct of the wife accepting the trustee's cheque for a smaller sum than was due did not amount either to accord & satisfaction or to such acquiescence as would prevent the wife from bringing a claim for the arrears. Her legal representative was therefore entitled to succeed in the action.—**SPRANGE v. LEE**, [1908] 1 Ch. 424; 77 L. J. Ch. 274; 98 L. T. 400, C. A.

**1006. — Failure to enforce payment.]—**An annuitant is not guilty of such laches as would disentitle her to recover arrears of her annuity merely on the ground that she has not actively enforced the performance of the duty of the trustees to pay her such annuity regularly.—*Re RIX, RIX v. RIX* (1912), 56 Sol. Jo. 573.

**1007. — — —.]—****EDWARDS v. WARDEN**, No. 762, *ante*.

**1008. Effect of—Loss of interest.]—****EDWARDS v. WARDEN**, No. 762, *ante*.

#### SECT. 4.—PROTECTION OF SECURITY.

**1009. Waste—Land converted to tillage—No fraud.]—****DARCY v. DARCY** (1668), Nels. 120; 21 E. R. 805.

**1010. — No right to restrain.]—***Qu.*: whether the grantor of an annuity, charged upon the rents & profits of an estate, with the usual demise to a trustee, has a right to cut timber for his own use

to them under the ct.—**WALCOTT v. CONDON** (1853), 5 Ir. Jur. 145.—*IR*.

**q. Appointment of receiver.]—****BEA-MISH v. AUSTEN** (1875), 9 I. R. Eq. 361.—*IR*.

#### PART VIII. SECT. 2, SUB-SECT. 2.

**r. Who may be parties—Owners of separate parcels of land.]—**Where a suit is brought to enforce the payment of an annuity issuing out of several parcels of lands, it is not necessary that all the persons interested in these lands should be made parties.—**MILLER v. VICKERS** (1876), 23 Gr. 218.—*CAN*.

**t. — Mortgagees of land—Subsequent to will creating charge.]—**In an action for arrears of an annuity &

to declare the same a charge on land, mtgees. of the land whose mtge. was subsequent to the will creating the charge & subject to the terms of it, were made defts. by the writ of summons.

with costs.—**NELSON v. COCHRANE** (1889), 13 P. R. 76.—*CAN*.

**a. — Sequestrators in possession of benefice.]—**Sequestrators in possession of a benefice, who have been appointed merely to pay curates, etc., are not necessary parties to an annuitant's bill whose annuity is charged on the benefice.—**STANNUS v. ROBINSON** (1837), 2 Jo. Ex. Ir. 498.—*IR*.

**b. Sufficiency of issues.]—**In debt

by exor. on an annuity bond made by deft. to testator, & payable during the lifetime of testator:—*Held*: the issues tendered by the replications were sufficient, & the allegations in the pleadings, set out in the case, were sufficient to warrant the assessment of damages.—**SMITH v. MUIRHEAD** (1852), 13 U. C. R. 9.—*CAN*.

**c. Restraint of vicar—Until answer filed—To bill for arrears against him.]—**A vicar having granted an annuity charged on his benefice, & being entitled to compensation for tithe arrears under the 3 & 4 Will. 4, c. 100, may be restrained from receiving them until answer has been filed to a bill filed against him to raise the arrears of the annuity.—**STANNUS v. ROBINSON** (1834), Hayes & Jo. 622.—*IR*.

*Sect. 4.—Protection of security. Part IX.*

& profit, the estate being inadequate to the payment of the charges upon it.—*FAIRFIELD v. WESTON* (1824), 2 Sim. & St. 96; 57 E. R. 282.

1011. ———.]—A plot of land was conveyed to uses to secure a rentcharge, with powers of distress & entry into receipt of the rents & profits if the rentcharge should fall into arrear, & subject thereto, to the use of defts'. predecessors in title. Defts. advertised for sale certain steamboilers & machinery on the property. The owners of the rentcharge applied for an injunction to restrain the sale. The rentcharge was not in arrear:—*Held*: the owner of a rentcharge is not in the position of a mtgee., & cannot obtain an injunction to restrain waste by the owner of the land out of which the rentcharge issues.—*SANDEMAN v. RUSHTON* (1891), 61 L. J. Ch. 136; 66 L. T. 180.

1012. *Covenant by grantor—What amounts to breach.*—An indenture recited that F. & G. were entitled to a fourth part of a colliery for a term of years; that G. was also entitled, by agreement with A., to a lease of land essential for working the colliery, & held the agreement in trust for himself & F. jointly; that P. had a power of sale upon a moiety of the colliery, for the same term, to secure an annuity, which power he was about to exercise; that F. & G. agreed to purchase the moiety, which was to be discharged from the annuity, & to grant a fresh annuity to P., payable out of the profits accruing from the working the coal, by virtue of the term in the three parts of the colliery, & the agreement. By the same indenture, after such recital, the moiety was assigned & the annuity granted; & F. & G. covenanted severally for themselves, their exors., administrators, & assigns, to pay the annuity, as above, from the profits accruing, after payment of all rates, taxes, etc., & of the rents

reserved on the term, or by the agreement; a right of entry on the premises charged, & of mtge. & sale, was given to P. on the annuity being in arrear; & F. & G. covenanted severally for themselves, their heirs, exors., & administrators, not naming assigns, to do nothing whereby the annuity might cease, determine, be impeached, or become void & of no effect, or whereby the lease by which the colliery was originally demised, or the agreement, should be forfeited, or the terms thereby created cease. P. sued in covenant on the indenture, assigning for breaches, (a) that F. & G. took a lease of the land to which G. was entitled under the agreement, in their own names, & not in trust for P., but for other persons, & forfeited & surrendered the agreement, whereby the annuity was impeached, & pltf.'s right over the land, & in the profits which would have accrued, ceased; (b) that under the land subject to the agreement there were veins of coal, the property of A., & that F. & G. took the land at a higher rent, & otherwise on worse terms, than G. was entitled to by the agreement, in order to obtain the last-mentioned coal on better terms than they otherwise could have done, whereby, etc.; (c) that F. and G. afterwards assigned the land, amongst other things, to H., whereby, etc. On general demurrer to the declaration:—*Held*: the third breach showed that the annuity was impeached; since the land in H.'s hands would not be subject to the powers of entry, mtge., & sale; H.'s interest not being that which the covenantors had under the agreement, & he appearing to come in as a purchaser, nor privy to the covenant, & not estopped by it.—*PITT v. WILLIAMS* (1830), 5 Ad. & El. 885; 111 E. R. 1402, Ex. Ch.

*Rights on compulsory purchase.*—See *COMPULSORY PURCHASE OF LAND*, Vol. XI., p. 273, Nos. 2033, 2034.

## Part IX.—Effect of Statutes of Limitation.

*See, generally, LIMITATION OF ACTIONS*, Vol. XXXII., pp. 315 *et seq.*

*Recovery of rentcharges & annuities secured on land.*—See *LIMITATION OF ACTIONS*, Vol. XXXII., pp. 323, 408, 417–420, 428, Nos. 85–88, 863, 864, 947–949, 959–973, 1030.

— *Action on collateral covenant for payment.*—See *LIMITATION OF ACTIONS*, Vol. XXXII., p. 430, Nos. 1047, 1048.

— *When time begins to run.*—See *LIMITATION OF ACTIONS*, Vol. XXXII., pp. 396, 443, Nos. 760, 1130–1135.

— *Effect of trust for payment.*—See *LIMITATION OF ACTIONS*, Vol. XXXII., pp. 430, 431, 467, 469, 470, 493, 498, 518, Nos. 1049, 1051, 1318, 1338–1344, 1539, 1592, 1761.

*Recovery of annuities payable out of personalty.*—See *LIMITATION OF ACTIONS*, Vol. XXXII., pp. 316, 417, Nos. 24, 25, 946.

*Action by grantee of void annuity for money had & received.*—See *LIMITATION OF ACTIONS*, Vol. XXXII., p. 335, No. 197.

— *When time begins to run.*—See *LIMITATION OF ACTIONS*, Vol. XXXII., pp. 335, 336, Nos. 198–200.

## REPAIRS AND IMPROVEMENTS.

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LAND IMPROVEMENT; LANDLORD AND TENANT; WATERS AND WATERCOURSES.

## REPLEVIN.

*See DISTRESS.*

## REPRESENTATION.

*See* GUARANTEE AND INDEMNITY ; INSURANCE ; MISREPRESENTATION AND FRAUD.

## REPUTATION.

*See* EVIDENCE.

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## REPUTED OWNERSHIP.

*See* BANKRUPTCY AND INSOLVENCY ; BILLS OF SALE.

## REQUISITIONS.

*See* LANDLORD AND TENANT ; SALE OF LAND.

## RES JUDICATA.

*See* CRIMINAL LAW AND PROCEDURE ; ESTOPPEL ; JUDGMENTS AND ORDERS.

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## RESCUE.

*See* CRIMINAL LAW AND PROCEDURE ; DISTRESS.

## RESERVATION.

*See* DEEDS AND OTHER INSTRUMENTS ; EASEMENTS AND PROFITS À PRENDRE ; LANDLORD AND TENANT ; SALE OF LAND.

## RESIGNATION BOND.

*See* ECCLESIASTICAL LAW.

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## RESPONDENTIA.

*See* INSURANCE ; SHIPPING AND NAVIGATION.



## RESTAURANTS.

*See* INNS AND INNKEEPERS ; INTOXICATING LIQUORS ; TRADE AND TRADE UNIONS.

## RESTITUTION OF CONJUGAL RIGHTS.

*See* CONFLICT OF LAWS ; HUSBAND AND WIFE.

## RESTITUTION OF PROPERTY.

*See* CRIMINAL LAW AND PROCEDURE ; PAWNS AND PLEDGES.

## RESTRAINT OF TRADE.

*See* DAMAGES ; TRADE AND TRADE UNIONS.

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## RESTRAINT ON ALIENATION.

*See* GIFTS ; HUSBAND AND WIFE ; PERPETUITIES ; PERSONAL PROPERTY ; REAL PROPERTY AND CHATELS REAL ; SETTLEMENTS ; TRUSTS AND TRUSTEES ; WILLS.

## RESULTING TRUSTS.

*See* CHARITIES ; GIFTS ; TRUSTS AND TRUSTEES.

## RETAINER.

*See* BARRISTERS ; SOLICITORS.

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<i>Income Tax</i> . . . . .	<i>„ INCOME TAX.</i>
<i>Land Tax</i> . . . . .	<i>„ LAND TAX.</i>
<i>Legacy Duty</i> . . . . .	<i>See ESTATE AND OTHER DEATH DUTIES.</i>
<i>Mint</i> . . . . .	<i>„ CONSTITUTIONAL LAW.</i>
<i>Succession Duty</i> . . . . .	<i>„ ESTATE AND OTHER DEATH DUTIES.</i>
<i>Super Tax</i> . . . . .	<i>„ INCOME TAX.</i>

## Part I.—Authorities Controlling the Revenue.

### SECT. 1.—THE CROWN.

As to limitations of prerogative as regards taxation, *see* CONSTITUTIONAL LAW, Vol. XI., pp. 502–504, Nos. 48, 61, 62.

1. The Crown as party to legal proceedings in revenue cases.]—“The Crown” is merely a phrase importing the legal concentration of all the subjects of the realm, whose private rights are injured by delinquents in revenue matters, & they are, in fact, the party who contend with the particular individual (GRAHAM, B.).—A.-G. v. LAMBIRTH (1818), 5 Price, 386; 146 E. R. 641.

Annotations:—*Mentd.* A.-G. v. Freer (1822), 11 Price, 183; A.-G. v. Smith, A.-G. v. Smith (1845), 4 L. T. O. S. 296.

### PART I. SECT. 2.

2i. General rule.]—It is a of the British Constitution,

in the Constitution of New Zealand, that no money can be taken out of the consolidated fund into which the revenues of the State have been paid,

### SECT. 2.—PARLIAMENT.

2. General rule.]—It is a principle of the British Constitution, inherited in the Constitution of New Zealand, that no money can be taken out of the consolidated fund into which the revenues of the state have been paid, except under a distinct authorisation by Parliament itself; a payment made without that authority is illegal & *ultra vires*, & the money, if it can be traced, can be recovered by the Govt.

An agreement made in 1913 provided, (*inter alia*), that the Minister of Railways of New Zealand, representing the Crown, should pay to applts.

except under a distinct authorisation by Parliament itself; a payment made without that authority is illegal & *ultra vires*, & the money, if it can be



*Secl. 2.—Parliament. Sects. 3 & 4. Part II. Sect. 1: Sub-sects. 1 & 2, A. & B. Sect. 2: Sub-sects. 1 & 2, A., B., C. & D. (a).]*

£7,500 when appts. granted a lease to B. & co. The making of the agreement had been authorised by an Act of 1912, which empowered the minister, without further appropriation, to pay to appts. out of the Public Works Fund such sum as might be payable in accordance with the agreement. Owing to an alteration in the scheme to which the agreement related, the minister did not require appts. to grant the lease, & it was not granted. Nevertheless the £7,500 was paid by the Minister of Railways to appts. in 1914 out of a vote included in the Public Works Schedule to the Appropriation Act for the year, & the Controller & Auditor-General passed the sum as being so payable:—*Held*: as the lease had not been granted the payment of the £7,500 was not authorised by the Act of 1912, & it was recoverable by the Govt. & could be deducted from a larger sum admittedly due to appts.—*AUCKLAND HARBOUR BOARD v. R.*, [1924] A. C. 318; 93 L. J. P. C. 126; 130 L. T. 621, P. C.

*Annotation*:—*Consol. A.-G. v. G. S. & W. Ry. of Ireland*, [1925] A. C. 754.

3. Resolution of Committee of Ways & Means — Income tax — Customs & Inland Revenue Act, 1890 (c. 8), s. 30—Deduction of tax from dividend before Act passed.]—A resolution of the Committee of the House of Commons for Ways & Means, assenting to income tax at a certain rate for the ensuing financial year, commencing Apr. 6, does not either *per se*, or after adoption by the

House of Commons, authorise the Crown to levy on the subject the tax so assented to, before the tax has been actually imposed by Act of Parliament; nor can the Bank of England, before the tax is so imposed by statute, lawfully deduct any income tax from the dividends payable by the Bank to a stockholder without the assent of the holder.

The effect of above sect. & other statutory provisions, enacted to meet the inconvenience caused by income tax being a temporary tax, when it was intended but not yet enacted that the tax should be imposed for the ensuing financial year, stated & explained.—*BOWLES v. BANK OF ENGLAND*, [1913] 1 Ch. 57; 82 L. J. Ch. 124; 108 L. T. 95; 29 T. L. R. 42; 57 Sol. Jo. 43; 6 Tax Cas. 136.

*Annotations*:—*Reid. Argyll v. I. R. Comrs.* (1913), 109 L. T. 893; *Gresham Life Assoc. Soc. v. A.-G.*, [1916] 1 Ch. 228.

*See, now*, Provisional Collection of Taxes Act, 1913 (c. 3).

### SECT. 3.—THE TREASURY.

Prerogative writs against Lords of the Treasury—*Mandamus*.—*See CROWN PRACTICE*, Vol. XVI., p. 304, Nos. 1164–1172.

### SECT. 4.—EXCHEQUER AND AUDIT DEPARTMENT.

*See Exchequer & Audit Department Acts, 1866 (c. 39); 1921 (c. 52).*

## Part II.—Authorities Collecting the Revenue.

### SECT. 1.—COMMISSIONERS AND OFFICERS OF INLAND REVENUE.

#### SUB-SECT. 1.—COMMISSIONERS.

*See Inland Revenue Regulation Act, 1890 (c. 21), ss. 1, 21, 24, 33, 35 (1); Consolidated Fund Act, 1816 (c. 98), s. 2.*

4. Right to fines, penalties & forfeitures—*Inland Revenue Regulation Act, 1890 (c. 21), s. 33—Effect on previous grant by charter to corporation.*—By above sect. "All fines, penalties, & forfeitures incurred under any Act relating to inland revenue which are not otherwise legally appropriated, shall be applied to the use of Her Majesty:—*Held*: deft. corpn. were precluded, by reason of the terms of this enactment, from claiming revenue fines to which they might otherwise have been entitled under their charters.—*A.-G. v. EXETER CORPN.*, [1911] 1 K. B. 1092; 80 L. J. K. B. 636; 104 L. T. 212; 75 J. P. 280; 27 T. L. R. 249; 5 Tax Cas. 629.

5. Right to call for security from collector—*Increased security during term of office—Taxes Management Act, 1880 (c. 19), s. 74.*—Above sect. which provides that the Board of Inland Revenue may call for security from a collector of taxes whenever it thinks fit, entitles the Board at any time during a collector's term of office to demand increased security if the Board think it desirable

to do so.—*MAXWELL v. NATHAN* (1915), 31 T. L. R. 288.

#### SUB-SECT. 2.—OFFICERS.

##### A. Powers and Duties.

6. Distress.]—A collector of taxes has no right to take a constable or other person with him into the house of a party, of whom he is about to demand the payment of arrears of taxes, & to levy a distress for such arrears, if necessary, unless he has reasonable ground for apprehending that an assault will be committed on him, or that the distress will be resisted.—*R. v. CLARK* (1835). 3 Ad. & El. 287; 4 Nev. & M. K. B. 671; 3 Nev. & M. M. C. 70; 1 Har. & W. 252; 4 L. J. M. C. 92; 111 E. R. 422.

7. —.]—*Jud. Act, 1875 (c. 77), s. 10*, does not so far assimilate the rules in the winding-up of cos. to the rules in bkpcy. as to give the collector of the Queen's taxes a right to distrain on the goods of a co. in liquidation.—*Re REGENT UNITED SERVICE STORES* (1878), 38 L. T. 130; 42 J. P. 279.

*Annotation*:—*Reid. Re Webb* (Smithfield, London), [1922] 2 Ch. 369.

8. Conduct of prosecutions.]—In prosecutions for taking game without a licence the supervisor

traced, can be recovered by the govt.—*AUCKLAND HARBOUR BOARD v. R.*, [1924] A. C. 318, P. C.—*N.Z.*

PART II. SECT. 1, SUB-SECT. 2.—A. a. *Comptroller-General.*]—The Comp-

troller-General of Customs is an "officer" within Customs Act, 1901–1910, ss. 221, 225.—*ZACHARIASSEN v. THE COMMONWEALTH* (1917), 24 C. L. R. 166.—*AUS.*

b. *Deputy treasurers.*]—Deputy

treasurers, appointed under the revenue laws in New Brunswick, are substantive revenue officers of the Crown, although appointed by the Province Treasurer, & the appointment does not terminate with the life of the Province Treasurer

of Inland Revenue for the district has a right to conduct the case, though the prosecution is not in his name; & a general authority given to him by the comrs. is sufficient compliance with Inland Revenue Regulation Act, 1890 (c. 21), s. 27.—*R. v. TURNER* (1894), 58 J. P. 320, D. C.

#### *B. Privileges.*

See Juries Act, 1870 (c. 71), s. 9.

**9. Exemption from service on jury—Employee of foreign bank.]**—A member of a firm of foreign bankers, which carries on business in London & is employed by the Inland Revenue Comrs. in the collection of income tax, on foreign dividends & is paid by poundage, is not employed by the Inland Revenue Comrs. within Juries Act, 1870 (c. 71), s. 9, & the schedule to that Act, & is not on that ground exempt from jury service.—*Ex p. VAN DRUTEN* (1913), 30 T. L. R. 198.

### SECT. 2.—COMMISSIONERS AND OFFICERS OF CUSTOMS AND EXCISE.

#### SUB-SECT. 1.—COMMISSIONERS.

See Customs Consolidation Act, 1876 (c. 36), ss. 1, 2, 3, 24, 32, 33, 37.

**10. Held strictly within jurisdiction.]**—Comrs. of excise shall be held strictly to the letter of 6 Geo. 1, c. 21, which gives them jurisdiction.—*WARWICK v. WHITE* (1722), Bumb. 106; 145 E. R. 612.

*Annotation*:—*Refd. R. v. Whitbread* (1780), 2 Doug. K. B. 549.

**Issue of prerogative writs against—Certiorari.]**—See CROWN PRACTICE, Vol. XVI., p. 418, No. 2772.  
**—Mandamus.]**—See CROWN PRACTICE, Vol. XVI., p. 305, Nos. 1174, 1175, 1178.

#### SUB-SECT. 2.—OFFICERS.

##### *A. In General.*

**11. Appointment—Insertion of name in warrant.]**—The insertion of the name of a person as collector of the assessed taxes in the warrants of the comrs. is not a sufficient appointment to that office.—*R. v. RADLEY* (1801), For. 150; 145 E. R. 1142.

—*See* Customs Consolidation Act, 1876 (c. 36), s. 3; Excise Transfer Order, 1909, r. 10.

**12. Injury to officer on duty—Defect in premises.]**—*FLINN v. MAGEE* (1898), 62 J. P. 489  
**13. Obstruction of officer—Reasonable grounds for search.]**—*R. v. AKERS*, No. 819, *post*.

**14. Search of ship—Customs & Inland Revenue Act, 1881 (c. 12), s. 12.]**—Where a person is summoned under above sect. for obstructing a customs officer in execution of his duty while on board a ship for the purpose of searching the same, the magistrate has no jurisdiction to

from whom it has proceeded.—*R. v. KERR* (1843), 4 N. B. R. (2 Kerr) 137.—CAN.

**PART II. SECT. 2, SUB-SECT. 2.—A.**  
*a. Remuneration—Commission on seizures.]*—*BOUCHARD v. R.* (1904), 24 C. L. T. 390; 9 Exch. C. R. 216.—CAN.

**PART II. SECT. 2, SUB-SECT. 2.—B.**  
*d. Liability of surety—On change of port of collector.]*—*R. v. MILLER* (1861), 30 U. C. R. 485.—CAN.

*e. Bond of collector—Liability for default of deputy collector.]*—*R. v.* 852, 2 C. P. 18.—CAN.

*f. Necessity for.]*—*CARTER v. RENDELL* (1821), 1 Nfld. L. R. 230.—NFLD.

**PART II. SECT. 2, SUB-SECT. 2.—D. (a).**

*g. Liability for goods in customs warehouse—Damage by fire.]*—The collector of customs, who has, as such, the charge of the customs warehouse, is not liable to an owner, of goods deposited therein for a loss to such goods by accidental fire, although he may have refused to open the warehouse & permit their removal during the fire; if in so refusing he has acted under a sense of duty for the general

inquire into the reasonableness or unreasonableness of the search, or to dismiss the information upon the ground that in his opinion the search was under the circumstances unreasonable, unless he finds that the search was a mere pretence for the purpose of justifying an interference or annoyance by the officer, the duty of deciding what search there shall be is by the Act imposed on the customs officer, & not on the magistrate.—*ANDERSON v. REID* (1902), 86 L. T. 713; 66 J. P. 564; 18 T. L. R. 463, D. C.

*Annotations*:—*Mentd. Wills v. McSherry*, [1913] 1 K. B. 20; *Michael v. Phillips* (1923), 93 L. J. K. B. 21.

#### *B. Fidelity Bonds.*

**15. Right of commissioners to require—At common law.]**—*Semble*: Comrs. of Customs might at common law take bonds from persons licensed by them to act as custom house agents, for the faithful conduct of such persons towards his Majesty's Customs.—*R. v. ATKINS* (1837), 2 M. & W. 289; 6 L. J. Ex. 99; 1 Jur. 199; 150 E. R. 765.

**Liability of surety.]**—See GUARANTEE, Vol. XXVI., pp. 65, 81, 82, Nos. 462, 577, 583.

#### *C. Tenure of Office.*

**16. Appointment during pleasure of Commissioners—Reduction in rank.]**—A supervisor of Inland Revenue was appointed in 1881 to hold office "during the pleasure of the Comrs. of Inland Revenue." By Inland Revenue Regulation Act, 1890 (c. 21), s. 4 (3), the Comrs. have power to reduce or discharge any such officer as they see cause.

The Comrs. directed the supervisor to collect statistics for the Board of Agriculture. The supervisor refused to comply with the order as being one which did not concern his duties as an official of Inland Revenue. The Comrs. thereupon reduced him in rank. In an action against the Comrs. to recover damages:—*Held*: no cause of action was shown, & in the exercise of the inherent jurisdiction of the ct. the action should be stayed.—*WORTHINGTON v. ROBINSON* (1896), 75 L. T. 446, C. A.

#### *D. Powers and Duties.*

##### *(a) In General.*

**17. Action for nonfeasance.]**—A collector of customs, appointed by the Comrs. under 3 & 4 Will. 4, c. 51, s. 6, to collect duties on articles coming into the kingdom, & on payment, sign bills of entry which, by sect. 18, are a warrant for delivery of such articles to the party paying, is not a mere servant of the Comrs., but a substantive & immediate officer of the Crown; & his functions, as collector, are ministerial. Therefore, he is liable in an action for nonfeasance in the exercise of his office; as for refusing to sign such bill of entry without payment of an excessive duty.—*BARRY v. ARNAUD* (1839), 10 Ad. & El. 646; 2

l. & not maliciously with intent to injure pltf., or in a negligent, wanton, or arbitrary manner.—*KIRK v. SMITH* (1843), 2 Kerr, 187.—CAN.

*h. On proof of negligence.]*—For the loss of any goods while in the custody of the customs officers the law affords no remedy, except such as the injured person may have against the officers through whose personal act or negligence the loss happens.—*CONSE & TONGAS v. R.* (1892), 3 Exch. C. R. 13.—CAN.

*k. Conduct of prosecution.]*—*LEONARD v. COGSWELL* (1867), 7 N. S. R. 121.—CAN.

*l. —.]*—*R. v. LIMERICK*, *Ex p.*

*Sect. 2.—Commissioners and officers of customs and excise: Sub-sect. 2, D. (a), (b), i. & ii., & (c).]*

*Per. & Dav.* 633; 9 L. J. Q. B. 226; 113 E. R. 245.

*Annotations:—*Reid. *Legge v. Boyd* (1845), 1 C. B. 92; *Lichfield Corp'n. v. Simpson* (1845), 9 Jur. 989; *R. v. Excise Comrs.* (1845), 9 Jur. 618; *Young v. Davis* (1862), 7 H. & N. 760.

—*See, generally, PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 62 et seq.*

(b) *Seizure of Goods.*

i. *In General.*

18. *Necessity for reasonable grounds of suspicion.*—*BRUEN v. ROE* (1665), 1 Sid. 264; 82 E. R. 1095.

*Annotations:—*Mentd. *Garland v. Carlisle* (1833), 2 Cr. & M. 31; *Fowler v. Hollins* (1872), L. R. 7 Q. B. 616.

19. *Seizure in river before landed or offered for sale.*—There is no right to seize contraband goods in the river before the goods are landed or offered to sale.—*SMYTH v. REYNOLDS* (1765), 2 Wils. 257; 95 E. R. 797.

20. *Seizure out of port to which appointed officer.*—A custom house officer has authority to seize uncustomed goods, with the carriage & horses carrying off the same, though out of the limit of the particular port of which he is denominated an officer in his deputation from the Comrs. of Customs.—*R. v. BARFOOT* (1811), 13 East, 506; 104 E. R. 467.

21. *Search warrant—Handed over for perusal—Right to regain possession.*—Excise officers went with a search warrant, & at the desire of the party gave it to him for his perusal, when he refused to return it:—*Held*: they had a right to take it from him, & even to coerce his person to obtain the possession of it, provided they used no more violence than was necessary.—*R. v. MITTON* (1827), 3 C. & P. 31; *sub nom. R. v. MILTON*, Mood. & M. 107, N. P.

22. — *Necessity for—Reasonable cause for suspicion.*—*Qu.*: whether a general writ of assistance will authorise an entry into a house, to search for uncustomed goods, there being reasonable cause to suspect such goods are there; or, whether the officer must enter & search at his peril, & be justified or not, according to the result of the search. *Semble*: at all events, the officer would not be justified, unless there was reasonable cause of suspicion.—*R. v. WATTS* (1830), 1 B. & Ad. 166; 8 L. J. O. S. K. B. 381; 109 E. R. 749.

23. *Officers search at their peril.*—*R. v. AKERS*, No. 819, *post*.

*Obstruction of officers.*—*See* Nos. 13, 14, *ante*.

*MURPHY* (N. B.) (1921), 69 D. L. R. 441; 37 Can. Crim. Cas. 344.—CAN.

m. — *R. v. GALLON* (N. B.), [1925] 4 D. L. R. 386; 44 Can. Crim. Cas. 240.—CAN.

n. *Allowance of discount for prompt payment.*—*BARROWMAN v. FADER* (1898), 31 N. S. R. (19 R. & G.) 20.—CAN.

o. — *ADAMS v. MCGILL*, [1923] 2 I. R. 98.—IR.

PART II. SECT. 2, SUB-SECT. 2.—  
D. (b) i.

p. *Search warrant—Necessity for.*—*R. v. KALLAN* (1896), 1 L. R. 19 Mad. 310.—IND.

q. *Effect of seizure—Forfeiture—On failure to claim within time.*—Where goods are seized for what appears to be a direct violation of the revenue laws relating to the customs, by which they become forfeited, they are absolutely

condemned at the end of thirty days, if no claim is properly made for them, according to 4 & 5 Will. 4. c. 39, s. 25; & after such condemnation the owner cannot bring trespass for any alleged illegality in the seizure.—*WADSWORTH v. MURPHY* (1846), 2 U. C. R. 120.—CAN.

r. — — — — — *DAME v. CARBERRY* (1853), 10 U. C. R. 374.—CAN.

t. *Seizure after passing custom house—For undervaluation.*—Where goods subject to an *ad valorem* duty have been entered at a port upon the importer's own declaration of value, which the collector had accepted & acted upon, the same goods cannot afterwards be seized by the collector of another port as having been undervalued upon their entry with the first collector.—*R. v. JAGGER* (1847), 3 U. C. R. 255.—CAN.

a. — — — — — *Goods which have passed the custom house upon importa-*

24. *Whether duty of every person employed by customs.*—Can it be said that it is the duty of every person employed in the service of the customs to seize goods? We cannot say so (*LORD TENTERDEN, C.J.*).—*R. v. EVERETT* (1828), 8 B. & C. 114; 2 Man. & Ry. K. B. 35; 1 Man. & Ry. M. O. 288; 6 L. J. O. S. M. C. 83; 108 E. R. 985.

*Annotations:—*Consd. *Edwards v. Bennett* (1829), 6 Bing. 230. *Reid. R. v. Blake* (1844), 6 Q. B. 126. *Mentd. Thibault v. Gibson* (1843), 7 Jur. 1043.

25. *Effect of seizure—Forfeiture.*—*CAWOOD v. BANCKS* (1594), Sav. 132; 123 E. R. 1054.

ii. *Liability for Wrongful Seizure.*

26. *Action of trover.*—*BRUEN v. ROE* (1665), 1 Sid. 264; 82 E. R. 1095.

*Annotations:—*Reid. *Fowler v. Hollins* (1872), L. R. 7 Q. B. 616. *Mentd. Garland v. Carlisle* (1833), 2 Cr. & M. 31.

27. — — — — — *LEGLISE v. CHAMPANTE* (1723), 2 Stra. 820; 93 E. R. 871.

*Annotation:—*Mentd. *Scott v. Godwin* (1797), 1 Bos. & P. 67.

28. — — — — — *Goods that are not imported by way of merchandise pay no duty. Trover lies against the officer who seizes & carries them away.*—*CHAPMAN v. LAMB* (1732), 2 Stra. 943; 2 Barn. K. B. 168; Kel. W. 231; 93 E. R. 957; *sub nom. LAMB v. CHAPMAN*, 2 Barn. K. B. 212.

29. — — — — — *Trover lies against a custom house officer for seizing goods not liable.*—*TINKLER v. POOLE* (1770), 5 Burr. 2657; 3 Wils. 146; 98 E. R. 396.

*Annotations:—*Reid. *Shipwick v. Blanchard* (1795), 6 Term Rep. 298. *Mentd. R. v. Edwards* (1853), 9 Exch. 32.

30. — — — — — *In May, 1837, pltf. & deft. exchanged cases for the opinion of the ct., in an action in trover for certain tobacco. The questions were, whether pltf. had tendered a proper amount of duty to the customs, & whether this action lay against deft., a collector of customs. The same question being raised in another action then pending in the Ct. of K. B., pltf. suspended proceedings till the decision of that cause in Trinity term, 1839; & that ct. having determined that the action should be conceived in case for non-feasance, & not in trover, pltf. in Michaelmas term, 1839, applied to amend, by substituting a count on a nonfeasance for his count in trover. The ct. allowed the amendment.—*LEGGE v. BOYD (1840), 6 Bing. N. C. 240; 8 Dowl. 272; 8 Scott, 502; 9 L. J. C. P. 170; 4 Jur. 271; 133 E. R. 95.

31. — — — — — *Goods lodged in customs house.*—*ETRICHE v. REVENUE OFFICER* (1720), Bunb. 67; 145 E. R. 597.

*Annotations:—*N.F. *Tinkler v. Poole* (1770), 3 Wils. 146. *Reid. Shipwick v. Blanchard* (1795), 6 Term Rep. 298.

tion, & been taken into the interior, are still liable to seizure if it should appear that they have been fraudulently undervalued, but not for defects of form, such as the want of a permit.—*WILE v. CAYLEY* (1857), 14 U. C. R. 285.—CAN.

b. *Rights of customs after seizure—Possession free from liabilities.*—When the Customs seize goods under 12 Vict. c. 4, there is no liability to the captain of the vessel for payment of freight, they take the goods without any liability attaching to them.—*BRIEN v. KENT* (1854), 4 Nfld. L. R. 46.—NFLD.

c. *Right of search—Right to break open building—Necessary authority.*—*R. v. WALSH* (1852), 7 N. B. R. (2 All.) 387.—CAN.

*Search of private residence.]*

**32. — Whether finding of commissioners can be questioned on trial.]—TERRY v. HUNTINGTON (1668), Hard. 480 ; 145 E. R. 557.**

*Annotations:—Mentd.* Gwinne v. Poole (1892), 2 Lut. App. 1560 ; Greenvelt v. Burwell (1700), 1 Ld. Raym. 454 ; Perkin v. Proctor (1768), 2 Wils. 382 ; Miller v. Searo (1777), 2 Wm. Bl. 1141 ; Brittain v. Kinnaird (1819), 1 Brod. & Bing. 432.

**33. Action of trespass.]—ETRICHE v. REVENUE OFFICER (1720), Bunb. 67 ; 145 E. R. 597.**

*Annotations:—N.F.* Tinkler v. Poole (1770), 3 Wils. 146. *Refd.* Shipwick v. Blanchard (1795), 6 Term Rep. 198.

**34. —.]—Trespass against custom house officers for entering pltf.'s house & searching for prohibited goods where they found none ; the jury find £200 damages against them, though they did very little or no damage. A new trial refused.—REDSHAW v. BROOK (1769), 2 Wils. 405 ; 95 E. R. 887.**

*Annotation:—Mentd.* Price v. Severn (1831), 7 Bing. 316.

**35. —.]—Trespass against custom house officers for entering pltf.'s house, & searching for rungoods where they found none ; jury assess £100 damages on a writ of inquiry against them, though they did little or no damage, the ct. refused to set aside the inquisition.—BRUCE v. RAWLINS (1770), 3 Wils. 61 ; 95 E. R. 934.**

*Annotations:—Mentd.* Longman v. Fenn (1791), 1 Hy. Bl. 541 ; Price v. Severn (1831), 7 Bing. 316.

**36. —. Acting under warrant of commissioners.]—Trespass against an excise officer for breaking & entering pltf.'s house, under colour of a warrant of the Comrs. of Excise, obtained upon deft.'s own information that he suspected teas were concealed in or about pltf.'s house.—BOSTOCK v. SAUNDERS (1773), 3 Wils. 434 ; 2 Wm. Bl. 912 ; 95 E. R. 1141.**

*Annotations:—Distd.* Cooper v. Booth (1785), 3 Esp. 135. *Refd.* Wood v. Chessal (1778), 2 Wm. Bl. 1254 ; R. v. Watts (1830), 1 B. & Ad. 166.

**37. —.]—An officer, acting under a warrant granted by Comrs. of Excise under 10 Geo. 1, c. 10, is not liable as a trespasser, although no goods are found, nor is it necessary for him to prove that he had reasonable grounds of suspicion.—COOPER v. BOOT (OR BOOTH) (1785), 4 Doug. K. B. 339 ; 3 Esp. 135 ; 99 E. R. 911 ; *sub nom.* BOOT v. COOPER, 4 Dow. & Ry. M. C. 538, n.**

*Annotation:—Refd.* R. v. Watts (1830), 1 B. & Ad. 166.

**38. —.]—If subsequent misbehaviour of a custom house officer, entering by lawful authority, & justified by a seizure, will make him a trespasser *ab initio*.—OLDFIELD v. LICET (1775), 2 Wm. Bl. 1001 ; 96 E. R. 589.**

*Annotation:—Refd.* Wood v. Chessal (1778), 2 Wm. Bl. 1254.

**39. — Whether finding of Commissioners can be questioned on trial.]—Condemnation of goods by the Comrs. of Excise is not conclusive evidence to a jury in an action of trespass.—HENSHAW v. PLEASANCE (1777), 2 Wm. Bl. 1174 ; 96 E. R. 692.**

*Annotations:—Refd.* Wood v. Chessal (1779), 2 Wm. Bl. 1254 ; Brittain v. Kinnaird (1819), 1 Brod. & Bing. 432.

**40. —.]—In trespass against custom house officers for taking pltf.'s goods, which had been**

returned in a deteriorated state before action brought, a verdict was found for pltf., for the difference in price between the value of the goods at the time of the seizure, & the time when they were returned. The judge certified that there was probable cause for the seizure :—*Held* : pltf. was not precluded by 28 Geo. 3, c. 37, s. 24, from taking out execution for the damages found by the jury.—LAUGHER v. BRETT (1822), 5 B. & Ald. 762 ; 1 Dow. & Ry. K. B. 417 ; 106 E. R. 1370.

**41. —.]—Pltf. having landed some goods liable to duty at the custom house, they were taken possession of by defts., who were custom house officers, for the purpose of examination, & detained by them upon a misapprehension that they were prohibited & liable to forfeiture. They were afterwards returned to pltf. :—*Held* : defts. were not liable in trespass.—JACOBSON v. BLAKE (1844), 6 Man. & G. 919 ; 7 Scott, N. R. 772 ; 13 L. J. C. P. 89 ; 2 L. T. O. S. 310 ; 8 Jur. 272 ; 134 E. R. 1164.**

**42. —.]—In trespass against two excise officers for entering pltf.'s house, there was at the close of pltf.'s case no evidence against one of defts. :—*Held* : if no further evidence was given for pltf., pltf.'s counsel must then elect to go on as to the other deft. only, & could not wait till the defence was concluded.—DAVIS v. MOSELEY (1845), 1 Car. & Kir. 710.**

**43. Action for money had & received—Recovery of payment to obtain release of goods.]—If a revenue officer seize goods as forfeited, which are not liable to seizure, & take money of the owner to release them, the latter may recover back the money in action for money had & received.—IRVING v. WILSON (1791), 4 Term Rep. 485 ; 100 E. R. 1132.**

*Annotations:—Refd.* Wallace v. Smith (1804), 5 East, 115 ; Morgan v. Palmer (1824), 2 B. & C. 729 ; Waterhouse v. Keen (1825), 4 B. & C. 200. *Mentd.* Cook v. Leonard (1827), 6 B. & C. 351 ; Butler v. Ford (1833), 1 Cr. & M. 662 ; Calvert v. Moggs (1839), 10 Ad. & El. 632 ; Mid. Ry. v. Withington L. B. (1883), 11 Q. B. D. 788.

**44. Injury to goods during transit.]—Where excise officers seized & carried away goods as a distress to satisfy a conviction for penalties under the Malt Acts, & immediately afterwards the owner released the goods by paying the penalty without demanding a return of the goods :—*Held* : the officers were not liable for injury done to the goods in carrying them back to the owner of their own accord.—HUTCHINGS v. MORRIS (1827), 6 B. & C. 464 ; 4 Dow. & Ry. M. C. 399 ; 9 Dow. & Ry. K. B. 499 ; 5 L. J. O. S. M. C. 144 ; 108 E. R. 522.**

#### (c) Arrest and Detention.

**45. Extent of power.]—Under Excise Management Act, 1827 (c. 53), s. 33, officers of excise may do all that is reasonable by way of arrest & detention for the purpose of having the matter adjudicated upon.—EVANS v. MCLOUGHLAN (1861), 4 Macq. 89 ; 4 L. T. 31 ; 25 J. P. 211 ; 7 Jur. N. S. 1253, H. L.**

#### PART II. SECT. 2, SUB-SECT. 2.— D. (b) ii.

**391. Action of trespass—Whether finding of commissioners can be questioned on trial.]—Where a claim for goods seized was brought before the comrs. of customs, under 4 Geo. 4, c. 11, & they restored the property to the claimant, without any trial or verdict passing upon the matter, but gave a certificate to the officer who had seized that there was a probable cause of seizure, such certificate however not**

being entered of record in any way :—*Held* : in trespass against the officer for the seizure, that the certificate afforded him no protection.—LEWIS v. KIRBY (1845), 1 U. C. R. 486.—CAN.

*e. Protection of collector—Right to certificate by court of probable cause of seizure.]—THE FAME (1807), Stewart, 112.—CAN.*

**1. —.]—If a revenue officer acting in the *bond fide* discharge of his duty, does an injury by mistake, either of fact or of law, he is under the**

protection of the law.—MAGRANE v. GILBOURNE (1794), Ridg. L. & S. 135, 140.—IR.

#### PART II. SECT. 2, SUB-SECT. 2.— D. (c).

*g. Necessary incident to seizure.]—It is a necessary incident to seizure of goods which have become forfeited that the offending vessel should be taken & detained for a reasonable time.—ARNOULD v. O'DWYER (1891), 7 Nfld. L. R. 554.—NFLD.*

## Part III.—Sources of Revenue.

### SECT. 1.—TREASURY BILLS.

*See, generally,* Treasury Bills Act, 1877 (c. 2); Consolidated Fund (No. 1) Act, 1912, & succeeding years; Revenue Act, 1906 (c. 20); National Debt Act, 1889 (c. 6); War Loan Acts, 1915 (c. 55), 1918 (c. 25), & War Loan (Exchange of Securities) Rules, 1917.

### SECT. 2.—EXCHEQUER BILLS AND BONDS.

*See* Exchequer Bills & Bonds Act, 1866 (c. 25); Treasury Bills Act, 1877 (c. 2); Revenue Act, 1906 (c. 20).

46. Whether "effects"—Bank of England Act, 1741 (c. 13), s. 12.]—Securities issued by Govt. as Exchequer bills, are "effects" within above Act, although from not having been signed by a person legally authorised they are not valid & legal Exchequer bills.—*R. v. ASLETT* (1804), Russ. & Ry. 67; 2 Leach, 958; 1 Bos. & P. N. R. 1; 168 E. R. 687, C. C. R.

*Annotation* :—*Mentd. R. v. Gardner* (1862), L. & Ca. 243.

47. Whether "money"—Action for money had & received.]—*DOUGAN v. BOLLAND* (1826), 5 B. & C. 622; 8 Dow. & Ry. K. B. 435; 4 L. J. O. S. K. B. 278; 108 E. R. 232.

48. Whether "government securities"—1 & 2 Vict. c. 117.]—The words "govt. security or securities" held not to apply to Exchequer bills.—*Ex p. CHAPLIN* (1839), 3 Y. & C. Ex. 397; 3 Jur. 750; 160 E. R. 756.

*Annotation* :—*Refd. Baud v. Fardell* (1855), 7 De G. M. & G. 628.

49. —. —.] — Exchequer bills are govt. securities within above Act.—*Ex p. SOUTH EASTERN RY. CO.* (1845), 9 Jur. 650.

50. Exchange of securities—Specific bequest of securities.]—Specific bequests of Exchequer Bonds & 4½ per cent. War Loan are not adeemed by their conversion by testator into 5 per cent. War Loan, for such conversion is not a purchase, but an exchange.—*Re MACARTNEY, BROOKHOUSE v. BARMAN* (1920), 36 T. L. R. 394; 64 Sol. Jo. 409.

## Part IV.—Duties on Land Values.

### SECT. 1.—MINERAL RIGHTS DUTY.

#### SUB-SECT. 1.—IN GENERAL.

*See* Finance (1909–1910) Act, 1910 (c. 8), s. 20.

51. Minerals in respect of which duty payable—Brine.]—Defts. owned land on & in which were two vertical shafts used by them for the purpose of pumping to the surface natural brine, i.e. water which had become fully saturated with salt in solution. The brine so pumped up was put by defts. to commercial use. It was impossible to ascertain whence the brine had come or where its saturation had taken place, but as there were no surface subsidences within defts.' land the inference was that the brine did not come from & had not been saturated within the boundaries of defts.' land :—*Held* : the brine was a "mineral" within Finance (1909–1910) Act, 1910 (c. 8), s. 20, & the mineral rights duty was therefore payable by defts. on the rental value of the rights so to work the brine.—*A.-G. v. SALT UNION, LTD.*, [1917] 2 K. B. 488; 86 L. J. K. B. 1026; 117 L. T. 140; 33 T. L. R. 365.

As to definition of minerals & substances therein included, *see* MINES, Vol. XXXIV., pp. 606 *et seq.*

#### SUB-SECT. 2.—ASSESSMENT AND COLLECTION OF DUTY.

##### A. Basis of Assessment.

*See* Finance (1909–1910) Act, 1910 (c. 8), s. 20; Finance Act, 1922 (c. 17), s. 26.

52. "Right to work minerals"—Lease of minerals under copyholder's land—Operating as

release of right to support.]—Resp. was the owner in fee of certain copyhold lands. In 1873 the lords of the manor granted a lease of the coal & other minerals under his land to a colliery co. By the custom of the manor the lords & their lessees were entitled to work the minerals without the consent of the copyholder so long as they did not let down or injure the surface. In 1897 resp. "demised" to the colliery co. full power & liberty to work the coal under his land, without leaving any support for the surface, at a rent measured by the quantity of coal raised :—*Held* : the so called demise was merely a release by resp. of his right to support in consideration of a money payment, & was not a lease of a "right to work minerals" within Finance (1909–1910) Act, 1910 (c. 8), s. 20 (2).—*INLAND REVENUE COMRS. v. JOICEY* (No. 2), [1913] 2 K. B. 580; 82 L. J. K. B. 784; 108 L. T. 738; 29 T. L. R. 537, C. A.

*Annotations* :—*Refd. Davies v. Powell Duffryn Steam Coal Co.* (1920), 36 T. L. R. 358; *Re Markham Main Colliery* (1925), 134 L. T. 253.

53. "Rental value"—Whether rent includes arrears of rent paid by lessee in last working year.]—By Finance (1909–1910) Act, 1910 (c. 8), s. 20, mineral rights duty is charged on the rental value of all rights to work minerals. Where the right to work the minerals is the subject of a mining lease, the rental value is the amount of rent paid by the working lessee in the last working year in respect of that right.

(1) The Marquess of Anglesey was the grantor of a mining lease at a yearly rent of £150. In the year ending Sept. 30, 1911, which was the last working year for the purposes of the case, he received from the lessees a sum of £141 5s., being

### PART IV. SECT. 1, SUB-SECT. 1.

b. Minerals in respect of which duty payable—Felsite whinstone.]—All substances obtained from the crust of the earth, other than surface soil, by

mining, quarrying, or open working are minerals in the sense of Finance (1909–1910) Act, 1910, with the exception of those substances expressly excepted in the Act; & felsite whinstone & granite, not being among the excepted

substances, are minerals, & subject to mineral rights duty.—*ANSTRUTHER'S TRUSTEES v. INLAND REVENUE, PATON v. INLAND REVENUE*, [1912] S. C. 1165.—*SCOT.*



£150 for rent up to Apr. 5, 1911, less £8 15s. deducted by the lessees in respect of income tax :—*Held*: the amount of rent paid by the working lessees was the sum of £141 5s., & not the sum of £150, & consequently the former & not the latter sum constituted the rental value upon which mineral rights duty was chargeable.

(2) The Duke of Beaufort was the grantor of a mining lease at a yearly rent of £500. In the year ending Sept. 30, 1909, which was the last working year for the purposes of the case, he received from the lessees £356 5s. in respect of three quarters' rent in arrear for the year 1907. The Act came into force on Apr. 29, 1910 :—*Held*: mineral rights duty was payable on the £356 5s. arrears of rent.—*BEAUFORT (DUKE) v. INLAND REVENUE COMRS., INLAND REVENUE COMRS. v. ANGLESEY (MARQUESS), [1913] 3 K. B. 48; sub nom. BEAUFORT (DUKE) v. INLAND REVENUE COMRS., ANGLESEY (MARQUESS) v. SAME, 82 L. J. K. B. 865; 108 L. T. 902; 29 T. L. R. 534, C. A.*

*Annotations*:—*As to* (1) *Apprvd.* *Northumberland v. I. R. Comrs., [1920] A. C. 825. Reid.* *Hill v. Kirshenstien, [1920] 3 K. B. 556; Re Fife's Settlt. Trusts, [1922] 2 Ch. 348. Generally, Reid.* *Shawo Storey v. I. R. Comrs. (1913), 109 L. T. 550.*

54. — *Whether income tax deducted from rent paid included.*—*BEAUFORT (DUKE) v. INLAND REVENUE COMRS., INLAND REVENUE COMRS. v. ANGLESEY (MARQUESS), No. 53, ante.*

55. — *Whether rent to be included if way leave for minerals not the property of person assessed.*—*Applt. demised the coal mines on her property to lessees who were also empowered to convey over roads or railways on applt.'s land coal worked by them in certain "foreign" mines, that is, mines not the property of applt. & in respect of this privilege the lessees had, by virtue of the lease, to pay a rent to applt. Some of the coal worked by the lessees in the foreign mines was brought to bank partly on applt.'s land & partly elsewhere:—Held: under Finance (1909–1910) Act, 1910 (c. 8), s. 20, in the case of a mineral way leave, mineral rights duty is payable on the amount of rent paid by the working lessee in respect of the way leave whether that relates to minerals which are the property of the person assessed or not, & therefore, mineral rights duty was payable by applt. on the rent received by her from her lessees in respect of the right to convey coal from the foreign mines over her land.—*SHAWO STOREY v. INLAND REVENUE COMRS., [1914] 1 K. B. 87; 83 L. J. K. B. 251; 109 L. T. 559; 30 T. L. R. 39; 58 Sol. Jo. 121.**

#### *B. Returns to Commissioners.*

*See Finance (1909–1910) Act, 1910 (c. 8), s. 20.*

56. *Form of.*—On a claim by pltf. for a declaration that Form 5 issued by the Comrs. of Inland Revenue under Finance (1909–1910) Act, 1910 (c. 8), s. 20, was illegal, unauthorised, & *ultra vires*, & he was under no obligation to comply with the requisitions contained therein, the Comrs., being of opinion that Form 5 could not be supported, consented to an order being made following the form made in *Dyson v. A.-G., [1912] 1 Ch. 159.—MOWBRAY (LORD) v. A.-G. (1912), 29 T. L. R. 115.*

#### SECT. 2.—INCREMENT VALUE DUTY.

*NOTE.—The above duty was repealed by Finance Act, 1920 (c. 18), s. 57, & cases thereon are not therefore included in this work.*

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#### SECT. 3.—REVERSION DUTY.

*NOTE.—The above duty was repealed by Finance Act, 1920 (c. 18), s. 57, & cases thereon are not therefore included in this work.*

#### SECT. 4.—APPEALS.

##### SUB-SECT. 1.—TO REFEREE.

*See, generally, Finance (1909–1910) Act, 1910 (c. 8), ss. 33, 34.*

57. *Who may appeal — Remainderman — Settled land—Tenant for life & trustee exercising discretion as to acceptance of provisional valuation.*—Under a will certain property, consisting of freehold land divided into numerous plots on which houses had been built & now let on leases for long terms, stood limited to trustees upon trust for E. for life, with remainder to S. in base fee. A number of provisional valuations had been made by the district surveyor under Finance (1909–10) Act, 1910 (c. 8), for the purpose of assessing the increment value duty under Finance (1909–10) Act, 1910 (c. 8). S. applied to the trustees to take measures to check the provisional valuations & for that purpose to have valuations made. E. opposed this on the ground of expense. S. then applied to the comrs. as a person interested under Finance (1909–1910) Act, 1910 (c. 8), s. 27 (5), that he might be supplied with copies of the provisional valuations, & this was promised. He then took out this summons for an order directing the trustees to have valuations made for the purpose of checking the valuations of the district surveyor. The only evidence in support of the application was an affidavit by a surveyor of standing & experience that the valuations under the Act were usually too low. The judge held that on the true construction of Finance (1909–1910) Act, 1910 (c. 8), the duty of protecting the estate in the matter of these valuations was thrown on the owner, *i.e.* in the case of settled land, the tenant for life, & not on the trustees. Under Finance (1909–1910) Act, 1910 (c. 8), s. 39, the trustees if they did interfere could charge their costs on the estate, but the ct. would not direct the trustees to take proceedings except in a case where serious injury was threatened to the estate, & in this case there was no sufficient evidence of any such threatened injury :—*Held*: in the course of their ordinary duty trustees had to exercise their discretion in such cases; the trustees in the present case had honestly exercised that discretion; & there was no reason why the ct. should interfere with it.—*Re KNOLLYS' TRUSTS, SAUNDERS v. HASLAM, [1912] 2 Ch. 357; 81 L. J. Ch. 572; 56 Sol. Jo. 632; sub nom. Re KNOLLYS' SETTLEMENT, SANDERS v. HASLAM, 107 L. T. 335, C. A.*

58. — *Person assessed.*—*ALLEN v. INLAND REVENUE COMRS., No. 59, post.*

59. *What may be appealed against—Assessability—As well as grounds of assessment.*—*Applt., whose business was that of a land developer, bought some land & cut it up into plots, which were purchased by different persons under agreements providing for the payment of the purchase-money by instalments & for the execution of conveyance on the completion of the payments. The comrs. made an assessment upon applt. for undeveloped land duty in respect of these plots of land. At the date of the assessment the purchasers were in possession of their respective plots, but not having completed their payments had not received their conveyances. Applt. appealed to a referee against the assessment on the ground that*



**Sect. 4.—Appeals: Sub-sects. 1, 2 & 3. Sect. 5. Part V. Sect. 1: Sub-sect. 1.]**

he was not the owner of the plots of land & was, therefore, not liable to pay the duty. The referee by his award declared that applt. was the owner & was liable. From this decision applt. appealed to the High Ct.:—*Held*: (1) a person upon whom an assessment for undeveloped land duty is made is entitled under Finance (1909-1910) Act, 1910 (c. 8), s. 33, to appeal against the assessment to a referee, & to appeal from the referee's decision to the High Ct. on the question whether he is the owner of the land in respect of which the assessment has been made; (2) the purchasers & not applt. were at the date of the assessment the owners of the plots of land within Finance (1909-1910) Act, 1910 (c. 8), s. 41, & that the assessment had, therefore, been wrongly made upon applt.—**ALLEN v. INLAND REVENUE COMRS.**, [1914] 1 K. B. 327; *affd.*, [1914] 2 K. B. 327; 83 L. J. K. B. 649; 110 L. T. 446; 58 Sol. Jo. 318, C. A.

*Annotations*:—*As to* (2) *Refd.* *Bodega Co. v. Martin* (1915), 113 L. T. 1091. *Generally, Mentd.* *Bradshaw v. Bird*, [1920] 3 K. B. 144; *Richards v. Pryse*, [1927] 2 K. B. 76.

**Decision of referee—Form.**—*See* Land Valuation (Referee) Rules, 1910, sched. II.

**60. — Order as to expenses.**—On the hearing of an appeal under Finance Act (1909-1910) Act, 1910 (c. 8), s. 33 (3), the referee made an order in the following terms: I order that any expenses incurred by the comrs. be paid by applt. On a motion to make this award a rule of ct.:—*Held*: the award was void for uncertainty & could not be made a rule of ct.—**SIMPSON v. INLAND REVENUE COMRS.**, [1914] 2 K. B. 842; 83 L. J. K. B. 1818; 110 L. T. 909; 30 T. L. R. 436. *Annotation*:—*Consd.* *Matthews v. I. R. Comrs.*, [1914] 3 K. B. 192.

**61. — Order as to costs.**—On the hearing of an appeal under Finance (1909-1910) Act, 1910 (c. 8), s. 33 (3), the referee made an order that the costs of applt. incidental to this appeal be borne by the comrs. On a motion to make this order a rule of ct.:—*Held*: the order was good & could be made a rule of ct.—**MATTHEWS v. INLAND REVENUE COMRS.**, [1914] 2 K. B. 192; 83 L. J. K. B. 1552; 110 L. T. 931, C. A.

**62. — Jurisdiction to order costs—Against appellant partially successful.**—Where a person

aggrieved by the decision of Comrs. of Inland Revenue as to the value of property for the purposes of estate duty appeals to a referee under Finance (1909-1910) Act, 1910 (c. 8), s. 60 (3), applt. is in the position of pltf., & notwithstanding that he is partially successful in his appeal, the referee has jurisdiction to order him to pay the costs of the appeal.—**ELLESMERE (EARL) v. INLAND REVENUE COMRS.**, [1918] 2 K. B. 735; 88 L. J. K. B. 337; 119 L. T. 568; 34 T. L. R. 560.

**SUB-SECT. 2.—TO HIGH COURT.**

*See, generally*, Finance (1909-1910) Act, 1910 (c. 8), ss. 33, 34.

**63. With what matters court will deal—Decision of referee on matters of fact.**—The ct. ought not as a rule to review his [the referee's] decision on what is in truth a question of fact (*COZENS-HARDY, M.R.*).—**INLAND REVENUE COMRS. v. CLAY, INLAND REVENUE COMRS. v. BUCHANAN**, [1914] 3 K. B. 466; 83 L. J. K. B. 1425; 111 L. T. 484; 30 T. L. R. 573; 58 Sol. Jo. 610, C. A.

*Annotation*:—*Consd.* *I. R. Comrs. v. Driver Holloway* (1917), 87 L. J. K. B. 406.

**64. — Who is owner of land assessed.**—**ALLEN v. INLAND REVENUE COMRS.**, No. 59, *ante*.

**65. — Costs of proceedings before referee.**—It is not the practice of the High Ct. upon an appeal from a decision of a referee appointed under Finance (1909-1910) Act, 1910 (c. 8), to deal with the costs of the proceedings before the referee.—**MORRISON v. INLAND REVENUE COMRS.**, [1915] 1 K. B. 716; 84 L. J. K. B. 1166; 112 L. T. 1044; 31 T. L. R. 176.

**SUB-SECT. 3.—TO COUNTY COURT.**

*See, generally*, Finance (1909-1910) Act, 1910 (c. 8), s. 33 (4), as extended by Revenue Act, 1911 (c. 2), s. 7.

**SECT. 5.—OTHER CASES.**

*See cases infra.*

**PART IV. SECT. 5.**

**k. Unearned increment duty—Valuation.**—**TOOHEY'S LTD. v. VALUER-GENERAL**, [1925] A. C. 439.—**AUB.**

**l. —**—The date in respect to which the value of land, except the first taxable value, is to be ascertained for the purposes of Unearned Increment Tax Act, 1913, is

the date of registration of the transfer, even where the transfer is made in pursuance of an agreement for sale entered into before the passing of the Act & another & intervening transfer has been given & registered after the passing of the Act.—**BREDIN v. CANADIAN NORTHERN TOWN PROPERTIES, LTD.**, [1918] 1 W. W. R. 542; 13 Alta. L. R. 225; 39 D. L. R. 20.—**CAN.**

**m. — Exemption.**—The exemp-

tion given by Unearned Increment Tax Act, 1913, s. 3 (3), is absolute, i.e. it is not limited to the first or any other transfers of the land, but entirely frees from the operation of the Act land of the character described in the sub-sect. during the continuance of the conditions giving rise to the exemption.—*Re WITT (Alta.)*, [1918] 1 W. W. R. 612.—**CAN.**

## Part V.—Customs Duties.

## SECT. 1.—LIABILITY TO DUTY.

## SUB-SECT. 1.—IN GENERAL.

See Customs Consolidation Act, 1876 (c. 36), ss. 40, 50.

66. What amounts to "landing"—Discharge of goods from one ship to another—Goods not actually on shore.]—A merchant brought eighty weights of bay salt by sea, to a haven in England, & out of the ship sold twenty weights, & discharged them to another ship in which they were transported; but the said twenty weights were never actually put on shore; & for the residue, viz. 60, he agreed for the custom, & put them upon land; & now the doubt was, upon the words of 1 Eliz. c. 11, concerning exportation, viz. sent from the wharf, quay, or other place on the land, & concerning importation, take up, discharge, & lay on land; if in this case the said twenty weights which always were water borne, & never touched the land, ought to pay custom as well inwards as outwards:—*Held*: in both the cases custom ought to be paid; for the discharging out of the ship upon the sale aforesaid amounts in law to a putting them upon the land, for in the law this is *infra corpus comitatus*; & if the law shall not be so taken, the King may be defrauded of all his

custom; & in this case, forasmuch as no custom was paid, it was resolved that the goods were forfeited, etc.—CUSTOM CASE (1582), 12 Co. Rep. 18; 77 E. R. 1299.

67. —.]—Bringing goods to shore is a putting them on land. Goods must be landed by way of merchandise to be liable to duties.—LEAK v. HOWEL (1596), Cro. Eliz. 533; Noy, 55; 78 E. R. 780.

*Annotations*:—*Consd.* Camplin v. Bullman (1761), Park. 198. *Refd.* Harvey v. Lyme Regis Corpn. (1869), L. R. 4 Exch. 260. *Menid.* Parker v. Kett (1700), 1 Ld. Raym. 658.

68. What amounts to "importation"—Arrival within limits of the port.]—It shall be deemed an importation when a ship is within the limits of the port.—LEAPER v. SMITH & ELLIOT (1721), Bunb. 79; 145 E. R. 601.

69. What amounts to "exportation."—Unless a vessel has proceeded out of the limits of the port with her cargo, it is not such an exportation of the goods as will protect the cargo from duties subsequently imposed on the exportation of goods of the same nature, although she is not only freighted & afloat, but has gone through all the formalities of clearing, etc., at the custom house & has paid the exportation duties, & all such new

## PART V. SECT. 1, SUB-SECT. 1.

68 i. What amounts to "importation."—Arrival within limits of the port.]—It has been decided over & over again, that in order to constitute an importation it is not necessary that vessels should come to a wharf. The mere fact of coming into port with goods on board is *prima facie* evidence of an importation.—THE MINNIE, Y. A. D. 65.—CAN.

68 ii. —.—]—PITTS v. O'DWYER (1891), 7 Nfld. L. R. 536.—NFLD.

n. —.—]—Whether transhipment without landing.]—LOKIMER v. R. (1862), 1 W. & W. (L.) 244.—AUS.

o. —.—]—Clearing out to Boston entering, trading & clearing out from thence to Halifax, an importation from Boston.—THE UNION (1806), Stewart, 99.—CAN.

p. —.—]—Fraudulent landing of goods by boats.]—A vessel fraudulently landing goods by means of boats shall be legally intended to have come into port under the revenue laws. Statutes relating to the revenue are not to be construed as penal Acts in proceedings against persons for smuggling goods into the province.—A. G. v. PATTERSON (1827), 1 N. B. R. (Chip.) 16.—CAN.

q. —.—]—Entering port in distress.]—A. G. v. SPAFFORD (1831), Dra. 333.—CAN.

r. —.—]—THE ACTIVE (circa 1846), Stewart, 169.—CAN.

t. —.—]—R. v. MACDONELL (1883), 1 Exch. C. R. 99.—CAN.

a. —.—]—Cattle straying over frontier—Exercise of ownership after crossing.]—Where cattle are brought to Canada for pasturage, or to a point from which they themselves may drift into Canada for pasturage, if the owner in Canada exercises any control over them, a contravention of Customs Act is complete, more especially where the control exercised is that of putting Canadian brands upon such cattle.—SPENCER BROTHERS v. R. (1906), 10 Exch. C. R. 79; 28 C. L. T. 422; *affd.* (1907), 39 S. C. R. 12.—CAN.

b. —.—]—Landing & delivery to importer.]—The time at which, under

Customs & Tariff Acts of Canada, goods for the purposes of custom duties are imported is when they are landed & delivered to the importer or to his order, or when they are taken out of warehouse, if, instead of being delivered, they have been placed in bond.—CANADA SUGAR REFINING CO. v. R. (1898), 67 L. J. P. C. 126.—CAN.

c. Liability for additional duty—Where goods landed & warehoused under bond.]—TUCKER v. DUNCAN (1866), 5 N. S. W. S. C. R. (L.) 198.—AUS.

d. Meaning of "importers."— "Importers" means not the consignees, but the owners or proprietors.—THE NANCY (1805), Stewart, 49.—CAN.

e. Goods in transit through United States—Whether deemed foreign goods.]—KINNEAR v. ROBINSON (1868), 1 Han. 559.—CAN.

f. —.—]—Teas in bond.]—CARTER, MACY & CO. v. R. (1890), 18 S. C. R. 706.—CAN.

g. Importation of parts—Liability where duty on completed article.]—GRINNELL v. R. (1888), 16 S. C. R. 119.—CAN.

h. Liability of salvaged goods—Warehoused for re-export.]—BARR v. NEWFOUNDLAND GOVERNMENT (1898), 8 Nfld. L. R. 78.—NFLD.

k. Valuation for duty—Value at time of purchase.]—The value of goods purchased by an importer in the country from which they are exported is to be ascertained for the purposes of duty at the time of purchase.—GOODE & CO., LTD. v. THRELFALL, [1918] S. A. L. R. 291.—AUS.

l. —.—]—Import of parts—Value of parts or completed article.]—R. v. AYER (J. C.) Co. (1887), 1 Exch. C. R. 232.—CAN.

m. —.—]—SHARLAND & CO., LTD. v. TRADE & CUSTOMS COMR. (1892), 11 N. Z. L. R. 557.—N.Z.

aa. —.—]—Proof of value.]—When goods are procured by purchase in the ordinary course of business, & not under any exceptional circumstances, an invoice correctly disclosing the

transaction affords the best evidence of the value of such goods for duty. In such a case the cost to him who buys the goods abroad, is, as a general rule, assumed to indicate the market value thereof. It is presumed that he buys at the ordinary market value. It is not the value at the manufactory, or place of production, but the value at the principal markets of the country, i.e. the price there paid by consumers or middlemen to dealers, that should govern. Such value for duty must be ascertained by reference to the fair market value of such or like goods, when sold in like quantity & condition for home consumption in the principal markets of the country, whence they are exported.—VACUUM OIL CO. v. R. (1890), 2 Exch. C. R. 234.—CAN.

bb. —.—]—Goods without market value in country of production.]—When the goods imported have no market value, in the usual & ordinary commercial acceptance of the term in the country of their production or manufacture, or where they have no such value for home consumption, their value for duty may be determined by reference to the fair market value for home consumption of like goods sold under like conditions.—SMITH & PATTERSON v. R. (1891), 2 Exch. C. R. 417.—CAN.

cc. Right to repayment of duty—Duty paid before legally imposed.]—SARGOOD BROTHERS v. THE COMMONWEALTH (1910), 11 C. L. R. 258.—AUS.

dd. —.—]—Whether recoverable from Crown.]—Where the dispute between the importer & the collector of customs is, whether any duty at all is payable, the importer's only remedy is to deposit the amount claimed & sue the collector within three months: he cannot maintain a petition against the Crown after paying the amount under protest.—SARGOOD v. R., M'ARTHUR v. R. (1878), 4 V. L. R. (Law) 389.—AUS.

ee. —.—]—Where waiver of prescribed remedies.]—Under C. S. C. 17, sect. 33, the only recourse against the first appraisal of the collector was an appraisal by two merchants as therein prescribed, & where an importer preferred to pay the duties exacted by

**Sect. 1.—Liability to duty: Sub-sects. 1, 2, 3 & 4.**  
**Sect. 2.]**

imposts as are laid on such goods attach while the vessel is water borne within any part of the port.—*A.-G. v. POUGETT* (1816), 2 Price, 381; 146 E. R. 130.

**70. Whether double duty payable—Carriage of goods overland from one port to another.]—BRUEN v. ROE** (1865), 1 Sid. 264; 82 E. R. 1095.  
*Annotations:—Mentd. Garland v. Carlisle* (1833), 2 Cr. & M. 31; *Fowler v. Hollins* (1872), L. R. 7 Q. B. 616.

**Prerogative of Crown—Appointment of officers to gauge imported articles.]—See CONSTITUTIONAL LAW**, Vol. XI., p. 502, No. 51.

**SUB-SECT. 2.—WHO MAY BE**

**Partner.]—See PARTNERSHIP**, Vol. XXXV., p. 373, No. 492.

**71. Factor.]—A factor for a merchant abroad must be taken to be the importer.**—*A.-G. v. WEEKS* (1726), Bunb. 223; 145 E. R. 654.  
*Annotations:—Refd. A.-G. v. Thornton* (1824), M'Cle. 600.  
*Mentd. A.-G. v. Lambirth* (1818), 5 Price, 386.

**SUB-SECT. 3.—ENTRY.**

*See Customs Consolidation Act, 1876* (c. 36), ss. 55, 57, 58, 61, 73; *Customs & Inland Revenue Act, 1881* (c. 12), s. 13; *Revenue Act, 1898* (c. 46), s. 3.

**72. Entry by bill of sight—Necessity for subsequent perfect entry.]—An entry & landing of goods by bill of sight, without perfect entry, will not protect parties from penalties making such entry & landing with a view to a fraudulent evasion of duties.**—*A.-G. v. HAWKES* (1830), 1 Cr. & J. 121; 1 Tyr. 3; 9 L. J. O. S. Ex. 17.

**73. ———.]—Deft.'s goods were provisionally landed by a bill of sight; subsequently to which, deft., by the "perfect entry," fraudulently represented the goods to be of less quantity than was actually the case:—Held: in an information against him, for knowingly harbouring goods which had been "illegally unshipped," he was liable to penalties & the goods were illegally unshipped, within the Acts of Parliament, as soon as the perfect entry was fraudulently made.**—*A.-G. v. HUREL* (1843), 11 M. & W. 585; 12 L. J. Ex. 413.

the collector:—*Held: he had no action to recover them back.*—*ROONEY v. LEWIS* (1870), 14 L. C. J. 155.—CAN.

**t. ———. Payment under protest—Right to interest on repayment.]—ROSS v. R.** (1902), 7 Exch. C. R. 287; 22 C. L. T. 86.—CAN.

**a. ———. Necessity for notice of action—Action against Minister of Finance.]—BENNING v. UNION GOVERNMENT**, [1914] App. D. 180.—S. AF.

**PART V. SECT. 1, SUB-SECT. 2.**

**b. Liability of person in possession—Unconnected with importation.]—Customs Act, 1901**, s. 233, does not impose a penalty on a person who is in possession of goods which have been unlawfully imported but who was in no way connected with their importation although he knows that they have been so imported.—*LYONS v. SMART* (1908), 6 C. L. R. 143.—AUS.

**c. ———.]—O'GRADY v. WISEMAN** (1900), Q. R. 9 Q. B. 169.—CAN.

**PART V. SECT. 1, SUB-SECT. 3.**

**d. Necessity for entry.]—No arrange-**

ment or understanding, or error of an appraiser, can relieve the importer from his statutory duty to make a "due entry."—*R. v. ZIZU NATANSON*, [1927] 3 D. L. R. 591; [1927] 2 W. W. R. 139; 48 Can. Crim. Cas. 194; 21 Sask. L. R. 518.—CAN.

**e. ———. When arising—At time of importation.]—WILSON v. CHAMBERS & CO. PROPRIETARY, LTD.**, [1926] Argus L. R. 274.—AUS.

**f. ———. Before unloading.]—R. (A.-G.) v. BRUNSKILL** (1851), 8 U. C. R. 546.—CAN.

**g. ———.]—DICKSON v. STEVENS** (1889), 31 N. B. R. 611.—CAN.

**h. Fraudulent entry—Entry at undervalue.]—An entry of goods at the custom house by invoice, in which the goods are under-valued, is presumably a fraudulent entry.**—*LYMAN v. BOUTILLIER* (1863), 7 L. C. J. 169.—CAN.

**PART V. SECT. 1, SUB-SECT. 4.**

**k. Forfeiture—For undervaluation.]—Where it appears to the Comr. of Customs that foreign goods entered at the Customs for *ad valorem* duty are in an invoice or entry produced by the**

**SUB-SECT. 4.—PENALTIES.**

*See Excise Management Act, 1827* (c. 53), ss. 67, 69; *Customs Consolidation Act, 1876* (c. 36), ss. 168, 214.

**74. Illegal unshipment—What amounts to.]—On an information for penalties on 6 Geo. 4, c. 108, s. 45, it was proved, that about two miles from shore, but within the limits of the port of Dover, as set out by Comrs. under 13 & 14 Car. 2, c. 11, s. 14, goods were transferred from a foreign vessel without payment of duties to boats which conveyed them within the low watermark:—Held: whether or not the transfer from the vessel to the boats was or was not within the United Kingdom, there was an illegal unshipment within the statute.**—*A.-G. v. TOMSETT* (1835), 2 Cr. M. & R. 170; 1 Gale, 147; 5 Tyr. 514; 4 L. J. Ex. 171.

*Annotations:—Appld. A.-G. v. Catt* (1837), 3 M. & W. 7.  
*Refd. A.-G. v. Groves* (1835), 2 Cr. M. & R. 669.

**75. ———.]—In an information on 3 & 4 Will. 4, c. 53, s. 44, the venue being laid in Middlesex, one count charged deft. with assisting & being concerned in unshipping goods liable to the duties of customs, the duties for the same not having been first paid or secured. Another count charged him with harbouring & concealing goods which had been illegally unshipped, the duties due thereon not having been first paid or secured. Other counts charged deft. with being concerned in the unshipping of goods prohibited to be imported, & which had been imported into the United Kingdom; & with harbouring goods prohibited to be imported, which had been imported, etc.**

It was proved on the trial, that deft., in England, concerted with M. a plan for smuggling tobacco into Ireland; that, in performance of such concerted plan, he took on board his vessel, on the high seas, from a cutter dispatched from Flushing for the purpose, a cargo of tobacco in illegal packages, sailed with it to Neath, in Glamorgan-shire, there took on board a quantity of culm, in order to conceal the tobacco, & sailed thence to Youghal, in Ireland, where he landed the tobacco:—*Held: deft. was properly triable in England, as having, in England, assisted & been concerned in an illegal unshipping of prohibited goods within the statute, viz. the transhipment of them from the foreign vessel to his own.*—*A.-G. v. CATT* (1837), 3 M. & W. 7; *Murp. & H.* 300; 7 L. J. Ex. 38.

**76. "Cause to be imported"—Meaning of.]—By Customs (Amendment) Act, 1859** (c. 37), s. 6,

importers undervalued, all such goods are, under Customs Act, 1890, s. 84, forfeited, or liable to be forfeited to the Crown.—*A.-G. v. JULES RENARD & CO.* (1899), 24 V. L. R. 970.—AUS.

**l. ———.]—R. v. HIBBARD** (1853), 3 C. P. 451.—CAN.

**m. ———. Goods unladen under defective entry.]—PRINCE v. COLLECTOR OF CUSTOMS, NEW SOUTH WALES** (1873), 43 L. J. P. C. 14.—AUS.

**n. ———.]—Goods unladen under a defective or improper entry, are liable to forfeiture; & any person assisting, etc., the unloading, etc., of such goods is liable to forfeit the treble value thereof.**—*GRAHAM v. POCOCK* (1870), 23 L. T. 527, P. C.—S. AF.

**o. ———. Entry false in part—Forfeiture of whole consignment.]—An entry of the Custom House declared that the packages contained articles not subject to duty; but some of them contained contraband goods:—Held: it was but one entry, & that being false as to some of the packages, the goods were not duly entered, & the whole were forfeited.**—*R. v. SIX*

any person who "shall cause to be imported goods of one denomination concealed in packages of goods of any other denomination," shall be liable to a penalty. By sect. 8, "the word importer in any Act relating to the customs is to apply to, & include, any owner or other person for the time being possessed of or beneficially interested in any goods imported":—*Held*: the interpretation of the word "importer," in sect. 8, is not to be applied to the phrase, "cause to be imported," in sect. 6; but these latter words are only applicable to a person who has ordered the goods, or otherwise in fact caused them to be imported.—*BUDENBERG v. ROBERTS* (1866), L. R. 1 C. P. 575; *Har. & Ruth*, 836; 35 L. J. M. C. 235; 15 L. T. 387; 14 W. R. 992.

**77. Action for treble value—Jury find single value.]**—Where a statute gives, by way of penalty for withholding duties double or any other multiple of the sum withheld, the sum found by the jury is to be taken as the amount due in point of fact; & it is the course of the ct. for the officer to enter the verdict for the multiplied amount of the sum found by the jury, & the ct. discharged a rule for reducing a verdict so entered to the sum found by the jury where from the evidence it appeared that the duties withheld amounted to about double that sum.—*A.-G. v. HATTON* (1824), *M'Cle.* 214; 13 Price, 476; 147 E. R. 1053.

**78. ———.]**—*A.-G. v. GOLDSTEIN* (1905), *Times*, July 26.

**79. Action for penalty—Magistrates may not mitigate.]**—The power of mitigating the penalty imposed upon an offender against the Customs Acts, given to the magistrate by Customs Consolidation Act, 1853 (c. 107), ss. 263, 280, does not apply to the case of a person who "has been detained," & taken before a magistrate, under Supplemental Customs Act, 1853 (c. 96), s. 28, for "having been found or discovered to have been on board a ship, etc., having contraband goods on board"; & in such case, upon the confession of the offender, or proof upon oath of the offence, the magistrate is bound to convict him in the full penalty of £100 imposed by sect. 28, & the offender must thereupon immediately pay the same "without any mitigation" or be committed to gaol in default.—*BOND v. JACKSON* (1869), 20 L. T. 327.

**Recovery of penalties.]**—*See* Part XIII., *post*.

## SECT. 2.—WAREHOUSING.

*See* Customs Consolidation Act, 1876 (c. 36); Spirits Act, 1880 (c. 24); & Finance Act, 1921 (c. 32), s. 20.

**BARRELS OF HAMS, SOUTHWARD, CLAIMANT** (1856), 8 N. B. R. (3 All.) 387.—*CAN.*

**p. — Landing without permit.]**—If the duties on goods be offered to a collector, & he refuses to grant a permit, either on the ground that the sum tendered is insufficient in amount, or for any other reason which may not be tenable, if the goods be afterwards landed without a permit they are liable to forfeiture, & the only remedy for the owner is by action against the collector for the injury which he may suffer by the refusal of the permit.—*MCKENZIE v. KIRBY* (1842), 6 O. S. 416.—*CAN.*

**q. — For false declaration.—Restora-**

**D. L. R. 483.—CAN.**

**r. — Of vessel.—Additional penalties or specific offences.]**—*THE GLADIATOR*, *F. A. D.* 196.—*CAN.*

**t. — Of property connected with landing & importation.—Liability of innocent owner of conveyance employed.]**

—*LORD ADVOCATE v. CROOKSHANKS* (1888), 15 R. (Ct. of Sess.) 995; 25 Sc. L. R. 705.—*SCOT.*

**a. For false declaration.—Where goods not dutiable.]**—*STEPHEN v. ABRAHAM* (1902), 27 V. L. R. 753.—*AUS.*

**b. — Of value.]**—*CUSTOMS COMR. v. LEFDALS PIANOS, LTD.* (1926), 47 N. L. R. 57.—*S. AF.*

**c. For breaking customs seals on ship's goods.—On high seas or elsewhere.]**—A penalty is incurred for the act of breaking the seals, whether on the high seas or elsewhere, which had been lawfully imposed on ship's goods in lieu of exacting payment of duties & entering an Australian port with the seals broken.—*PENINSULAR & ORIENTAL STEAM NAVIGATION CO. v. KINGSTON*, [1903] A. C. 471, P. C.—*AUS.*

**d. Whether fraudulent intention neces-**

**80. Duty of warehouse keeper—To receive goods.]**—Where private property is, by the consent of the owner, invested with a public interest or privilege for the benefit of the public, the owner can no longer deal with it as private property only, but must hold it subject to the rights of the public in the exercise of that public interest or privilege conferred for their benefit.

Where the London Dock co., having built warehouses in which wines were deposited, upon payment of such a rent as they & the owners agreed upon afterwards accepted a certificate from the Board of Treasury under 43 Geo. 3, c. 132, whereby it became lawful for the importers to lodge & secure the wines there, without paying the duties for them in the first instance; & it did not appear that there was any other place in the port of London where the importers had a right to bond their wines, though if the exclusive privilege had been extended to a few others, it does not appear that it would have varied the case:—*Held*: such a monopoly & public interest attaching upon their property; they were bound by law to receive the goods into their warehouses for a reasonable hire & reward. *Qu.*: whether, having accepted such certificate, they could afterwards repudiate it at pleasure.—*ALLNUTT v. INGLIS* (1810), 12 East, 527; 104 E. R. 206.

*Annotations:—Reid, Cochrane v. Exchange Telegraph Co.* (1896), 65 L. J. Ch. 334; *Simpson v. A.-G.*, [1904] A. C. 476. *Mentd. Lancaster Canal Co. v. Parnaby* (1839), 3 Per. & Dav. 162.

**81. Liability of warehouse keeper—Fraudulent interference with goods—Connivance of customs officer.]**—A concealment of soap in violation of 1 Geo. 1, St. 2, c. 31, may be in an entered place, & by mixing with other soap, & although done with the privity of the inferior attending officer.—*A.-G. v. BREWSTER & MORTON* (1795), 2 Anst. 560; 145 E. R. 966.

**82. Liability for illegal removal from warehouse—Removal for pretended exportation.]**—If goods prohibited from being sold in this country by 11 & 12 Will. 3, c. 10, are taken out of a warehouse, & put on board a vessel as if for exportation, but in fact with a view to be reloaded, they are liable to be seized, though no actual attempt to reload them has been made.—*WILSON v. SAUNDERS* (1798), 1 Bos. & P. 267; 126 E. R. 897.

**83. — Removal of goods not duly entered—King's warehouse.]**—3 & 4 Will. 4, c. 52, s. 20, enacts, that goods taken or delivered out of any warehouse, not having been duly entered, shall be forfeited. The King's warehouse is a warehouse within this clause. 3 & 4 Will. 4, c. 53, s. 28, if goods, which shall have been warehoused or otherwise secured for home consumption or

*sary.]*—Where unsatisfactory statements with respect to certain articles of jewelry imported into Canada were made by the owner to the Customs authorities who had seized the goods, but the ct., on a reference of the claim, found that upon the evidence before it there was no intention on the part of the claimant to evade the law, the goods were ordered to be restored to the claimant.—*GREENSPAN v. R.* (1909), 12 Exch. C. R. 254; 29 C. L. T. 712.—*CAN.*

**e. —.]**—A fraudulent intention is not necessary to render a person liable to a penalty.—*GRAHAM v. POCOCK* (1870), 19 W. R. 31, P. C.—*S. AF.*

## PART V. SECT. 2.

**1. Liability of Crown for goods lost while warehoused.]**—The Crown is not liable for the loss of any goods while the same were in the custody of the officers of Customs.—*HODGSON, SUMNER & CO., LTD. v. R.* (1915), 15 Exch. C. R. 487; 33 D. L. R. 934.—*CAN.*

**Sect. 2.—Warehousing: Sects. 3 & 4: Sub-sects. 1, 2, 3 & 4. Part VI. Sects. 1, 2 & 3.]**

exportation, shall be clandestinely removed from or out of any warehouse or place of security, they shall be forfeited. *Qu.*: whether the King's warehouse is within this clause.—*A.-G. v. VON-DIERRE* (1834), 1 Cr. M. & R. 570; 5 Tyr. 206; 4 L. J. Ex. 41.

**84.** ———.—[The King's warehouse is a warehouse within 3 & 4 Will. 4, c. 53, s. 44, prohibiting the illegal removal of goods from any warehouse or place of security in which they shall have been deposited.—*LOWE v. A.-G.* (1835), 2 Cr. M. & R. 544; 1 Gale, 249; 5 Tyr. 1133; 4 L. J. Ex. 336.

**85. Effect of warehousing—Liability of importer for payment of duty.]**—(1) The importer of goods from a foreign country is liable, on the importation, to the duties of customs payable thereon; & this liability is not affected by 3 & 4 Will. 4, c. 57, the effect of which is only to give the merchant, in the case of goods warehoused under it, time for payment of the duties until the goods are entered for home consumption.

(2) If the merchant have obtained the goods from a bonded warehouse without making any entry for home consumption, & without the duties having been paid, he is liable to an information of debt for the duties, & it is no answer to it that a custom house agent, employed by him to make the entry & pay the duties, misappropriated the money & fraudulently obtained the goods.—*A.-G. v. ANSTED* (1844), 12 M. & W. 520; 13 L. J. Ex. 101; 2 L. T. O. S. 349; 152 E. R. 1304.

*Annotations*:—*As to* (1) *Refd. Legge v. Boyu* (1845), 14 L. J. C. P. 138; *Dean v. R.* (1846), 15 M. & W. 475.

**Rights of sureties for Crown debt.]—See GUARANTEE, Vol. XXVI., p. 130, Nos. 932-936.**

**SECT. 3.—DELIVERY FROM WAREHOUSE.**

**Calculation of duty.]—See Customs Consolidation Act, 1876 (c. 36), ss. 17, 98, 99; & Revenue Act, 1903 (c. 46), ss. 2, 3.**

**Rate of duty.]—See Customs Consolidation Act, 1876 (c. 36), s. 19; Finance Act, 1900 (c. 7), s. 9; Finance Act, 1911 (c. 48), s. 3.**

**Restriction on delivery of goods from bond.]—See Finance (No. 2) Act, 1915 (c. 89), s. 15; & Finance Act, 1919 (c. 32), s. 13.**

**Recovery of increase of duty—As between vendor & purchaser.]—See Finance Act 1901 (c. 7), s. 10; SALE OF GOODS, pp. 410, 411, Nos. 449-453, *post*.**

**Contract for sale of permit to draw wine from bond—Validity.]—See CONTRACT, Vol. XII., p. 255, No. 2088.**

**Lien of vendor of goods—For duty paid.]—See LIEN, Vol. XXXII., p. 252, No. 381.**

**SECT. 4.—THE DUTIES.**

**SUB-SECT. 1.—SPIRITS.**

*See Finance Act, 1918 (c. 15); & Finance Act, 1920 (c. 18).*

**Meaning of "spirits."—See INTOXICATING LIQUORS, Vol. XXX., p. 7, Nos. 1-3.**

**PART V. SECT. 4, SUB-SECT. 1.**

**g. Meaning of "proof" strength—*Rum.*—HAMMOND v. ROBINSON** (1843), 4 N. B. R. (2 Kerr) 295.—**CAN.**

**k. Liability for improper importation—*Casks & ship below specified capacity.*—*A.-G. v. 20 CASKS OF SPIRITS, WALSH CLAIMANT* (1852), 7 N. B. R. (2 All.) 457.—**CAN.****

**l. Time allowed to importer to remove to registered premises.]—A liquor importer is entitled to sufficient time to**

**86. Meaning of "proof" strength.]—Before 1875 the word "proof" only was to be found in the Acts relating to the strength of spirits, & proof spirit means that which contains 50·76 of water, as against 49·24 of pure alcohol, that is to say, pure alcohol & water in nearly equal quantities (DAX, J.).—NEWBY v. SIMS, [1894] 1 Q. B. 478; 63 L. J. M. C. 228; 70 L. T. 105; 10 T. L. R. 206, D. C.**

*Annotations*:—*Mentd. Fortune v. Hanson*, [1896] 1 Q. B. 202; *Gould v. Rook*, *Bent v. Ormerod*, *Lee v. Bent*, *Barlow v. Noblett* (1901), 84 L. T. 719; *Jenkins v. Naden* (1919), 88 L. J. K. B. 1137.

—[*See, also, Spirits (Strength Ascertainment) Act, 1818 (c. 28), ss. 2, 3; Spirits Act, 1880 (c. 24), s. 3; Finance Act, 1907 (c. 13), s. 4.*

**87. Liability for illicit importation of spirits—Liability of ship—Customs Consolidation Act, 1876 (c. 36), ss. 42, 179—Customs Consolidation Act, 1876, Amendment Act, 1890 (c. 56), ss. 1, 2, 3.]—*A.-G.* by information alleged that deft.'s ship, a German ship exceeding 250 tons burden, being about 2,000 tons dead weight, was found within a port in the United Kingdom having on board concealed in the coal bunkers 97 gallons of spirits in packages of a size & character prohibited by Customs Consolidation Act, 1876 (c. 36), to be imported, being in bottles not packed in cases & not forming part of the cargo duly reported & in tins each of the size & content of less than 9 gallons, & that the responsible officers of the ship were implicated in the offence. The jury having found that there was an illicit importation of spirits into this country by deft.'s ship, & that a responsible officer of deft.'s ship was implicated:—**Held**: the ship must be condemned in the sum of £500, with costs against deft.—*A.-G. v. KIRSTEIN* (1923), 130 L. T. 18; 87 J. P. 151; 16 Asp. M. L. C. 242.**

**Duties on spirits.]—See, also, Customs Consolidation Act, 1876 (c. 36); Customs & Inland Revenue Act, 1879 (c. 21); Spirits Act, 1880 (c. 24); Customs & Inland Act, 1881 (c. 12); Revenue Act, 1883 (c. 55); Customs & Inland Revenue Act, 1890 (c. 8); Finance Act, 1902 (c. 7); Revenue Act, 1903 (c. 46); Revenue Act, 1906 (c. 20); Revenue Act, 1909 (c. 43).**

**SUB-SECT. 2.—CINEMATOGRAPH FILMS.**

*See Finance Act, 1925 (c. 36), s. 3.*

**88. Liability for duty—Meaning of "Cinematograph films"—Whether uncut emulsionised celluloid sheets included.]—The effect of Customs Consolidation Act, 1876 (c. 36), s. 17, is that duty is payable under Finance Act, 1925 (c. 36), s. 3 (1), on films of the width of 9½ millimetres for use in a toy cinematograph.**

But emulsionised celluloid sheets in the form of rolls 3 feet 9 inches wide, although when cut & otherwise treated they could be used in a cinematograph, are not necessarily "cinematograph films" within Finance Act, 1925 (c. 36), s. 3 (1), & therefore on importation may not be chargeable with Customs Duty under that enactment.—*PATHE OF FRANCE, LTD. v. HARRIS, SAME v. MANSBRIDGE* (1927), 137 L. T. 129; 43 T. L. R. 251, C. A.

clear the customs, pay the freight & make arrangements for hauling the liquor from the cars to his warehouse before being liable to prosecution for failing to keep it in his registered warehouse as required by the said Act.—*v. BELL (Alta.)*, [1920] 2 W. W. R. 535; 53 D. L. R. 576.—**CAN.**



89. Films not of standard width—For use in toy cinematograph.]—*PATHE OF FRANCE, LTD. v. HARRIS, SAME v. MANSBRIDGE*, No. 88, *ante*.

#### SUB-SECT. 3.—SAFEGUARDING OF INDUSTRIES.

See Safeguarding of Industries Act, 1921 (c. 47); Finance Act, 1922 (c. 17), s. 10.

90. "Compounds of thorium & cerium"—Distinguished from manufactured article of substances.]—Incandescent gas mantles being manufactured articles containing thorium & cerium need not be included in the list issued by the Board of Trade under Safeguarding of the Industries Act, 1921 (c. 47), s. 1 (5), defining the articles falling

under the general description "compounds of thorium & cerium," in the Schedule to Safeguarding of Industries Act, 1921 (c. 47), which imposes a customs duty on such articles. The expression "compounds of thorium & cerium" in that Schedule, merely mean substances made up of thorium & cerium, & not manufactured articles containing thorium & cerium.—*Re INCANDESCENT MANTLE MANUFACTURERS' ASSOCN.'S COMPLAINT* (1922), 91 L. J. K. B. 901; 127 L. T. 398; 38 T. L. R. 575, D. C.

#### SUB-SECT. 4.—OTHER CASES.

See cases *infra*.

## Part VI.—Excise Duties.

### SECT. 1.—EXCISE ENTRIES.

"Entry."—See Excise Management Act, 1827 (c. 53), s. 21; & Excise Management Act, 1834 (c. 51), s. 5.

Duty to make entry.]—See Excise Management Act, 1827 (c. 53), s. 33; & Excise Management Act, 1834 (c. 51), ss. 6, 8.

Entry by minor.]—See Excise Management Act, 1827 (c. 53), s. 20.

Entry by married woman.]—See Excise Management Act, 1841 (c. 20), s. 7.

Entry by corporation.]—See Revenue Act, 1898 (c. 46), s. 15.

91. Liability of trader—Acts of wife.]—A wife possessed authority from her husband, a paper maker, to give in his absence certain requisite excise notices & receipts, without which paper could not legally be removed from the mill, though the making it might continue. She had also paid excise duty by his authority. But it did not appear that she had any other authority from him respecting the manufacture, or to remove paper at all. She afterwards removed paper in an illegal manner & pledged it, stating that she wished to make up

a sum to pay duty with. The husband having been proceeded against for such removal:—*Held*: her former acts were evidence to be left to the jury to decide whether or not the illegal act was done by his authority.—*A.-G. v. RIDDLE* (1832), 2 Cr. & J. 493; 2 Tyr. 523; 1 L. J. Ex. 182; 149 E. R. 209. *Annotations*:—*Expld.* Lyons v. Martin (1838), 8 Ad. & El. 512. *Refd.* The Druid (1842), 1 Wm. Rob. 391.

### SECT. 2.—OFFICIAL SURVEY BOOKS.

Admissibility in evidence.]—See EVIDENCE, Vol. XXII., p. 348, Nos. 3514–3521.

### SECT. 3.—RECOVERY BACK OF DUTY PAID.

See Excise Licences Act, 1825 (c. 81), s. 22; Finance Act, 1911 (c. 48), s. 7.

Right to repayment.]—See CONTRACT, Vol. XII., p. 549, No. 4563; MISTAKE, Vol. XXXV., pp. 159, 160, No. 556.

### PART V. SECT. 4, SUB-SECT. 4.

m. Paper—Exemption of pictures (not being advertising)—Whether pictures used for advertising exempt.]—*CHANDLER & CO. v. COLLECTOR OF CUSTOMS* (1907), 4 C. L. R. 1719.—AUS.

n. Yarn—For whatever purpose used.]—*BICKFORD SMITH & CO. v. MUSGROVE* (1891), 17 V. L. R. 295.—AUS.

o. Drugs & chemicals—Insecticides—What amounts to.]—*MARKELL v. WOLLASTON* (1906), 4 C. L. R. 141.—AUS.

p. Motor cars—Driver's car with petrol driven electric generator—Trailers driven by electric motors.]—*FALKNER v. WHITTON*, [1917] A. C. 106, P. C.—AUS.

q. Molasses—Meaning of refined molasses.]—Molasses strained & filtered in a bonded warehouse so as to free them from impurities contracted in uncovered tanks, but not involving any chemical change or alteration in colour, taste, or smell, cannot be regarded as "molasses refined in bond."—*COLONIAL SUGAR REFINING CO., LTD. v. A.-G. FOR VICTORIA*, [1901] A. C. 544, P. C.—AUS.

r. Steel rails—Whether character in which used material—Temporary use for constructional purposes.]—*SINCLAIR v. R.* (1894), 4 Exch. O. R. 275.—CAN.

t. —.—The question whether imported steel rails are taxed or free

depends solely upon their weight, not upon the character of the railway track for which they are intended.—*TORONTO RY. CO. v. R.*, [1896] A. C. 551, P. C.—CAN.

a. Jute cloth.]—*DOMINION BAG CO., LTD. v. R.* (1894), 4 Exch. C. R. 311.—CAN.

b. Timber—Not shaped, planed or otherwise manufactured—Timber cut to length but requiring recutting & fitting.]—*MAGANN v. R.* (1889), 2 Exch. O. R. 64.—CAN.

c. —.—Dressed on one side only but not further manufactured.—Timber sized by saw.]—*FOSS LUMBER CO. v. R.* (1912), 47 S. C. R. 130; 23 W. L. R. 76; 8 D. L. R. 437.—CAN.

d. Ships.]—A foreign-built ship bought in the United States & brought to Canada is liable to the duty imposed by Canadian Customs Tariff Act, 1897.—*ALGOMA CENTRAL RY. CO. v. R.*, [1903] A. C. 478, P. C.—CAN.

e. —.—Shot-ship.]—*NEVILLE CANNERIES, LTD. v. THE STA MARIA (F. E. I.)* (1918), 14 D. L. R. 32.—CAN.

f. Machinery—For mining purposes—Steel tubs.]—*WESTPORT COAL CO. v. R.* (1889), 7 N. Z. L. R. 437.—N.Z.

g. —.—Iron segments of airshaft tubing.]—*TACFIRI EXTENDED COAL CO., LTD. v. R.* (1892) 11 N. Z. L. R. 436.—N.Z.

h. —.—Steam engine pump at top of mine shaft.]—*WAHI GOLD-MINING CO. LTD., v. COLLECTOR OF CUSTOMS, AUCKLAND* (1904), 24 N. Z. L. R. 349.—N.Z.

k. —.—For agricultural purposes—Manure mixer.]—*NIMMO & BLAIR v. COLLECTOR OF CUSTOMS* (1901), 21 N. Z. L. R. 109.—N.Z.

l. —.—For gold saving—Ore crusher.]—Machinery used for crushing the ore is not machinery for gold-saving purposes & is not exempt from the payment of duty.—*CHAMBERS v. COLLECTOR OF CUSTOMS* (1898), 16 N. Z. L. R. 65.—N.Z.

aa. —.—Printing machines & presses—Machine setting up matrices & casting stereotypes.]—*BRETT v. COLLECTOR OF CUSTOMS* (1898), 16 N. Z. L. R. 84.—N.Z.

bb. —.—For dairy purposes—Necessity for proof of purpose.]—*CHAMBERS & SON, LTD. v. CAMBERLAIN* (1905), 24 N. Z. L. R. 776.—N.Z.

cc. Proprietary medicines—Character determined at time of importation.]—*KEMPTHORNE PROSSER & CO.'S NEW ZEALAND DRUG CO., LTD. v. CAMBERLAIN* (1904), 24 N. Z. L. R. 205.—N.Z.

### PART VI. SECT. 3.

dd. Right to repayment—Of interest paid on arrears.]—Where a public officer of excise suffers the duties to be



*Sect. 3.—Recovery back of duty paid. Sect. 4: Sub-sects. 1, 2, 3, 4, 5 & 6. Part VII. Sects. 1 & 2: Sub-sects. 1, 2, 3, 4 & 5.]*

**92. Whether recoverable from excise officer.]—**WHITEBREAD v. BROOKSBANKS (1774), Lofft, 529; 1 Cowp. 66; 98 E. R. 783.

**93. —.]—Assumpsit for money had & received does not lie against an excise officer to recover duties received by him after 24 Geo. 3, c. 40, imposing them is repealed, if he have paid them over to his superior.—**GREENWAY v. HURD (1792), 4 Term Rep. 553; 100 E. R. 1171.

*Annotations:—***Appld.** Waterhouse v. Keen (1825), 4 B. & C. 200. **Distd.** Atlee v. Backhouse (1838), 3 M. & W. 633. **Refd.** Wallis v. Smith (1804), 1 Smith, K. B. 346; Morgan v. Palmer (1824), 2 B. & C. 729; Butler v. Ford (1833), 1 Cr. & M. 662; Calvert v. Moggs (1839), 10 Ad. & El. 632; Charrington v. Johnson (1845), 4 L. T. O. S. 398; Bradford Corp'n. v. Myers, [1916] 1 A. C. 242; Brocklebank v. R., [1925] 1 K. B. 52.

**Drawbacks & excise allowances.]—**See Part VIII., *post*.

## SECT. 4.—THE DUTIES.

### SUB-SECT. 1.—BETTING DUTY.

See Finance Act, 1926 (c. 22), ss. 15-18.

**Licence to carry on trade of bookmaker.]—**See Part VII., Sect. 3, sub-sect. 5, *post*.

### SUB-SECT. 2.—LIQUORS SUPPLIED TO CLUBS.

See Finance (1909-1910) Act, 1910 (c. 8), s. 48, & Finance Act, 1922 (c. 17), s. 9.

**Calculation of duty.]—**See CLUBS, Vol. VIII., p. 521, No. 108.

See, also, CLUBS, Vol. VIII., pp. 522, 524, Nos. 109, 123.

### SUB-SECT. 3.—MEDICINE LABELS.

See Medicines Stamp Act, 1802 (c. 56); Medicine

Stamp Act, 1812 (c. 150); Stamp Act, 1815 (c. 184), s. 54; Finance Act, 1926 (c. 22), s. 2.

**What is a proprietary medicine.]—**See MEDICINE & PHARMACY, Vol. XXXIV., p. 567, Nos. 243-245.

**"Held out or recommended to the public."]—**See MEDICINE & PHARMACY, Vol. XXXIV., pp. 567, 568, Nos. 246-251.

**Exemption from duty—"Entire without mixture or composition with any other drug or ingredient"—Mixture with starch & milk sugar.]—**See MEDICINE & PHARMACY, Vol. XXXIV., p. 567, No. 248.

**"Owner . . . first vendor."]—**See MEDICINE & PHARMACY, Vol. XXXIV., p. 568, No. 252.

**"Regular apprenticeship."]—**See MEDICINE & PHARMACY, Vol. XXXIV., p. 568, No. 253.

### SUB-SECT. 4.—RAILWAY PASSENGERS' FARES.

**Duties on passenger fares.]—**See RAILWAYS, Vol. XXXVIII., pp. 259, 260, Nos. 47-50.

**Cheap trains.]—**See CARRIERS, Vol. VIII., pp. 156-158, Nos. 1011-1026.

### SUB-SECT. 5.—SPIRITS.

See Customs Consolidation Act, 1876 (c. 36); Spirits Act, 1880 (c. 24); Customs & Inland Revenue Act, 1881 (c. 12); Customs & Inland Revenue Act, 1890 (c. 8); Revenue Act, 1898 (c. 46); Finance Act, 1902 (c. 7); Finance Act, 1918 (c. 15); Finance Act, 1920 (c. 18).

**"Spirits."]—**See INTOXICATING LIQUORS, Vol. XXX., p. 7, Nos. 1-3.

**"Proof strength."]—**See Part V., Sect. 4, sub-sect. 1, *ante*.

### SUB-SECT. 6.—OTHER CASES.

See cases *infra*.

in arrear & exacts interest on the arrear from the private party, the interest belongs to the officer or the public & the question is between them; & the private party has no reason to complain, & cannot recover the interest back again.—YOUNG & CO. v. LEVEN (1816), 4 Dow, 138.—SCOT.

**q. —.]—Payment in error.]—**LOWE v. R. (Y. T.) (1918), 17 Exch. C. R. 136; 40 D. L. R. 686.—CAN.

**r. —.]—**NATIONAL BANK OF SCOTLAND v. LORD ADVOCATE (1892), 30 Sc. L. R. 579.—SCOT.

### PART VI. SECT. 4, SUB-SECT. 6.

**t. Sales tax payable by manufacturers—Liability of master for neglect of servant to affix stamp.]—**MINISTER OF INLAND REVENUE v. HUOT (Que.) (1918), 25 R. de J. 119.—CAN.

**a. —.]—Who are "manufacturers"—Custom tailors.]—**R. v. PEDRICK & PALEN (1920), 21 Exch. C. R. 14; 59 D. L. R. 315.—CAN.

**b. —.]—Confectioners.]—**R. v. KARSON (1922), 63 D. L. R. 237; 21

Exch. C. R. 257.—CAN.

**c. —.]—Bakers.]—**R. v. DOMINION BAKERY (1923), 54 O. L. R. 656.—CAN.

**d. —.]—Job printers.]—**R. v. IRWIN PRINTING CO., LTD., [1926] Exch. C. R. 104.—CAN.

**e. —.]—]—**R. v. DOMINION PRESS, LTD., [1927] 4 D. L. R. 225; [1927] S. C. R. 583.—CAN.

**f. —.]—Classification by Minister of Customs—How far manufacturer protected thereby.]—**R. v. CHAIN PRINTERS, LTD. (Ont.), [1925] 3 D. L. R. 291.—CAN.

**g. —.]—Whether vendor liable for tax not received from purchaser.]—**R. v. WALKER & KING, LTD., [1921] 3 W. W. R. 191.—CAN.

**h. —.]—A.-G. OF CANADA v. REED, [1926] 1 D. L. R. 821; 36 B. C. R. 366.—CAN.**

**k. —.]—Liability of assignee of manufacturer receiving price of goods with tax from purchaser.]—**R. v. MCPHERSON & QUIGLEY & UNION BANK OF CANADA (Alta.), [1927] 4

D. L. R. 937; [1927] 3 W. W. R. 416.—CAN.

**l. —.]—Necessity for completion of sale.]—**R. v. DOMINION CARTRIDGE CO., LTD., [1923] Exch. C. R. 93.—CAN.

**m. —.]—Duty to furnish invoice to purchaser on all sales—Liability of vendor for tax on small sales.]—**VER-SAILLES SWEETS, LTD. v. A.-G. OF CANADA, [1924] 3 D. L. R. 884; [1924] S. C. R. 466.—CAN.

**n. —.]—Computation of tax—Wholesale & retail businesses.]—**As to the basis of computation of the tax, the excise tax regulations regarding concerns having wholesale & retail departments can apply only to concerns which had these departments in fact segregated at the time of the incidence of the tax.—R. v. DISAPPEARING PROPELLER BOAT CO., LTD. (1924), 55 O. L. R. 545.—CAN.

**o. —.]—Exemption of nursery stock—Meaning of nursery stock.]—**MINISTER OF CUSTOMS v. BRADSHAW (B. C.), [1927] 4 D. L. R. 278; [1927] 3 W. W. R. 85.—CAN.

## Part VII.—Excise Licences.

## SECT. 1.—IN GENERAL.

**Offences—Sale with license.**—*See* INTOXICATING LIQUORS, Vol. XXX., pp. 82–84, Nos. 640–647.

**—Sale & consumption contrary to terms of license.**—*See* INTOXICATING LIQUORS, Vol. XXX., p. 84, Nos. 651, 652.

## SECT. 2.—LICENCES TO MANUFACTURERS.

## SUB-SECT. 1.—BREWERS OF BEER FOR

*See* Inland Revenue Act, 1880 (c. 20); Finance (1909–10) Act, 1910 (c. 8).

**“Beer.”**—*See* FOOD & DRUGS, Vol. XXV., p. 116, Nos. 389–391; INTOXICATING LIQUORS, Vol. XXX., p. 7, Nos. 4–7.

## SUB-SECT. 2.—BREWERS OF BEER NOT FOR SALE.

*See, now,* Finance Act, 1919 (c. 32), s. 6; Finance Act, 1922 (c. 17), s. 8.

**94. Beer brewed in house below annual value—Brewer residing in house above annual value.**—By Inland Revenue Act, 1880 (c. 20), s. 33 (3), if the annual value of the house occupied by a brewer other than a brewer for sale does not exceed £10, the beer brewed by him shall not be charged with duty. Resp. brewed beer, not for sale, in a house occupied by him of an annual value not exceeding £10, & he occupied, as a residence, another house which was of greater annual value than £10:—*Held*: the exemption from duty did not apply to the beer so brewed.—*TIPPETT v. HART* (1883), 10 Q. B. D. 483; 52 L. J. M. C. 41; 48 L. T. 319; 47 J. P. 199; 31 W. R. 582, D. C.

## SUB-SECT. 3.—DISTILLERS OF SPIRIT.

*See* Spirits Act, 1880 (c. 24), & Finance (1909–10) Act, 1910 (c. 8).

**“Spirits.”**—*See* INTOXICATING LIQUORS, Vol. XXX., p. 7, Nos. 1–3.

**Offences against excise regulations as to spirits.**—*See* INTOXICATING LIQUORS, Vol. XXX., pp. 101, 102, Nos. 779–786.

**“Grogging.”**—*See* Finance Act, 1898 (c. 10), s. 4.

## SUB-SECT. 4.—MANUFACTURERS OF TOBACCO.

*See* Excise Licences Act, 1825 (c. 81); Excise Act, 1840 (c. 17); Tobacco Act, 1840 (c. 18); Tobacco Act, 1842 (c. 93); Finance Act, 1908 (c. 16).

**Prohibited ingredients.**—*See* Tobacco Act, 1842 (c. 93), ss. 1, 2; Manufactured Tobacco Act, 1863 (c. 7), s. 3; Revenue Act, 1867 (c. 90), s. 19; Customs & Inland Revenue Act, 1878 (c. 15), s. 25; & Customs & Inland Revenue Act, 1879 (c. 21), s. 27.

**Liability for excess of moisture or oil.**—*See* Customs & Inland Revenue Act, 1887 (c. 15), s. 4;

Finance Act, 1904 (c. 7), s. 3; & Oil in Tobacco Act, 1900 (c. 35), s. 1.

**Exemption from dealer's licence.**—*See* Manufactured Tobacco Act, 1863 (c. 7), s. 1; Finance Act, 1896 (c. 28), s. 6, & Finance Act, 1897 (c. 24), s. 3.

**95. Liability for excess of moisture**—“Any tobacco”—Any quantity not too small to be recognised—Customs & Inland Revenue Act, 1887 (c. 15), s. 4.—Two officers of customs & excise visited resps. (who were manufacturers of tobacco) premises & took a sample of tobacco of about 2 ounces from a “cob,” *i.e.* a small truss weighing about 5 pounds. The “cob” with several others was in a large tub which contained 60 or 70 pounds of tobacco. Each of two portions of this sample when dried at a temperature of 212° Fahrenheit was found to contain 33·7 per cent. of moisture, *i.e.* 1·7 per cent. in excess of the limit allowed by above Act. The two portions weighed about half an ounce each. The remainder of the sample was not tested. The sample did not in fact fairly represent the bulk of which it was intended to be a sample, & the tobacco in the tub as a whole did not contain more moisture than was allowed by law. The tobacco is ordinarily sold by the retailer by the ounce or half-ounce:—*Held*: resps. had committed an offence under above sect. in respect of the ounce of tobacco which was found to contain more moisture than was allowed by law, inasmuch as the words “any tobacco” covered any quantity which was not too small to be recognised, or which was large enough to be dealt in by the public.—*HALE v. MORRIS & SONS, LTD.*, [1914] 1 K. B. 313; 83 L. J. K. B. 162; 109 L. T. 875; 78 J. P. 17; 30 T. L. R. 9; 23 Cox, C. C. 666, D. C.

## SUB-SECT. 5.—MAKERS OF SACCHARINE.

*See* Finance Act, 1901 (c. 7), ss. 8, 9; Revenue Act, 1903 (c. 46), s. 2; Finance (No. 2) Act, 1915 (c. 89), s. 7; Finance Act, 1916 (c. 24), Sched. I.

**96. What constitutes “manufacture”**—Increase of sweetness of saccharine.—Appls. subjected certain “330 saccharine,” *i.e.* saccharine 330 times as sweet as sugar, to a chemical process, the result of which was that in some cases “550 saccharine,” *i.e.* saccharine 550 times as sweet as sugar, was produced, in others a mixture sweeter than 330, but not so sweet as 550 saccharine, & in a few cases a mixture less sweet than 330 saccharine:—*Held*: applts. were not manufacturing saccharine within Finance Act, 1901 (c. 7), so as to be compelled to take out the excise licence required by sect. 9 of that Act & sect. 2 of Revenue Act, 1903 (c. 46), & to obtain from an officer of Inland Revenue a book such as is prescribed by Regulation No. 633 of the Statutory Rules, 1904, inasmuch as the substance applts. dealt with was always saccharine both before & after their treatment of it.—*MCCNICOL v. PINCH*, [1906] 2 K. B. 352; 75 L. J. K. B. 741; 95 L. T. 530; 70 J. P. 438; 22 T. L. R. 654; 50 Sol. Jo. 576; 21 Cox, C. C. 299, D. C.

**Annotations**—*Apld.* *Gamble v. Jordan*, [1913] 3 K. B. 149; *Cooper v. Cook's Depositories, Guildford Corp'n. v. Brown* (1914), 13 L. G. R. 368.

## PART VII. SECT. 2, SUB-SECT. 4.

**p. Liability for possession of imitation tobacco.—Stained wood.**—*LORD ADVOCATE v. WILSON & BAXTER* (1902), 66 J. P. 263.—*SCOT.*

**Sect. 2.—Licences to manufacturers: Sub-sects. 6 & 7. Sect. 3: Sub-sects. 1, 2, 3 & 4, A. & B.; sub-sects. 5, 6, 7, 8 & 9.]**

**SUB-SECT. 6.—MAKERS OF VINEGAR.**

See Vinegar Act, 1844 (c. 25), ss. 2, 3, 4; Still Licences Act, 1846 (c. 90), s. 1; Spirits Act, 1880 (c. 24), s. 12; & Customs & Inland Revenue Act, 1889 (c. 7), s. 4.

**97. Necessity for licence—Production of vinegar—For manufacture of blacking.]—**A maker of vinegar for sale, whether as vinegar or as blacking, or as any other article not being vinegar properly so called, or pure & applicable to the common uses of vinegar, is liable to the duty of excise & the other provisions of the several statutes relating to the makers & preparers of vinegar for sale. It is not necessary to state in the information that the liquid was preparing for sale; that may be proved.—*A.-G. v. GREEN* (1817), 4 Price, 224; 146 E. R. 447.

**Annotations:—***Consol. A.-G. v. Bailey* (1846), 16 M. & W. 74. *Distd. A.-G. v. Bailey* (1847), 1 Exch. 281.

**98. ——— By tar distillers.]—**Tar distillers, necessarily making tar acid or acetous acid, in the progress of their manufacture, are therefore to be taken to be vinegar makers, within 24 Geo. 3, c. 56, s. 6, & they are thereby subjected, as such, to all the excise regulations made by the statutes passed in respect of the makers of vinegar, & are not protected by the proviso in 24 Geo. 3, c. 56, s. 6; & consequently are liable to an information for penalties for not giving the usual notice to the excise, required by 10 & 11 Will. 3, c. 21, s. 14.—*A.-G. v. HOULGRAVE* (1822), 11 Price, 217; 147 E. R. 452.

**SUB-SECT. 7.—OTHER CASES.**

See cases *infra*.

**SECT. 3.—LICENCES TO CARRY ON TRADE OR BUSINESS.**

**SUB-SECT. 1.—APPRAISERS.**

See Appraisers Licences Act, 1806 (c. 43), ss. 4–7; Revenue Act, 1845 (c. 76), s. 1, & Revenue (No. 2) Act, 1864 (c. 56), s. 6.

**99. Unlicensed appraiser—Recovery of fees.]—**Assumpsit for work & labour. Plea: that the work consisted entirely of an appraisement of personal property, which pltf. appraised in expectation of reward, without being licensed as is required by 46 Geo. 3, c. 43, s. 5:—*Held*: on special demurrer, it was not necessary to allege, with reference to sect. 5, that pltf. exercised the calling or occupation of an appraiser, or that he acted as such, within the intent & meaning of the Act, as the plea used the very words of sect. 4, that “every person who shall value or appraise,” “for or in expectation of any hire,” etc. “or reward” shall be deemed to be an appraiser; nor to negative exceptions either in a subsequent sect. of the same act & the plea was good.—*PALK v. FORCE* (1848), 12 Q. B. 666; 17 L. J. Q. B. 299; 12 L. T. O. S. 104; 12 Jur. 797; 116 E. R. 1020.

See, generally, VALUERS & APPRAISERS.

**SUB-SECT. 2.—AUCTIONEERS.**

See Excise Licences Act, 1825 (c. 81), s. 7, & Auctioneers Act, 1845 (c. 15), s. 4.

**What amounts to sale by auction.]—**See AUCTION & AUCTIONEERS, Vol. III., pp. 2, 3, Nos. 1–7.

**Scope of licence—Right of licensed auctioneer without further licence to exercise calling of appraiser or house agent.]—**See Appraisers Licences Act, 1806 (c. 43), s. 7, & Revenue (No. 1) Act, 1861 (c. 21), s. 13.

**—Sale of excisable articles.]—**See Auctioneers Act, 1845 (c. 15), s. 6, & Revenue (No. 2) Act, 1864 (c. 56), s. 14.

**100. ——— Sale of intoxicating liquors—Revenue (No. 2) Act, 1864 (c. 56), s. 14.]—**ANGEL v. ALEXANDER (1868), 2 Highmore's Excise Laws, 3rd ed. 13.

**101. ——— ——— “Same town or place.”]—**Resp., an auctioneer, as agent for T., sold certain wine at S., in the county of London. T. was duly licensed to sell intoxicating liquors in the city of London, in the same county:—*Held*: S. & the City of London are not in the same town or place within sect. 1 of above Act.—CASEY v. ROSE (1900), 82 L. T. 616; 64 J. P. 313; 44 Sol. Jo. 468; 19 Cox, C. C. 510, D. C.

**102. ——— Personal liability of auctioneer for unpaid duty.]—**A person acting as broker & auctioneer employed by the agent in England of a foreign ambassador, who has quitted this country at the termination of his embassy, to sell on his Excellency's account, certain wines, spirits, etc., by auction, which had been imported by the ambassador duty free:—*Held*: to be personally liable, as agent of all parties, to pay the duties of customs in respect of the goods so sold by him, under the circumstances of this case, where he had received the proceeds, although he had from time to time, as he received the money, paid the net amount over to his employer, the immediate agent of the vendor.—A.-G. v. THORNTON (1824), 1 M'Cl. 600; 13 Price, 805; 2 State Tr. N. S. 129; 147 E. R. 1161.

**—Sales by travelling auctioneer—Necessity for hawkers' licence.]—**See MARKETS & FAIRS, Vol. XXXIII., p. 565, Nos. 503–505, 511, 512.

**Production of licence on demand.]—**See Auctioneers Act, 1845 (c. 15), s. 8.

**Selling without licence.]—**See AUCTION & AUCTIONEERS, Vol. III., pp. 3, 4.

**Exemptions from licence.]—**See Customs & Inland Revenue Act, 1870 (c. 32), s. 5, & Auctioneers Act, 1845 (c. 15), s. 5.

**Liability for auction duty.]—**See AUCTION & AUCTIONEERS, Vol. III., p. 37, Nos. 265–268.

**SUB-SECT. 3.—BEER DEALERS.**

See Excise Act, 1860 (c. 113), s. 36; Finance (1909–1910) Act, 1910 (c. 8), sched. I., B.

**What is “beer.”]—**See INTOXICATING LIQUORS, Vol. XXX., p. 7, Nos. 5–7; & FOOD & DRUGS, Vol. XXV., pp. 116, 117.

**Liability of dealer for dilution.]—**See Customs & Inland Revenue Act, 1885 (c. 51), s. 8 (2); & FOOD & DRUGS, Vol. XXV., p. 116, No. 392.

**Offences generally.]—**See INTOXICATING LIQUORS, Vol. XXX., pp. 75 *et seq.*

**SUB-SECT. 4.—BEER RETAILERS.**

**A. “On” Licences.**

See Finance (1909–1910) Act, 1910 (c. 8), sched. I., C. Provisions applicable to Retailers Licences.

**PART VII. SECT. 2, SUB-SECT. 7.**

**a. Whether distillation from raisins permissible.]—**R. v. BANNI (1919), 16 O. W. N. 160; 31 Can. Crim. Cas. 55.—CAN.

**Possession & use of prohibited articles.]—See Finance Act, 1896 (c. 28), s. 11.**

**103. Possession of prohibited articles—Proof of intention to use.]—Held:** in error in the Exch. Ch. the keeper of a beer shop, licensed under Beerhouse Act, 1830 (c. 64), & Beerhouse Act, 1834 (c. 85), is still liable to the penalties imposed by 56 Geo. 3, c. 58, s. 2, for having in his possession any of the prohibited articles therein specified, or any article or preparation to be used as a substitute for malt or hops, & in order to render such a person liable to those penalties for having in his possession any of the articles enumerated in 56 Geo. 3, c. 58, s. 2, it is unnecessary to aver or prove, either that the party had them in his possession to be used as a substitute for malt or hops, or that he had them in his possession with any criminal intention, but where the information is for having in his possession any article not designated by name in that sect., it is necessary to show that it was intended to be used as a substitute for malt & hops in the making of beer.—*LOCKWOOD v. A.-G.* (1842), 10 M. & W. 464; 152 E. R. 552, Ex. Ch.; *affg.* S. C. *sub nom.* A.-G. v. *LOCKWOOD*, 9 M. & W. 378.

*Annotations:—Mentd. Re Turner, Ex p. Attwater* (1877), 5 Ch. D. 27; *Sherras v. De Rutzen*, [1895] 1 Q. B. 918.

**“Beer.”—See INTOXICATING LIQUORS, Vol. XXX., p. 7, Nos. 5–7, & FOOD & DRUGS, Vol. XXV., p. 116, Nos. 389–391.**

*See, generally, INTOXICATING LIQUORS, Vol. XXX., pp. 20–48.*

**Sale of intoxicating liquors in clubs.]—See CLUBS, Vol. VIII., pp. 522–524.**

#### B. “Off” Licenses.

*See Finance (1909–1910) Act, 1910 (c. 8), sched. I., C.; & Licensing (Consolidation) Act, 1910 (c. 24), s. 1.*

*See INTOXICATING LIQUORS, Vol. XXX., pp. 83, 84, Nos. 646, 647.*

#### SUB-SECT. 5.—BOOKMAKERS.

*See Finance Act, 1926 (c. 22), ss. 15–18.*

**104. Conviction under Finance Act, 1926 (c. 22)—Validity.—Previous conviction under Betting Act, 1853 (c. 119).]**—Appellant was convicted under Betting Act, 1853 (c. 119), s. 3, of keeping a betting house. Subsequently, he was convicted, in respect of the same matters, under Finance Act, 1926 (c. 22), s. 17 (1) (b), of carrying on business as a bookmaker without having in force a proper certificate:—*Held:* the second conviction was valid since it was not barred by the conviction under Betting Act, 1853 (c. 119), & since Finance Act, 1926 (c. 22), s. 17 (1) (b), applied to a bookmaker although he carried on his betting business in such circumstances as to commit an offence under Betting Acts.—*CLARK v. WESTAWAY*, [1927] 2 K. B. 597; 137 L. T. 591; 91 J. P. 159; 43 T. L. R. 786; 28 Cox, C. C. 392, D. C.

**105. —What amounts to—Judgment for penalties on information by Attorney-General.]—**A judgment for penalties on an information by the A.-G. in the High Ct. under Finance Act, 1926 (c. 22), s. 17 (1), for failure to make returns of bets is a “conviction” within Finance Act, 1926 (c. 22), s. 17 (3).—*A.-G. v. STILL* (1927), 44 T. L. R. 102.

**PART VII. SECT. 3, SUB-SECT. 6.**  
*r. Liability of game dealer—Purchase from unlicensed person—Guilty*

*knowledge.]—To warrant a conviction for buying game from an unlicensed person it is sufficient to prove that the dealer bought or obtained game*

#### SUB-SECT. 6.—GAME DEALERS.

*See Game Act, 1831 (c. 32), s. 2; Game Licences Act, 1860 (c. 90), ss. 2, 14, & Revenue (No. 2) Act, 1861 (c. 91), s. 17.*

*See GAME, Vol. XXV., pp. 389, 390, Nos. 397–406.*

#### SUB-SECT. 7.—HAWKERS.

**What is “hawking.”]**—*See MARKETS, Vol. XXXIII., pp. 564, 565.*

**Hawkers’ licences.]—See MARKETS, Vol. XXXIII., pp. 565–567.**

#### SUB-SECT. 8.—PAWNBROKERS.

*See PAWNS & PLEDGES, Vol. XXXVII., pp. 22, 23, Nos. 175–177.*

#### SUB-SECT. 9.—PLATE DEALERS.

*See Revenue Act, 1867 (c. 90).*

**106. Necessity for licence—Isolated sale of plate.]—**One, not a general trader in silver plate, who sells a piece of plate in a particular instance for a price above the value of old silver, is not therefore a vendor of plate within 31 Geo. 2, c. 32, s. 6.—*R. v. BUCKLE* (1803), 4 East, 346; 1 Smith, K. B. 49; 102 E. R. 863.

*Annotation:—Reid, Holland v. Hall* (1902), 46 Sol. Jo. 319.

**107. —Gift of gold watches as prizes—In exchange for coupons.]—**Applts. sold packets of tea each containing a coupon, & gave notice that they would give prizes, consisting, amongst other things, of gold watches, for the largest number of these coupons presented to them by persons during a certain period:—*Held:* this was a dealing in plate for which a licence was required, & applts. were, therefore, rightly convicted under Revenue Act, 1867 (c. 90), s. 3.—*SCOTT & Co. v. SOLOMON*, [1905] 1 K. B. 577; 74 L. J. K. B. 262; 92 L. T. 325; 69 J. P. 137; 53 W. R. 459; 21 T. L. R. 230; 49 Sol. Jo. 261, D. C.

**Exemption from licence—Bonâ fide traveller for licensed dealer.]—See Revenue Act, 1867 (c. 90), s. 17.**

**108. —Meaning of “bonâ fide traveller”—Sale of plate on hire-purchase system.]—**Applt., a licensed pedlar, was in the sole employ of a London firm of watchmakers & jewellers, for offering their goods on the hire-purchase system within 10 miles of Newcastle-upon-Tyne. Applt. was bound not to part with the goods except on hire-purchase agreement to be signed by the hirer. Applt. entered into such an agreement with a customer with respect to a silver watch & chain. The London firm were duly licenced to deal in plate. Applt. was not so licenced, & was convicted of dealing in plate without having a proper licence in that behalf, the justices finding, as a fact, that she was not a *bonâ fide* traveller:—*Held:* the decision of the justices was right.—*HEPPLE v. BRUMBY* (1896), 60 J. P. 792; 13 T. L. R. 38, D. C.

**109. —Whether secretary of “watch club” included.]—**A watchmaker in London, holding an excise licence to deal in plate at his place of business in London, was the proprietor of a “watch club” in a provincial town. The

from an unauthorised person, & proof of guilty knowledge is not required.—*R. v. MUIRHEAD* (1887), 61 J. P. 760.—*SCOTT.*

*Sect. 3.—Licences to carry on trade or business:*  
*Sub-sects. 9, 10, 11 & 12, A. & B.; sub-sects.*  
*13, 14, 15 & 16. Sect. 4: Sub-sects. 1 & 2.]*

secretary of the club, a clerk in the town, obtained members from among his fellow employees, receiving from each member a weekly subscription, which he forwarded to the watchmaker. A ballot was held at intervals among the members; the member who was successful at the ballot chose a watch from a catalogue of the watchmaker's goods; the secretary communicated his choice to the watchmaker & received from him a watch, which he handed over to the member. The secretary, who had no excise licence to deal in plate, was paid by the watchmaker a commission upon the amount collected by him:—*Held*: the secretary of the club was a person soliciting, taking, or receiving orders for an excisable article without having in force a proper excise licence within Inland Revenue Act, 1867 (c. 90), s. 17, & he did not come within the proviso in favour of *bonâ fide* travellers therein contained.—*KILLICK v. GRAHAM, LINTERN v. BURCHELL*, [1896] 2 Q. B. 196; 65 L. J. M. C. 180; 75 L. T. 29; 60 J. P. 534; 44 W. R. 669; 12 T. L. R. 428; 40 Sol. Jo. 517; 18 Cox, C. C. 376, D. C.

*Annotation*:—*Consol. Elias v. Dunlop*, [1906] 1 K. B. 266.

—*See, also*, Revenue Act, 1867 (c. 90), s. 4; & Customs & Inland Revenue Act, 1870 (c. 32), s. 4.

**110. Rate of duty—Sale of article over two ounces in weight—But containing less than two ounces of gold—Revenue Act, 1867 (c. 90), s. 1.**—The term “gold” as used in above Act, which imposes a duty on licences to trade in gold or silver plate, does not mean pure gold, but a mixture of pure gold & alloy; so that a goldsmith, holding a licence on the lower scale, is liable to a penalty if he sells an article as gold which weighs more than two ounces, though it does not contain two ounces of pure gold.—*YOUNG v. COOK* (1877), 3 Ex. D. 101; 47 L. J. M. C. 28; 37 L. T. 530; 41 J. P. 824; 26 W. R. 100.

#### SUB-SECT. 10.—REFRESHMENT HOUSES.

*See* INTOXICATING LIQUORS, Vol. XXX., pp. 11, 71, 72, Nos. 38–42, 566–570.

#### SUB-SECT. 11.—SPIRIT DEALERS.

*See* INTOXICATING LIQUORS, Vol. XXX., p. 10, Nos. 31–33.

#### SUB-SECT. 12.—SPIRIT RETAILERS.

##### A. “On” Licences.

*See* Finance (1909–1910) Act, 1910 (c. 8), sched. I, C.

**111. Determination of annual license value—Conclusiveness of valuation list under Valuation (Metropolis) Act, 1869 (c. 67).**—The valuation list for the time being in force under above Act is not conclusive evidence of the annual value of licensed premises for the purpose of determining the amount

of the duties on excise liquor licenses imposed by Finance (1909–1910) Act, 1910 (c. 8), s. 43: the words in sect. 44 (1) of the latter Act, “& in the determination of that value the duty on the license is not to be allowed as a deduction,” having altered the basis of valuation for that purpose.—*WRIGGLESWORTH v. R.* (1910), 104 L. T. 593; 75 J. P. 118; 27 T. L. R. 154; 9 L. G. R. 329.

*Annotation*:—*Reid, Truman, Hanbury, Buxton v. I. R. Comrs.*, [1912] 3 K. B. 377.

**112. — Profits from sale of non-intoxicants not included—Finance (1909–1910) Act, 1910 (c. 8), s. 44 (2).**—By above Act, for the purposes of sub-sect. 2 the annual license value of licensed premises shall be taken to be the amount by which the annual value of the premises as licensed premises exceeds the annual value which the premises would bear if they were not licensed premises, & “in estimating for that purpose the value as licensed premises of hotels or other premises used for purposes other than the sale of intoxicating liquor, no increased value arising from profits not derived from the sale of intoxicating liquor shall be taken into consideration”:—*Held*: (1) the *ejusdem generis* rule of construction did not apply to the words “hotels or other premises used for purposes other than the sale of intoxicating liquor,” & consequently, a public-house which derived part of its profits from the sale of non-intoxicants fell within this provision; (2) the words “increased value” meant only the extra value arising from the profits of the trade in non-intoxicants due to the fact that the trade was carried on on licensed premises, & not the total value arising from the profits of that trade.—*INLAND REVENUE COMRS. v. TRUMAN, HANBURY, BUXTON & CO., LTD.*, [1913] A. C. 650; 82 L. J. K. B. 1042; 109 L. T. 337; 77 J. P. 397; 29 T. L. R. 661; 57 Sol. Jo. 662, H. L.; *on appeal* from S. C. *sub nom.* *TRUMAN, HANBURY, BUXTON & CO., LTD. v. INLAND REVENUE COMRS.*, [1912] 3 K. B. 377, C. A.

*Annotations*:—*Generally, Reid, R. v. Customs & Excise Comrs.*, [1913] 3 K. B. 483. *Mentd. Procter v. Tarry*, [1915] 2 K. B. 242.

**To whom granted.**—*See* INTOXICATING LIQUORS, Vol. XXX., p. 25, Nos. 162–164.

**Exemption from license—Clubs.**—*See* CLUBS, Vol. VIII., pp. 522–524.

**Non-exemption from license—Proprietary clubs.**—*See* CLUBS, Vol. VIII., p. 523, Nos. 117, 118.

**Offences.**—*See, generally*, INTOXICATING LIQUORS, Vol. XXX., pp. 75 *et seq.*

##### B. “Off” Licences.

*See* Finance (1909–1910) Act, 1910 (c. 8), sched. I, C.; & *generally*, INTOXICATING LIQUORS, Vol. XXX., pp. 75 *et seq.*

#### SUB-SECT. 13.—STILL USERS.

*See* Still Licences Act, 1846 (c. 90), s. 1; & Finance (1909–1910) Act, 1910 (c. 8), s. 84 (3).

**113. Exemption from license—Still used in alkali works—Alkali, etc., Works Regulation Act, 1881 (c. 37).**—*SIDGWICK v. SUNDERLAND GAS CO.* (1893), cited in Halsbury's Laws of England, Vol. XXIV., at p. 675.

#### PART VII. SECT. 3, SUB-SECT. 13.

*Apparatus suitable for the manufacture of spirits.*—The fact of liquor having been mixed & allowed to ferment in a crock found in possession of deft. held not to be proof that the crock was “suitable for the manufacture of spirits” so as to justify a conviction under Inland Revenue Act,

R. S. C. 1906, c. 34, s. 180.—*R. v. BELLMONT, (Alta.)*, [1919] 3 W. W. R. 895.—CAN.

*a. Liability for possession of still—Without knowledge.*—A person is not guilty of having in his possession a still under Inland Revenue Act, s. 180 (c), if, though the still be on his premises, he has no knowledge of

its existence.—*R. v. CAPPAN*, [1920; 2 W. W. R. 135; 51 D. L. R. 672] 32 Can. Crim. Cas. 267; 30 Man. L. R. 316.—CAN.

*b. — Liability for double duty.*—*R. v. WEDMAN*, [1924] 3 D. L. R. 314, [1924] 2 W. W. R. 11, 611; 42 Can. Crim. Cas. 262; 20 Alta. L. R. 409.—CAN.

## SUB-SECT. 14.—“SWEETS” DEALERS.

See Finance (1909–1910) Act, 1910 (c. 8), sched. I., B.

Meaning of “sweets.”—See Finance (1909–1910) Act, 1910 (c. 8), s. 52.

See, also, INTOXICATING LIQUORS, Vol. XXX., p. 10, Nos. 32–34; & compare, *ibid.*, p. 10, No. 29.

## SUB-SECT. 15.—TOBACCO DEALERS.

See Excise Licences Act, 1825 (c. 81), s. 2, & Excise Act, 1840 (c. 17), s. 1.

114. Liability of dealer—Possession of adulterated tobacco—Without knowledge of adulteration.]—*R. v. WOODROW*, No. 821, *post*.

Exemption of tobacco manufacturer.]—See Sect. 2, sub-sect. 4, *ante*.

Exemptions.]—See Finance (1909–1910), Act, 1910 (c. 8), sched. I., D., & Excise Licences Act, 1825 (c. 81), s. 12.

## SUB-SECT. 16.—OTHER CASES.

See cases *infra*.

## SECT. 4.—LOCAL TAXATION LICENCES.

## SUB-SECT. 1.—IN GENERAL.

See Revenue Act, 1869 (c. 14); Finance Act, 1908 (c. 16), s. 6.

115. Duty to make declaration—Person having more than one establishment—One penalty only incurred.]—M. keeps assessed articles in the parish of A., but when tax is due, carried on business only in the parishes of B. & C.:—*Held*: (1) he “resided or was” in both B. & C. for the purposes of House Tax Act, 1803 (c. 161), s. 27; (2) he was liable to a penalty for not making a return of the taxable articles to the assessors of both B. & C.; (3) only one penalty was payable for both offences.—*A.-G. v. McLEAN* (1863), 1 H. & C. 750; 1 New

Rep. 290; 32 L. J. Ex. 101; 8 L. T. 113; 27 J. P. 407; 158 E. R. 1085.

Annotation:—*Mentl. Milnes v. Balc, Milnes v. Lea* (1875), L. R. 10 Q. B. 591.

116. Power of county councils & county borough councils—Institution of proceedings.]—By Finance Act, 1908 (c. 16), s. 6, & the Order in Council made in pursuance thereof dated Oct. 19, 1908, the power to levy the duties on certain local taxation licences is transferred from the Comrs. of Inland Revenue to county councils & county borough councils, & by art. 1 of the Order in Council it is provided that county councils & county borough councils “shall have . . . all powers & duties now vested in the Comrs. of Inland Revenue for carrying into execution” the enactments relating to those duties:—*Held*: no greater power was thereby transferred than that formerly possessed by the Comrs. of Inland Revenue, & inasmuch as, prior to the transfer, no proceedings at the instance of an officer of Inland Revenue in respect to these licences could be commenced without an order of the comrs., similar proceedings after the transfer could only be commenced by an officer of a county council or county borough council on being specifically authorised to do so by the council.—*JONES v. WILSON*, [1918] 2 K. B. 36; 87 L. J. K. B. 1040; 119 L. T. 45; 82 J. P. 277; 62 Sol. Jo. 653; 16 L. G. R. 614; 26 Cox, C. C. 205, D. C.

## SUB-SECT. 2.—ARMORIAL BEARINGS.

See Revenue Act, 1869 (c. 14), ss. 18 19 (1), (13), (14), (15), 22, 27.

117. What are armorial bearings—Device not being family crest.]—*ASS. TAX CASE* (No. 2,097) (1848), 13 J. P. 221.

118. ———.]—A clergyman appeals against an assessment in respect of the device of a lion engraven on his note paper, on the ground that the device is not a family crest. An engraving of the device is given. There is no scroll, but the figure is in the attitude known in heraldry as “rampant.”

## PART VII. SECT. 3, SUB-SECT. 15.

c. What constitutes possession of tobacco—Temporary control.]—A mere handling, or temporary physical control, of tobacco belonging to another does not constitute a “possession” of it within Inland Revenue Act, R. S. C. 1906, c. 51, s. 356.—*R. v. YOUNG*, [1917] 3 W. W. R. 1066; 24 B. C. R. 482.—*CAN.*

d. ——— Tobacco purchased by & in charge of manager of store.]—One in charge of a store owned by another is deemed to “have in his possession” within Inland Revenue Act, s. 356, tobacco which is in the store & which was purchased by him in his management of the business & to be responsible for it not being in packages & stamped as required by said Act.—*R. v. YET SUN*, [1920] 1 W. W. R. 816.—*CAN.*

e. ——— Possession by vendor at purchaser's request.]—A tobacco vendor who has sold tobacco to a customer & received payment therefor, but, at the customer's request, has kept the tobacco in his store & cut it up for the customer who is to return for it, has the tobacco “in his possession” within Inland Revenue Act, s. 356, forbidding a vendor to have possession of tobacco not put up in packages & stamped.—*R. (THORBURN) v. LOY WAY*, [1921] 1 W. W. R. 690.—*CAN.*

## PART VII. SECT. 3, SUB-SECT. 16.

f. Licence to sell stills.]—*Re TEL-LIER* (1892), Cout. 110.—*CAN.*

g. Licence of wholesale trader—Meaning of wholesale trader.]—*R. v. PEARSON* (1894), 3 B. C. R. 325.—*CAN.*

h. Company incorporated abroad—Trading through agent.]—A company incorporated abroad, but doing business of a continuous character within the province through agents, is liable to the payment of an annual license fee in the place where such business is carried on.—*HALIFAX CITY CORPN. v. JONES* (1896), 28 N. S. R. (16 R. & G.) 452.—*CAN.*

k. Exemption from licence—Where locally assessed—Meaning of licence.]—*YORK v. EDMONTON CITY* (1909), 2 Alta. L. R. 38.—*CAN.*

l. Telegraph company—Company not carrying on business in or from colony.]—*COMMERCIAL CABLE CO. v. A.-G. of NEWFOUNDLAND*, [1912] A. C. 820, P. C.—*NFLD.*

m. Meat preserving & freezing.]—Where butchery is one of the substantial purposes for which a meat preserving & freezing company is formed, the co. is not exempt.—*Re GEAR MEAT PRESERVING & FREEZING CO., LTD.* (1883), 2 N. Z. L. R. 30, n. (S. C.).—*N.Z.*

n. ———.]—*Re STAMP ACT, 1882, Re NEW ZEALAND REFRIGERATING CO., LTD.* (1895), 13 N. Z. L. R. 685.—*N.Z.*

o. Mining—Exemption of company formed exclusively for.]—*Re PROGRESS MINES OF NEW ZEALAND, LTD.*

(1897), 15 N. Z. L. R. 567.—*N.Z.*

p. Farming—Exemption of company formed exclusively for.]—*NEW ZEALAND FARMERS' CO-OPERATIVE DISTRIBUTING CO., LTD. v. STAMPS COMR.* (1905), 24 N. Z. L. R. 638.—*N.Z.*

## PART VII. SECT. 4, SUB-SECT. 1.

1161. Power of county councils & county borough councils—Institution of proceedings.]—*M'MILLAN v. GRANT, RIPPET v. GRANT*, [1924] S. C. (J.) 13.—*SCOT.*

q. Power of local authorities—Collectors of inland revenue superceded.]—*Re LAKE & BLAKELEY* (1877), 40 U. C. R. 102.—*CAN.*

r. ———.]—Where a municipal council is authorised by the legislature to grant a licence to carry on a particular business but not expressly authorised to attach conditions to its exercise, the fact that appt. does not or cannot fulfil conditions which the members of the municipal council think should be attached thereto, as, e.g. the personal character or racial origin of appt. or his employees, does not give the council power to refuse the licence.—*YEE CLUN v. CITY OF REGINA*, [1925] 4 D. L. R. 1015; [1925] 3 W. W. R. 714.—*CAN.*

## PART VII. SECT. 4, SUB-SECT. 2.

t. What constitutes “using” armorial bearings—Device on ring.]—*ASS. TAX*



**Sect. 4.—Local taxation licences: Sub-sects. 2 3, A., B., C., D. & E.]**

The comrs. confirm. The comrs. right.—Ass. TAX CASE (No. 2,756) (1866), 32 J. P. 42.

119. — [.]—Appl. appeals against an assessment for armorial bearings in respect of the use of an envelope having impressed thereupon a device in the nature of a crest. States that he is not in practice of using armorial bearings, & accounts for the possession of this envelope by the suggestion that it must have been a casual purchase. The comrs. confirm. Comrs. right.—Ass. TAX CASE (No. 2,803) (1868), 32 J. P. 807.

120. — Family crest of another.]—Auctioneer charged for armorial bearings, who admitted having kept & used certain articles of plate, purchased by him at sales on which was a crest. He contended that he was not liable as it was not his crest. The comrs. relieved. Comrs. wrong.—*Re PHILLIPS* (1862), 11 L. T. 189; *sub nom.* Ass. TAX CASE (No. 2,634), 28 J. P. 810.

121. What constitutes "using" armorial bearings—Crest on buttons of military servant.]—Ass. TAX CASE (No. 2,096) (1848), 13 J. P. 221.

122. — Occasional use.]—Ass. TAX CASE (No. 2,522) (1859), 23 J. P. 457.

123. — Use of college arms on note paper by member—Royal College of Veterinary Surgeons.]—Resp., who was a member of the Royal College of Veterinary Surgeons & practised as a veterinary surgeon, used note paper for his business, not private; purposes at the head of which there was a device consisting of the arms of the college stamped in black on a shield stamped in relief, the whole being enclosed in a circular device bearing the words "William Kirk, Veterinary Surgeon." Apart from such device there was nothing on the note paper to indicate that resp. was a member of the college. Resp. did not, but the college did, take out a licence under Revenue Act, 1869 (c. 14), s. 18, to wear or use armorial bearings. Upon an information against resp. for using armorial bearings without a licence, the magistrate came to the conclusion that resp. only used the device to indicate that he was a veterinary surgeon & a member of the college, & he held that for a member of the college to use the recognised armorial bearings of the college to indicate his membership thereof was not "using" armorial bearings within the meaning of Revenue Act, 1869 (c. 14), & he dismissed the information:—*Held*: resp. "used" the armorial bearings within Revenue Act, 1869 (c. 14), s. 18, & ought to have taken out a licence for that purpose.—*LONDON COUNTY COUNCIL v. KIRK*, [1912] 1 K. B. 345; 81 L. J. K. B. 278; 106 L. T. 572; 76 J. P. 122; 28 T. L. R. 182; 10 L. G. R. 225; 22 Cox, C. C. 733, D. C.

124. Who is liable—Minor—Duty paid by parent.]—An undergraduate member of a university appeals against an assessment for armorial bearings in respect of a family crest on articles his own property, on the ground that he is a minor, & that the duty on armorial bearings is paid by his father. The comrs. confirm. Comrs. right.—Ass. TAX CASE (No. 2,755) (1866), 32 J. P. 41.

125. — Ancient city guild—Revenue Act, 1869 (c. 14), s. 19 (1).]—An ancient city guild incorporated by charter is not a corpn. within above sub-sect., & therefore is not exempted from

the taking out of a licence under above Act, s. 18, in respect of the use of armorial bearings on its official note paper.—*WORSHIPFUL CO. OF PLUMBERS v. LONDON COUNTY COUNCIL* (1913), 108 L. T. 655; 77 J. P. 302; 29 T. L. R. 424; 11 L. G. R. 480; 23 Cox, C. C. 355, D. C.

**SUB-SECT. 3.—CARRIAGES AND MOTOR CARS.**

**A. What is a "Carriage."**

*See* Revenue Act, 1869 (c. 14), ss. 18, 22, 27; Customs & Inland Revenue Act, 1875 (c. 23), s. 11; Customs & Inland Revenue Act, 1888 (c. 8), s. 4; Finance Act, 1920 (c. 18), s. 13, sched. II.; Finance Act, 1921 (c. 32), ss. 13, 22, sched. I.; Finance Act, 1926 (c. 22), s. 13, sched. I.; Roads Act, 1920 (c. 72), ss. 8, 12.

126. Motor bicycle.]—A motor bicycle is, within Customs & Inland Revenue Act, 1888 (c. 8), s. 4, a "carriage" for which a licence is required, as being a carriage drawn or propelled upon a road by mechanical power.—*O'DONOGHUE v. MOON* (1904), 90 L. T. 843; 68 J. P. 349; 20 T. L. R. 495; 48 Sol. Jo. 477, D. C.

127. Car on light railway—Light Railways Act, 1896 (c. 48).]—A light railway constructed under an order made under above Act is a "railway" within Customs & Inland Revenue Act, 1888 (c. 8), s. 4, which exempts from the licence duty on "carriages" thereby imposed any carriage drawn or propelled upon a railway by steam or electricity or other mechanical power.—*A.-G. v. YORKSHIRE WOOLLEN DISTRICT ELECTRIC TRAMWAYS, LTD.*, [1907] 2 K. B. 991; 77 L. J. K. B. 33; 97 L. T. 343; 71 J. P. 506; 23 T. L. R. 712; 5 L. G. R. 1098.

128. Bath chair propelled by electricity.]—A vehicle used as a bath chair or an ambulance, propelled by electricity with one-quarter horse power, weighing 2½ hundredweight, & travelling at an average speed of about 2 miles an hour, is a motor car within Motor Car Act, 1903 (c. 36). Consequently the vehicle must be registered under Motor Car Act, 1903 (c. 36), & the driver of the vehicle must be licenced.—*ELIESON v. PARKER* (1917), 117 L. T. 276; 81 J. P. 265; 33 T. L. R. 380; 61 Sol. Jo. 559; 15 L. G. R. 531, D. C.

What is a "hackney carriage."—*See* Sub-sect. 3, F., *post*.

**B. What amounts to "Keeping."**

129. Keeping ready for use.]—Ass. TAX CASE (No. 2,138) (1849), 14 J. P. 547.

130. Keeping but not using—Carriage sold prior to taxable year.]—Ass. TAX CASE (No. 2,177) (1850), 15 J. P. 261.

131. Carriage kept for sale by coachmaker—Occasional user by owner.]—Ass. TAX CASE (No. 2,402) (1855), 20 J. P. 423.

132. — Lent to customer during repair of customer's carriage.]—Where the owner of a carriage, which has accidentally become disabled during the year for which an excise licence has been duly taken out, is accommodated by his coachbuilder, during the repair of such carriage, with the use of another carriage without any payment, the coachbuilder is not required to take out a licence in respect of such carriage so lent.—

CASE (No. 684) (1848), 13 J. P. 539.  
—*SCOT*.

a. — [.]—*MILLIGAN v. COWAN* (1896), 60 J. P. 378.—*SCOT*.

b. — *Escutcheon on railway car-*

*riage & seal.*]—Ass. TAX CASE (No. 751) (1849), 14 J. P. 593.—*SCOT*.

PART VII. SECT. 4, SUB-SECT. 3.—A.

c. Trailers of road train—Trailers

*driven by electric motors—Power supplied by first vehicle of train.*]—*FALKNER v. WHITTON* (1916), 22 C. L. R. 824.—*AUS*.

DAVEY v THOMPSON (1886), 54 L. T. 495; 50 J. P. 260; 84 W. R. 411; 2 T. L. R. 420, D. C. *Annotation*.—*Reid*. L. O. C. v. Fairbank, [1911] 2 K. B. 32.

133. *User for purpose of selling.*—*Ass. TAX CASE* (No. 2,501) (1857), 22 J. P. 692.

134. *User on single occasion.*—*Ass. TAX CASE* (No. 2,478) (1857), 22 J. P. 466.

135. *Spare carriage kept in reserve.*—A cab proprietor who has in reserve in his yard a number of spare cabs ready for use & intended to be used if & when occasion requires does not “keep” them within Revenue Act, 1869 (c. 14), s. 27, until he in fact begins to use them.—*LONDON COUNTY COUNCIL v. FAIRBANK*, [1911] 2 K. B. 32; 80 L. J. K. B. 1032; 105 L. T. 46; 75 J. P. 356; 9 L. G. R. 549.

#### C. Who Liable for Duty.

136. *Carriage hired by the day.*—*Ass. TAX CASE* (No. 2,024) (1847), 12 J. P. 727.

137. *Hire for less than one year—Carriage let on hire purchase.*—By sect. 27 of 32 & 33 Vict. c. 14, a penalty of £20 is imposed upon a person keeping a carriage without a licence; & by section 11 of 38 & 39 Vict. c. 23, “every person who shall let any carriage for hire for any period less than one year shall for the purpose of 32 & 33 Vict. c. 14, be deemed to be the person keeping such carriage.” *Resp.*, a coachbuilder by an agreement in writing, let to R. two clarence cabs on hire at 30s. per week, payable weekly, the cabs to be the property of R. if he regularly paid the 30s. for seventy-five weeks consecutively, & an additional £5 at the expiration of that period; but it was stipulated that if R. should omit to make any of the weekly payments as agreed, *resp.* might resume possession of the cabs:—*Held*: under the agreement there was no letting of the cabs for a period less than one year, so as to make *resp.* the “person keeping” them within Revenue Act, 1869 (c. 14), s. 27.—*BARBER v. CALLOW* (1877), 2 C. P. D. 558; 37 L. T. 130; 41 J. P. 823, D. C.

#### D. Rate of Duty.

138. *Carriage fitted to be drawn by two or more horses—Proof of user of two horses not necessary.*—*FLINT v. MILLER* (1891), cited in Halsbury's Laws of England, Vol. XXIV. at p. 689.

139. *Calculation of horse power of motor car.*—By Finance Act, 1909–1910 (c. 8), s. 86 (1), the excise duty for carriages payable in respect of a motor car shall be at the rates specified in Part II. of schedule V. to the Act, & by sub-sect. 2, the unit of horse power for the purpose of any rate of duty in schedule V. shall be calculated in accordance with regulations made by the Treasury for the purpose, & Part II. of schedule V. specifies the rates of duty on motor cars according to the horse power. The Treasury having made regulations under sub-sect. 2 of sect. 86 for calculating the horse power:—*Held*: those regulations are the only standard by which, for the purpose of the rate of duty, the horse power of a motor car is to be calculated, & consequently, if the horse power as so calculated is greater than the actual horse power of the motor car, the duty is payable on the greater horse power as ascertained according to the regulations, although erroneous.—*LONDON COUNTY COUNCIL v. TURNER* (1911), 105 L. T. 380; 75 J. P. 551; 9 L. G. R. 1155; 22 Cox, C. C. 592, D. C.

140. *Carriage having four wheels—Tricycle with autowheel attached.*—A tricycle to which an autowheel is attached & by which it is propelled is a carriage having four wheels propelled by mechanical power within the definition contained in Customs & Inland Revenue Act, 1888 (c. 8), s. 4 (3), & is therefore liable to excise duty.—*HOLLANDS v. WILLIAMSON*, [1920] 1 K. B. 716; 89 L. J. K. B. 298; 122 L. T. 291; 83 J. P. 289; 17 L. G. R. 737, D. C.

#### E. Liability for Penalty.

*See Roads Act, 1920 (c. 72), ss. 8, 12.*

141. *Fallure to take out licence within time allowed by Act—Offence charged within period allowed.*—If a person fails to take out a licence within the periods allowed by Revenue Act, 1869 (c. 14), s. 22, for payment of the duty he can thereafter be summoned & made liable to the penalty imposed by Revenue Act, 1869 (c. 14), s. 27, for having kept a carriage without a licence on a date within those periods.—*SLY v. RANDALL*, [1916] 1 K. B. 710; 85 L. J. K. B. 1057; 114 L. T. 560; 80 J. P. 199; 14 L. G. R. 550; 25 Cox, C. C. 321, D. C.

142. *Use of vehicle for purpose other than that for which licenced—Roads Act, 1920 (c. 72), s. 8—Occasional user of goods lorry for passengers.*—*Applt.* took out a licence under Finance Act, 1920 (c. 18), sched. II., para. 6, in respect of a motor lorry. The lorry was usually used for the conveyance of goods, but on the occasion charged was used by *applt.* as a hackney carriage, the duty payable on its use as a hackney carriage being higher than the rate chargeable in respect of the licence held by him:—*Held*: the licence held by *applt.* under Finance Act, 1920 (c. 18), sched. II., para. 6, had not been taken out as for a vehicle to be used solely for a certain purpose within Roads Act, 1920 (c. 72), s. 8 (3), & consequently the penalty therein imposed was not payable by him.—*R. v. WOOD, Ex p. ANDERSON*, [1922] 1 K. B. 674; 91 L. J. K. B. 573; 126 L. T. 522; 86 J. P. 64; 38 T. L. R. 269; 66 Sol. Jo. 453; 20 L. G. R. 189, D. C.

*Annotation*.—*Reid*. *Morris v. Tolman*, [1923] 1 K. B. 166.

143. — *Liability limited to person holding licence.*—An information was preferred against the owner of a motor vehicle charging that he had on a certain day used it for a purpose other than that for which it was licenced & chargeable at a higher rate of duty, & also charging *resp.* with aiding & abetting the commission of the offence. The justices dismissed the information against the owner, & being of opinion that having dismissed it as against him, they had no power to convict *resp.* of aiding & abetting; they also dismissed the information as against *resp.*:—*Held*: the language of Roads Act, 1920 (c. 72), s. 8 (3), showed that it was limited to persons holding a licence for a vehicle, & inasmuch as *resp.* was not the holder of the licence, he was not liable to be convicted.—*MORRIS v. TOLMAN*, [1923] 1 K. B. 166; 92 L. J. K. B. 215; 123 L. T. 118; 86 J. P. 221; 39 T. L. R. 39; 67 Sol. Jo. 169; 20 L. G. R. 803; 27 Cox, C. C. 345, D. C.

144. — *Roads Act, 1920 (c. 72), s. 12—Necessity for mens rea.*—A motor car belonging to *resps.*, who were the holders of a limited trade licence in respect of it, was driven on a public road by one of their servants, & more than two

#### PART VII. SECT. 4, SUB-SECT. 3.—C.

1361. *Carriage hired by the day.*—*HARDY v. SMITH*, [1919] Q. S. R. 41. —*AUS.*

#### PART VII. SECT. 4, SUB-SECT. 3.—E.

d. *Use of vehicle for purpose other than that for which licenced—Penalty*

*for seating more than permitted number in omnibus—Number standing in material.*—*MOFFATT v. SIX COUNTY MOTORS, LTD.*, [1927] N. I. 218.—*IR.*

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persons were in the car in addition to the driver, this being without the knowledge, & contrary to the express orders, of resps., who had taken all reasonable precautions to prevent a contravention of the Road Vehicles (Trade Licences) Regulations, 1922:—*Held*: *mens rea* was not an essential ingredient of the offence in respect of a contravention of the Road Vehicles (Trade Licences) Regulations, 1922, & resps. were liable to the penalty imposed by above sect. of the Roads Act, 1920.—*GRIFFITHS v. STUDEBAKERS, LTD.*, [1924] 1 K. B. 102; 93 L. J. K. B. 50; 130 L. T. 215; 87 J. P. 199; 40 T. L. R. 26; 68 Sol. Jo. 118; 21 L. G. R. 796; 27 Cox, C. C. 565, D. C.

145. ——— What constitutes "load."—Resp. was summoned for using a limited trade licence upon a vehicle contrary to proviso (b) of Art. (1) of para. 4 of the Road Vehicles (Trade Licences) Regulations, 1922. Resp. was driving a motor chassis fitted with two convertible bodies; at the time of the alleged offence the lorry body was fitted to the chassis, & the touring body was being carried on the lorry body. While so arranged the car could not be used for any other purpose:—*Held*: either the lorry alone or the tourer alone was a complete vehicle, but the lorry plus the touring body was a complete vehicle carrying part of another which constituted a "load" within proviso (b) of Art. B. (1), para. 4, of the Road Vehicles (Trade Licences) Regulations, 1922.—*LEES v. RAVENHILL* (1924), 94 L. J. K. B. 97; 132 L. T. 201; 88 J. P. 197; 41 T. L. R. 36; 69 Sol. Jo. 177; 23 L. G. R. 10; 27 Cox, C. C. 667, D. C.

**F. Hackney Carriages.**

See Customs & Inland Revenue Act, 1888 (c. 8), s. 4; Finance Act, 1920 (c. 18), sched. II.

146. What is "hackney carriage"—Omnibus.—Sect. 4, sub-s. 1, Customs & Inland Revenue Act, 1888 (c. 8), s. 4 (1), imposes a duty upon every hackney carriage as thereafter defined, & by Customs & Inland Revenue Act, 1888 (c. 8), s. 4 (3), a "hackney carriage" means "any carriage standing or plying for hire":—*Held*: an ordinary omnibus running along a fixed route is a "hackney carriage" within Customs & Inland Revenue Act, 1888 (c. 8).—*HICKMAN v. BIRCH* (1889), 24 Q. B. D. 172; 59 L. J. M. C. 22; 62 L. T. 113; 54 J. P. 406; 6 T. L. R. 104, D. C.

What constitutes "plying for hire."—See STREET & AERIAL TRAFFIC.

What constitutes "keeping."—See Sub-sect. 3, B., *ante*.

147. User for private purposes—Liability to full duty.—ASS. TAX CASE (No. 2,355) (1854), 19 J. P. 246.

148. ———.—ASS. TAX CASE (No. 2,407) (1855), 20 J. P. 423.

149. ———.—TAX CASE (No. 2,408) (1855), 20 J. P. 423.

150. ———.—ASS. TAX CASE (No. 2,419) (1856), 21 J. P. 456.

151. ———.—ASS. TAX CASE (No. 2,518) (1859), 23 J. P. 457.

152. ———.—A licenced postmaster appeals against a charge for one of his carriages & horses used by him occasionally for private purposes. The comrs. confirm. Comrs. right.—ASS. TAX CASE (No. 2,703) (1865), 31 J. P. 730.

153. ———.—A licenced postmaster appeals against assessments for a carriage & horse in respect of the use by him for his private purposes

of a carriage for which he holds a licence to let for hire; as also for a servant in respect of the person employed to attend to the same. The comrs. relieve. Comrs. wrong.—ASS. TAX CASE (No. 2,796) (1868), 32 J. P. 745.

154. ———.—A licenced postmaster appeals against an assessment for a horse & carriage kept by him & used by him in his capacity of a local preacher in driving to different places to preach, accompanied at times by his family. He states that the congregation pays him for the hire on these occasions. The comrs. relieve. Comrs. wrong.—ASS. TAX CASE (No. 2,798) (1868), 32 J. P. 760.

**G. Exemptions.**

**(a) In General.**

155. Exemption must be claimed.—ASS. TAX CASE (No. 2,480) (1857), 22 J. P. 466.

156. ———.—A butcher appeals against an assessment for a carriage, & horse, Schedule E., as being used solely in the course of trade. The character & use of the carriage is not disputed, but objection is taken that applt. had not claimed the exemption in making his return. The comrs. confirm. Comrs. rights.—ASS. TAX CASE (No. 2,772) (1867), 32 J. P. 105.

157. Carriage used by police officer.—ASS. TAX CASE (No. 2,485) (1857), 22 J. P. 466.

158. Carriage given away—Duty paid by new owner.—A farmer appeals against an assessment for a carriage, also servant & horse, for 1865–66 on the ground that he gave up same at Michaelmas, 1864, to his son, who is also charged for them for 1865–66. The comrs. confirm. Comrs. right.—ASS. TAX CASE (No. 2,739) (1866), 32 J. P. 8.

159. Parish hearse.—A churchwarden appeals against a charge for a hearse purchased by subscription for the benefit of the parish & let for hire, the profits being applied to the incidental expenses of the church. The comrs. relieve. Comrs. wrong.—ASS. TAX CASE (No. 2,741) (1866), 32 J. P. 9.

Fire engines, ambulances & road rollers.—See Finance Act, 1920 (c. 18), s. 13 (4).

Vehicle used for conveyance of electors to poll.—See Corrupt & Illegal Practice Prevention Act, 1872 (c. 51), s. 14 (4).

**(b) Trade Vehicles.**

**i. In General.**

See Customs & Inland Revenue Act, 1888 (c. 8), s. 4 (3).

160. Vehicle constructed for use & used for conveyance of goods—Exempt.—Builder claimed exemption for a light spring cart with a movable seat, marked with his name, etc., & never used but in his trade, although occasionally without any load whatever. He was also charged with £1 1s. duty for the horse used with such cart. The comrs. relieved. Comrs. right.—ASS. TAX CASE (No. 2,617) (1862), 28 J. P. 762.

161. ———.—Licenced hawker claimed exemption for a four-wheeled van on springs, used solely in conveying goods, with a door for goods, & a seat outside for driver; marked with name & address. The comrs. relieved. Comrs. right.—ASS. TAX CASE (No. 2,622) (1862), 28 J. P. 777.

162. ———.—ASS. TAX CASE (No. 2,623) (1862), 28 J. P. 777.

163. ———.—*Re BAYLEY*, No. 181, *post*.

164. ———.—Claim [for exemption] for a light cart on springs, marked with the name, etc., used by applt., or his wife & family to fairs & markets, usually taking with them their farm

produce. The comrs. confirmed. Comrs. wrong.—*Re GRIFFITHS* (1864), 11 L. T. 147.

165. Onus of proof—On party claiming exemption—Vehicle not *prima facie* constructed for conveyance of goods.]—*HANWORTH v. WILLIAMS*, No. 203, *post*.

166. What is "burden."—*COOK v. HOBBS*, No. 221, *post*.

## ii. Construction of Vehicle.

See Customs & Inland Revenue Act, 1888 (c. 8), s. 4 (3).

167. What is "waggon, cart or other such vehicle"—Whether "other vehicle" words of *eiusdem generis*.—In order that a vehicle may be exempt from carriage duty by virtue of Customs & Inland Revenue Act, 1888 (c. 8), s. 4 (3), it must be constructed or adapted solely for the conveyance of goods, as well as used solely for the conveyance of goods, though it need not be *eiusdem generis* with a waggon.

Upon the hearing of an information charging resp. with keeping a carriage without a licence, it was proved that he drove a pony attached to a governess cart. Resp. gave evidence that the vehicle was used solely for the purposes of his business of a wardrobe dealer, & that he never used it for pleasure, but only drove in it to private houses to call for & bring away goods after receiving orders:—*Held*: the vehicle did not come within the exception to the definition of "carriage," in Customs & Inland Revenue Act, 1888 (c. 8), s. 4 (3), of "a waggon, cart, or other such vehicle, which is constructed or adapted for use, & is used, solely for the conveyance of any goods or burden in the course of trade or husbandry."—*MOORE v. LEWIS*, [1906] 1 K. B. 27; 75 L. J. K. B. 89; 93 L. T. 812; 70 J. P. 26; 54 W. R. 194; 22 T. L. R. 51; 21 Cox, C. C. 60, D. C.

*Annotations*:—*Distd. Cook v. Hobbs* (1910), 80 L. J. K. B. 110. *Consd. Collman v. Stokes* (1910), 103 L. T. 592; *Strutt v. Clift* (1910), 80 L. J. K. B. 114; *Minty v. Glew* (1913), 110 L. T. 340. *Apud. French v. Champkin*, [1920] 1 K. B. 76.

168. ———.]—In Customs & Inland Revenue Act, 1888 (c. 8), s. 4 (3), exempting from the requirement of a carriage licence "a waggon, cart, or other such vehicle, which is constructed or adapted for use, & is used, solely for the conveyance of any goods or burden in the course of trade," the word "vehicle" is to be construed as *eiusdem generis* with "waggon" & "cart," & the word "adapted" does not mean "suitable," but "altered so as to make the vehicle apt."

A ralli car not originally constructed for the conveyance of goods or altered so as to make it suitable for that purpose does not come within the exemption, notwithstanding that it is solely used for the conveyance of goods.—*FRENCH v. CHAMPKIN*, [1920] 1 K. B. 76; 89 L. J. K. B. 131; 122 L. T. 95; 83 J. P. 258; 36 T. L. R. 14; 17 L. G. R. 761, D. C.

169. What is vehicle "constructed or adapted for use for conveyance of goods"—Vehicle constructed for conveyance of persons.]—*ASS. TAX CASE* (No. 2,482) (1857), 22 J. P. 466.

170. ———.]—*ASS. TAX CASE* (No. 2,548) (1860), 24 J. P. 151.

171. ———.]—*ASS. TAX CASE* (No. 2,581) (1861), 25 J. P. 119.

172. ———.]—*ASS. TAX CASE* (No. 2,582) (1861), 25 J. P. 119.

173. ———.]—A flour dealer appeals against a charge for a two-wheeled carriage, adapted as well for the carriage of persons as for that of goods, & shown to have been so employed.

The comrs. confirm the charge. Comrs. right.—*ASS. TAX CASE* (No. 2,662) (1865), 31 J. P. 616.

174. ———.]—A farmer appeals against a charge of 15s. for a two-wheeled carriage, as being used solely in affairs of husbandry, which the surveyor contends is taken, by its construction, out of the operation of the exemption. The comrs. relieve. Comrs. wrong.—*ASS. TAX CASE* (No. 2,700) (1865), 31 J. P. 729.

175. ———.]—A harness maker appeals against an assessment for a carriage, also horse, Schedule E., admitted to be kept for purposes of trade, but alleged not to be of such construction as to fall within the exemption. The carriage is furnished with springs & a splashboard, & is admitted to have been used to drive to an appeal meeting. The comrs. relieve. Comrs. wrong.—*ASS. TAX CASE* (No. 2,734) (1866), 31 J. P. 826.

176. ———.]—A confectioner appeals against an assessment for a carriage admitted to be kept, & used solely for the purposes of trade, but alleged not to be of such a construction as to fall within the exemption. The carriage is on springs with a seat in front & a splashboard. The hinder part of the carriage is fitted up for the stowage of goods. The comrs. confirm. Comrs. right.—*ASS. TAX CASE* (No. 2,735) (1866), 31 J. P. 826.

177. ———.]—A publican, contractor, & farmer appeals against an assessment for a carriage alleged to be used solely for the purposes of trade or in the affairs of husbandry. It is on springs, has lamp irons, a movable seat with a back; & the hinder part of the carriage is so constructed as to let down & form a footboard, thus fitting it to carry four persons. The comrs. confirm. Comrs. right.—*ASS. TAX CASE* (No. 2,736) (1866), 31 J. P. 826.

178. ———.]—A farmer appeals against a charge for a two-wheeled carriage kept for market purposes. It is constructed with the conveniences & appliances usual in carriages designed for the conveyance of persons, & it is admitted by applt. that persons have occasionally ridden with him. The comrs. relieve. Comrs. wrong.—*ASS. TAX CASE* (No. 2,768) (1867), 32 J. P. 89.

179. ———.]—*Dog cart*.—*ASS. TAX CASE* (No. 2,425) (1856), 21 J. P. 455.

180. ———.]—*ASS. TAX CASE* (No. 2,613) (1862), 28 J. P. 761.

181. ———.]—Farmer claimed exemption for a two-wheeled carriage used solely in his business, never for pleasure; the carriage was constructed like a dog cart, to carry four persons back to back. The Comrs. confirmed. Comrs. right.—*Re BAYLEY* (1864), 11 L. T. 146.

182. ———.]—A farmer & general merchant appeals against a charge for a dog cart as being used solely for the purposes of business. The comrs. confirm the charge. Comrs. right.—*ASS. TAX CASE* (No. 2,666) (1865), 31 J. P. 632.

183. ———.]—A farmer appeals against a charge for a two-wheeled carriage adapted as well for the conveyance of persons as for that of produce. The comrs. relieve. Comrs. wrong.—*ASS. TAX CASE* (No. 2,667) (1865), 31 J. P. 648.

184. ———.]—Licenced hawker appeals against an assessment for a two-wheeled carriage used by him in the conveyance of goods. It is admitted that, although containing a box for the conveyance of goods, the carriage is, in fact, a dog cart or gig. The comrs. confirm. Comrs. right.—*ASS. TAX CASE* (No. 2,769) (1867), 32 J. P. 104.

185. ———.]—A licenced hawker appeals against an assessment for three two-

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wheeled carriages alleged to be used by him solely in his business. The exclusive employment of these carriages for purposes of business is not disputed, but it is contended that they are excluded from the operation of the exemption by their construction, & that they are in fact dog carts. The comrs. confirm. Comrs. right.—ASS. TAX CASE (No. 2,800) (1868), 32 J. P. 777.

186. ————.]—A retired solr. appeals against an assessment for a dog cart, on the ground of its being kept for the purpose of conveying garden produce to market. The comrs. confirm. Comrs. right.—ASS. TAX CASE (No. 2,859) (1871), 35 J. P. 552.

187. ————]—Specially adapted for carriage of samples.]—Resp. kept a vehicle of the description known as a dog cart with four wheels. It had seating accommodation for four persons, & was fitted with rubber tyres & smart lamps. It was used by him for the purpose of his business, a shoe manufacturer's agent, to carry his samples. The interior fittings had been removed, steel plates had been put on the bottom & on the springs to strengthen the vehicle, & the two back seats removed to take seven specially made cases to carry the samples:—*Held*: there was evidence on which the magistrate could find that the vehicle was adapted for use solely for the conveyance of goods within the Customs & Inland Revenue Act, 1888 (c. 8), s. 4.—COLLMAN v. STOKES (1910), 103 L. T. 592; 74 J. P. 473; 9 L. G. R. 150, D. C.

*Annotation*:—*Appl.* Minty v. Glew (1913), 110 L. T. 340.

188. ————]—Oxford cart.]—ASS. TAX CASE (No. 2,546) (1860), 24 J. P. 151.

189. ————]—Sulky.]—ASS. TAX CASE (No. 2,577) (1861), 25 J. P. 118.

190. ————]—Coburg.]—A farmer appeals against a charge for a carriage, a "coburg," occasionally employed in the conveyance of agricultural produce, but kept principally for conveying the family to church. The comrs. confirm the charge. Comrs. right.—ASS. TAX CASE (No. 2,665) (1865), 31 J. P. 632.

191. ————]—Phaeton.]—Manufacturer of cement appeals against an assessment for a four-wheeled carriage, & horse Schedule E., as being used solely in the course of trade. The carriage is found to be a phaeton, with a movable box suitable for carrying small parcels substituted for the back seat. The comrs. relieve. Comrs. wrong.—ASS. TAX CASE (No. 2,771) (1867), 32 J. P. 105.

192. ————]—Governess cart.]—Resp., a travelling upholsterer, was possessed of a governess cart which he used for the purposes of his trade & to collect debts & obtain orders:—*Held*: the carriage was not "used solely for the conveyance of goods or burden in the course of trade or husbandry," & did not come within the exemption given by Customs & Inland Revenue Act, 1888 (c. 8), s. 4 (3).—WHITHAM v. MORRIS (1905), 93 L. T. 813; 70 J. P. 11; 21 Cox, C. C. 64, D. C.  
*Annotation*:—*Consd.* Collman v. Stokes (1910), 103 L. T. 592.

193. ————]—MOORE v. LEWIS, No. 167, *ante*.

194. ————]—Waggonette—Specially adapted for purpose of husbandry.]—Resp., a farmer, was summoned under Revenue Act, 1869 (c. 14), s. 27, for keeping a carriage without a licence. The carriage was an old four-wheeled waggonette; it was adapted to carry six persons & to be drawn by one horse. It had wooden seats along each

side with back rests, a driving seat in front, two iron steps at the back & iron steps on each side of the front; it was not upholstered or cushioned, & had a name painted on it. Resp. stated in his evidence that he had never used the carriage as a private carriage or for carrying any passengers except his own workpeople to or from work on his farm; that he had the wheels & springs strengthened & used it for general use on his farm, such as taking farm produce to the railway station, but not for any other purpose. The justices having found that a licence was not required;—*Held*: the vehicle had been so altered with the object of using it solely for agricultural purposes, there was evidence on which the justices could find, as they must be taken to have found, that the vehicle had been adapted for use solely for the conveyance of goods or burden in the course of trade or husbandry, & was therefore within the exemption.—MINTY v. GLEW (1913), 110 L. T. 340; 78 J. P. 69; 12 L. G. R. 121; 24 Cox, C. C. 73, D. C.

*Annotation*:—*Consd.* French v. Champkin, [1920] 1 K. B. 76.

195. ————]—Ralli car.]—FRENCH v. CHAMPKIN, No. 168, *ante*.

196. ————]—Farmer's cart.]—Farmer claimed exemption for a two-wheeled carriage used solely in his business, on springs & with a seat, but no dashboard. The comrs. confirmed. Comrs. wrong.—ASS. TAX CASE (No. 2,612) (1862), 28 J. P. 761.

197. ————]—Claim of exemption for a light cart on narrow wheels & on springs, used on the farm & for going to market, etc. The comrs. confirmed. Comrs. wrong.—ASS. TAX CASE (No. 2,614) (1862), 28 J. P. 761.

198. ————]—Claim of exemption for a light cart on springs, marked with the name, etc., used by applt. or his wife & family for fairs & markets, usually taking with them their farm produce. The comrs. confirmed. Comrs. wrong.—ASS. TAX CASE (No. 2,615) (1862), 28 J. P. 761.

199. ————]—ASS. TAX CASE (No. 2,666), No. 182, *ante*.

200. ————]—ASS. TAX CASE (No. 2,667), No. 183, *ante*.

201. ————]—ASS. TAX CASE (No. 2,700), No. 174, *ante*.

202. ————]—ASS. TAX CASE (No. 2,768), No. 178, *ante*.

203. ————]—Vehicle capable of use for other purposes.]—(1) In order to bring a vehicle within the exception to the definition of "carriage" in Customs & Inland Revenue Act, 1888 (c. 8), s. 4 (3), it must be shown that it was constructed or adapted for use for the conveyance of goods or burden in the course of trade or husbandry, not merely that it was capable of being so used. If the real use of a vehicle under ordinary circumstances is for trade or husbandry, the vehicle would not be said to be kept without a licence simply because on a particular day it was being used for the conveyance of persons.

(2) Having regard to the elaborate description of this dogcart, & the way in which it was fitted up, the way in which it was adapted, showing that many of its fittings would in no way be required for the carrying of "goods or burden in the course of trade or husbandry" . . . that being the *prima facie* condition of the trap, the justices ought to have considered it. If resp. was going to rely upon the sole use for taking goods in it, the *onus* to a certain extent would undoubtedly rest upon him (LORD ALVERSTONE, C.J.).—HANWORTH



*v. WILLIAMS* (1903), 67 J. P. 315; 19 T. L. R. 384, D. C.

*Annotations:—As to* (1) *Reid, Latchford v. Kelsey* (1907), 71 J. P. 225. *As to* (2) *Dbd. Moore v. Lewis*, [1906] 1 K. B. 27.

204. ———.]—*MOORE v. LEWIS*, No. 167, ante.

205. ———.]—*COOK v. HOBBS*, No. 221, post.

206. Meaning of “adapted.”]—*FRENCH v. CHAMPKIN*, No. 168, ante.

### iii. User of Vehicle.

*See Customs & Inland Revenue Act, 1888 (c. 8), s. 4 (3).*

207. What constitutes sole user for conveyance of goods—Occasional user for carriage of persons.]—Gentleman claimed relief from a charge made on him for a four wheeled carriage in respect of a light waggon, on springs drawn by two horses, & marked with his name, etc. He contended that it was not a carriage chargeable under Schedule D., being chiefly used for farming purposes, although occasionally by his family to ride in. The comrs. confirmed the charge. Comrs. right.—*ASS. TAX CASE* (No. 1,966) (1846), 12 J. P. 281.

208. ———.]—*ASS. TAX CASE* (No. 2,359) (1854), 19 J. P. 327.

209. ———.]—*ASS. TAX CASE* (No. 2,379) (1855), 20 J. P. 199.

210. ———.]—*ASS. TAX CASE* (No. 2,381) (1855), 20 J. P. 248.

211. ———.]—*ASS. TAX CASE* (No. 2,415) (1855), 20 J. P. 423.

212. ———.]—*ASS. TAX CASE* (No. 2,486) (1857), 22 J. P. 466.

213. ———.]—*ASS. TAX CASE* (No. 2,499) (1857), 22 J. P. 691.

214. ———.]—A pork butcher appeals against a charge for a two wheeled vehicle employed for the conveyance of persons & goods. The comrs. confirm the charge. Comrs. right.—*ASS. TAX CASE* (No. 2,663) (1865), 31 J. P. 631.

215. ———.]—A milkman appeals against a charge for a two wheeled carriage. It is alleged never to have been used except for the conveyance of milk, but it is admitted that a person has occasionally been taken up on the road. The comrs. confirm the charge. Comrs. wrong.—*ASS. TAX CASE* (No. 2,664) (1865), 31 J. P. 631.

216. ———.]—A firm of brewers & wine merchants appeals against a charge for a carriage used by them in their trade, whereon the style of the firm & their trade & place of residence, but not the Christian names of the partners, is painted. The carriage is admitted to have been used for the purpose of conveying a volunteer band to & from drill, on an excursion of school children, & on other occasions. The comrs. relieve. Comrs. wrong.—*ASS. TAX CASE* (No. 2,698) (1865), 31 J. P. 729.

217. ———.]—A rectifier of weights & measures appeals against an assessment for a carriage, also servant & horse, Schedule E. The carriage which is on springs & so fitted as to resemble a sociable, is alleged to be kept for the purpose of conveying the tools & weights necessary in the exercise of the vocation of applt.; but he admits frequently taking a person out with him for a ride, & giving other persons a ride when out on his business. The comrs. confirm. Comrs. right.—*ASS. TAX CASE* (No. 2,738) (1866), 32 J. P. 8.

218. ———.]—A solr. occupying land appeals against an assessment for a four wheeled carriage in the nature of a van, used for conveying plants & flowers & sometimes pigs to places of exhibition, for the carriage of provender for his live stock, & once or twice for a picnic, or the conveyance of school children to a cathedral festival. The comrs. confirm. Comrs. right.—*ASS. TAX CASE* (No. 2,742) (1866), 32 J. P. 9.

219. ———.]—A. appeals against an assessment for a carriage & horse, on the plea of same being used solely for husbandry. A. occupies twenty-four acres of land. The carriage & horse have never been used without having some agricultural produce therein, but A. has driven his wife in the carriage to see her doctor. The Comrs. confirm. Comrs. right.—*ASS. TAX CASE* (No. 2,824) (1869), 34 J. P. 745.

220. ———.]—To sell goods at market.]—*ASS. TAX CASE* (No. 2,500) (1857), 22 J. P. 691.

221. ———.]—Where a cart is used only for the purpose of taking goods to market to be sold, the fact that the persons who are intended to sell the goods at the market are conveyed there in the cart along with the goods will not take away the cart's title to exemption.

If a cart has been constructed with a view to its being used only for the exempted purposes, the mere fact that it is capable of being used for other purposes will not deprive it of the exemption.

I am not altogether clear what the draftsmen of Customs & Inland Revenue Act, 1888 (c. 8), meant by the word “burden,” & I am not going to attempt to define it. But I think that at all events it includes persons who are taken to a market along with goods for the purpose of assisting in setting them there, & who have to bring them back if they are not sold (*LORD ALVERSTONE, C.J.*).—*COOK v. HOBBS*, [1911] 1 K. B. 14; 80 L. J. K. B. 110; 103 L. T. 566; 75 J. P. 14; 9 L. G. R. 143, D. C.

*Annotations:—Consd. Minty v. Glew* (1913), 110 L. T. 340; *French v. Champkin*, [1920] 1 K. B. 76. *Reid. Collman v. Stokes* (1910), 103 L. T. 592.

222. ———.]—Single user for carriage of persons.]—*ASS. TAX CASE* (No. 2,358) (1854), 19 J. P. 327.

223. ———.]—A farmer appeals against a charge for a two wheeled carriage, as having been kept for the purposes of husbandry, but admitted to have been on one occasion employed in driving a person to a railway station. A necessity for going to the station in his business on this occasion is alleged on the part of applt. The comrs. relieve. Comrs. wrong.—*ASS. TAX CASE* (No. 2,702) (1865), 31 J. P. 730.

224. ———.]—Liability of owners for act of bailiff.]—Appls. were the owners of a dairy farm which they placed in the charge of a bailiff. They had at the farm a milk van specially constructed for the conveyance of their milk churns from the farm to the railway station. For this van they held no carriage licence. On one occasion the bailiff without the knowledge or authority of appls. used the van for the purpose of driving to a town some miles distant & bringing back his wife & some friends who had been to a place of amusement there. Appls. were charged with keeping the van without a licence:—*Held*: as they had placed the bailiff in charge of the farm generally, they were responsible for his act in using the van for the purpose for which he did, & they consequently failed to bring themselves within the exemption & were liable to be convicted.—*STRUTT*

### PART VII. SECT. 4, SUB-SECT. 3.—G. (b) iii.

e. Vehicle to be used by licensee only.]—*WAUGH v. PATERSON*, [1924] S. C. (J.) 52.—SCOT.



*Sect. 4.—Local taxation licences: Sub-sect. 3, G. (b) iii. & iv.; sub-sect. 4, A.]*

*v. CLIFT*, [1911] 1 K. B. 1; 80 L. J. K. B. 114; 103 L. T. 722; 74 J. P. 471; 27 T. L. R. 14; 8 L. G. R. 989, D. C.

*Annotation:—Reid*, Phelon & Moore v. Keel, [1914] 3 K. B. 165.

**225.** *User for breaking in horse.]—Ass. TAX CASE (No. 2,382) (1855), 20 J. P. 248.*

**226.** *Occasional user to attend funerals.]—Ass. TAX CASE (No. 2,404) (1855), 20 J. P. 423.*

**227.** *Driving to church—Visiting friend on journey.]—Ass. TAX CASE (No. 2,428) (1856), 21 J. P. 456.*

**228.** *Driving to & from work.]—Ass. TAX CASE (No. 2,484) (1857), 22 J. P. 466.*

**229.** *—A journeyman bricklayer appeals against charges for a carriage & pony drawing same, kept by him to drive backwards & forwards to his work. The comrs. relieve for the carriage, & reduce the assessment on the pony to 5s. 3d. Comrs. wrong.—Ass. TAX CASE (No. 2,699) (1865), 31 J. P. 729.*

**230.** *Calling for orders.]—A shoemaker appeals against a charge for a two wheeled carriage used in calling for orders, & generally in the course of trade. The comrs. relieve. Comrs. right.—Ass. TAX CASE (No. 2,668) (1865), 31 J. P. 648.*

**231.** *User of auctioneer's cart in driving to sale.]—An auctioneer & occupier of land appeals against a charge for a two wheeled carriage, of the nature of a spring cart, admitted to have been used by him for driving to a sale, as well as to fetch goods purchased on such an occasion. The comrs. relieve. Comrs. wrong.—Ass. TAX CASE (No. 2,697) (1865), 31 J. P. 729.*

**232.** *Single user without goods.]—A farmer appeals against a charge of 15s. for a two wheeled carriage, admitted to have been used, on one occasion, for driving, with no farm produce therein contained, to a market town, to receive the price of certain corn. The comrs. relieve. Comrs. right.—Ass. TAX CASE (No. 2,701) (1865), 31 J. P. 730.*

**233.** *Occasional user for pleasure on Sundays.]—A baker & confectioner appeals against an assessment for a trade carriage, also horse, Schedule E., which he admits using occasionally for pleasure on Sunday. The comrs. confirm. Comrs. right.—Ass. TAX CASE (No. 2,737) (1866), 31 J. P. 826.*

**234.** *User of carriages by travelling circus.]—The business of a travelling circus is not a trade, & carriages belonging to a circus, & used for carrying the band & other performers in a parade through the town, are not carriages "used solely for the conveyance of any goods or burden in the course of trade," so as to be exempt from duty under Revenue Act, 1869 (c. 14), s. 19 (6).—SPEAK v. POWELL (1873), L. R. 9 Exch. 25; 43 L. J. M. C. 19; 29 L. T. 434; 38 J. P. 8.*

**235.** *User by farmer for driving labourers to & from work.]—A farmer's cart used for the conveyance of farm produce on the farm, & adapted for use & used solely for farm purposes, which is exempt from the excise duty imposed upon "carriages" by Customs & Inland Revenue Act, 1888 (c. 8), s. 4, as being a cart or vehicle which is constructed or adapted for use, & is used solely for the conveyance of any goods or burden*

*in the course of husbandry, does not lose its exemption merely because the farmer is in the habit of using the cart for the purpose of driving his farm labourers to & from their work.—LATCHFORD v. KELSEY (1907), 96 L. T. 620; 71 J. P. 225; 23 T. L. R. 416; 21 Cox, C. C. 410, D. C. Annotations:—Consd. Minty v. Glew (1913), 110 L. T. 340. Reid. Collman v. Stokes (1910), 103 L. T. 592; Cook v. Hobbs, [1911] 1 K. B. 14.*

*iv. Inscription of Owner's Name and Address.*

*See Customs & Revenue Act, 1888 (c. 8), s. 4 (3). 236. Necessity for.]—Ass. TAX CASE (No. 2,042) (1847), 13 J. P. 24.*

**237.** *—.]—Ass. TAX CASE (No. 2,426) (1856), 21 J. P. 455.*

**238.** *What is visible & legible inscription—Name painted on sliding box.]—Where the name, etc., of the owner were painted on a movable box, which slid in & out, going in so that the name may be seen or not seen, as the party put in the same, & the carriage could be used as well without as with the box:—Held: such carriage was liable.—Ass. TAX CASE (No. 1,458) (1840), 6 J. P. 5.*

**239.** *Inscription which might be obscured.]—Applt. had all the requisite matters prescribed by 6 & 7 Will. 4, c. 65, s. 2, & 1 Vict. c. 61, s. 1, duly painted "on the top part of the back of his gig, which had a boot projecting behind." Objected that name, etc., were not on the hindermost part & that a loose garment, etc., thrown over the back would cover the name, etc. Comrs. relieved applt.:—Held: comrs.' determination was right.—Ass. TAX CASE (No. 1,921) (1845), 10 J. P. 694.*

**240.** *Inscription partly concealed by portion of vehicle.]—Farmer claimed exemption for a two wheeled carriage which was opposed on the ground of the name & address on the back not being painted in letters of sufficient breadth, & also on account of part of the name being concealed by the block by which the body of carriage is fixed to the back spring. Comrs. relieved. Comrs. wrong.—Ass. TAX CASE (No. 1,971) (1846), 12 J. P. 527.*

**241.** *S. P. ASS. TAX CASE (No. 1,973) (1846), 12 J. P. 527.*

**242.** *When vehicle loaded.]—Party claimed exemption for a gig, which was opposed on the ground that the inscription at the back was not at all times visible & legible, the same being painted so low on the panel, that when the gig was loaded the springs gave way, & the inscription was partly concealed by the bar. Comrs. relieved. Comrs. wrong.—Ass. TAX CASE (No. 1,972) (1846), 12 J. P. 527.*

**243.** *S. P. ASS. TAX CASE (No. 1,974) (1846), 12 J. P. 527.*

**244.** *S. P. ASS. TAX CASE (No. 1,975) (1846), 12 J. P. 527.*

**245.** *—.]—Ass. TAX CASE (No. 2,043) (1847), 13 J. P. 24.*

**246.** *Inscription sometimes obscured—Not visible when vehicle in motion.]—Ass. TAX CASE (No. 2,022) (1847), 12 J. P. 727.*

**247.** *—.]—Ass. TAX CASE (No. 2,159) (1850), 15 J. P. 211.*

**248.** *—.]—Ass. TAX CASE (No. 2,179) (1850), 15 J. P. 261.*

**249.** *Seat letting down at back.]—Ass. TAX CASE (No. 2,022) (1847), 12 J. P. 727.*

#### PART VII. SECT. 4, SUB-SECT. 3.—G. (b) iv.

**239i.** *What is visible & legible inscription—Inscription which might be obscured.]—Ass. TAX CASE (No. 669) (1848), 13 J. P. 539.—SCOT.*

**240 i.** *Inscription partly concealed by portion of vehicle.]—Ass. TAX CASE (No. 668) (1848), 13 J. P. 539.—SCOT.*

**240 ii.** *—.]—Ass. TAX CASE (No. 673) (1848), 13 J. P. 539.—SCOT.*

**240 iii.** *—.]—Ass. TAX CASE (No. 728) (1849), 14 J. P. 579.—SCOT.*

**i.** *—Seat letting down at back.]—Ass. TAX CASE (No. 647) (1848), 13 J. P. 509.—SCOT.*

250. ————]—ASS. TAX CASE (No. 2,044) (1847), 13 J. P. 24.
251. ————]—ASS. TAX CASE (No. 2,049) (1847), 13 J. P. 24.
252. ————]—ASS. TAX CASE (No. 2,051) (1847), 13 J. P. 24.
253. ———— **Door letting down at footboard.**]—ASS. TAX CASE (No. 2,090) (1848), 13 J. P. 221.
254. ———— **Footboard let down.**]—ASS. TAX CASE (No. 2,317) (1853), 18 J. P. 282.
255. ————]—ASS. TAX CASE (No. 2,318) (1853), 18 J. P. 282.
256. ————]—ASS. TAX CASE (No. 2,319) (1854), 18 J. P. 282.
257. ————]—ASS. TAX CASE (No. 2,320) (1854), 18 J. P. 282.
258. **What is sufficient inscription—Necessity for inscription at length.**]—Two persons who were in partnership claimed exemption for a two wheeled carriage, the cost of which did not exceed £21 & which was marked with their name & address & calling thus “E. B. & D., brewers.” The surveyor maintained that they were not entitled to exemption, as the Act required the Christian & surname of every owner to be in words at length. Comrs. however relieved. Comrs. wrong.—ASS. TAX CASE (No. 1,970) (1846), 12 J. P. 526.
259. ———— **Necessity for Christian name.**]—ASS. TAX CASE (No. 2,136) (1849), 14 J. P. 547.
260. ————]—ASS. TAX CASE (No. 2,178) (1850), 15 J. P. 261.
261. ———— **Whether all Christian names must be inscribed.**]—ASS. TAX CASE (No. 2,135) (1849), 14 J. P. 531.
262. ————]—ASS. TAX CASE (No. 2,183) (1850), 15 J. P. 261.
263. ———— **Words placed together without break.**]—ASS. TAX CASE (No. 2,157) (1850), 15 J. P. 211.
264. **Liability for failure to paint name—Intention to defraud not essential.**]—B. was charged with keeping a carriage without a proper licence. B.’s bailiff used a cart for husbandry, but the name of the master was not painted thereon, though intended to be so:—*Held*: the justices were wrong in not convicting B., merely because they thought there was no intention to defraud.—WHITROW v. BROWN (1891), 56 J. P. 374; 8 T. L. R. 75, D. C.

## SUB-SECT. 4.—DOGS.

## A. In General.

See Dog Licences Act, 1867 (c. 5); Customs & Inland Revenue Act, 1878 (c. 15), ss. 17–23.

265. **What amounts to “keeping” dog.**]—Gentleman charged for 27 dogs for the year 1844–1845. It seems that prior to Apr. 6, 1843, he had sent the dogs, harriers, to be kept among his father’s tenants, intending to part with them, & had not used them that year. That in May 1843, he found a purchaser, & sent them to the purchaser’s agent for shipment to India, & he contended that not having used them between Apr. 1843, & Apr. 1844, he was not liable. The comrs., considering that he had not proved the purchaser was assessed, confirmed the charge. Comrs. right.—ASS. TAX CASE (No. 1,977) (1846), 12 J. P. 537.

265 i. **What is sufficient inscription—Necessity for inscription at length.**]—ASS. TAX CASE (No. 648a) (1849), 13 J. P. 509.—SCOT.

g. ———— **Inadequate address.**]—ASS. TAX CASE (No. 672) (1848), 13 J. P. 539.—SCOT.

## PART VII. SECT. 4, SUB-SECT. 4.—A.

h. **Proceedings for keeping dog without licence—When certificate of exemption refused.**]—A tenant of six acres of pasture land, kept two, & sometimes three, cows. He claimed exemption from duty in respect of a

266. ————]—ASS. TAX CASE (No. 2,150) (1850), 15 J. P. 211.

267. ————]—ASS. TAX CASE (No. 2,431) (1856), 21 J. P. 488.

268. ————]—ASS. TAX CASE (No. 2,487) (1857), 22 J. P. 467.

269. ————]—A gentleman appeals against a charge for a dog on the ground that, in Aug. of the year preceding that of assessment, he had given it to a person who was in assessment. The comrs. relieve. Comrs. wrong.—ASS. TAX CASE (No. 2,678) (1865), 31 J. P. 679.

270. ————]—An applt. appeals against an assessment for two dogs, on the ground that they were not his property. He produces no evidence that the duty is charged to the alleged owner. The comrs. confirm. Comrs. right.—ASS. TAX CASE (No. 2,802) (1868), 32 J. P. 792.

271. **Production of licence—When failure to produce justifiable.**]—R. v. SEARS (1875), *Times*, Aug. 7.

272. **Proceedings for keeping dog without licence—Licence taken out immediately after offence—Offence not purged.**]—It is no answer to a charge of having kept a dog without a licence on a particular day to produce a licence taken out on that day, if it is proved that the licence was applied for later in the day than the detection of the offence charged.—CAMPBELL v. STRANGEWAYS (1877), 3 C. P. D. 105; 47 L. J. M. C. 6; 47 L. J. Q. B. 85; 37 L. T. 672; 42 J. P. 39.

*Annotation*:—*Reid*. Clarke v. Bradlaugh (1881), 44 L. T. 779.

273. ———— **Jurisdiction of justices—To reduce fine—Previous offence not stated in information.**]—Where at the hearing of a summons for keeping a dog without a licence it is proved that deft. has been convicted on a former occasion of a similar offence, but such previous conviction is not stated in the information, the case cannot be treated as the case of a first offence, within the meaning of Summary Jurisdiction Act, 1879 (c. 49), s. 4, & therefore the magistrate has no power under Summary Jurisdiction Act, 1879 (c. 49), s. 4, to reduce the amount of the fine imposed for the offence by Dog Licences Act, 1867 (c. 5), s. 8, & the only power to reduce such fine is that given by Excise Management Act, 1827 (c. 53), s. 78, under which it cannot be reduced to less than one-fourth of the amount.—MURRAY v. THOMPSON (1888), 22 Q. B. D. 142; 58 L. J. M. C. 41; 60 L. T. 151; 53 J. P. 70; 37 W. R. 221; 5 T. L. R. 125; 16 Cox, C. C. 554, D. C.

*Annotation*:—*Reid*. R. v. Beesby, [1909] 1 K. B. 819.

274. ———— **When certificate of exemption refused.**]—PHILLIPS v. EVANS, No. 296, *post*.

275. ———— **Effect of previous conviction—In respect of same dog in same year.**]—Sections 5 & 8 of the Dog Licences Act, 1867, provide that a dog licence shall commence on the day on which the same shall be granted, & shall terminate on December 31 following, & that any person keeping a dog without a licence under the Act shall for every offence, forfeit the sum of £5.

Resp. was convicted on Apr. 18, 1917, under Dog Licences Act, 1867 (c. 5), of keeping a dog without a licence, & was fined. He was again charged on May 30, 1917, for keeping the same dog without a licence under Dog Licences Act,

dog alleged to be kept for tending the cows on his land. The Comrs. of Inland Revenue refused to grant a certificate of exemption. He was prosecuted for keeping a dog without a licence & convicted:—*Held*: the conviction was right.—GRAHAM v. HAIG (1891), 58 J. P. 835.—SCOT.

*Sect. 4.—Local taxation licences: Sub-sect. 4, A. & B. (a) & (b) i. & ii.; sub-sects. 5, 6 & 7, A.]*

1867 (c. 5), but the justices dismissed the charge, being of opinion that resp. could not be again convicted under Dog Licences Act, 1867 (c. 5), during the same year in respect of the same dog:—*Held*: the view of the justices was erroneous, & resp. ought to have been convicted.—*FLACK v. CHURCH* (1918), 87 L. J. Ch. 744; 117 L. T. 720; 82 J. P. 59; 34 T. L. R. 32; 15 L. G. R. 951; 26 Cox, C. C. 110, D. C.

### *B. Exemptions.*

#### *(a) In General.*

**276. Police bloodhound—Not exempt.]—**Ass. TAX CASE (No. 2,186) (1850), 15 J. P. 261.

**Dog kept & used by blind person.]—**See Customs & Inland Revenue Act, 1878 (c. 15), s. 21.

**Whelps kept by master of pack of hounds.]—**See Customs & Inland Revenue Act, 1878 (c. 15), s. 20.

**Sheep or cattle dogs.]—**See Sub-sect. 4, B. (b), *post*.

#### *(b) Sheep and Cattle Dogs.*

##### *i. In General.*

See Customs & Inland Revenue Act, 1878 (c. 15), s. 22.

**277. Ground of exemption—General rule.]—**Farmers taking in sheep to pasture, & having some sheep of their own, & using a dog to protect same, as well as the land from trespass, not chargeable for.—Ass. TAX CASE (No. 1,470) (1840), 6 J. P. 45.

**278. ———.]—**A person employed as a watchman to protect property, & as a watcher of sheep, & using a dog wholly for the latter purpose, not liable.—Ass. TAX CASE (No. 1,469) (1840), 6 J. P. 44.

**279. ———.]—**Farmers, some of whom kept no sheep, & only a few cattle, claimed exemption for dogs alleged to be kept "for the care of sheep or cattle," the surveyor contended that the exemption was only intended to apply where parties kept a large quantity of sheep or cattle, but not to cases where the number kept was inconsiderable. The comrs., considering that the dogs were *bonâ fide* & wholly kept & used in the care of sheep or cattle, allowed the exemption. Comrs. right.—Ass. TAX CASE (No. 2,005) (1847), 11 J. P. 792.

**280. ———.]—**Ass. TAX CASE (No. 2,521) (1859), 23 J. P. 457.

**281. ———.]—**Ass. TAX CASE (No. 2,775) (1867), 32 J. P. 153.

**282. ———.]—**Protection of land from sheep & cattle.]—Ass. TAX CASE (No. 2,386) (1855), 20 J. P. 248.

**283. Necessity for user solely for tending cattle or sheep.]—**A thoroughbred shepherd's dog, used sometimes to keep sheep, & when the owner had none, sometimes to keep cows, & sometimes as a house dog, is chargeable for.—Ass. TAX CASE (No. 1,468) (1840), 6 J. P. 44.

TAX CASE (No. 2,165) (1850), 15 J. P. 211.

**285. ———.]—**Ass. TAX CASE (No. 2,324) (1854), 18 J. P. 362.

**286. ———.]—**Ass. TAX CASE (No. 2,430) (1856), 21 J. P. 488.

**287. ———.]—**Applt. assessed for dwelling-house in £65, contending that the value is £50 only, also for a dog as being kept for the care of cattle.

Comrs. find the value of the house £60, & that the dog is not kept *bonâ fide* for the care of cattle, & confirm assessments, house duty on £60. Comrs. right.—Ass. TAX CASE (No. 2,646) (1864), 29 J. P. 57.

**288. ———.]—**An occupier of a small quantity of land appeals against a charge for a dog employed to take care of sheep & cattle, also to protect his orchard, & generally as a watch dog. The comrs. relieve. Comrs. wrong.—Ass. TAX CASE (No. 2,676) (1865), 31 J. P. 678.

**289. ———.]—**A hawkier appeals against an assessment for a dog, as being kept for the care of sheep and cattle. It is shown that his land, 14 acres only in extent, is at a considerable distance from his residence, where the dog is kept at night, & it is not stated what number of sheep & cattle are kept. The comrs. confirm. Comrs. right.—Ass. TAX CASE (No. 2,776) (1867), 32 J. P. 153.

**290. Applicable only to required number of dogs—Work sufficient for one dog—Exemption claimed for two.]—**Clergyman claimed exemption for two dogs. He occupied 12 acres of pasture & other lands, & had five cattle, & alleged that the dogs were kept for the care of the cattle & the protection of his land from his neighbours' sheep. The comrs. considering that one dog was necessary for the care of the cattle, allowed exemption for one, & confirmed the charge for the other at 8s. Comrs. right.—Ass. TAX CASE (No. 2,004) (1847), 11 J. P. 791.

**291. Who may claim exemption—Clergyman.]—**Ass. TAX CASE (No. 2,004), No. 290, *ante*.

**292. ———.]—**Butcher.]—Ass. TAX CASE (No. 2,164) (1850), 15 J. P. 211.

**293. ———.]—**Ass. TAX CASE (No. 2,188) (1850), 15 J. P. 261.

**294. ———.]—**A butcher appeals against a charge for a dog employed in his trade in driving & removing sheep & cattle. It is contended that the exemption does not apply to butchers' dogs. The comrs. relieve. Comrs. right.—Ass. TAX CASE (No. 2,677) (1865), 31 J. P. 678.

**295. What are "cattle"—Mules & asses.]—**Ass. TAX CASE (No. 2,455) (1850), 21 J. P. 550.

##### *ii. Certificate of Exemption.*

See Customs & Inland Revenue Act, 1878 (c. 15), s. 22; Dogs Act, 1906 (c. 32), s. 5; Dogs Act Rules, 1906.

**296. Grant of certificate—Jurisdiction of justices.]—**Resp., the owner of a dog, having applied to the Comrs. of Inland Revenue for a certificate of exemption & been refused, declined to take out a licence, & was summoned before justices. The justices held that the comrs. ought to have granted a certificate of exemption, & if resp. had committed an offence it was in their opinion of so trifling a nature that they would exercise the powers given to them by Summary Jurisdiction Act, 1879 (c. 49), s. 16, & dismiss the information:—*Held*: the justices had no jurisdiction to review the decision of the comrs. as to granting or withholding a certificate of exemption, & the offence of refusing to take out a dog licence was not an offence of a trifling nature to which Summary Jurisdiction Act, 1879 (c. 49), s. 16, would apply.—*PHILLIPS v. EVANS*, [1896] 1 Q. B. 305; 65 L. J. M. C. 101; 74 L. T. 314; 60 J. P. 120; 44 W. R. 429; 12 T. L. R. 204; 40 Sol. Jo. 278; 18 Cox, C. C. 300, D. C.

*Annotations:—**Apld.* Nisbet v. Lloyd (1904), 48 Sol. Jo. 397; Barnard v. Barton, [1906] 1 K. B. 357; Wing v. Dent

### **PART VII. SECT. 4, SUB-SECT. 4.—**

#### **B. (b) i.**

**292 i. Who may claim exemption—**

*Butcher.]—*Ass. TAX CASE (No. 681) (1848), 13 J. P. 539.—*SCOT.*

**292 ii. ———.]—**Ass. TAX CASE

(No. 682) (1848), 13 J. P. 539.—*SCOT.*  
*k. ———.]—*Ass. TAX CASE (No. 679) (1848), 13 J. P. 539.—*SCOT.*

Main Colliery Co., [1924] 2 K. B. 389. *Reid. Ex p. Marshall* (1907), 71 J. P. 501; *Oaten v. Auty*, [1919] 2 K. B. 278; *Vigers v. L. C. C.*, [1919] 1 K. B. 56.

297. ———.]—A farmer claimed exemption from duty in respect of two dogs which were kept by him solely for use in tending sheep & cattle, one being specially trained to tend sheep & the other to tend cattle. The justices in petty sessions found that only one dog was necessary for appt. & refused their consent to the grant of a certificate of exemption for more than one dog:—*Held*: the justices had only jurisdiction under Dogs Act, 1906 (c. 32), s. 5 (1), to inquire whether the conditions specified in Customs & Inland Revenue Act, 1878 (c. 15), s. 22, applied, namely, whether appt. was a farmer or shepherd, & whether the dogs in respect of which exemption was claimed were kept by him solely for use in tending sheep or cattle, or in the exercise of the calling or occupation of a shepherd, & as those conditions were fulfilled the justices had no power to refuse their consent to exemption for two dogs because they were of opinion that, in the circumstances, only one dog was necessary.—*JOHNSON v. WILSON*, [1909] 2 K. B. 497; 78 L. J. K. B. 912; 101 L. T. 315; 73 J. P. 396; 25 T. L. R. 663, D. C.

298. Whether conclusive of right to exemption.]—N., a farmer, got an exemption certificate for a sheep dog, & was summoned for not having a licence. At the hearing, the revenue officer proved seeing a trial of the dog as a sheep & cattle dog, & the dog did not obey its master's orders like a cattle dog:—*Held*: as the exemption certificate was some evidence of a right to exemption, the justices were right in dismissing the information, for the prosecutor had failed to prove that the dog was not a cattle dog.—*JAMES v. NICHOLAS* (1886), 50 J. P. 292, D. C.

299. ——— Effect of user for other purposes.]—*MACKENZIE v. SCOTT* (1906), *Highmore's Local Taxation Licences*, 2nd ed. 60, D. C.

Annotation:—*Reid. Egan v. Floyde* (1910), 102 L. T. 745.

300. ——— Exceptional use.]—Resp., a farmer, was the owner of & kept on his premises a dog for which he had no licence but for which he had obtained an exemption in pursuance of Customs & Inland Revenue Act, 1878 (c. 15), s. 22, & Dogs Act, 1906 (c. 32), s. 5, as being a dog kept & used by him solely in tending sheep or cattle. On a certain day while resp. was cutting corn with a reaping machine which he was driving in a harvest field on his farm, the dog was seen by a constable to be in the field & to be chasing & catching rabbits that ran from the standing corn as it was being cut, & labourers in the presence & with the knowledge of resp. shouted & urged the dog on to catch the rabbits. Upon an information against resp. for keeping the dog without a licence:—*Held*: as resp. was not using the dog for catching rabbits, the mere exceptional use of the dog as above described was not a breach of the conditions of the exemption & did not prevent the exemption from applying, & the information was properly dismissed.—*EGAN v. FLOYDE* (1910), 102 L. T. 745; 74 J. P. 223; 26 T. L. R. 401; 8 L. G. R. 495, D. C.

Annotation:—*Distd. Strutt v. Clift*, [1911] 1 K. B. 1.

Effect of refusal of grant.]—See Sub-sect. 4, A., ante.

#### PART VII. SECT. 4, SUB-SECT. 6.

1. Exemption from licence — Use of gun by occupier of land for killing vermin.—Rabbits not "vermin."—Y. had no licence to carry or use a gun. He carried a gun for the purpose only of killing rabbits on lands of which

he was occupier. He killed a rabbit on his lands with the gun:—*Held*: rabbits are not vermin in the sense of Gun Licence Act, & Y. had contravened the statute & incurred the penalty.—*LORD ADVOCATE v. YOUNG* (1898), 62 J. P. 199.—*SCOT*.

#### SUB-SECT. 5.—GAME LICENCES.

See GAME, Vol. XXV., pp. 386–390, Nos. 359–406. Gamekeepers' licences.]—See GAME, Vol. XXV., p. 382, Nos. 320–322.

#### SUB-SECT. 6.—GUN LICENCES.

See Gun Licence Act, 1870 (c. 57); Customs & Inland Revenue Act, 1883 (c. 10), s. 6; Pistols Act, 1903 (c. 18), ss. 3, 8.

301.—What is "gun"—Pocket pistol.]—*CAMPBELL v. HADLEY* (1876), 40 J. P. Jo. 756.

302. ——— Air gun.]—Pistols Act, 1903 (c. 18), does not apply to a mere toy, but it does apply to an air gun if it is a weapon from which a shot, bullet, or other missile can be discharged, although it is not a firearm.—*BRYSON v. GAMAGE, LTD.*, [1907] 2 K. B. 630; 76 L. J. K. B. 936; 97 L. T. 399; 71 J. P. 439; 21 Cox, C. C. 515, D. C.

303. What constitutes "within curtilage" of house—Orchard adjoining house.]—An orchard behind the dwelling-house & its outhouses is not within the curtilage, & therefore the occupier is not exempt from gun licence duty who uses a gun there.—*ASQUITH v. GRIFFIN* (1884), 48 J. P. 724, D. C.

304. Exemption from licence — Necessity for statement.]—On the sale of a pistol to a person who being a householder purposes to use such pistol only in his own house or the curtilage thereof, it is necessary under Pistols Act, 1903 (c. 18), s. 3, not only that reasonable proof of these facts shall be given to the vendor, but also that the intending purchaser shall produce to the vendor a statement to that effect signed by himself & either by a police officer or a justice of the peace.—*MATTHEWS v. GRAY*, [1909] 2 K. B. 89; 78 L. J. K. B. 545; 100 L. T. 907; 73 J. P. 303; 25 T. L. R. 476, D. C.

#### SUB-SECT. 7.—MALE SERVANTS.

A. Who are "Male Servants."

See Revenue Act, 1869 (c. 14), ss. 18, 19 (3); Customs & Inland Revenue Act, 1876 (c. 16), s. 5.

305. General principle.]—For the purpose of determining whether a male servant is a taxable male servant within Revenue Act, 1869 (c. 14), s. 19 (3), there is no general trade exemption, & a servant, though employed for trade purposes, may come within Revenue Act, 1869 (c. 14), s. 19 (3), as a taxable male servant, & would come within it if he were employed for the purposes of trade to render domestic or menial services; but if in the course of trade he is not employed to render such services he is not taxable. The proper test to be applied is not as to the purposes, whether trade purposes or purposes of pleasure, for which the servant is employed, but it is as to the nature of the duties he has to perform, & if his duties are those of a domestic or menial kind & also fall within any of those enumerated in the list in Revenue Act, 1869 (c. 14), s. 19 (3), then the servant, unless he comes within some of the specified statutory exemptions, is taxable; otherwise he is not.

The provision in Motor Car Act, 1903 (c. 36), s. 13, that the person employed to drive a motor car

#### PART VII. SECT. 4, SUB-SECT. 7.—A.

m. College servants.—Assistant janitor.—*HERIOT'S TRUSTS (GOVERNORS) v. MATSON* (1920), 57 Sc. L. R. 203. —*SCOT*.

n. ———.]—The duties of the

**Sect. 4.—Local taxation licences: Sub-sect. 7, A. & B. (a).]**

is brought within the definition of "male servant" in Revenue Act, 1869 (c. 14), s. 19 (3), does not necessarily render the driver of every motor car a taxable male servant, & the question whether such a driver is taxable or not is to be determined by the same test as in other cases.—*LONDON COUNTY COUNCIL v. PERRY*, [1915] 2 K. B. 193; 84 L. J. K. B. 1518; 113 L. T. 85; 79 J. P. 312; 31 T. L. R. 281; 13 L. G. R. 746; 25 Cox, C. C. 4, D. C.

**306. Daily general servant.]**—A person employed as a day labourer by an employer in whose service he had been several years, & who was paid monthly for convenience, who worked in the garden & did anything that was required, except on Sundays, is a servant within 52 Geo. 3, c. 93, & to be charged for.—*ASS. TAX CASE* (No. 1,452) (1841), 5 J. P. 801.

**307. Porter—Servant living in lodge.]**—Appl't. employed a man who resided at a lodge on the estate at a considerable distance from the mansion. He was employed as a common labourer, & his work consisted in supplying the house with wood & water, lighting the stoves, taking up & beating carpets, & carrying articles for the other servants. Appl't. also employed another man, who lived in the mansion house, & was solely employed in cleaning, trimming, lighting & repairing the lamps in the mansion:—*Held*: the former was a "porter" & the latter a "domestic servant" within 52 Geo. 3, c. 93, sched. C., No. 1.—*ASS. TAX CASE* (No. 1,993) (1846), 11 J. P. 353.

**308. — Porters & messengers at bank.]**—Sub-agent to a branch Bank of England appeals against a charge for persons employed in the day as house porters & messengers, & on alternate nights as watchmen. The comrs. confirm the assessment. Comrs. wrong.—*Re GODDARD* (1864), 11 L. T. 48; *sub nom.* *ASS. TAX CASE* (No. 2,658), 29 J. P. 89.

**309. — Porter at block of flats.]**—(1) A male servant was employed as porter at a block of residential flats, which were let to different tenants. His duties were to attend, work, & clean the lifts, to keep the brasswork, staircase, front steps, & back yards clean, to take coals to the various flats, to bring down the dustbins by means of trade lifts from each flat, to attend in the hall & open the doors when necessary, & to call cabs or fetch carriages & carry luggage for the tenants:—*Held*: the servant was a house porter & therefore a "male servant" within the definition of that term in Revenue Act, 1869 (c. 14), s. 19 (3), & therefore his employer was liable to pay the duty imposed in respect of him by Revenue Act, 1869 (c. 14), s. 18.

(2) There is no general exemption from duty contained in Revenue Act, 1869 (c. 14), in respect of a male servant employed for the purposes of a trade or business.—*MARCHANT v. LONDON COUNTY COUNCIL*, [1910] 2 K. B. 379; 79 L. J. K. B. 718; 100 L. T. 217; 74 T. D. 222; 25 Cox, C. C. 110; 13 L. G. R. 746; 25 Cox, C. C. 110.

assistant janitor were to attend to the central heating, stoke the boilers, take charge of the swimming bath, playground, & lavatories. He also cut the grass, attended to the flowers, looked after the clocks, & carried out small repairs in the premises. He did not attend to visitors, or go on errands

for the rector or masters:—*Held*: justices of the peace were entitled to find that the janitor was a "house-porter" & accordingly, a "male servant."—*EDINBURGH EDUCATION AUTHORITY v. SKINNER*, [1921] S. C. (J.) 99.—*SCOT.*

*o. Gardener—Who is—Person em-*

**310. "Domestic servant"—Servant employed in attending to lamps.]**—*ASS. TAX CASE* (No. 1,993), No. 307, *ante*.

**311. College servants—Bedmakers.]**—*ASS. TAX CASE* (No. 2,414) (1855), 20 J. P. 423.

**312. —**—The steward of a college in a university appeals against an assessment for male servants in respect of ten persons employed as under cook, confectioner, kitchen clerk, under butler, scout, messenger, & kitchen man on the following grounds: (a) that the tax does not apply to servants employed by colleges; (b) that the persons are employed as occasional servants only; (c) that any of them may be employed by other persons during college vacations; (d) as to the scout, that the employment is not such as to involve a liability to duty. The comrs. confirm. Comrs. right.—*ASS. TAX CASE* (No. 2,822) (1869), 34 J. P. 728.

**313. Huntsman—Employment at annual salary.]**—*ASS. TAX CASE* (No. 2,545) (1860), 24 J. P. 151.

**314. Coachman—Mail cart driver.]**—A mail contractor appeals against a charge for a servant, carriage, & horse employed under his contract. The comrs. relieve. Comrs. wrong.—*ASS. TAX CASE* (No. 2,695) (1865), 31 J. P. 728.

**315. Trainer of race horses.]**—Gentleman appeals against charges for eight male servants, in respect of a professional training groom & his apprentices employed in training appl't's race horses. The comrs. confirm the assessment. Comrs. right.—*Re MONCK* (1864), 11 L. T. 47; *sub nom.* *ASS. TAX CASE* (No. 2,653), 29 J. P. 73.

**316. Attendants at lunatic asylum—Private asylum.]**—Keeper of a private lunatic asylum appeals against a charge for persons employed in waiting upon patients. Comrs. relieve appl't. Comrs. wrong.—*Re REY* (1864), 11 L. T. 48; *sub nom.* *ASS. TAX CASE* (No. 2,657), 29 J. P. 89.

**317. — Public asylum.]**—Trustees of a lunatic hospital assessed for inhabited house duty & for male servants. The hospital is for lunatics, not paupers, paying sums, the highest of which is only partially remunerative. Three of the male servants are employed in waiting upon the patients, the fourth as nurse & watchman. Comrs. confirm assessment. Comrs. wrong.—*ASS. TAX CASE* (No. 2,636) (1864), 29 J. P. 9.

**318. Driver employed by contractors—Conveyance of children to school.]**—Resp. was a carman & contractor, & was under contract with appl'ts. to convey in certain omnibuses & ambulances supplied by appl'ts., and drawn by horses supplied by resp., defective children from their homes to public elementary schools. The drivers of the vehicles were employed by, & were in the exclusive service of, resp.:—*Held*: the drivers were not coachmen within Revenue Act, 1869 (c. 14), s. 19 (3), & resp. was therefore not liable to pay in respect of them the duty imposed by Revenue Act, 1869 (c. 14), s. 18, on "male servants" as defined by Revenue Act, 1869 (c. 14), s. 19 (3).

If a man is let out on hire for the purpose of performing the ordinary duties of a coachman, the duty would have to be paid in respect of him (*CHANNELL, J.*).—*LONDON COUNTY COUNCIL v. ALLEN*, [1913] 1 K. B. 9; 82 L. J. K. B. 432;

*played to keep approaches to house.]*—*ASS. TAX CASE* (No. 726) (1849), 14 J. P. 579.—*SCOT.*

*p. Groom.]*—*ASS. TAX CASE* (No. 737) (1849), 14 J. P. 579.—*SCOT.*

*q. Who may be liable for licence fee*



107 L. T. 853; 77 J. P. 48; 29 T. L. R. 30; 10 L. G. R. 1089; 23 Cox, C. C. 266, D. C.

*Annotations* :—*Apld.* *Wolffenden v. Mason* (1913), 110 L. T. 31. *Consd.* *L. C. C. v. Perry*, [1915] 2 K. B. 193.

**319. Gardener—Employment in cemetery.**—A cemetery co. appeal against an assessment for one head & three under gardeners. The latter are employed to dig graves, & in their spare time, in laying out & tending the flower beds & otherwise beautifying the cemetery; the former in superintending & assisting. The comrs. relieve. *Comrs. right.*—*Ass. TAX CASE* (No. 2,728) (1866), 31 J. P. 810.

**320. — Who is—Question of fact.**—Whether a workman employed all his time in working in a garden is or is not a gardener or undergardener or a person employed in any capacity involving the duties of a gardener or undergardener within Revenue Act, 1869 (c. 14), ss. 18, 19 (3), is a question of fact to be decided by the justices on the evidence submitted to them.

The mere employment in a garden of a man doing work which a single handed gardener would have to do does not necessarily make the man a gardener, & justices, in deciding the point, are entitled to consider whether or not the work done by him is work for the proper execution of which skill in gardening is required.—*DILLON v. BATH* (1899), 81 L. T. 186; 63 J. P. 597; 15 T. L. R. 393, D. C.

*Annotation* :—*Consd.* *Bedford v. L. C. C.*, *L. C. C. v. Bedford* (1911), 104 L. T. 889.

**321. — — — — —**—Whether a man employed all his time in a garden is or is not a gardener or undergardener within Revenue Act, 1869 (c. 14), s. 19 (3), is a question of fact for the magistrate, having regard to what are the duties performed by the particular man.—*BEDFORD (DUKE) v. LONDON COUNTY COUNCIL, LONDON COUNTY COUNCIL v. BEDFORD (DUKE)* (1911), 104 L. T. 889; 75 J. P. 317; 55 Sol. Jo. 423; 9 L. G. R. 617.

**Person occasionally employed in garden.**—*See* Sub-sect. 7, B. (b), *post*.

**322. Club steward.**—*Resps.*, the committee of a working men's club, had power to discharge the steward, who had to be a member of the club, & was paid by the committee 38s. a week. He served at a bar at a window, but did not leave such bar to wait on the members, but passed what was ordered through the window. Besides accounting for moneys he received, this was the only service rendered by him. No licence had been taken out by debts, in respect of such steward :—*Held* : such steward was a "male servant" within Revenue Act, 1869 (c. 14), & *resps.* should have taken out a licence in respect of him.—*SOLOMON v. CROPPER* (1898), 79 L. T. 301; 62 J. P. 758; 15 T. L. R. 2; 42 Sol. Jo. 851, D. C.

*Annotation* :—*Refd.* *Whiteley v. Burns*, [1908] 1 K. B. 705.

**323. Cooks employed in civil service club.**—The chief officials of the Board of Education, Home Office, & Local Govt. Board considered it desirable to make some provision for supplying the officials employed in these departments with luncheon, & for that purpose a portion of the building was set apart for the use of members as refreshment rooms. A club was formed & registered as a club, & rules were submitted to & approved by the heads of the offices.

Officials employed in the departments were eligible for membership, no entrance fee or sub-

scription being charged, & a member could introduce a guest. The premises & the heating, etc., were provided by the Govt., & an annual grant of £100 made towards the expenses, but otherwise the expenses & wages were paid out of profits. The management was vested in a committee who engaged & paid the servants, but the servants were not entitled to sick pay or pension from the Govt. & their wages were not paid by the Govt. A number of cooks had been so employed, in respect of whom no licences had been taken out. Upon an information under Revenue Act, 1869 (c. 14), for keeping these cooks without having licences for them as "male servants":—*Held* : these cooks were neither servants of the Crown nor servants employed for the purposes of the Crown, & that they were therefore "male servants" in respect of whom licences were necessary.—*LONDON COUNTY COUNCIL v. HOUNDLE* (1911), 105 L. T. 211; 75 J. P. 442; 27 T. L. R. 465; 9 L. G. R. 958.

**324. Motor car driver—Motor Car Act, 1903 (c. 36), s. 13.**—*LONDON COUNTY COUNCIL v. PERRY*, No. 305, *ante*.

## B. Exemptions.

### (a) In General.

*See* Revenue Act, 1869 (c. 14), s. 19 (5); Customs & Inland Revenue Act, 1873 (c. 18), s. 4 (4); Customs & Inland Revenue Act, 1876 (c. 66), s. 5.

**325. Assessment returned by another—Liability of parent for servants of minors.**—Nobleman charged for the year 1849–1850 the progressive duty from eight to ten servants. He had paid for ten servants in previous years, but in the present had returned only eight, the remaining two having been returned by his sons, who are minors, & who resided, when not at college, with their father. The sons had an annual allowance, & paid the servants' wages, & the servants attended to the sons' horses only. The comrs. discharged the assessment. *Comrs. right.*—*Ass. TAX CASE* (No. 2,155) (1850), 15 J. P. 211.

**326. Apprentice.**—Wine & spirit merchant appeals against a charge in respect of an apprentice under eighteen years of age, who waits on the guests who come to the spirit vaults. The comrs. relieve *applt.* *Comrs. wrong.*—*Re NUNN* (1864), 11 L. T. 47; *sub nom.* *Ass. TAX CASE* (No. 2,656), 29 J. P. 89.

**327. — — — — —**—*Re MONCK*, No. 315, *ante*.

**328. — — — — —**—The employer of an apprentice under a *bona fide* contract of apprenticeship is not required to take out a licence for the apprentice as a male servant under Revenue Act, 1869 (c. 14), s. 18, even though the apprentice is employed in one of the capacities specified in the definition of "male servant" in Revenue Act, 1869 (c. 14), s. 19 (3).—*HORAN v. HAYHOE*, [1904] 1 K. B. 288; 73 L. J. K. B. 133; 90 L. T. 12; 68 J. P. 102; 52 W. R. 231; 20 T. L. R. 118; 48 Sol. Jo. 117, D. C.

**329. Employment by licensed victualler—General servant not exempt.**—Licensed victualler appeals against an assessment for a man employed generally as a servant. The comrs. confirm the charge. *Comrs. right.*—*Re WALKER* (1864), 11 L. T. 47.

**330. Employment for trade purposes—Serving meals to assistants in a business.**—Revenue Act,

—*Corporation.*—Under Revenue Act, 1869, every "person" who employs a male servant must take out a licence for him :—*Held* : a corporn. was a

"person" within the Act & accordingly, that an education authority were bound to take out a licence for a male servant whom they employed.

—*TAYLOR v. RENFREWSHIRE EDUCATION AUTHORITY*, [1921] S. C. (J). 95.  
—*SCOT.*



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1869 (c. 14), which imposes a tax upon male servants, is *primâ facie* intended to apply only to servants employed in private establishments, & not to servants employed for purposes of trade, even though they may be employed in any of the capacities enumerated in Revenue Act, 1869 (c. 14), as being included in the expression "male servant."—**WHITELEY v. BURNS**, [1908] 1 K. B. 705; 77 L. J. K. B. 467; 98 L. T. 836; 72 J. P. 127; 24 T. L. R. 319; 52 Sol. Jo. 264, D. C.

**Annotations:—***Consd.* **Whiteley v. R.** (1909), 101 L. T. 741. **Expld.** **Marchant v. L. C. C.**, [1910] 2 K. B. 379. **N.F.** **L. C. C. v. Perry**, [1915] 2 K. B. 193.

**331. — Porter at block of flats.]—MARCHANT v. LONDON COUNTY COUNCIL**, No. 309, *ante*.

**332. — Farm servant.]—WOLFENDEN v. MASON**, No. 357, *post*.

**333. — ]—LONDON COUNTY COUNCIL v. PERRY**, No. 305, *ante*.

**334. Coachman let out on hire.]—LONDON COUNTY COUNCIL v. ALLEN**, No. 318, *ante*.

**(b) Occasional or Temporary Employment.**

**335. Gardener.]—**A gardener not living in the employer's house, nor employed throughout the year, & being a weekly servant at 16s. a week, is chargeable for, at the progressive rate, as a servant.—**ASS. TAX CASE** (No. 1,451) (1841), 5 J. P. 801.

**336. —.]—ASS. TAX CASE** (No. 1,452), No. 306, *ante*.

**337. —.]—ASS. TAX CASE** (No. 2,1 5) (1850), 15 J. P. 261.

**338. —.]—ASS. TAX CASE** (No. 2,422) (1856), 21 J. P. 455.

**339. —.]—ASS. TAX CASE** (No. 2,572) (1861), 25 J. P. 105.

**340. — Jobbing gardener.]—**Resp. employed a man as a gardener or jobbing gardener for four days a week at a certain sum per day. The man worked for another employer in the same capacity on other days of the week when he was not employed by resp., & by his contract with resp., if he could not come himself on any date he could send a qualified substitute, & he could also exchange days to suit the convenience of his other employer. He did not reside in resp.'s house. Upon an information against resp. under Revenue Act, 1869 (c. 14), for keeping a "male servant" without a licence:—**Held:** the man so employed as a gardener was not a servant of resp., & was therefore not a "male servant" within Revenue Act, 1869 (c. 14), s. 19 (3), & no licence was necessary.—**BRADDELL v. BAKER** (1911), 104 L. T. 673; 75 J. P. 185; 27 T. L. R. 182; 9 L. G. R. 245, D. C.

**341. General servant—Employment for part of year.]—**Applt. charged for two male servants under 52 Geo. 3, c. 93, Sched. (C.), No. 1, where one of such two servants was only "employed by him from Oct. to May, was a young man about twenty-one years of age, who assisted occasionally in the stable, broke & carried in coal & wood for the house, cleaned the knives, boots & shoes, worked in the garden & upon the land occupied by applt., & did anything he was ordered, either by the master or servant."—**ASS. TAX CASE** (No. 1,944) (1845), 11 J. P. 189.

**342. College servant—Employment by member of governing body.]—**Member of the governing body of St. John's College, Oxford, appeals against

a charge for a male servant. He keeps his carriage in the college stables, where it is cleaned by a servant of the college. Comrs. confirm the assessment. Comrs. right.—**Re ADAMS** (1864), 11 L. T. 46; *sub nom.* **ASS. TAX CASE** (No. 2,652), 29 J. P. 73.

**343. Hotel waiter—Temporary employment.]—**Every person employed by an hotel keeper, as a waiter in his hotel, if only for two or three weeks together, in addition to his ordinary permanent number of licenced servants, is a "male servant," within Revenue Act, 1869 (c. 14), ss. 18 & 19, for whom the hotel keeper is bound to pay the duty, & take out the licence prescribed by the provisions of that Act, & is not an "occasional waiter," & exempt as such within the meaning of the printed notice or direction given to taxpayers by the Comrs. of Inland Revenue.—**SPENCER v. SHEERMAN** (1871), 23 L. T. 873.

**Annotation:—***Consd.* **L. C. C. v. Perry**, [1915] 2 K. B. 193.

**(c) Partial Employment in Taxable Capacity.**

**344. Farm labourer employed as gardener.]—****ASS. TAX CASE** (No. 2,310) (1853), 18 J. P. 267.

**345. —.]—ASS. TAX CASE** (No. 2,343) (1854), 19 J. P. 8.

**346. —.]—ASS. TAX CASE** (No. 2,344) (1854), 19 J. P. 8.

**347. Farm labourer employed as groom.]—****ASS. TAX CASE** (No. 2,443) (1856), 21 J. P. 519.

**348. —.]—**H. was employed in the yard of a farmer to feed cows & horses, chop hay & do miscellaneous work; also to groom the horse & drive his master to & from the railway station. The farmer being charged with keeping a male servant without a licence, the justices found that H. was *bonâ fide* employed as a groom & *bonâ fide* employed as yardman, & was exempt under Customs & Inland Revenue Act, 1876 (c. 16), s. 5:—**Held:** the justices were wrong, as the exemption only applied to one occasionally & partially employed as a groom, & this was not found.—**YELLAND v. VINCENT** (1883), 47 J. P. 230, D. C.

**Annotation:—***Distd.* **Yelland v. Winter** (1885), 53 L. T. 912.

**349. —.]—**H. was employed by resp., a farmer, to feed the pony, attend to the bullocks in the yard, & to work on the land. When resp.'s trap was washed, H. did it, & he also cleaned the harness & occasionally drove resp. to the railway station. Resp. employed no other groom, but he sometimes harnessed & unharnessed & groomed the pony himself. If H. was present on those occasions he helped. Resp. had taken out no licence for H.:—**Held:** H. was being employed substantially in the capacity of general servant & partially only in that of groom, resp. being exempted by Customs & Inland Revenue Act, 1876 (c. 16), s. 5, from the tax upon male servants imposed by Revenue Act, 1868 (c. 14), ss. 16, 19 (3).—**YELLAND v. WINTER** (1885), 53 L. T. 912; 50 J. P. 38; 34 W. R. 121; 2 T. L. R. 117.

**350. Apprentice employed as groom.]—****ASS. TAX CASE** (No. 2,495) (1857), 22 J. P. 691.

**351. Grocer's assistant employed as groom.]—**A grocer appeals against a charge in respect of a person employed, as it would appear, in his business, by whom a carriage & horse (Schedule E.), duly charged, are occasionally attended to. The comrs. relieve. Comrs. wrong.—**ASS. TAX CASE** (No. 2,729) (1866), 31 J. P. 810.

**352. Farm servant employed as coachman.]—**Party charged for a servant in respect of a man

**PART VII. SECT. 4, SUB-SECT. 7.—B. (b).**

**335 i. Gardener.]—SCHULZE v. STEELE** (1890), 27 Sc. L. R. 636.—**SCOT.**

who is a labourer in husbandry, but who was employed daily to drive a pony carriage. The comrs. relieved. Comrs. wrong.—*ASS. TAX CASE* (No. 2,605) (1862), 28 J. P. 729.

353. —.]—Party charged for a servant in respect of a man who is a labourer in husbandry, but who was employed daily to drive a pony carriage. The comrs. relieved; comrs. wrong.—*Re CROSSE* (1864), 11 L. T. 112.

354. *Labourer employed in stable & garden.*—Gentleman appeals against an assessment for a labourer employed as helper in his stables & garden, on the ground that such employment is occasional only. The comrs. relieve applt. Comrs. wrong.—*Re TWEEDY* (1864), 11 L. T. 47; *sub nom.* *ASS. TAX CASE* (No. 2,654), 29 J. P. 88.

355. *Boy employed partly in garden.*—An appeal is made against an assessment in respect of a youth employed by a gentleman, at small daily wages, to run on errands & work occasionally in the garden. He is admitted to have cleaned shoes on one or two occasions, though not, at the time, with the knowledge of his employer. The comrs. relieve. Comrs. right.—*ASS. TAX CASE* (No. 2,725) (1866), 31 J. P. 810.

356. —.]—*HELSEY v. WINTLE* (1895), 59 J. P. Jo. 309, D. C.

357. *Horse breeder's man employed in domestic duties.*—An information was laid by applt. against resp. for employing a male servant without taking out a licence in respect of him. The servant lived indoors, & his duty was to clean the carriages & harness & to yoke & unyoke the horses of his employer, who was a farmer & horse breeder. In addition, the servant was engaged in looking after brood mares, cleaning boots, pumping water, bringing in coal, & feeding poultry.

The justices held that the major portion of the employment was attending to horses kept by resp. in connection with his business as a farmer & horse breeder, & dismissed the summons:—*Held*: the decision of the justices was correct.—*WOLFENDEN v. MASON* (1913), 110 L. T. 31; 78 J. P. 13; 11 L. G. R. 1243; 23 Cox, C. C. 722, D. C.  
*Annotation*:—*Consol. L. C. C. v. Perry*, [1915] 2 K. B. 193.

#### SUB-SECT. 8.—MOTOR CARS.

*See Sub-sect. 3, ante.*

## Part VIII.—Drawbacks and Excise Allowances.

*Drawback.*—*See Excise Drawback Act, 1817* (c. 87); *Customs Consolidation Act, 1876* (c. 36); *Finance Act, 1916* (c. 24), s. 20; *Finance Act, 1918* (c. 15), ss. 14, 15; *Isle of Man (Customs) Act, 1916* (c. 27), s. 5 (2), Sched.

358. — *How lost*—*Reservation on sale of goods shipped.*—No drawback is due for pepper, unless exported within the year, or prevented by accident. If goods are imported by one, & shipped for exportation by another, who sells to a third, reserving the drawback, it is lost.—*COOKE v. A.-G.* (1699), Park. 266; 145 E. R. 775.

359. — *Performance of condition of bond*—*Relanding of goods.*—Breaches of the common exportation bond were assigned in the replication to a plea of performance on *sci. fa.*, in that deft. had not exported, etc., & that he had unshipped & relanded, etc. It was proved that the goods, spirits, had been, in fact, shipped & carried out to the place of the vessel's destination, that they were not landed there, but were in part used at that place & on the homeward voyage by the master & crew of the vessel, & that the remainder was brought home into the London Docks where it was emptied out of a beer cask, into which it had been drawn off out of the export cask, into the water. There was no evidence of fraud. *Qu.*: whether not a fair exportation of the spirits, & so far a literal performance of the condition of the bond:—*Held*: to be an unshipping & relanding in Great Britain, & therefore, so far, a literal breach of the condition, & sufficient to support a verdict obtained by the Crown.—*It. v. DIXON* (1822), 11 Price, 204; 147 E. R. 448.

360. — *Assignment as security for debt*—*Priority of assignees over debenture-holders.*—A brewery co. created debenture stock secured by a trust deed. By that trust deed the co. specifically mortgaged to the trustees certain freehold & leasehold properties & created a general charge on the assets of the co. In the course of business they shipped through shipping agents beer for foreign ports, & became entitled to certain drawbacks provided for by Inland Revenue Act, 1880 (c. 20). Those drawbacks became a debt due from the Crown to the firm of brewers & they were assigned by them to the trustees for their bankers. No notice of this assignment was given to the Crown authorities by the assignees. A receiver for the debenture-holders took possession & gave notice to the Crown authorities having at that time knowledge of the previous assignment to the trustees for the bank:—*Held*: as the co. had power by their contract with the debenture-holders to deal with the drawbacks, the debenture-holders could not with notice of the assignment obtain priority to the assignees by giving notice to the Crown authorities.—*Re IND, COOPE & Co., LTD., FISHER v. THE CO., KNOX v. THE CO., ARNOLD v. THE CO.*, [1911] 2 Ch. 223; 80 L. J. Ch. 661; 105 L. T. 356; 55 Sol. Jo. 600.

*Excise allowances.*—*See Spirits Act, 1880* (c. 24), s. 3; *Customs & Inland Revenue Act, 1885* (c. 51), s. 3; *Revenue Act, 1889* (c. 42), s. 21; *Finance Act, 1895* (c. 16), ss. 6, 7; *Finance Act, 1902* (c. 7), s. 5; *Revenue Act, 1906* (c. 20), s. 1.

#### PART VIII.

r. *Drawback*—*Re-export of coal as ash in cement.*—*CANADA CEMENT Co., LTD. v. R.*, [1923] Exch. C. R. 145.—CAN.

t. — *New tea duty*—*Exportation & reimportation.*—On the imposition of a reduced tea duty, a holder may ship, export, & land tea at the place for which it is entered outwards, thus obtaining a drawback of the

duty, & then reimport, paying the reduced duty, so long as the tea is actually landed at the place for which it is so entered outwards.—*R. v. MACKERRAS* (1898), 16 N. Z. L. R. 677.—N.Z.

## Part IX.—Stamp Duties.

### SECT. 1.—IN GENERAL.

See Stamp Act, 1891 (c. 39); Stamp Duties Management Act, 1891 (c. 38); Revenue Act, 1898 (c. 46), s. 13; Finance Act, 1911 (c. 48), s. 20; Finance Act, 1922 (c. 17), s. 48.

**361. Stamp not part of document.]**—The stamp is no part of the document to which it is affixed.—*R. v. KEIGHLEY (INHABITANTS)* (1846), 8 Q. B. 877; 2 New Sess. Cas. 321; 15 L. J. M. C. 102; 10 J. P. 440; 10 Jur. 492; 115 E. R. 1104; *sub nom. R. v. KIGHLEY*, 7 L. T. O. S. 158.

**362. Retroactive effect of stamping.]**—A stamp when imposed has a retroactive effect, so as to authorise acts previously done under the instrument in question. But this rule does not apply to cases, with respect to which there is a positive enactment, that a stamp shall not be imposed after the instrument has been issued.—*ANON.* (1827), 5 L. J. O. S. K. B. 76.

**363. —.]**—A deed stamped after proceedings have begun is good *ab initio*.—*BROWNE v. SAVAGE* (1859), as reported in 5 Jur. N. S. 1020; 7 W. R. 571.

*Annotations:—Mentd.* *Forward v. Edginton* (1860), 8 W. R. 206; *Willes v. Greenhill* (No. 1) (1860), 29 Beav. 376; *Willes v. Greenhill* (No. 2) (1860), 29 Beav. 387; *Newman v. Newman* (1885), 28 Ch. D. 674; *Low v. Bouverie*, [1891] 3 Ch. 82; *Lloyd's Bank v. Pearson*, [1901] 1 Ch. 865; *Re Dallas*, [1904] 2 Ch. 385.

**364. Issue of stamps—Not issued post-dated.]**—*HOWE v. BURCKHARDT* (1891), cited in *Wills' Circumstantial Evidence*, 6th ed. at p. 242.

**Judicial notice of stamp duty.]**—*See EVIDENCE*, Vol. XXII., pp. 146, 147, No. 1236.

### SECT. 2.—CONSTRUCTION OF STATUTORY PROVISIONS.

**365. Words of exceptions construed liberally.]**—A guarantee in writing, for the payment of goods thereafter to be purchased by a third person to a certain amount, is within the exception of 23 Geo. 3, c. 58, "a contract for or relating to the sale of goods" & need not be stamped.

I think that where the subject is to be charged with a duty, the cases in which it is to attach ought to be fairly marked out & we should give a liberal construction to words of exception confining the operation of the duty (*LORD ELLENBOROUGH, C.J.*).—*WARRINGTON v. FURBOR* (1807), 8 East, 242; 103 E. R. 334.

*Annotations:—Refd.* *Boydell v. Drummond* (1809), 11 East, 142; *Rein v. Lane* (1867), L. R. 2 Q. B. 144; *Horsey v. Graham* (1869), 21 L. T. 530; *Armistage v. Wilkinson* (1878), 3 App. Cas. 355. *Mentd.* *Phillips v. Astling* (1809), 2 Taunt. 206; *Murray v. King* (1821), 5 B. & Ald. 165; *Holborow v. Wilkins* (1822), 2 Dow. & Ry. K. B. 59; *Van Wart v. Woolley* (1824), 3 B. & C. 439; *Camidge v. Allenby* (1827), 6 B. & C. 373; *Hitchcock v. Humfrey* (1843), 5 Man. & G. 559; *Barber v. Mackrell* (1892), 67 L. T. 108.

**366. Statute imposing charge—Necessity for clear & unambiguous language.]**—*WARRINGTON v. FURBOR*, No. 365, *ante*.

**367. —.]**—Where a father, seised in fee of an estate, conveyed it to his son by a deed, which recited that he, the father, was minded, & had resolved to give & assure it to his son, as well in consideration of natural love & affection,

as also in consideration of the provision which the son had that day made, by his bond, of £1,500 in augmentation of the portions or fortunes of his sisters:—*Held*: this was not a sale to the son within Probate & Legacy Duties Act, 1808 (c. 149), Sched. title Conveyance, & the conveyance was not subject to the *ad valorem* stamp duty.

It is a well settled rule of law that every charge upon the subject must be imposed by clear & unambiguous language (*BAYLEY, J.*).—*DENN d. MANIFOLD v. DIAMOND* (1825), 4 B. & C. 243; 6 Dow. & Ry. K. B. 328; 3 L. J. O. S. K. B. 211; 107 E. R. 1049.

*Annotations:—Consd.* *Massey v. Nanney* (1837), 3 Bing. N. C. 478; *Wroughton v. Turtle* (1843), 1 Dow. & L. 473; *Henniker v. Henniker* (1852), 1 E. & B. 54. *Refd.* *Belcher v. Sikes* (1827), 6 B. & C. 234; *A.-G. v. Bradbury* (1851), 7 Exch. 97; *Chandos v. L. R. Comrs.* (1851), 17 L. T. O. S. 128; *Vauxhall Bridge Co. v. Sawyer* (1851), 6 Exch. 504; *Gosling v. Veley* (1853), 4 H. L. Cas. 679; *Waddington v. London Union Grdns.* (1858), E. B. & E. 391; *Christie v. L. R. Comrs.* (1866), 15 L. T. 282. *Mentd.* *Floyer v. Bankes* (1863), 32 L. J. Ch. 610.

**368. —.]**—A statute imposing a tax upon the subject should always receive a strict interpretation & should not be allowed to operate as a charge unless the words are plain & unambiguous (*WILDE, C.J.*).—*DAINES v. HEATH* (1847), as reported in 3 C. B. 938; 136 E. R. 370; *sub nom. DAVIES v. HEATH*, 8 L. T. O. S. 91.

**369. —.]**—*CHANDOS (MARQUIS) v. INLAND REVENUE COMRS.*, No. 669, *post*.

**370. Inconvenience caused by decision not considered.]**—By an instrument under seal, A. agreed to take & hire of B. certain premises at a certain yearly rent, but no time was fixed for the commencement or determination of the interest. It was also agreed that A. should take at a valuation to be made on a future day, the fixtures, furniture, & stock in trade on the premises. The instrument had a stamp of £1 10s. impressed upon it:—*Held*: it was only an agreement for a lease, & the stamp was not sufficient. *Semble*: it should have been a stamp of £1 15s., the instrument being "a deed not otherwise charged" in Stamp Act, 1815 (c. 184), Sched.

It is said that inconvenience will be produced by such a decision. Without inquiring whether that be so or not it suffices to say that the consequences cannot alter the law (*LITTLEDALE, J.*).—*CLAYTON v. BURTENSHAW* (1826), 5 B. & C. 41; 7 Dow. & Ry. K. B. 800; 108 E. R. 16.

*Annotation:—Refd.* *Wilson v. Smith* (1844), 12 M. & W. 401.

**371. Benefit of doubt—To subject not Crown.]**—In all revenue cases let the officers of Govt. take care that the legislature is made to speak plain & intelligible language. If the legislature is not made to speak plain & intelligible language, let not individuals suffer, but let the public. I am bound to say, if there is any doubt about these words, the benefit of that doubt should be given to the subject (*LORD WYNFORD*).—*R. v. WINSTANLEY* (1831), 1 Cr. & J. 434; 148 E. R. 1492; *sub nom. A.-G. v. WINSTANLEY*, 5 Bli. N. S. 130; 2 Dow. & Cl. 302; 9 L. J. O. S. Ex. 92, H. L.

*Annotations:—Refd.* *Flather v. Stubbs* (1842), 2 Q. B. 614. *Mentd.* *It. v. Sedgwick* (1835), Tyr. & Gr. 94.

**372. —.]**—(1) By an agreement under seal between the owner & the manager of an hotel,

merely empowers the Legislature to make laws for the peace, welfare & good government of the State in all cases, one of the canons of construction

to be applied in regard to the Stamp Duties Acts of the State is that unless either by express words or necessary implication such Acts are shown to

### PART IX. SECT. 2.

a. *Canons of construction—Whether operation of statute limited in area.]*—Where the constitution of a State

the manager was until determination of the agreement to carry on the business of hotel proprietor, & to have entire control of the business without interference by the owner; he was to receive the whole of the receipts & profits, & pay all necessary outgoings, & to pay to the owner a fixed sum per week. No period was fixed for the duration of the agreement, which contained powers for its determination by either party in certain events; it was *ipso facto* to determine on the death of the manager. The agreement was not to operate as a demise to the manager, nor to constitute a partnership between the parties:—*Held*: the agreement was a security for an indefinite period for a sum of money at weekly periods, & not for an annuity or yearly sum payable by weekly instalments, & was therefore liable to *ad valorem* duty upon the sum agreed to be paid weekly, & not upon the total amount of such weekly payments for a year.

If the statute is so indefinite & uncertain that it can be treated in two ways & the true construction of it is open to two views, the one most favourable to the Crown & the other to the subject, then the latter construction should be adopted (POLLOCK, B.).—CLIFFORD v. INLAND REVENUE COMRS., [1896] 2 Q. B. 187; 65 L. J. Q. B. 582; 74 L. T. 699; 45 W. R. 14; 12 T. L. R. 439, D. C. Annotations:—*As to* (1) *Distd.* Lewis v. I. R. Comrs., [1898] 2 Q. B. 290. *Folld.* Jackson v. I. R. Comrs. (1902), 87 L. T. 269. *Consd.* Underground Electric Rys. of London & Glyn, Mills, Currie v. I. R. Comrs., [1916] 1 K. B. 306. *Refd.* Hulse v. Hulse (1910), 54 Sol. Jo. 704.

**373. Construction dependent on language of legislature.**—The law upon the subject of stamps is altogether a matter *positivi juris*. It involves nothing of principle or of reason, but depends altogether on the language of the legislature (TAUNTON, J.).—MORLEY v. HALL (1834), 2 Dowl. 494.

Annotation:—*Refd.* Clarke v. Jones (1834), 3 Dowl. 277.

**374. No presumption in favour of duty.**—(1) A paper, signed by defts., stated, that plffs. agreed to sell to defts. all the two upper veins or beds of coal, describing them by their name & locality, containing by admeasurement 16 acres, at the price or sum of £77 per acre, to be paid as follows: the sum of £100 on the day of the date thereof, & the remainder by equal quarterly payments of £25 each; & it was stipulated, that, if defts. should work more coal than in any year should exceed £100, at the rate of £77 per acre, they should pay for such excess:—*Held*: the instrument did not require an *ad valorem* stamp, as upon a conveyance, under Stamp Act, 1815 (c. 184), & a stamp of 35s. was sufficient.

(2) The party, who seeks to bring an instrument within the Stamp Act, must show clearly that it falls within it. . . . We can make no inferences in favour of the liability (*per CUR.*).—PHILLIPS v. MORRISON (1844), 12 M. & W. 740; 13 L. J. Ex. 212; 3 L. T. O. S. 39; 8 Jur. 343; 152 E. R. 1397.

Annotation:—*As to* (2) *Consd.* A.-G. v. Smith-Marriott, [1899] 2 Q. B. 595.

**375. Statute construed in popular sense.**—(1) 13 & 14 Vict. c. 97, Sched. title Mortgage, imposes on the transfer of a mtge. exceeding £1,400 a fixed duty of £1 15s. Revenue No. 2 Act, 1861 (c. 91), s. 30, enacts that where there are several deeds on the transfer of a mtge. from old to new trustees, if one of the deeds stamped with the duty of £1 15s. it shall be sufficient that the others are stamped with the duty by law chargeable

on a duplicate or counterpart, viz. 5s. Revenue No. 2 Act, 1865 (c. 96), s. 17, after reciting that certain duties were imposed on transfers of mtges. by 13 & 14 Vict. c. 97, enacts that in lieu thereof there shall be charged & paid on every such transfer for every £100 of the amount or value of the principal money or stock already secured by such mtge. thereby transferred or fractional part of £100 the duty of 6d.:—*Held*: the provisions of Revenue No. 2 Act, 1861 (c. 91), s. 30, were not repealed by the general enactment contained in Revenue No. 2 Act, 1865 (c. 96), s. 17, & therefore trustees were still entitled to the privileges afforded under that sect.

(2) We think that Acts of Parliament imposing stamp duties ought to be construed according to the plain & ordinary meaning of the words used, as it appears from the words themselves & that such an incongruity as this does not authorise a ct. of law to adopt a strained & forced construction in order to avoid it (KELLY, C.B.).—FOLEY (LORD) v. INLAND REVENUE COMRS. (1868), L. R. 3 Exch. 263; 37 L. J. Ex. 109; 18 L. T. 725; 16 W. R. 1055.

**376.** —(1) A co., duly incorporated under the laws of the United States of America, & having its chief seat of business in New York, invited tenders for bonds of the value of \$2,000,000, which were tendered & purchased by a firm in New York, where the purchase-money was paid, & the bonds handed over, the name of the payee being left blank. The bonds were then sent to England, & advertised for sale there by the agents of the purchasers, who issued prospectuses, letters of allotment, & scrip certificates, & delivered the bonds to purchasers:—*Held*: the issue of the bonds was completed at New York, when the co. parted with the possession of & control over them, & they were not therefore foreign securities issued in England within Stamp Act, 1871 (c. 4), s. 2, so as to be liable to stamp duty.

(2) As to the construction of the Stamp Act, I think it was very properly urged that the statute is not to be construed according to the strict or technical meaning of the language contained in it, but that it is to be construed in its popular sense: meaning, of course, by the words "popular sense" that sense which people conversant with the subject matter with which the statute is dealing would attribute to it (POLLOCK, B.).—GRENFELL v. INLAND REVENUE COMRS. (1876), 1 Ex. D. 242; 45 L. J. Q. B. 465; 34 L. T. 426; 24 W. R. 582.

Annotations:—*As to* (1) *Consd.* Baring v. I. R. Comrs., [1898] 1 Q. B. 78. *Refd.* Chicago Ry. Terminal Elevator Co. v. I. R. Comrs. (1896), 75 L. T. 137; Brown v. I. R. Comrs., Gordon v. I. R. Comrs. (1900), 84 L. T. 71.

**377. Right to avoid liability.**—A. agreed with B. to apprentice his nephew to him, with a premium of £250 for his board, lodging, & education. But previously to the execution of the deed of apprenticeship, in order to evade the stamp duty, it was agreed that £90 19s. should be the sum appropriated for the education only, & the deed was drawn with the proper stamp for that amount of premium, & notes were given for the remaining £150 for the board & lodging. The deed stated the consideration to be for instruction only:—*Held*: a sufficient stamp, & not an evasion of the Stamp Act.

The Stamp Act is not intended to fetter the proceedings of parties; & if a party so acts as not to be hit by it, he has a right to do so (ROLFE, B.).—HANKINS v. CLUTTERBUCK (1848), 2 Car. & Kir.

violate the principle of territoriality they must be construed as limited in their operation to that State & con-

sequently, as not selecting as the subject-matter of taxation any person, thing or circumstance not within its

territory.—QUEENSLAND STAMP COMRS. v. WISNHOLT (1915), 20 C. L. R. 531. —AUS.

**Sect. 2.—Construction of statutory provisions. Sect. 3: Sub-sects. 1 & 2, A. & B.]**

810; *sub nom.* **HAWKINS v. CLUTTERBUCK**, 11 L. T. O. S. 456.

**378.** —[—(1) Stamp Act, 1870 (c. 97), Sched. imposes an *ad valorem* duty upon a "conveyance or transfer on sale of any property." By sect. 70, "the term 'conveyance on sale' includes every instrument, & every decree or order of any ct. or of any comrs., whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser, or any other person on his behalf or by his direction":—*Held*: an agreement for the sale of lands, buildings, & the goodwill of a business, was not a "conveyance on sale" within the above definition & did not therefore require an *ad valorem* stamp.

(2) The question is, whether, upon that agreement the stamp duty ought to be an *ad valorem* stamp upon the purchase-money, or whether the instrument would be sufficiently stamped if the ordinary deed or agreement stamp is placed upon it. Clearly, it must be a deed stamp, because the instrument is a deed under seal & that stamp must be affixed (**HAWKINS, J.**).

(3) The Crown must make out its right to the duty, & if there be a means of evading the stamp duty, so much the better for those who can evade it. It is no fraud upon the Crown, it is a thing which they are perfectly entitled to do (**LORD FISHER, M.R.**).—**INLAND REVENUE COMRS. v. ANGUS, SAME v. LEWIS** (1889), 23 Q. B. D. 579; 61 L. T. 832; 38 W. R. 3; 5 T. L. R. 67, C. A.; *affg.* **S. C. sub nom. LEWIS v. INLAND REVENUE COMRS.**, **ANGUS v. INLAND REVENUE COMRS.**, 53 J. P. 453, D. C.

*Annotations*:—*As to* (1) *Refd.* **West London Syndicate v. I. R. Comrs.**, [1898] 2 Q. B. 507; **Midland Bank v. I. R. Comrs.**, [1927] 2 K. B. 465. *Generally*, *Mentd.* **I. R. Comrs. v. Muller's Margarine**, [1901] A. C. 217; **A.-G. v. Richmond** (No. 1), [1907] 2 K. B. 923.

**379.** —[—There is the possibility of the revenue being wronged by an instrument such as this being post-dated, but that did not occur to the framers of the recent statute & they do not provide for it. It requires some positive enactment to meet that evasion: for it is not illegal at common law to evade a stamp duty (**BLACKBURN, J.**).—**EMANUEL v. ROBERTS** (1868), as reported in 9 B. & S. 121.

*Annotations*:—*Refd.* **Bull v. O'Sullivan** (1871), L. R. 6 Q. B. 209; **Gatty v. Fry** (1877), 46 L. J. Q. B. 605. *Mentd.* **Royal Bank of Scotland v. Tottenham** (1894), 71 L. T. 168.

**380.** — **By private Act of Parliament.**—The G. ry. co. was incorporated by an Act of Parliament in 1899 with a capital of £2,400,000, & duly paid the duty thereon under Stamp Act, 1891 (c. 39). The B. ry. co. was incorporated by an Act of 1897 with a capital of £800,000, & duly paid the duty thereon under the Act of 1891. By an Act of 1902 all the powers, rights, privileges, liabilities, & immunities of the G. ry. co. were transferred to the B. ry. co., & the G. ry. co. was dissolved:—*Held*: by the transfer there was "an increase of the amount of nominal share capital of the B. co. authorised by" the Act of 1902 to the extent of £2,400,000, & the duty thereon must be paid by the B. ry. co., under Stamp Act, 1891 (c. 39).

The cts. will take every means of defeating an attempt by a private Act to affect the rights either of the Crown or of other persons who have not been brought in (**LORD LOREBUEN, C.**).—**GREAT NORTHERN, PICCADILLY & BROMPTON RY. Co. v. A.-G.**, [1909] A. C. 1; 78 L. J. K. B. 185; 98 L. T. 731; 24 T. L. R. 506; 52 Sol. Jo. 411,

**SECT. 3.—STAMP DUTIES ON INSTRUMENTS GENERALLY.**

**SUB-SECT. 1.—PRESUMPTION AS TO STAMPING.**

*See EVIDENCE*, Vol. XXII., pp. 272, 273, Nos. 2571–2580.

**381. General rule.**—On parol evidence of existence of an indenture, sessions may presume that the indentures were stamped & the duty paid.—**R. v. BADBY** (1772), 1 Bott, 520.

**382. Instrument sufficiently stamped at trial—Admissibility of evidence—Proving absence of stamp when executed.**—Although a policy of insurance produced at the trial of an action has a sufficient stamp, evidence will be received that it had no such stamp when it was effected, in which case it is a mere nullity, though stamped afterwards by order of the comrs. of stamps; for this is forbidden by 35 Geo. 3, c. 63, & not authorised by 37 Geo. 3, c. 136, which extends only to such instruments as could before be legally stamped after they were executed.—**RODERICK v. HOVIL** (1811), 3 Camp. 103; 170 E. R. 1320.

*Annotation*:—*Mentd.* **Mead v. Davison** (1835), 3 Ad. & El. 303.

**383. Document thirty years old—Bearing mark of stamp.**—Where a deed thirty years old, requiring an *ad valorem* stamp, bore the mark of having had some stamp upon it, but there was nothing to indicate whether the stamp had been a proper stamp or not, & no evidence was given on the point:—*Held*: it was to be presumed that the deed had been properly stamped.—**DOE d. FRYER v. COOMBE** (1842), 3 Q. B. 687; 3 Gal. & Dav. 193; 12 L. J. Q. B. 36; 6 J. P. 687; 6 Jur. 930; 114 E. R. 670.

**384. Lost or destroyed instrument.**—Where an instrument has been lost, the rule is to presume that it was duly stamped, & the *onus* of proving the contrary lies upon the party who objects that the lost document was unstamped; but where circumstances are proved which raise a strong presumption that the document was never stamped, the burden of proving it to have been stamped lies on the party adducing secondary evidence of the lost instrument.—**SMITH v. HENLEY** (1844), 1 Ph. 391; 13 L. J. Ch. 221; 3 L. T. O. S. 49; 8 J. P. 223; 8 Jur. 434; 41 E. R. 680, L. C. *Annotation*:—*Refd.* **Blair v. Ormond** (1847), 1 De G. & Sm. 428.

—[—*See, also*, *EVIDENCE*, Vol. XXII., p. 272, Nos. 2571–2577.

**Documents not produced after notice.**—*See EVIDENCE*, Vol. XXII., pp. 272, 273, Nos. 2578–2580.

**385. Rebuttal of presumption—Onus of proof—Instrument executed by several parties.**—Where an agreement between several parties is offered in evidence, & it is objected to on the ground that it is not sufficiently stamped, by reason of the omission of the stamp, proof of that lies on deft., who makes the objection, it being a fact.—**WADDINGTON v. FRANCIS** (1804), 5 Esp. 182; 170 E. R. 779.

**386.** — **Lost instrument.**—**SMITH v. HENLEY**, No. 384, *ante*.

**387.** — **Foreign bill of exchange.**—By Stamp Act, 1854 (c. 83), s. 5, it is provided that no person shall be entitled to recover in an action on any foreign bill of exchange unless it had upon it at the time it was transferred to him the stamp required by the Act.

In an action on a foreign bill of exchange, the required stamp was upon the bill at the time of the trial, but no evidence was given to show that it was on the bill at the time it was indorsed to pltf.:—*Held*: it must be presumed to have been so, the



contrary not having been shown by deft.—*BRADLAUGH v. DE RIN* (1868), L. R. 3 C. P. 286; 37 L. J. C. P. 146; 18 L. T. 904; 16 W. R. 1128.  
*Annotation* :—*Apld.* *Marc v. Rouy* (1874), 31 L. T. 372.

**388.** ———.—*By Stamp Act, 1870* (c. 97), ss. 24, 51, 54, a foreign bill, in order to be admissible in evidence, requires only that the proper stamp should have been duly affixed. Although not cancelled, if the holder proves that the proper stamp was affixed before the bill came into his possession, the burden of proof that it was not duly stamped is thrown upon the person objecting to its admission. *Semble* : such an objection can be raised only by plea.—*MARC v. ROUY* (1874), 31 L. T. 372; 23 W. R. 89.

———.—*See EVIDENCE*, Vol. XXII., p. 274, Nos. 2596–2606.

#### SUB-SECT. 2.—WHAT STAMP NECESSARY OR SUFFICIENT.

##### A. In General.

**389.** Conveyance executed in England—On sale of land abroad—*Ad valorem* stamp.]—A conveyance, executed in England upon a sale of land in Australia requires an *ad valorem* stamp.—*Re WRIGHT* (1855), 11 Exch. 458; 156 E. R. 911; *sub nom.* *WRIGHT v. INLAND REVENUE COMRS.*, 25 L. J. Ex. 49.

**390.** Instrument coming within two categories—One duty payable—Crown may choose higher duty.]—Where a document comes within each of two categories chargeable with duty under Stamp Act, 1891 (c. 39), the Crown is entitled to only one of the duties, but it may choose the higher.

The United States of Mexico issued “gold coupon treasury notes” with a promise to pay principal & interest to bearer at fixed dates either abroad or, at the option of the holder, in London. There was evidence that the notes were saleable on the London & other Stock Exchanges :—*Held* : the notes being in fact both promissory notes & marketable securities within Stamp Act, 1891 (c. 39), they were liable to the higher duty imposed by that Act upon marketable securities.—*SPEYER BROTHERS v. INLAND REVENUE COMRS.*, [1908] A. C. 92; 77 L. J. K. B. 302; 98 L. T. 286 24 T. L. R. 257; 52 Sol. Jo. 222, H. L.  
*See Stamp Act, 1891* (c. 39), ss. 1–6.

##### B. Construction of Instrument.

**391.** Legal effect of instrument considered—Not merely legal words used.]—The question of the sufficiency or insufficiency of a stamp, is to be decided by the legal effect of the instrument, & not merely the legal words which may be used by the parties. Accordingly, where an instrument not under seal, used words of conveyance of the fee, it was held to be an agreement only, & to be properly stamped as an agreement.—*R. v. RIDGWELL* (INHABITANTS) (1827), 6 B. & C. 665; 9 Dow. & Ry. K. B. 678; 4 Dow. & Ry. M. C. 459; 5 L. J. O. S. M. C. 67; 108 E. R. 596.

*Annotations* :—*Foll.* *Freeman v. I. R. Comrs.* (1871), L. R. 6 Exch. 101. *Refd.* *Limmer Asphalt Paving Co. v. I. R. Comrs.* (1872), L. R. 7 Ex. Ch. 211.

**392.** ———.—*At date of execution.*]—Whenever the stamp is affixed it must be affixed according to the manner in which the instrument operated

at the time it was executed (*PARKE, B.*).—*WEDDALL v. CAPES* (1836), 1 M. & W. 50; 1 Gale, 432; Tyr. & Gr. 430; 5 L. J. Ex. 111; 150 E. R. 341.

*Annotations* :—*Mentd.* *Doe d. Murrell v. Milward* (1838), 3 M. & W. 328; *Turner v. Watts* (1927), 44 T. L. R. 105.

**393.** ———.—*WEST LONDON SYNDICATE v. INLAND REVENUE COMRS.*, No. 626, *post*.

**394.** Instrument purporting to convey land—Not under seal—*Operating as agreement.*]—*R. v. RIDGWELL* (INHABITANTS), No. 391, *ante*.

**395.** Admissibility of extrinsic evidence—Nominal date not true date of execution—Stamp at true date insufficient.]—A deed executed before the commencement of Stamp Act, 1870 (c. 97), & at the time of execution requiring a 35s. stamp, was not dated nor stamped until afterwards; so that on its face it appeared to be duly stamped with a 10s. stamp, under sects. 4 & 78 of that Act :—*Held* : evidence of the real date of execution was admissible; & under sect. 17, the deed could not be given in evidence.—*CLARKE v. ROCHE* (1877), 3 Q. B. D. 170; 47 L. J. Q. B. 147; 37 L. T. 633; 42 J. P. 151; 26 W. R. 112.

*Annotation* :—*Refd.* *Royal Bank of Scotland v. Tottenham* (1894), 71 L. T. 168.

**396.** ———.—*Transfer of shares—Evidence of true consideration.*]—A transfer to the pltf. of shares in deft. co. was presented for registration. The stamp on the transfer was in accordance with the consideration stated on the face of it, but it was discovered that the consideration so stated was less than that which had been given. The directors thereupon refused to register the transfer. In an action to recover damages arising out of this refusal :—*Held* : since a transfer not duly stamped according to law would not, by reason of Stamp Act, 1891 (c. 39), s. 14 (4), be available in a ct. of law either to enforce rights of the co. against the transferee, or to justify an alteration of the register of shareholders, the directors were entitled to refuse to register the transfer & in determining whether the transfer was duly stamped they were entitled to go behind that which appeared on the face of the document.—*MAYNARD v. CONSOLIDATED KENT COLLIERIES CORPN.*, [1903] 2 K. B. 121; 72 L. J. K. B. 681; 88 L. T. 676; 52 W. R. 117; 19 T. L. R. 448; 47 Sol. Jo. 513; 10 Mans. 386, C. A.  
*Annotation* :—*Refd.* *Re Indo-China Steam Navigation Co.*, [1917] 2 Ch. 100.

**397.** Instrument in form of trust—Securing previous settlement.]—In Stamp Act, 1891 (c. 39), Sched. I. “settlement,” defined as “any instrument . . . whereby any definite & certain principal sum of money . . . or any definite & certain amount of stock, or any security is settled or agreed to be settled in any manner whatsoever,” is made liable to *ad valorem* stamp duty.

By an ante-nuptial contract of marriage A. bound himself in the event of his wife surviving him to pay to her an annuity of £400. & in security of annuity A. bound himself & his heirs to infest his wife in certain lands. The contract of marriage was impressed with a stamp duty & was adjudicated as duly stamped. Subsequently A. desired to sell the lands forming the security & his wife agreed to consent to the sale on condition that the annuity was otherwise secured; accordingly A. in place of the security executed a deed by which he conveyed to trustees certain property upon trust for, *inter alia*, the payment of the annuity

#### PART IX. SECT. 3, SUB-SECT. 2.—A.

b. Time for valuation of consideration—For stamp duty purposes.]—Consideration in an agreement for sale is to be valued for stamp duty as at time of sale not transfer, where consisting

of shares.—*R. v. BULLFINCH PROPRIETARY* (W. A.), LTD. (1912), 15 C. L. R. 443.—*AUS.*

#### PART IX. SECT. 3, SUB-SECT. 2.—B.

c. Admissibility of extrinsic evi-

dence.]—The question whether an instrument is or is not taxable under Stamp Act, 1892 (Vict.), must be determined by the examination of the instrument itself & not upon extrinsic evidence.—*DAVIDSON v. CHIRNSIDE* (1908), 7 C. L. R. 324.—*AUS.*



**Sect. 3.—Stamp duties on instruments generally:**

provided to the wife in her marriage contract & subject thereto upon trust for A. himself. The Crown claimed that the deed of trust was chargeable with an *ad valorem* stamp duty as being a "settlement":—*Held*: the deed was not a "settlement" under Stamp Act, 1891 (c. 39).—*INLAND REVENUE v. OLIVER*, [1909] A. C. 427; 78 L. J. P. C. 146; 101 L. T. 140; 25 T. L. R. 707; 53 Sol. Jo. 649, H. L.

**C. Several Documents Forming One Instrument.**

**398. Stamp on one sufficient.**—A deed legally stamped is not vitiated by referring to inventories which are not stamped.—*DUCK v. BRADDYLL* (1824), 1 M'Cle. 217; 13 Price, 455; 147 E. R. 1047.  
*Annotations*:—*Reid*, *Doe d. Kettler v. Lewis* (1830), 10 B. & C. 673; *Dyer v. Green* (1847), 1 Exch. 71. *Mentd.* *Darby v. Harris* (1841), 1 Q. B. 895; *Re McKenzie, Ex p. Hertfordshire Sheriff*, [1899] 2 Q. B. 566.

**399.** —.]—Deft., by letter afterwards requested pltf's. auctioneer to remove the fixtures, which was done; & on the following day, deft. wrote pltf's. that he would attend at the house & pay them the amount of the fixtures, as settled by the appraisers. The first & last letters were signed by deft., but the first only was stamped:—*Held*: one stamp was sufficient, as it fell within the proviso in Stamp Act, 1815 (c. 184), Sched. Part I., Title Agreement.—*HEMMING v. PERRY* (1828), 2 Moo. & P. 375.

**400.** —.]—Where an agreement refers to another document, so that the two papers, in fact, form only one agreement, it is sufficient if one of the papers only bear an agreement stamp.—*PEATE v. DICKEN* (1834), 1 Cr. M. & R. 422; 5 Tyr. 116; 4 L. J. Ex. 28; 149 E. R. 1145.  
*Annotation*:—*Distd. R. v. Lloyd* (1852), 19 L. T. O. S. 203.

**401.** —.]—Where, by an agreement, dated May 14 the parties agreed to refer the striking of a boundary line to a surveyor, who did not live within a certain neighbourhood; & by an agreement, dated May 25, written upon the same paper, they modified the former, & submitted the matter in dispute to a surveyor, residing in the neighbourhood, & this latter agreement was acted upon; the stamp being attached to & placed in juxtaposition with the former:—*Held*: no distinct stamp need be affixed to the second agreement, which had been acted upon inasmuch as the two agreements constituted, in substance, but one, & consequently one stamp was sufficient.—*TAYLOR v. PARRY* (1840), 1 Man. & G. 604; 1 Scott, N. R. 576; 9 L. J. C. P. 298; 4 Jur. 967; 133 E. R. 474.

*Annotations*:—*Reid*, *Fishmongers Co. v. Dimsdale* (1852), 22 L. J. C. P. 44. *Mentd.* *Holmes v. Powell* (1856), 5 De G. M. & G. 572; *Humphrey v. Nowland* (1862), 15 Moo. P. C. C. 343.

**402.** — **Necessity for same parties to each document.**—*R. v. LLOYD* (1852), 19 L. T. O. S. 203.

**403.** — **Admissibility of unstamped document.**—Deft., by a lease which was not stamped, demised to W. He afterwards, by an agreement, stamped with a lease stamp, but which did not contain words of demise, though it referred to the lease, let the same premises to pltf.:—*Held*: the terms of the lease were incorporated in, & formed part of the agreement; & the former was admissible in evidence, though it was not stamped.—*PEARCE v. CHESLYN* (1835), 4 Ad. & El. 225; 1 Har. & W.

768; 5 Nev. & M. K. B. 652 5 L. J. K. B. 113; 111 E. R. 772.

**404.** —.]—A. writes to B., "I hereby agree, according to our conversation of last evening, to pay you fifty guineas for the occupation of your first floor furnished, from Mar. 4 to Sept. 4. I also agree either to occupy the rooms from Sept. 4 to Dec. 4, furnished, on the same terms, that is to say, twenty-five guineas for the three months, or take them unfurnished at the rate of eighty guineas *per annum*." To prove this contract, under a plea of *non assumpsit* in an action by B. against A. for refusing to occupy the rooms furnished till Dec. 4, or to take them unfurnished after the three months at the rate of £84 *per annum*, A.'s letter was put in stamped with a 30s. stamp. To show that the real contract between the parties was for a yearly tenancy of the unfurnished rooms, A. produced a contemporaneous letter written to him by B., unstamped, in which B. stated that he agreed to let the rooms by the year:—*Held*: this letter was properly rejected, inasmuch as if it created a new or substituted contract, it required a 30s. stamp, & if it formed part of the original agreement, a 35s. stamp was required for some one of the letters, under Stamp Act, 1815 (c. 184), Sched. Part I., Title Agreement.—*ATHERSTONE v. BOSTOCK* (1841), 2 Man. & G. 511; *Drinkwater*, 96; 2 Scott, N. R. 637; 10 L. J. C. P. 113; 5 J. P. 259; 133 E. R. 850.

**405.** —.]—In order to prove the terms on which certain notes were deposited by A. with a banking co., deft. produced a paper signed by the manager, & stamped as an agreement, which acknowledged the receipt from A. of the notes as a collateral security "for bills discounted for you," by the bank. The judge was of opinion that that meant "which have been discounted"; & pltf. then produced a paper of the same date signed by A. in these words:—*Held*: "In consideration of your discounting for me bills from time to time, I deposit as collateral security" the notes in question. It was objected that that was inadmissible for want of a stamp, but the judge thought that it was a part of the same contract, that one stamp was sufficient for the two, & that deft. was bound to give it in evidence:—*Held*: the judge was right.—*LAURIE v. HAMMOND* (1847), 2 New Pract. Cas. 379; 10 L. T. O. S. 130.

**406.** —.]—It was agreed to run a foot race for £25. The agreement was contained in two written documents. It was alleged that there was no race; & in an action brought by one of the parties against the stakeholder to recover the deposit:—*Held*: one of the written documents must be stamped before it could be put in evidence; but the second might be used without being stamped, the one stamp covering both documents, they being evidence of one agreement.—*SOUTHBY v. SMITH* (1867), 17 L. T. 323, N. P.

**407.** — **Agreement contained in letters.**—Where a contract is contained in letters, it is sufficient if one of the letters bear a £1 15s. stamp, although, on the part of one of the contracting parties, the letters are written & signed by an agent.—*GRANT v. MADDOX* (1846), 15 M. & W. 737; 15 L. J. Ex. 104; 6 L. T. O. S. 376; 153 E. R. 1048.  
*Annotations*:—*Mentd.* *Simpson v. Margitson* (1847), 11 Q. B. 23; *Sotlichos v. Kemp* (1848), 18 L. J. Ex. 36; *Harmer v. Cornelius* (1858), 4 Jur. N. S. 1110; *Myers v. Sarl* (1860), 3 E. & E. 306; *Abbott v. Bates* (1875), 45 L. J. Q. B. 117; *Bruner v. Moore*, [1904] 1 Ch. 305; *Clayton-Greene v. De Courville* (1920), 36 T. L. R. 790.

**PART IX. SECT. 3, SUB-SECT. 2.—C.**

**398 i. Stamp on one sufficient.**—Where a letter of proposal & acceptance

were carried into effect by an impeached lease duly stamped, was offered in evidence, & objected to as not being stamped:—*Held*: if there be a series of paper-writings leading

to a contract, & the final one is stamped, that is sufficient.—*MOORE v. M'KAY* (1828), 2 Mol. 134; 2 Ir. L. Rec. 1st ser. 5, 22, 305; Beat. 282.  
—IR.

**408. — Agreement executed in two parts.]**—Where two parts of an agreement are executed, one by each of the contracting parties, the two parts make one agreement, & it is sufficient if the proper stamp be upon one part.—*WRIGHT v. WEBB* (1846), 1 New Pract. Cas. 509; 7 L. T. O. S. 433.

**409. — Policy of insurance—Letter giving authority to effect.]**—B. & co., by letter, authorised the managers of a mutual marine insurance assocn. to insure a ship with the assocn. & undertook to abide by the rules & regulations thereof. By the rules, each insurer became liable to contribute to the losses of any other insurer in certain proportions. In pursuance of the authority given by B. & co., a duly stamped policy was issued to them, which, however, contained no reference to the rules:—*Held*: the letter, although not stamped, was admissible in evidence, & B. & co. were contributories.—*BLYTH & Co.'s CASE* (1872), L. R. 13 Eq. 529; 20 W. R. 504.

#### D. Several Parties Joining in Instrument.

**410. Admission to corporation.]**—If a statute directs that there shall be a certain stamp upon every piece of vellum, etc., upon which any admission into a corp'n. shall be ingrossed, etc., the admission of several persons cannot be ingrossed upon the same piece of vellum, etc. unless it has as many stamps as there are admissions.—*R. v. REEKS* (1726), 2 Ld. Raym. 1445; 2 Stra. 716; 92 E. R. 440; *sub nom.* *R. v. RICH*, 1 Barn. K. B. 8.  
*Annotations*:—*Distd.* *Bowen v. Ashley* (1805), 1 Bos. & P. N. R. 274. *Refd.* *Jones d. Rayner v. Sandys* (1753), Barnes, 463.

**411. Assignment of prize money.]**—An assignment of the prize money of several seamen on board a privateer, being payable out of one fund, requires only one stamp.—*BAKER v. JARDINE* (1784), 13 East, 235, n.; 104 E. R. 360, n.

*Annotation*:—*Apld.* *Goodson v. Forbes* (1815), 6 Taunt. 171.

**412. Agreement to contribute to common fund.]**—An agreement by several for a subscription to one common fund, such as for making a wet dock at Bristol, though several as to each subscriber, only requires one stamp.—*DAVIS v. WILLIAMS* (1811), 13 East, 232; 104 E. R. 358.

*Annotations*:—*Apld.* *Goodson v. Forbes* (1815), 6 Taunt. 171; *Ramsbottom v. Davis* (1839), 4 M. & W. 584.

**413. Release—To several persons.]**—In an action for running down a ship, deft.'s captain may be rendered a competent witness for him, by a release to the captain, & the rest of the crew, with a single stamp, the captain's name standing first, & the release being first tendered to him.—*PERRY v. BOUCHIER* (1814), 4 Camp. 80; 171 E. R. 26, N. P.

*Annotation*:—*Mentd.* *Solari v. Yorston* (1839), 8 L. J. Q. B. 234.

**414. — —.]**—*SPICER v. BURGESS*, No. 463, *post*.

**415. Grant of annuity—Several grantors.]**—Where an annuity was granted by three, one of whom was known to be only a surety for the other two, to whose use the consideration money was in fact applied; yet all three being present when the money was paid down upon the table & counted over by them all, & the receipt of it signed by all, it was properly stated in the memorial as a payment made to the three, & one stamp as for one annuity is sufficient.—*COOK v. JONES* (1812), 15 East, 237; 104 E. R. 834.

**416. Partnership—Signature of undertaking in partnership name—Individual undertaking by partner.]**—Deft. was interested solely in certain goods conveyed by the ship *S* & was also interested jointly with his partners, who with him formed the firm of T. & W., in other goods also

sent by the ship *S*. He signed a promise to make certain payments in respect of freight on board the *S*. not stating upon which goods, beginning, "I hereby engage to pay" but signed with the style of T. & W. In an action against him solely, for the freight of his own goods:—*Held*: such engagement was evidence of a several contract by him, & for the purpose of the action, required only one stamp.—*SHIPTON v. THORNTON* (1838), 9 Ad. & El. 314; 1 Per. & Dav. 216; 1 Will. Woll. & H. 710; 8 L. J. Q. B. 73; 112 E. R. 1231.

*Annotations*:—*Refd.* *Re Clarke, Ex p. Buckley* (1845), 14 M. & W. 469. *Mentd.* *Rosetto v. Gurney* (1851), 11 C. B. 176; *Gibbs v. Grey, Grey v. Gibbs* (1857), 2 H. & N. 22; *The Newport* (1858), Sw. 335; *Matthews v. Gibbs* (1860), 3 E. & B. 282; *Great Indian Peninsula Ry. v. Saunders* (1862), 6 L. T. 297; *The Bahia* (1864), 11 Jur. N. S. 90; *Kidston v. Empire Marine Insee.* (1866), Har. & Ruth. 433; *Atwood v. Sellar* (1879), 4 Q. B. D. 342; *Hill v. Wilson* (1879), 4 C. P. D. 329; *Svendson v. Wallace* (1885), 10 App. Cas. 404; *Assicurazioni Generali v. S.S. Bessie Morris Co.*, [1892] 1 Q. B. 571; *Bradley v. Newsom*, [1919] A. C. 16.

**417. Release by next of kin to administrator.]**—*Qu.*: whether a release by two of the next of kin to the administrator, of their respective interests in the goods subject of the action, required more than one stamp.—*THOMAS v. BRID* (1841), 9 M. & W. 68; 1 Dowl. N. S. 906; 11 L. J. Ex. 261; 152 E. R. 30.

*Annotation*:—*Refd.* *Doe d. Croft v. Tidbury* (1854), 14 C. B. 304.

**418. Copyholds—Purchaser from five tenants in common—Admittance of purchaser.]**—Copyhold land was devised to A. for life, remainder to five persons, as tenants in common; A. was admitted. After his death, the five, having contracted to sell to B., severally surrendered to the use of B. in fee, which surrender was accepted by the lord:—*Held*: B., on claiming admittance, must pay five fees, & the admittance would require five stamps.—*R. v. ETON COLLEGE* (1846), 8 Q. B. 526; 6 L. T. O. S. 369; 115 E. R. 973; *sub nom.* *R. v. EVERDON (LORDS OF THE MANOR)*, 16 L. J. Q. B. 18.

*Annotation*:—*Refd.* *Doe d. Croft v. Tidbury* (1854), 14 C. B. 304.

**419. — Conveyed in several parcels to different parties—Some parcels devolving on single person.]**—If a copyhold tenant convey his tenement in several parcels to different parties, & some only of those parcels afterwards devolve upon a single person, such person, in the absence of special custom, is not entitled to be admitted by a single admittance; but the lord may insist upon several admittances, whether in a single instrument or not, in respect of each parcel which has so devolved; & there must be stamps in respect of each.—*TRAHERNE v. GARDNER* (1856), 5 E. & B. 913; 25 L. J. Q. B. 201; 2 Jur. N. S. 394; 119 E. R. 721; *sub nom.* *TREHERNE v. GARDNER*, 26 L. T. O. S. 271; 4 W. R. 281; *subsequent proceedings* (1857), 8 E. & B. 161.

*Annotations*:—*Consd.* *Johnstone v. Spencer* (1885), 30 Ch. D. 581. *Mentd.* *Bryant v. Foot* (1868), L. R. 3 Q. B. 497; *Lawrence v. Hitch* (1868), 9 B. & S. 467.

**420. Conveyance of shares—By several shareholders jointly.]**—An indenture, whereby several persons jointly convey their separate interests in certain shares in an incorporated co. does not require several stamps, but one *ad valorem* stamp is sufficient.—*WILLS v. BRIDGE* (1849), 4 Exch. 193; 18 L. J. Ex. 384; 154 E. R. 1179.

*Annotations*:—*Apld.* *Freeman v. I. R. Comrs.* (1871), L. R. 6 Exch. 101. *Refd.* *Doe d. Croft v. Tidbury* (1854), 2 C. L. R. 347.

**421. — By executors to several residuary legatees.]**—Four residuary legatees, of whom two were exors., by a deed, made in pursuance of an arrangement for specifically dividing among them

**Sect. 3.—Stamp duties on instruments generally:**  
**Sub-sect. 2, D. & E. (a) & (b).]**

certain parts of the testator's personal estate, transferred & released to one another shares in nine cos. forming part of the residuary estate, so as to vest in each of the four a portion of the shares in each of eight of the cos., & in one of them all the shares in the ninth co.:—*Held*: the deed required only four transfer stamps under Stamp Act, 1815 (c. 184), sched. Title Transfer.—*FREEMAN v. INLAND REVENUE COMRS.* (1871), L. R. 6 Exch. 101; 40 L. J. Ex. 85; 24 L. T. 323; 19 W. R. 591.

**422. Encroachment on common—Conveyance of whole encroachment by several encroachers.]**—By an indenture, reciting that the parties of the first part had encroached upon a common, & were respectively in possession of their several encroachments, & that they had agreed to relinquish release, & convey all & singular their several & respective estates & interests therein to the parties of the third part, it was witnessed, that, in consideration of 10s. to each of them paid by the parties of the third part, they & each & every of them granted, bargained, sold, etc., & each of them did grant, etc. to the parties of the third part, the several premises, describing them. The deed contained a proviso that each of them the parties of the first part, & their wives, should have the liberty & privilege of holding their respective messuages, etc., during their respective lives:—*Held*: there being a community of interest in the subject-matter of the conveyance in all the conveying parties one stamp only was necessary.—*DOE d. CROFT v. TIDBURY* (1854), 14 C. B. 304; 2 C. L. R. 347; 23 L. J. C. P. 57; 18 Jur. 468; 139 E. R. 124.

*Annotations*:—*Mentd.* *Berney v. Bickmore* (1863), 8 L. T. 333; *A.-G. v. Tomline* (1877), 5 Ch. D. 750; *A.-G. v. Tomline* (1880), 15 Ch. D. 150.

**423. Statutory declaration—Sworn by one person as to whole—As to part by another.]**—A statutory declaration for the purpose of carrying through a transaction was sworn to, as to the whole of it by one person, & as to part of it by another person:—*Held*: the document constituted only one declaration, it was not a declaration as to two distinct matters within Stamp Act, 1891 (c. 39), s. 4 (a), & it was therefore chargeable with only one stamp duty of 2s. 6d. in accordance with the heading "Affidavit & Statutory Declaration" in Schedule I. to the Act.—*REVERSIONARY INTEREST SOCIETY, LTD. v. INLAND REVENUE COMRS.* (1906), 22 T. L. R. 740.

**Bond where several obligors bound for same matter.]**—*See BONDS*, Vol. VII., p. 256, Nos. 975–977.

**Apprenticeship indenture—Successive masters.]**—*See MASTER & SERVANT*, Vol. XXXIV., p. 509, No. 4230.

**Insurance policy.]**—*See INSURANCE*, Vol. XXIX., p. 442, Nos. 3409, 3410.

**Mortgage.]**—*See MORTGAGE*, Vol. XXXV., p. 315, Nos. 610, 611.

**Tenancy agreement.]**—*See LANDLORD & TENANT*, Vol. XXX., p. 448, No. 1091.

*E. Instrument relating to Several Matters.*

(a) *In General.*

*See Stamp Act*, 1891 (c. 39), s. 4.

**424. Stamp duty measured by principal object.]**—The proper stamp to be borne by a written instrument must depend on what is the leading character of such instrument.

A., by deed, demised lands to B., & this deed

contained a covenant by C. to pay the rent. The deed bore a stamp of £1 10s., which was the proper stamp for it, as a lease. In an action of covenant against C., for non-payment of the rent:—*Held*: this stamp was sufficient, & the deed did not require a £1 15s. stamp.—*PRATT v. THOMAS* (1831), 4 C. & P. 554, N. P.; *subsequent proceedings*, *sub nom. PRICE v. THOMAS*, 2 B. & Ad. 218.

**425. —.**—(1) Where a document has several objects, of which some are merely ancillary to the main one, the amount of stamp duty is to be measured by the principal object.

(2) Where a document has a double object, & has an unappropriated stamp on it large enough for it in either sense, it is admissible when offered to establish one of its objects.—*WALKER v. GILES* (1849), 6 C. B. 662; 2 Car. & Kir. 671; 18 L. J. C. P. 323; 13 L. T. O. S. 209; 13 Jur. 588; 136 E. R. 1407.

*Annotations*:—*Generally*, *Reid. Barnard v. Pilsworth* (1849), 6 C. B. 698, n.; *Thorn v. Croft* (1866), L. R. 3 Eq. 193; *Re Loyal Liver Friendly Soc.* (1870), L. R. 5 Exch. 78. *Mentd.* *Doe d. Dixie v. Davies* (1851), 7 Exch. 89; *Pinhorn v. Souster* (1853), 8 Exch. 763; *Brown v. Metropolitan Counties, etc. Soc.* (1859), 1 E. & E. 832; *Turner v. Barnes* (1862), 2 B. & S. 135; *Re Betts, Ex p. Harrison* (1881), 18 Ch. D. 127.

**426. Unappropriated stamp—Sufficient to cover either object—Admissibility to prove either object.]**—*WALKER v. GILES*, No. 425, *ante*.

(b) *Matters Subsidiary to Principal Object.*

*See Stamp Act*, 1891 (c. 39), s. 4.

**427. Lease—Covenants to pay rent by third party.]**—*PRATT v. THOMAS*, No. 424, *ante*.

**428. — Surrender of—Agreement to grant new lease by vendor of property.]**—On surrender of a lease for lives, purporting to be made in consideration of £120 & of a new lease to be granted to the surrenderor for his life, the deed does not require an agreement stamp in addition to the *ad valorem* stamp; the stipulation for a new lease not being a "matter or thing besides what" is "incident to the sale & conveyance" within Stamp Act, 1815 (c. 184), Sched., Part I., Title Conveyance.—*DOE d. PHILLIPPS v. PHILLIPPS* (1840), 11 Ad. & El. 796; 3 Per. & Dav. 603; 113 E. R. 616.

—*See LANDLORD & TENANT*, Vol. XXX., pp. 447–449, Nos. 1090–1105.

**429. Sale of ship—Provisions securing payment.]**—(1) An agreement, that A. will sell a ship to B.; that part of the price shall be secured by mtge. of the ship; that A. will procure the ship to be chartered on a voyage; that the earnings on the voyage shall be paid to A. as part of the price; & that at the end of the voyage the mtge. shall close; is an agreement for & relating to the sale of goods, & requires no stamp.

An agreement for the sale of a ship is within the exemptions as an agreement for the sale of goods, & the mere circumstance of other matters connected with the principal object being introduced, does not take the instrument out of the exemption (*LORD TENTERDEN, C.J.*).

(2) The instrument was not intended to operate as a transfer of the vessel, pursuant to 6 Geo. 4, c. 110, because the vessel was to be mortgaged as a security for the payment of the purchase-money, & she was to be chartered to London, & her earnings upon that voyage were to go in part payment of the purchase-money (*LORD TENTERDEN, C.J.*).—*MEERING v. DUKE* (1828), 2 Man. & Ry. K. B. 121; 6 L. J. O. S. K. B. 211; *sub nom. TOOKE v. MEERING*, Dan. & Ll. 35.

**430. Transfer of shares—Covenant by transfer to observe regulation of company.]**—By the deed of settlement of a joint stock co., the shares were

made transferable, & the directors were empowered to regulate the transfer, & to require, in respect of such transfer a covenant from the transferee to observe the co.'s regulations, etc., as to holders of shares. The directors prescribed a form of transfer under seal, by which the shareholder conveyed his shares to the transferee, to hold subject to the regulations & covenants contained in & resolved upon pursuant to the deed of settlement, & the transferee covenanted with the party conveying, & also separately with trustees on behalf of the co., to abide by & perform all the regulations, etc.:—*Held*: such transfer required an *ad valorem* stamp only, & not an additional stamp under Stamp Act, 1815 (c. 184), sched. Part I., Title Conveyance, as containing matter besides that which was "incident to the sale & conveyance of the property sold."—*WOLSELEY v. COX* (1841), 2 Q. B. 321; 11 L. J. Q. B. 9; 6 Jur. 599; 114 E. R. 126.

**431. Mortgage—Resettlement of property.]—**A mtge. deed, which was expressed to be made in consideration of the advance, & also for the purpose of resettling the property, & reserved the equity of redemption to the mtgor. & his wife, or the survivor:—*Held*: not to require an extra stamp for a settlement in addition to the *ad valorem* stamp on the mtge.—*DAWSON v. MEDHURST* (1866), 14 L. T. 622.

**432. — Provisions making expenses a further charge on property.]—**By an indenture dated May 28, 1897, certain freehold & leasehold hereditaments were by direction of a brewery co., respectively conveyed & demised to trustees. The indenture contained a covenant to surrender to the use of the trustees certain copyholds, & an assignment to them of a goodwill & other matters. By the indenture it was agreed that the trustees should stand possessed of the hereditaments & premises upon the trusts contained in an indenture dated May 20, 1897.

The indenture of May 20, 1897, after reciting (*inter alia*), that the co. had determined to issue certain debenture stock, to be constituted & secured as therein provided, contained a covenant by the co. with the trustees that the co. would cause the hereditaments to be forthwith conveyed to & vested in the trustees for securing the payment by the co. of the debenture stock & the dividends thereon, with a provision for reconveyance to the co. upon proof that all the stockholders had been paid off or satisfied & upon payment of all costs incurred by the trustees in relation to the indenture. The indenture also created a floating charge upon all the property & assets for the time being of the co. In addition to other provisions for the maintenance & enforcement of the security thereby created, the indenture contained (clause 33) a provision that if default should be made in keeping the mtged. premises in a good state of repair & working condition, & so insured as in the indenture specified, the trustees might from time to time repair or renew, or insure, as the case might require, the mtged. premises or any part thereof, & the co. would on demand repay to the trustees every sum of money expended by them for the above purposes, with interest at the rate of 5 per cent. *per annum* from the time of the same having been expended, & until such repayment the same should be a charge upon the mtged. premises.

The indenture was stamped with 2s. 6d. per cent. upon £230,000, the amount to which the stock was limited, & £23,000, the premium at which the stock was redeemable at the co.'s option.

Debenture stock to the amount of £223,200

was subsequently issued by the co. upon the security of the indentures:—*Held*: (1) clause 33 of the indenture of May 20, 1897, although one of the provisions referred to in the indenture of May 28, 1897, subject to which the trustees were to stand possessed of the hereditaments, did not make the latter indenture a security for money or stock without limit within Stamp Act, 1891 (c. 39), s. 12 (6) (b), & therefore the Comrs. of Inland Revenue were bound to adjudicate the liability of the indenture to duty; (2) the indenture of May 20, 1897, was the primary security, & the indenture of May 28, 1897, a mtge. by way of further assurance, within the meaning of the head of the schedule I. to the Stamp Act, 1891—"Mortgage, Bond, Debenture, Covenant," sub-head (2) & therefore, in addition to the duty to which the indenture of May 28, 1897, was liable as a conveyance on sale, duty at the rate of 6d. per cent. upon £223,200, the amount of the debenture stock issued, was payable upon it.

(3) Sect. 88 of Stamp Act, 1891 (c. 39), contemplates that a primary security may be a deed on which, at the time it is executed, there has been no money lent or advanced.

(4) Sect. 7 of Revenue Act, 1903 (c. 46), is not retrospective, & the duty which is payable on a deed is that which was payable at the date of its execution.—*SUFFIELD (LORD) v. INLAND REVENUE COMRS.*, [1908] 1 K. B. 865; 77 L. J. K. B. 746; 98 L. T. 405; 24 T. L. R. 371; 15 Mans. 233.

**433. Licence granting monopoly—Covenant securing payment by instalments.]—**By an indenture between a co. & a licensee, in consideration of £7,500, of which £1,500 was then paid, & the remainder was to be paid in monthly instalments of £1,000, the co. granted to the licensee "the sole & exclusive right, licence, & authority to carry on with the asphalt of or to be supplied by the co., but not with any other asphalt, the business of asphalt paving, & of therein & otherwise using, vending, & dealing in asphalt, & of an asphalt co. or asphalt business generally, within the counties of Lancaster & Chester," during the continuance of the co.'s concessions. The co. covenanted to supply the licensee with asphalt, but were not to be bound to prevent the use or sale of asphalt within the counties by any other person, excepting only the use or sale of such asphalt as was agreed to be supplied under the contract, either by the co. or by persons purchasing from the co.; & the licensee agreed not during the continuance of the licence to use, sell, or deal within the counties in any other asphalt than that to be supplied by the co. The licensee covenanted to pay the remaining £6,000 by six monthly instalments of £1,000, & if he should assign the licence, to pay the whole of the remaining instalments or the expiration of two months from the date of the assignment:—*Held*: (1) the deed was not chargeable as a conveyance on sale, no property being in fact conveyed by it; (2) if it had been so chargeable, one duty only could have been charged in respect of the £7,500. & not a second duty in respect of the covenant to pay by instalments the £6,000 remaining unpaid; (3) such a payment by instalments was a periodical payment within Stamp Act, 1870 (c. 97), s. 72.—*LIMMER ASPHALTE PAVING CO. v. INLAND REVENUE COMRS.* (1872), L. R. 7 Exch. 211; 41 L. J. Ex. 106; 26 L. T. 633; 20 W. R. 610.

*Annotations*:—As to (1) *Expld.* *Mutual Property Insee. v. I. R. Comrs.* (1926), 136 L. T. 354. As to (2) *Appld.* *Jones v. I. R. Comrs.*, *Sweetmeat Automatic Delivery Co. v. I. R. Comrs.*, [1895] 1 Q. B. 484. *Apprd.* *National Telephone Co. v. I. R. Comrs.*, [1899] 1 Q. B. 250. *Consd.* *County of Durham Electrical Power Distribution Co. v. I. R. Comrs.*, [1909] 1 K. B. 757.

**Sect. 3.—Stamp duties on instruments generally:**  
*Sub-sect. 2, E. (b) & (c), & F.; sub-sects. 3 & 4.]*

**434. Promissory note—Stipulation as to giving of time.]**—A document, in the form of a joint & several promissory note by a principal debtor & a surety for £5 payable by instalments, with the proviso that, in case of default in payment of any one of the instalments, the whole amount remaining unpaid should become due, concluded with the following clause namely, "Time may be given to either without the consent of the other & without prejudice to the rights of the holders to proceed against either party, notwithstanding time may be given to another":—*Held*: the document was not by reason of such a clause an agreement requiring to be stamped as an agreement, but a good promissory note.

Even if the clause in question amounts to an agreement, it is by Stamp Act, 1870 (c. 97), exempted from stamp duty, the subject-matter not exceeding £5.—*YATES v. EVANS* (1892), 61 L. J. Q. B. 446; 66 L. T. 532; 56 J. P. 565; 36 Sol. Jo. 274, D. C.

*Annotation*:—*Reid*. *Kirkwood v. Carroll*, [1903] 1 K. B. 531.

**Guarantee.]**—*See* GUARANTEE, Vol. XXVI., p. 51, Nos. 349–351.

(c) *Matters Separate and Distinct.*

*See* Stamp Act, 1891 (c. 39), s. 4.

**435. Sale by auction—One instrument in respect of several lots.]**—If an interest in land be of the value of £20 an agreement for it requires an agreement stamp. If on a sale by auction the same person is declared the highest bidder for several lots, a distinct contract arises for each lot; & although all the lots together amount to a greater value than £20 no stamp is required if the lots were separately of less value than £20.—*EMMERSON v. HEELIS* (1809), 2 Taunt. 38; 127 E. R. 989.

*Annotations*:—*Mentd.* *White v. Proctor* (1811), 4 Taunt. 209; *Kemys v. Proctor* (1820), 1 Jac. & W. 350; *Baldry v. Parker* (1823), 2 B. & C. 37; *Kenworthy v. Schofield* (1824), 2 B. & C. 945; *Evans v. Roberts* (1826), 5 B. & C. 829; *Glengal v. Barnard* (1836), 1 Keen, 769; *Laythorp v. Bryant* (1836), 2 Bing. N. C. 735; *Seaton v. Booth* (1836), 1 Har. & W. 742; *Jones v. Flint* (1839), 10 Ad. & El. 753; *Murphy v. Boese* (1875), L. R. 10 Exch. 126; *Sims v. Landray* (1894), 8 R. 582; *Bell v. Balls*, [1897] 1 Ch. 663; *Dewar v. Mintoft*, [1912] 2 K. B. 373; *Cohen v. Roche*, [1927] 1 K. B. 169.

**436. ———.]**—Where several lots are knocked down to a bidder at an auction & his name marked against them in a catalogue a distinct contract arises for each lot; & a memorandum, signed afterwards by the bidder stating that he agrees to become the purchaser of the several lots set against his name does not require a stamp, though the aggregate exceed £20 in value, no single lot being of that price.—*ROOTS v. DORMER (LORD)* (1832), 4 B. & Ad. 77; 1 Nev. & M. K. B. 607; 100 E. R. 384.

*Annotations*:—*Reid*. *Watling v. Horwood* (1847), 12 Jur. 48. *Mentd.* *Casamajor v. Storde* (1833), 2 My. & K. 706; *Holliday v. Lockwood*, [1917] 2 Ch. 47.

**437. ———.]**—Leasehold & copyhold premises were put up to auction in two separate lots, which were knocked down to deft., & he signed the following memorandum: "I do hereby acknowledge that I have this day purchased by Public Auction Lots 1 & 2 of the estates mentioned in the annexed particulars, at the sum of £245, £150 for Lot 1 & £95 for Lot 2," etc. Upon refusal of deft. to complete the purchase, the premises were resold, & an action was brought to recover the difference of the price:—*Held*: the memorandum required two stamps.—*WATLING v. HORWOOD* (1847), 12 Jur. 48.

**438. Conveyance of land on trust—Deed con-**

**taining declaration of similar trust of stocks.]**—By indenture to which A., exor. & devisee in trust, & C. & D. were parties, it was agreed & declared that certain stock, formerly testator's, should be transferred to C. & D. in trust, according to the dispositions of the will; & in pursuance of an agreement, which was recited, A., by the same indenture, bargained, sold, released, etc., lands of A. to C. & his heirs, in trust that C. should, out of the proceeds, make certain payments directed by the will. The indenture bore a £1 15s. stamp:—*Held*: such stamp was sufficient under Stamp Act, 1815 (c. 184), Sched. part I.; & the indenture did not require to be stamped both as a "deed not otherwise charged," etc., in respect of the disposition of stock, & as a "conveyance not otherwise charged," etc., in respect of the bargain, sale, & release of lands.—*DOE d. HARTWRIGHT v. FEREADAY* (1840), 12 Ad. & El. 23; 4 Per. & Dav. 287; 11 L. J. Q. B. 19; 113 E. R. 718.

*Annotation*:—*Reid*. *Lovelock v. Franklyn* (1847), 8 L. T. O. S. 444.

**439. Lease—To trustee for purchaser—Conveyance of reversion to purchaser.]**—Land was conveyed upon a sale by an instrument, dated Oct. 28, 1847, in the following manner: the land was first bargained & sold by the vendor to a trustee for the purchasers for a term of three months, & then the reversion conveyed to the purchaser. The instrument was twice executed by the vendor, once by a mere signature, & then immediately afterwards by his signing, sealing, & delivery:—*Held*: two stamp duties were chargeable upon the instrument as having two distinct operations, one as a lease, & the other as a conveyance on a sale.—*BRIGHTMAN v. INLAND REVENUE COMRS.* (1868), 18 L. T. 412.

—*See* LANDLORD & TENANT, Vol. XXX., pp. 447–449, Nos. 1090–1105.

**440. Appointment of new trustees of charity—Vesting property in trustees.]**—An order of charity comrs., by which new trustees of a charity are appointed & the property of the charity vested in them, is chargeable, under Stamp Act, 1870 (c. 97), s. 8, with duty in respect both of the appointment & of the vesting order, & does not come within the proviso to Stamp Act, 1870 (c. 97), s. 78, as a conveyance or transfer made for effectuating the appointment of a new trustee.—*HADGETT v. INLAND REVENUE COMRS.* (1877), 3 Ex. D. 46; 37 L. T. 612; 42 J. P. 216; 26 W. R. 115, D. C.

*F. Instruments Containing Provisions Implied by Law.*

**441. Necessity for stamp in respect of provision—Memorandum of deposit of bills.]**—A mere acknowledgment, which does not bind the party signing it to do any more than he was otherwise bound to do by law, does not require an agreement stamp. Thus, an acknowledgment in these words: "I have in my hands, three bills, which amount to £120 10s. 6d. which I have to get discounted, or return on demand," was held to require no stamp, because it did not bind the party to get the bills discounted; & the law would compel him to return them on demand. So, an acknowledgment in these words: "I have received a bill, drawn by P. upon H., bearing my indorsement & the indorsement of P. which I hold, as your attorney, to receive the value from the respective parties, or to make such other arrangement for your benefit as may appear to me, in my professional capacity, reasonable & proper," was held to require no stamp.—*MULLETT v. HUTCHISON* (1828), 7 B. & C. 639; 3 C. & P. 92; 1 Man. &



Ry. K. B. 522 ; 6 L. J. O. S. K. B. 176 ; 108 E. R. 861.

*Annotations* :—**Refd.** Blackwell v. McNaughtan (1841), 1 Q. B. 127 ; Semple v. Steinau (1853), 8 Exch. 622. **Mentd.** Doe d. Franks v. Franks (1840), 11 Ad. & El. 792.

**442.** ———.]—"I have received a bill of exchange which I hold as your attorney to recover the value of from the parties or to make such other arrangement for your benefit as may appear to me in my professional character reasonable & proper" is not an agreement or a receipt & may be read in evidence without any stamp.—**LANGDON v. WILSON** (1828), 7 B. & C. 640, n. ; 2 Man. & Ry. K. B. 10 ; 6 L. J. O. S. K. B. 177 ; 108 E. R. 862. *Annotation* :—**Mentd.** Parker v. Housefield (1834), 2 My. & K. 419.

**443.** **Joint & several bond by principal & surety—Covenant by principal to indemnify surety.**]—Where by bond A, as principal, & B., as surety, were jointly & severally bound to pay to the creditors of C. 14s. in the pound on the amount of their debts, & by the same bond A. was bound to indemnify B. against all loss by reason of his becoming surety :—**Held** : a stamp of £1 15s. was sufficient in amount for this instrument, & it did not require a second stamp on account of A.'s obligation to indemnify B., the whole being one transaction.—**ANNANDALE v. PATISON** (1829), 9 B. & C. 919 ; 8 L. J. O. S. K. B. 66 ; 109 E. R. 342.

*Annotations* :—**Refd.** Dickson v. Cass (1830), 1 B. & Ad. 343 ; Wharton v. Walton (1845), 9 Jur. 638 ; Stirrup v. Whiston (1846), 8 L. T. O. S. 90.

**444.** **Admission of tenancy on sufferance—Agreement to give up tenancy on demand.**]—An instrument in these terms : "I hereby certify that I remain in the house No. 3, Swinton Street, belonging to W. on sufferance only, & agree to give him immediate possession at any time he may require" :—**Held** : not to amount to an agreement for a tenancy, so as to require a stamp.—**BARRY v. GOODMAN** (1837), 2 M. & W. 768 ; Murp. & H. 124 ; 6 L. J. Ex. 188 ; 150 E. R. 967.

**445.** **Admission of debt in consideration of withdrawal of distress—Authority to re-enter & distrain—In default of payment.**]—A memorandum, by which, in consideration that A. will withdraw a distress for a sum exceeding £20, which B. admits to be due from him as tenant to A., until a future day, B. declares, that in case of default it shall be lawful for A. to enter & distrain, & to pursue all remedies for the recovery of the rent, as if no distress had been taken, is admissible in evidence to prove the tenancy without an agreement stamp.—**HILL v. RAMM** (1843), 5 Man. & G. 789 ; 6 Scott, N. R. 571 ; 1 L. T. O. S. 109 ; 134 E. R. 779 ; *sub nom.* **HILL v. RANSOM**, 12 L. J. C. P. 275.

**446.** **Bill of exchange—Agreement to meet accommodation bill when due.**]—In an action against the acceptor of an accommodation bill, the following memorandum, with reference to the bill declared on, was held to be admissible in evidence without a stamp : "I hereby acknowledge that you have for my accommodation, accepted a bill of even date herewith, for £25, payable, etc. ; & I agree to provide for the same when due."—**NOTLEY v. WEBB** (1848), 5 C. B. 834 ; 136 E. R. 1107.

**447.** **Acknowledgment of receipt containing condition—Rendering bill null & void.**]—Declaration stated that pltf. employed deft. to obtain a partner for him in his trade ; that deft. obtained such partner, to wit, S., who entered into co-partnership with pltf., upon certain terms ; that pltf. paid to deft. £25 for obtaining for him the said partner, & it was then agreed between

pltf. & deft. that pltf. should accept & deliver to deft. a bill of exchange for £27 10s. payable eighteen months after date, upon condition that S. should accept the partnership beyond two years, but if S. should, at the expiration of eighteen months give notice of his wish to retire from the trade, & not rescind it, the bill should be void ; that in consideration pltf. would accept the bill, & deliver the same accepted to deft. upon the said condition, deft. promised that if he should negotiate the bill, & if S. should give to pltf. the notice, & not rescind it, deft. would indemnify pltf. from the payment of the said bill & all costs ; that pltf. delivered the bill to deft., who took & received it upon the condition aforesaid, & deft. negotiated it, & thereby pltf. had been compelled to pay the amount ; & that S. gave the said notice to pltf., & did not rescind it, Breach, that deft. had not indemnified pltf. Plea, that deft. did not take or receive the bill upon the condition in the declaration mentioned. On the trial, pltf. offered in evidence the following writing, signed by deft. :—"Memorandum.—I have this day received of F. a bill for £27 10s., at eighteen months' date, on condition that S. accepts the partnership beyond two years ; but should S. give notice at the expiration of eighteen months, & not afterwards rescind the same, the bill to be null & void" :—**Held** : admissible without a stamp, not being "an agreement, or any minute or memorandum of an agreement," or "evidence of a contract" within Stamp Act, 1815 (c. 184), sched., Part I., Title "Agreement" ; because it was only evidence of the contract as a subsequent admission ; & because it only expressed the same consequence which the law would imply.—**DE PORQUET v. PAGE** (1850), 15 Q. B. 1073 ; 20 L. J. Q. B. 28 ; 16 L. T. O. S. 232 ; 15 Jur. 148 ; 117 E. R. 765.

— **Provisions implied in mortgage deed.**]—**See MORTGAGE**, Vol. XXXV., pp. 316, 317, Nos. 620–625.

#### SUB-SECT. 3.—ABSENCE OR INSUFFICIENCY OF STAMP.

**Jurisdiction of court.**]—**See EVIDENCE**, Vol. XXII., pp. 274, 275, Nos. 2607–2614.

**Effect.**]—**See EVIDENCE**, Vol. XXII., pp. 262, 263, Nos. 2465–2474.

**Admissibility in evidence.**]—**See EVIDENCE**, Vol. XXII., pp. 263–271, Nos. 2475–2558.

**Secondary evidence of unstamped documents.**]—**See EVIDENCE**, Vol. XXII., pp. 275, 276, Nos. 2615–2630.

**Production for purpose of stamping.**]—**See CORPORATIONS**, Vol. XIII., p. 349. No. 875 ; **DISCOVERY**, Vol. XVIII., pp. 114, 163, 170, 171, Nos. 652, 1151, 1230–1239.

**Stamp objections.**]—**See EVIDENCE**, Vol. XXII., pp. 273, 274, Nos. 2581–2606.

#### SUB-SECT. 4.—ALTERATIONS IN INSTRUMENTS.

**448. Whether restamping necessary.**]—If two persons by an agreement in writing, lay a wager, & then by another agreement, indorsed on the first, consent that the bet should be doubled, there must be two 6s. agreement stamps.—**ROBSON v. HALL** (1792), Peake, 172 ; 170 E. R. 118.

*Annotation* :—**Refd.** Reed v. Deere (1827), 7 B. & C. 261.

**449.** ———.]—Every alteration in an instrument requiring a stamp makes it a new instrument, & requires a new stamp.—**BOWMAN v. NICHOL**



**Sect. 3.—Stamp duties on instruments generally:**  
**Sub-sects. 4, 5 & 6. Sect. 4.]**

(1794), 5 Term Rep. 537; 1 Esp. 81; 101 E. R. 302.

**Annotations:—***Apld.* Wilson v. Justice (1796), Peake, Add. Cas. 96. *Distd.* Kershaw v. Cox (1800), 3 Esp. 246.

**450. — Alteration after execution—Deed re-executed.]—**A deed was executed, & altered by consent of parties, & then re-executed. This deed cannot be given in evidence as a new deed, unless it be stamped afresh, because the alteration vacates the whole deed (*per Cur.*).— *v. LEE* (1735), 2 Eq. Cas. Abr. 414; 22 E. R. 352.

**451. — Correction of mistake.]—**An alteration in the terms of a written contract, after it has been executed, unless made to correct some mistake, or supply some omission, will render a new stamp necessary, in order to make it admissible in evidence as a security, or to sustain an action founded upon it.—*SUTTON v. TOOMER* (1827), 7 B. & C. 416; 1 Man. & Ry. K. B. 125; 6 L. J. O. S. K. B. 49; 108 E. R. 778.

**Annotations:—***Distd.* Ashling v. Boon, [1891] 1 Ch. 568. *Refd.* Serle v. Norton (1842), 9 M. & W. 309.

**452. — Grant of annuity—Indorsement containing redemption clause.]—**Where a former rule for setting aside an annuity was discharged because it did not appear that an indorsement, not memorialised, containing a clause of redemption, bearing date after the deed, had been made prior to the execution of it; in which case it could not be received in evidence for want of being stamped; the ct. will not enter into the question on a subsequent rule, although it appear clearly that the indorsement was made before the deed was executed; & that such clause of redemption was not inserted in the memorial of the annuity enrolled according to 17 Geo. 2, c. 26.—*SCHUMANN v. WEATHERHEAD* (1801), 1 East, 537; 102 E. R. 207.  
**Annotation:—***Distd.* Jones v. Jones (1833), 1 Cr. & M. 721.

**453. — Rectification of mistake—Bill of sale.]—**26 Geo. 3, c. 60, s. 17, avoiding a bill of sale of a registered ship, which does not truly & accurately recite the certificate of registry; where parties by mistake mis-recited in a bill of sale the certificate of registry, by stating Guernsey as the port where the certificate was granted instead of Weymouth; which mistake was rectified when discovered by consent of all parties, & the deed delivered *de novo*.—*Held*: no new stamp was necessary upon such re-execution; the deed taking no effect from its first delivery, & the defect arising not from intention but from mistake, & the alteration merely making the contract what it was originally intended to have been.—*COLE v. PARKIN* (1810), 12 East, 471; 104 E. R. 184.

**Annotations:—***Consd.* Bathe v. Taylor (1812), 15 East, 412. *Refd.* Webber v. Maddocks (1811), 3 Camp. 1. *Mentd.* *Re* Queensland Land & Coal Co., *Davis v. Martin*, [1894] 3 Ch. 181.

**454. — Contract.]—***SUTTON v. TOOMER*, No. 451, *ante*.

**455. — Affidavit.]—**Affidavits filed under a wrong title by mistake, ordered to be resworn & filed under their proper title, without being restamped.—*PEARSON v. WILCOX* (1853), 10 Hare, App. II., xxxv.; 1 Eq. Rep. 239; 21 L. T. O. S. 258; 1 W. R. 492; 68 E. R. 1134.

**456. — Immaterial variation—Affidavit.]—**A plea *puis darrein continuance* may be pleaded at any time after the last continuance, either in bank, or at *Nisi Prius*, & it is imperative on the judge at *Nisi Prius* to receive it. Pltf. cannot object, at *Nisi Prius*, that the plea is such a one as ought not to be received. An affidavit which is annexed to a plea, refers to the plea, & therefore need not be entitled of the cause; if, however, on the objection

being made, deft. entitle it, that is not such an alteration as to make a new stamp necessary.—*PRINCE v. NICHOLSON* (1814), 1 Marsh. 70; 5 Taunt. 333; 128 E. R. 718.

**Annotations:—***Refd.* Richards v. Seftree (1816), 3 Price, 197. *Mentd.* Lyttleton v. Cross (1824), 3 B. & C. 317.

**457. — Warrant of attorney.]—**By Stamp Act, 1815 (c. 184), sched., Part I., a warrant of attorney is required to have an *ad valorem* stamp, except where it is given for securing a sum of money for which the party giving it is in custody, when a £1 stamp is sufficient. Where a warrant of attorney was given under such circumstances:—*Held*: an interlineation in the instrument made by consent of both parties, after execution, stating the party to be "now a prisoner in the custody of the sheriff of K.," was not an alteration in a material part of the instrument, so as to render a new stamp necessary.—*HARTLEY v. MANSON* (1842), 4 Man. & G. 172; 1 Dowl. N. S. 711; 4 Scott, N. R. 728; 11 L. J. C. P. 199; 134 E. R. 71.

**458. — Bill of exchange.]—**In an action by the indorsee against the acceptor of a bill of exchange, the declaration stated that the drawer, "on Mar. 22, 1844, made his bill of exchange," etc.:—*Held*: deft. was not at liberty to prove, under *non acceptit*, that the bill had been altered from Mar. 2 to Mar. 22, there being no variance, as the date was immaterial, & therefore the objection that the alteration was such as to require a new stamp unavailing.—*PARRY v. NICHOLSON* (1845), 13 M. & W. 778; 2 Dow. & L. 640; 14 L. J. Ex. 119; 4 L. T. O. S. 399.

**Annotations:—***Refd.* Hirschmann v. Budd (1873), L. R. 8 Exch. 171; *Vance v. Lowther* (1874), 45 L. J. Q. B. 200.

**459. — Bond—Addition of obligor before acceptance by obligee.]—**The addition of another obligor after the bond has been executed, but before the sheriff has accepted it, with the assent of the sheriff & the prior obligors, does not vacate the bond or make a new stamp necessary.—*MATSON v. BOOTH* (1816), 5 M. & S. 223; 105 E. R. 1033.

**Annotations:—***Refd.* Spicer v. Burgess (1834), 1 Cr. M. & R. 129; *Hibblewhite v. M'Morine* (1840), 6 M. & W. 200.

**460. — Alteration declaratory of something already implied.]—**Agreement containing an express provision for giving up the farm at Michaelmas, the lessor with the assent of the lessee adds the words "house & buildings." *Semble*: this alteration, being merely an expression of what was before implied, does not require a new stamp.—*DOE d. WATERS v. HOUGHTON* (1827), 1 Man. & Ry. K. B. 208; 6 L. J. O. S. K. B. 86.

**461. — Submission to arbitration—Indorsement after time limited for award.]—**On the fly leaf of an arbn. bond was an indorsement, bearing date after the time limited by the bond for making the award & stating that the parties within named had met that day by consent, on the award:—*Held*: this memorandum, being evidence of a new agreement to refer, was not admissible in evidence without a stamp.—*STEPHENS v. LOWE, SAME v. STRICK* (1832), 9 Bing. 32; 2 Moo. & S. 44; 1 L. J. C. P. 150; 131 E. R. 526.

**462. — Marriage settlement—Execution by grantor—Alteration before execution by grantee.]—**The necessary parties met to execute a marriage settlement. Immediately after the conveying party had executed, & before the execution or assent by any other party, the father of the intended wife objected to a clause; the objection was acquiesced in, & the clause was struck out, & then the conveying party immediately re-executed & the other parties executed:—*Held*: the execution of the deed was *in fieri* only when the alteration took place, & the alteration did not make a

fresh stamp requisite.—*JONES v. JONES* (1833), 1 Cr. & M. 721; 3 Tyr. 890; 2 L. J. Ex. 249.

*Annotation*.—*Fold*. *Spicer v. Burgess* (1834), 1 Cr. M. & R. 129.

**463. — Release to witness—Name of second witness added before delivery.**—Deft. executed a release to one of his witnesses in the usual manner, & gave it to his attorney. At the trial it appeared that another witness would require to be released. His name was accordingly inserted in the release, & defts. re-executed it before it had been delivered to either witness:—*Held*: this re-execution did not make a fresh stamp necessary. *Qu.*: whether one stamp is sufficient on a release to two witnesses.—*SPICER v. BURGESS* (1834), 1 Cr. M. & R. 129; 2 Dowl. 719; 4 Tyr. 598; 3 L. J. Ex. 285.

*Annotation*.—*Mentd.* *Wade v. Dowling* (1854), 4 E. & B. 44.

**464. — Assignment of lease—Indorsement enlarging time for performance.**—Agreement provided that either party making default should pay to the other £500 as liquidated damages. After the making of the agreement, but before the day for its completion arrived, the parties agreed, by an indorsement on the former agreement, to enlarge the time for its performance for a few days:—*Held*: this amounted to a fresh agreement. *Qu.*: whether it was an agreement, the subject-matter whereof was of the value of £20, so as to require a fresh stamp.—*BACON v. SIMPSON* (1837), 3 M. & W. 78; *Murp. & H.* 309; 7 L. J. Ex. 34; 150 E. R. 1064.

*Annotations*.—*Refd.* *Gwynne v. Davy* (1840), 1 Man. & G. 857. *Mentd.* *Tharpe v. Stallwood* (1843), 7 J. P. 400.

**465. — Addition of point left open—Position of boundary.**—*TAYLOR v. PARRY*, No. 401, *ante*.

**466. — Bill of sale—Description of property sold.**—A bill of sale assigning certain horses as a security, & also such other horses as might be substituted for them in the business of the assignor, provided the names & descriptions of such substituted horses were indorsed:—*Held*: the indorsements did not require an additional stamp, being only for the purpose of identification.—*BARKER v. ASTON* (1858), 1 F. & F. 192.

**467. — Proxy—Date of meeting.**—Provided a proxy be stamped with a penny stamp on execution the date of execution & the date of the meeting at which it is to be used may be filled in afterwards by any person duly authorised by the giver of the proxy to do so; even though at the time of execution the date of the meeting has not been fixed.—*SADGROVE v. BRYDEN*, [1907] 1 Ch. 318; 76 L. J. Ch. 184; 96 L. T. 361; 23 T. L. R. 255; 51 Sol. Jo. 210; 14 Mans. 47.

**468. — Transfer of shares by deed—Completion of transfer—Substitution of new transferee.**—A railway Act makes the shares transferable by deed, & directs that on every sale, the deed being executed by the seller & the purchaser, shall be kept by the co., or by the secretary or clerk of the co., who shall enter, in some book to be kept for that purpose, a memorial of such transfer & sale, & indorse the entry of such memorial on the deed of sale or transfer; & that until such memorial shall have been made & entered, the seller shall remain liable for all future calls, & the purchaser shall have no part or share in the profits.

The deed of transfer was executed by A., the seller, with the name of B. inserted as the purchaser; before any execution of the deed by B., it was arranged that C. instead of B. should be the

purchaser; whereupon the name of B. being struck out & that of C. substituted, A. re-executed the altered deed:—*Held*: the deed was so far complete as between A. & B. that it could not operate as a conveyance to C. without a new stamp. *Qu.*: whether it might have been shown that B.'s name had been inserted by mistake.—*LONDON & BRIGHTON RY. CO. v. FAIRCLOUGH* (1841), 2 Man. & G. 674; 2 Ry. & Can. Cas. 544; *Drinkwater*, 196; 3 Scott, N. R. 68; 10 L. J. C. P. 133; 5 J. P. 513; 133 E. R. 916.

*Annotations*.—*Refd.* *Nanney v. Morgan* (1887), 37 Ch. D. 346. *Mentd.* *Flory v. Denny* (1852), 7 Exch. 581; *Fuller v. Earle* (1852), 21 L. J. Ex. 314; *Martin v. Reid* (1862), 11 C. B. N. S. 730; *Cochrane v. Moore* (1890), 25 Q. B. D. 57.

**469. — Variation in charterparty.**—*CROPTON v. PICKERNELL* (1847), 6 L. T. 257; *subsequent proceedings*, 16 M. & W. 829.

— *Bills of exchange.*—*See* *BILLS OF EXCHANGE*, Vol. VI., pp. 503–507, Nos. 3200–3233.

— *Insurance policy.*—*See* *INSURANCE*, Vol. XXIX., pp. 67, 68, Nos. 253–261.

#### SUB-SECT. 5.—INSTRUMENTS EXECUTED ABROAD.

**470. Bond for foreign stock—Signed abroad—Issued in England.**—A bond for foreign stock, signed in Paris, but issued in England, does not require an English stamp.—*YRISARRI v. CLEMENT* (1826), as reported in 2 C. & P. 223; 2 State Tr. N. S. App. 986; 4 L. J. O. S. C. P. 128; 172 E. R. 101.

*Annotations*.—*Mentd.* *Thompson v. Barclay* (1831), 9 L. J. O. S. Ch. 215; *British South African Co. v. Companhia de Mocambique* (1893), 69 L. T. 604; *Duff Development Co. v. Kelantan Government*, [1924] A. C. 797.

**471. Receipts for loan.**—The cts. of this country will take no notice of the revenue laws of foreign states. Therefore where *assumpsit* was brought for money lent in France, & unstamped receipts were produced in proof of the loan, evidence to show that by the law of France, such receipts required stamps to render them valid, was rejected.—*JAMES v. CATHERWOOD* (1823), 3 Dow. & Ry. K. B. 190.

*Annotation*.—*Apld.* *Bristow v. Sequeville* (1850), 5 Exch. 275.

**472. Agreement—Relating to property abroad.**—An agreement made between two persons residing in Calcutta relating to property in Calcutta need not necessarily be written on stamped paper.—*GILCHRIST v. HERBERT* (1872), 26 L. T. 381; 20 W. R. 348.

**473. Conveyance on sale—Consideration payable in England.**—*INLAND REVENUE COMRS. v. MAPLE & CO (PARIS), LTD.*, No. 651, *post*.

#### SUB-SECT. 6.—CONFLICT OF LAWS.

*See* *CONFLICT OF LAWS*, Vol. XI., pp. 308, 309, 393, Nos. 14–16, 608–670; *BILLS OF EXCHANGE*, Vol. VI., pp. 439–441, Nos. 2820–2836.

#### SECT. 4.—REGULATIONS AS TO STAMPING INSTRUMENTS.

*See* Stamp Act, 1891 (c. 39), ss. 12, 13, 88, sched. I.

**474. Re-stamping—Instrument applied to second use—Non-negotiable promissory note—Transfer**

#### PART IX. SECT. 4.

*d. Adjudication stamp—Whether effectual—On documents prohibited by law from being stamped.*—As 33 & 34

Vict. c. 97, s. 18, did not authorise the Comrs. of Inland Revenue to attach an adjudication stamp to documents which were prohibited by law from being stamped after execution an

adjudication stamp impressed on such a document was ineffectual.—*VALANCE v. FORBES* (1879), 6 R. (Ct. of Sess.) 1099.—*SCOT*.

**Sect. 4.—Regulations as to stamping instruments.**  
**Sect. 5.]**

**without second stamp.]**—Deft., the indorsee of a promissory note which was not negotiable, indorsed it to pltf., in payment for goods; pltf. neglected to present the note to the maker when it became due, & it remained unpaid:—*Held*: pltf. could, notwithstanding, recover the price of the goods sold from deft., as the note not being originally negotiable, pltf. had not been guilty of laches in not presenting it, & the transfer not amounting to a new making, for want of a stamp.—*PLIMLEY v. WESTLEY* (1835), 2 Bing. N. C. 249; 1 Hodg. 324; 2 Scott, 423; 5 L. J. C. P. 51; 132 E. R. 98.

*Annotation* :—*Consd. Gwinnell v. Herbert* (1836), 5 Ad. & El. 436.

**475. Adjudication—Whether objection to admissibility precluded—Stamp affixed after objection at trial & before appeal.]**—(1) Documents stamped with a “denoting” stamp by the Comrs. under Stamp Act, 1870 (c. 97), s. 14, cannot be objected to, when tendered in evidence as being improperly stamped.

(2) Where in an action on a bond the instrument is objected to at the trial as being insufficiently stamped, & afterwards, but before the case is argued in banc, a denoting stamp is affixed to it by the Comrs., such objection to the sufficiency of the first stamp is not thereby removed.—*PRUDENTIAL MUTUAL ASSURANCE INVESTMENT & LOAN ASSOCN. v. CURZON* (1852), 8 Exch. 97; 22 L. J. Ex. 85; 19 L. T. O. S. 257; 155 E. R. 1275.

**476. — Power of commissioners to affix.]**—A mtge. deed though expressed to be made for securing the repayment or retransfer of an uncertain & unlimited amount of money or stock is admissible in evidence, & available under 13 & 14 Vict. c. 97, sched. Title Mortgage, for such amount of money or stock intended to be thereby secured, as the *ad valorem* duty denoted by the stamp thereon will extend to cover. *Qu.*: as to power of the comrs. of stamps in such a case to affix the denoting stamp under sect. 14.—*MORGAN v. PIKE* (1854), 14 C. B. 473; 2 C. L. R. 696; 23 L. J. C. P. 64; 22 L. T. O. S. 242; 2 W. R. 193; 139 E. R. 195.

*Annotation* :—*Refd. Northampton Gas-Light Co. v. Parnell* (1855), 15 C. B. 630.

**477. — Finality of.]**—*GRUX v. DALBY* (1854), 23 L. T. O. S. 271.

**478. — Case stated for Divisional Court—Appeal to Court of Appeal.]**—The decision of a Div. Ct. upon a case stated by the Comrs. of Inland Revenue under Stamp Act, 1870 (c. 97), s. 19, is an “order” & not a “judgment,” & an appeal from such decision to the Ct. of Appeal must be brought within twenty-one days.—*ONSLOW v. INLAND REVENUE COMRS.* (1890), 25 Q. B. D. 465; 59 L. J. Q. B. 556; 63 L. T. 513; 38 W. R. 728; 6 T. L. R. 454, C. A.

**479. — Duty of commissioners to adjudicate—Instrument made as security without limit—Stamp Act, 1891 (c. 39), s. 12 (6).]**—*SUFFIELD (LORD) v. INLAND REVENUE COMRS.*, No. 432, *ante*.

**480. Adhesive stamp—Sufficiency of cancellation—By stamping.]**—The cancellation by stamping of an adhesive stamp on a bill is clearly sufficient.—*VIALE v. MICHAEL* (1874), 30 L. T. 463.

**481. — By defacing marks.]**—An adhesive stamp used on a letter or power of attorney for appointing a proxy to vote at a meeting is sufficiently cancelled within Stamp Act, 1891 (c. 39), s. 8 (1), by the writing across it of part of the name of the person cancelling it, or the date

of cancellation alone, or other marks of a defacing nature.—*M’MULLEN v. SIR ALFRED HICKMAN STEAMSHIP, LTD.* (1902), 71 L. J. Ch. 766; 18 T. L. R. 650; 10 Mans. 106.

**482. — Or impressed stamp — Charterparty.]**—A charterparty executed entirely abroad & stamped within two months after it has been received in this country can be received in evidence, since it falls within Stamp Act, 1870 (c. 97), s. 15, & not of sects. 67 & 68 of that Act.—*THE BELFORT* (1884), 9 P. D. 215; 53 L. J. P. 88; 51 L. T. 271; 33 W. R. 171; 5 Asp. M. L. C. 291, D. C.

**483. Time for stamping — After execution—Instrument executed abroad—Time for stamping after receipt in United Kingdom.]**—*THE BELFORT*, No. 482, *ante*.

**484. — — — — —.]**—A chartered banking co., the principal business of which was in Australia, stopped payment, & was ordered to be wound up in this country. A scheme of reconstruction was proposed, by which a new bank was to be established, which was to defray the liabilities of the old bank with certain exceptions. The judge directed meetings of the shareholders & creditors to be held in order to ascertain their wishes as to the scheme. It being necessary that this should be done without delay, & the great majority of the creditors being resident in Australia, the judge made an order directing a form of proxy to be sent by the Official Receiver by telegraph to Australia appointing specified persons to vote for or against the scheme at the London meeting; the proxy papers were to be executed by the creditors in Australia & deposited at the offices of the co. at the principal cities in Australia not later than three days previous to the meeting in London, & the particulars & number of the proxies for & against the scheme were to be telegraphed to the Official Receiver. This was done, & the result declared at the meeting in London, when it was found that more than the statutory number of the creditors, including the Australian creditors, were in favour of the scheme, but that if the Australian votes were not counted the resolution in favour of the scheme would not have been carried. Under these circumstances the judge sanctioned the scheme. Some of the Scottish & English creditors appealed from this decision on the grounds (a) that the scheme was improvident & unfair towards the creditors generally; (b) that the judge had no power to order the result of the Australian proxies to be communicated by telegram to the meeting, but that the proxies ought to have been produced at the meeting; (c) that the Australian proxy papers were irregular in naming a particular person as agent for the voter; (d) that as to some of the proxy papers, which were stamped with a penny stamp, the day of the meeting at which they were to be used was not inserted, & therefore, they were void under Stamp Act, 1891 (c. 39), s. 80:—*Held*: the proxies on which the day of meeting was not named would be good if stamped with a ten shilling stamp within thirty days of their being received in England under Stamp Act, 1891 (c. 39), s. 15 (3).—*RE ENGLISH, SCOTTISH & AUSTRALIAN CHARTERED BANK*, [1893] 3 Ch. 385; 62 L. J. Ch. 825; 69 L. T. 268; 42 W. R. 4; 9 T. L. R. 581; 37 Sol. Jo. 648; 2 R. 574, C. A.

*Annotations* :—*Mentd. Re London Chartered Bank of Australia*, [1893] 2 Ch. 540; *Re Queensland National Bank* (1893), 37 Sol. Jo. 632; *Re Canning Jarrah Timber Co.* (1900), 69 L. J. Ch. 416; *Re Syria Ottoman Ry.* (1904), 20 T. L. R. 217; *Re Tea Corp.*, *Sorsbie v. Tea Corp.*, [1904] 1 Ch. 12; *Re A Debtor, Ex p. Peak Hill Goldfield*, [1909] 1 K. B. 430.

— — — — — **Bills of exchange.]**—*See* **BILLS OF**

EXCHANGE, Vol. VI., pp. 440, 441, Nos. 2830, 2833, 2834, 2836.

—J.—*See, also*, EVIDENCE, Vol. XXII., p. 271, Nos. 2559–2570.

#### SECT. 5.—EXEMPTIONS FROM STAMP DUTIES.

*See* Stamp Act, 1891 (c. 39), sched. I.

**485. Burden of proof that instrument exempt—On party offering instrument in evidence.**—Where an unstamped indenture of apprenticeship recited that a premium of £12 had been paid; but added, that it was paid out of a charitable donation fund belonging to the parish, & the master being called, proved that the premium had been paid by the parish officers, who told him at the time of paying it that it was charity money:—*Held*: the fact of payment being proved, the recital in the indenture, & the declarations of the parish officers, were not admissible in evidence, so as to bring the case within the exception in 44 Geo. 3, c. 98, s. 190, & the indenture, being unstamped, was void. *Semble*: a charitable donation fund belonging to a parish is a public charity, within such exception.

They (resps.) . . . produce an indenture that on the face of it purports that a premium has been paid & which has not been stamped. Now if that premium was paid out of a public charity, it was the duty of appls. to prove that fact (BAYLEY, J.).—*R. v. SKEFFINGTON (INHABITANTS)* (1820), 3 B. & Ald. 382; 106 E. R. 702.

*Annotation*:—*Reid*, *R. v. Llangunnor* (1831), 2 B. & Ad. 616.

**486.** ———.]—A memorandum as follows: "Send me a licence to use two of A.'s patent furnaces to be applied to a single plate, etc., for which I agree to pay, as agreed, £25 as a patent right, & which is to include iron works, fire bricks, & labour; engineers' or furnace-builders' time to superintend or fix the above order, to be paid 6s. per day":—*Held*: (1) to be either an agreement, or an acceptance of a previous proposal, & therefore to require a stamp; (2) it was not within the exemption in Stamp Act, 1815 (c. 184), sched., Part I., as relating to "the sale of goods, wares, or merchandise," as either the primary object of the agreement was the licence, or it was an agreement for the erection of fixtures.

#### PART IX. SECT. 5.

**e. Transfer of land in a State by private persons to Commonwealth.—Not taxable.**—A memorandum of transfer of land held under Real Property Act (N. S. W.) to the Commonwealth for Commonwealth purposes under Property for Public Purposes Acquisition Act, 1901, s. 3, is not liable to stamp duty under sect. 2, sched. 4, & therefore the Commonwealth is entitled to have such instrument marked exempt by the Comr. for the purpose of registration under Real Property Act.—*THE COMMONWEALTH v. STATE OF NEW SOUTH WALES* (1906), 3 C. L. R. 807.—**AUS.**

**f. Deed of gift.**—*PEERS v. COLLECTOR OF IMPOSTS*, [1920] V. L. R. 516.—**AUS.**

**g.** ———.]—A transaction is not liable to duty as a deed of gift under Stamp Acts (Amendment) Acts, 1891 & 1895, unless there is some instrument, or series of instruments perhaps, executed by donor for the purpose of giving effect to the gift.—*HANNAH v. STAMPS COMR.* (1902), 21 N. Z. L. R. 409.—**N.Z.**

**h. Summons to agent—Under absent or absconding debtor process.**—A summons to agent under the absent or absconding debtor process is not a

(3) Where an agreement is *prima facie* within Stamp Act it is for the party offering it in evidence to bring it within the exemption.—*CHANTER v. DICKINSON* (1843), 5 Man. & G. 253; 2 Dowl. N. S. 838; 6 Scott, N. R. 182; 12 L. J. C. P. 147; 7 Jur. 89; 134 E. R. 560.

**487. Exemptions under particular statutes—Sale directed by guardians—By order of poor law authority—Poor Law (Amendment) Act, 1834 (c. 76), s. 86.**—*Assumpsit* against vendee of lands, for not paying the purchase-money in pursuance of a contract of sale upon an auction alleged in the declaration to have been directed by guardians of an union in pursuance of an order under the hands & seals of the Poor Law Comrs. On executing a writ of inquiry, the contract was offered in evidence:—*Held*: it might be received, though unstamped, the declaration showing sufficiently that the sale was in pursuance of an order of the comrs., & therefore exempted from stamp duty by above sect.—*BANBURY UNION GUARDIANS v. ROBINSON* (1843), 4 Q. B. 919; Dav. & Mer. 92; 12 L. J. Q. B. 327; 1 L. T. O. S. 313; 7 Jur. 599; 114 E. R. 1141.

*Annotation*:—*Mentl. R. v. Johnson* (1845), 10 J. P. 72.

**488.** ——— **Conveyance to local authority.**—The City of Bath Act, 1851 (c. civ), constituting the mayor, etc., the local board of health for the city of Bath, incorporates portions of Public Health Act, 1848 (c. 63), but expressly excepts sect. 151, which exempts from stamp duty, deeds, etc., executed by local boards for the purpose of that Act. Sect. 85 of the Bath Act declares that the Act shall be subject to the provisions of any subsequent Act for amending the Public Health Act, 1848 (c. 63). The Local Government Act, 1858 (c. 98), is to be construed with & form part of Public Health Act, 1848 (c. 63), & to take effect where the Act of 1848 was already in force wholly or partially; & local boards formed under the later Act are to have all the rights & liabilities of boards under the Act of 1848. A subsequent Act of 1861 provides that the Act of 1858 shall extend to local boards constituted under local Acts as well as under the general Act of 1858, with this qualification, that provisions of the general Act opposed to or restrictive of the provisions of any local Act, shall be of no force in the district for which the local Act was passed:—*Held*: a deed

writ of summons within 1879 Act, c. 86 (in relation to the issue of stamps for the support of the law library at Halifax), & does not require to have a stamp affixed thereto, as provided by the Act.—*HENRY v. CURRY* (1890), 22 N. S. R. 152.—**CAN.**

**k. Manufacturing company—Power to promote companies.**—A manufacturing co. which by its arts. of assocn. is empowered to promote cos., & to hold & deal in their shares, & to acquire & sell patents & licences, is not a co. formed exclusively for manufacturing purposes, & is not entitled to be exempted from payment of stamp duty.—*RE ELECTRIC LIGHT & POWER CO., LTD.* (1883), 2 N. Z. L. R. 28 (S. C.).—**N.Z.**

**l. Statutory declaration.**—A statutory declaration verifying a copy of the last balance sheet of a co., & deposited with it in the office of the Registrar of the Supreme Ct. in compliance with Fire & Marine Insurance Companies Act, 1889, s. 11, is a declaration filed in a ct. within the meaning of the first exemption under the heading of "Affidavits & Declarations" in Stamp Act, 1882, Sched. 3, & is therefore exempt from stamp duty.—*RE COMMERCIAL UNION ASSURANCE CO., LTD.* (1892), 18 N. Z. L. R. 585.—**N.Z.**

**m. Instrument dedicating road to local authority.**—An instrument dedicating land to a local authority for the use of the public, although the dedication is expressed to be for consideration, is exempt from stamp duty under the exemptions contained in Stamp Act, 1882, Sched. 3, Par. 2, under the head of "conveyance on sale," the word "dedicating" in that exemption not necessarily implying a grant without consideration.—*HUTT BOROUGH COUNCIL v. STAMPS COMR.* (1906), 26 N. Z. L. R. 560.—**N.Z.**

**n. Letter of obligation.**—A letter of obligation if produced by the Crown in the Ct. of Justiciary need not be stamped.—*DICK* (1832), 4 Sc. Jur. 594.—**SCOT.**

**o. Acknowledgments signed by defendant.**—In an action by the exors. of a deceased for cash advances, there were produced acknowledgments signed by defender blank, & afterwards filled up by deceased:—*Held*: such documents did not require to be stamped.—*HAMILTON'S EXECUTORS v. STRUTHERS* (1858), 21 Dunl. (Ct. of Sess.) 51; 31 Sc. Jur. 42.—**SCOT.**

**p. Few contract.**—*LANARKSHIRE COUNTY COUNCIL v. INLAND REVENUE COMRS.*, [1918] S. C. (H. L.) 126; 55

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by which, in pursuance of the powers in the Act of 1858, land was conveyed to the mayor, etc., of Bath, "acting as the local board, & requiring the land thereby conveyed for a street improvement within their district," was exempt from stamp duty by virtue of Public Health Act, 1848 (c. 63), s. 151, notwithstanding the express exception of that sect. from the Bath Local Act of 1851.—*BATH CORPN. v. INLAND REVENUE COMRS.* (1871), 40 L. J. Ex. 181; 25 L. T. 28; 20 W. R. 80.

— **Building societies.]**—See *BUILDING SOCIETIES*, Vol. VII., pp. 483, 484, Nos. 175–182.

— **Friendly societies.]**—See *FRIENDLY SOCIETIES*, Vol. XXV., pp. 291, 295, Nos. 27, 46, 47.

— **Acknowledgments in writing.]**—See *LIMITATION OF ACTIONS*, Vol. XXXII., p. 378, Nos. 615–619.

— **Contracts of poor law authorities.]**—See *POOR LAW AMENDMENT ACT, 1834* (c. 76), s. 80.

**Particular instruments.]**—See Sect. 6, *post*.

**SECT. 6.—DUTIES UPON PARTICULAR INSTRUMENTS.**

**SUB-SECT. 1.—ADMISSION TO OFFICE OR POSITION.**

See Stamp Act, 1891 (c. 39), ss. 18–21, sched. 1, & Finance Act, 1895 (c. 16), s. 10.

**489. Admission of several persons—On single stamp—Validity as to all persons.]**—*R. v. REEKS*, No. 410, *ante*.

**SUB-SECT. 2.—AFFIDAVIT AND STATUTORY DECLARATION.**

See Stamp Act, 1891 (c. 39), sched. I.; Finance Act, 1907 (c. 13), s. 6; Patents & Designs Act, 1907 (c. 29).

**490. Separate stamp for each affidavit.]**—There must be a distinct & separate stamp for each distinct affidavit, before the same can be used or read.—*ATKINS v. REYNOLDS* (1815), 2 Chit. 14.

**491. One affidavit relating to several matters—Stamp in respect of each matter.]**—An affidavit that relates to several indictments or causes must have as many stamps as there are cases to which the affidavit & motion founded thereon apply.—*R. v. CARLISLE* (1819), 1 Chit. 451.

**492. Memorandum of sworn parol statement—Whether affidavit stamp required.]**—By Distress for Rent Act, 1738 (c. 19); s. 23, the sheriff, on taking a replevin bond, must ascertain the value of the goods distrained, on oath. Where the under sheriff administered the oath to A. B., the broker, & there was also written on the margin of the replevin bond, "A. B. maketh oath, that the value of the goods within specified is £49 16s. 0d.":—*Held*: this was a mere memorandum, & did not require an affidavit stamp.—*DUNN v. LOWE* (1827), 4 Bing. 193; 12 Moore, C. P. 407; 5 L. J. O. S. C. P. 149; 130 E. R. 742.

**493. Statutory declaration—Sworn by one person as to whole—As to part by another—Only**

**one stamp required.]**—*REVERSIONARY INTEREST SOCIETY, LTD. v. INLAND REVENUE COMRS.*, No. 423, *ante*.

**494. Alteration in.]**—*PEARSON v. WILCOX*, No. 455, *ante*.

**495. —.]**—*PRINCE v. NICHOLSON*, No. 456,

**SUB-SECT. 3.—AGREEMENT AND MEMORANDUM OF AGREEMENT.**

**A. In General.**

See Stamp Act, 1891 (c. 39), ss. 22, 23, sched. I.

**496. Proposal.]**—In an action for work & labour, a proposal on the part of deft., which was not finally acceded to, containing an estimate for the amount of the work, may be read in evidence by deft., although it be not stamped.—*PENNIFORD v. HAMILTON* (1819), 2 Stark. 475; 171 E. R. 710, N. P.

*Annotation*:—*Appld. Parker v. Dubois* (1836), Tyr. & Gr. 243.

**497. —.]**—*HUDSPETH v. YARNOLD*, No. 521, *post*.

**498. Acceptance of oral proposal.]**—Where a proposal made orally is assented to in writing, the latter, being evidence of an agreement, is not admissible without a stamp, as where it is written by deft. & signed by pltf.—*HEGARTY v. MILNE* (1854), 14 C. B. 627; 2 C. L. R. 779; 23 L. J. C. P. 151; 18 Jur. 490; 139 E. R. 258; *sub nom. PETERGATE v. MILNE*, 23 L. T. O. S. 78; 2 W. R. 373.

**499. Agreement not required to be in writing.]**—*VAUGHTON v. BRINE*, No. 535, *post*.

**500. Agreement signed by one party.]**—*HUGHES v. BUDD*, No. 532, *post*.

**501. —.]**—It [an agreement, signed only by one of the parties] may nevertheless be a "minute or memorandum" of an agreement, & as "evidence" of it, may require a stamp (*COCKBURN, C.J.*).—*OXENHAM v. SMYTHE* (1860), 2 F. & F. 220.

**502. Agreement not binding per se.]**—The stamp imposed by Stamp Act, 1815 (c. 184), on agreements under hand, applies, only to agreements, which, *per se*, are binding as agreements.—*R. v. ST. MARTIN'S LEICESTER (INHABITANTS)* (1834), 2 Ad. & El. 210; 4 Nev. & M. K. B. 202; 2 Nev. & M. M. C. 472; 4 L. J. M. C. 25; 111 E. R. 81.

*Annotation*:—*Mentd. Hill v. Barry* (1842), 7 Jur. 10.

**503. — Document as evidence of previous contract.]**—A writing containing not direct evidence of a contract, but merely evidence of a material fact from which a contract may be inferred, does not require a stamp.

A letter was written by pltf.'s attorney to deft.'s attorney, requesting to know whether deft. wished pltf. to pay certain calls in a joint stock co. for him, to which deft.'s attorney, in reply, wrote a letter authorising pltf. to pay the calls. In an action to recover the sum paid:—*Held*: the letters did not require an agreement stamp.—*PARKER v. DUBOIS* (1836), 1 M. & W. 30; 1 Gale, 366; Tyr. & Gr. 243; 5 L. J. Ex. 90.

**504. —.]**—A document which is not intended to operate as a binding contract, but is

Sc. L. R. 504; [1917] 2 S. L. T. 17.—*SCOT*.

**q. Company carrying on business in colony—Principal office in England.]**—The memorandum of assocn. of a limited co. having its principal office in England declared that one of the objects of the co. was "to carry on in any part of the world the business," etc. The co. carried on business through an agent in the Cape Colony:

—*Held*: the co. was not liable to stamp duty.—*MARSHALL v. ORPEN* (1895), 72 L. T. 783, P. C.—*S. AF.*

**PART IX. SECT. 6, SUB-SECT. 2.**

**r. Papers annexed to affidavit.]**—Papers annexed to an affidavit are not filings distinct from the affidavit, & do not require to be stamped.—*CASE v. STEPHENS* (1890), 6 Man. L. R. 552.—*CAN.*

**PART IX. SECT. 6, SUB-SECT. 3.—A.**

**496 i. Proposal.]**—A written proposal or a written offer does not become subject to stamp duty by reason of subsequent acceptance which is not in writing.—*SECRETARY TO THE COMR. OF SALT, ABKARI & SEPARATE REVENUE v. SOUTH INDIAN BANK, LTD., TIN-NEVELLY* (1913), 1 L. L. R. 38 Mad. 349.—*IND.*



only used as evidence of a previous contract is not within Stamp Act, 1815 (c. 184), which imposes a stamp upon agreements, whether used as evidence of a contract, or as obligatory upon the parties.—*BEECHING v. WESTBROOK* (1841), 8 M. & W. 411; 1 Dowl. N. S. 18; 10 L. J. Ex. 464; 151 E. R. 1099.

*Annotations*:—*Appld.* *Fancourt v. Thorne* (1846), 9 Q. B. 312; *Knight v. Barber* (1846), 16 M. & W. 66. *Consd.* *Toll v. Lee* (1849), 4 Exch. 230. *Refd.* *Marshall v. Powell* (1846), 1 New Pract. Cas. 590; *Clay v. Crofts* (1851), 17 L. T. O. S. 231.

505. ———.—[As to the admissibility of the latest document, I think it required no stamp. It is merely a recapitulation of the former agreement; & its object seems to have been to show that the promissory note was given up on the day named: & for this purpose I cannot but think it was receivable without a stamp. The former agreement, which was rehearsed, was properly stamped, & is binding. I cannot think that a memorandum which merely recites a former agreement requires a stamp (*LORD DENMAN, C.J.*).—*MARSHALL v. POWELL* (1846), 9 Q. B. 779; 1 New Pract. Cas. 590; 16 L. J. Q. B. 5; 8 L. T. O. S. 159; 11 Jur. 61; 115 E. R. 1475.

506. ———.—[*WOOD v. COCKERELL*, No. 518, *post*.

507. ———.—[If, after two parties have orally agreed to certain terms, one of them desires that they shall be put into writing, & the other writes them out in the form of a proposal, which is orally accepted; this, though necessary to be put in as matter of evidence, does not require a stamp as an agreement.—*LAING v. SMITH* (1862), 3 F. & F. 97.

#### *B. Particular Instances.*

See Stamp Act, 1891 (c. 39), ss. 22, 23, sched. I.

508. *Indorsement on deed*—*Altering terms of debt.*—A memorandum on the back of a debt, altering some of the terms of it, does not require to be stamped.—*HERNE v. HALE* (1800), 3 Esp. 237, N. P.

509. *Acknowledgment of debt.*—A written paper containing a bare acknowledgment of a debt is good evidence under the money counts, without a stamp.—*ISRAEL v. ISRAEL* (1808), 1 Camp. 499; 170 E. R. 1035, N. P.

510. ———.—*With promise of repayment.*—An instrument whereby pltf. acknowledges a loan of money, & promises repayment, & engages to pay an unliquidated demand out of interest, & to pay the principal & the remainder of the interest to the lender, his exors., administrators, & assigns, is not a promissory note, & it is properly stamped with an agreement stamp.—*BOLTON v. DUGDALE* (1833), 4 B. & Ad. 619; 1 Nev. & M. K. B. 412; 2 L. J. K. B. 104; 110 E. R. 589.

*Annotation*:—*Refd.* *Davies v. Wilkinson* (1839), 10 Ad. & El. 98.

511. ———.—*I.O.U.*—*Stating time for payment.*—An instrument in the following form: "Oct. 11, 1831. I.O.U. £20, to be paid on the 22nd inst., W. B.," requires a stamp, either as a promissory note, or as an agreement for the payment of money above the value of £10.—*BROOKS v. ELKINS* (1836), 2 M. & W. 74; 2 Gale, 200; 6 L. J. Ex. 6; 150 E. R. 675.

*Annotations*:—*Distd.* *Jarvis v. Wilkins* (1841), 7 M. & W. 410; *Melanotte v. Teasdale* (1844), 1 New Pract. Cas. 17.

512. ———.—[A paper signed by deft. was in the following form: "Mr. H., pltf., has advanced me £12 on furniture, etc., delivered to him at Stratford":—*Held*: this did not require a stamp.—*HUXLEY v. O'CONNOR* (1837), 8 C. & P. 204, N. P.

513. ———.—*In memorandum of relinquishment of possession.*—*ROGERS v. CALVERT* (1859), 1 F. & F. 680.

514. ———.—*No definite time for payment stated.*—A document in these words: "I, A., have this day borrowed of B. £300 4 per hundred, payable yearly," does not require a stamp, either as a promissory note or an agreement.—*CORY v. DAVIS* (1863), 14 C. B. N. S. 370; 143 E. R. 489; *sub nom.* *CONY v. DAVIES*, 2 New Rep. 29. *Annotation*:—*Mentd.* *Blewitt v. Tritton*, [1892] 2 Q. B. 327.

———.—[See *LIMITATION OF ACTIONS*, Vol. XXXII., pp. 378, 379, Nos. 615–619.

515. *Prospectus*—*Containing agreement*—*Actual copy delivered.*—Where the agreement on which the action is brought is contained in a prospectus of terms delivered by pltf. to deft., it is necessary to get that identical copy stamped, which has been delivered, & it is not sufficient to get another copy stamped.—*WILLIAMS v. STOUGHTON* (1817), 2 Stark. 292; 171 E. R. 650, N. P.

*Annotation*:—*Refd.* *Chadwick v. Clarke* (1845), 1 C. B. 700.

516. ———.—*Containing proposal only.*—In an action by a schoolmaster for a sum of money in lieu of three months' notice of the removal of applt.'s, deft.'s, sons from school, it appeared that applt.'s agent having expressed a wish to place applt.'s sons under resp.'s, pltf.'s, care, received from the latter a prospectus, which stated that the terms were sixty guineas *per annum*, & that three months' notice or payment was required previously to the removal of the pupil. Resp. at the time of delivering the prospectus agreed, verbally, that the boys should be charged for at the rate of fifty guineas *per annum* each. The boys were, thereupon, sent to resp.'s school, & were taken away without the stipulated notice:—*Held*: the prospectus was a proposal, & not an agreement, & no stamp was necessary.—*CLAY v. CROFTS* (1851), 20 L. J. Ex. 361; 17 L. T. O. S. 231. *Annotation*:—*Refd.* *Carlill v. Carbolic Smoke Ball Co.*, [1892] 2 Q. B. 484.

517. *Correspondence*—*Letter proving contract*—*Marriage.*—A letter read to prove a contract of marriage need not be stamped.—*ORFORD v. COLE* (1818), 2 Stark. 351; 171 E. R. 670, N. P. *Annotation*:—*Refd.* *Wrigley v. Smith* (1834), 3 L. J. K. B. 116.

518. ———.—[*Semble*: letters offered in evidence to prove the terms of a contract ought to be stamped, though they purport to refer to an agreement previously made, to terms previously accepted.—*WOOD v. COCKERELL* (1846), 7 L. T. O. S. 469.

519. ———.—*Evidence of material fact*—*From which agreement inferable.*—*PARKER v. DUBOIS*, No. 503, *ante*.

520. ———.—*Letter to third party.*—A letter, in which deft., who was proprietor of a theatre, wrote to a third person, saying, "F. must be satisfied with his present salary until I know what turn the season takes," is not an agreement, & does not require a stamp.—*FRAZER v. BUNN* (1838), 8 C. & P. 704, N. P.

521. ———.—*Containing proposals only.*—Deft., a manager of a theatre, wrote to the pltf., an actor, offering him an engagement, at a weekly salary of £2. Some months afterwards deft. wrote to the pltf., stating that his services would be no longer required, unless he would accept 30s. a week only, for the summer season. Deft., however, subsequently wrote to pltf. as follows, "I have received your letter, & on reconsideration will give you the same terms, £2, per week for the summer season." In an action for the amount of pltf.'s



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salary, as actor at deft.'s theatre:—*Held*: the above letters were only proposals, & did not require a stamp.—*HUDSPETH v. YARNOLD* (1850), 9 C. B. 625; 19 L. J. C. P. 321; 15 L. T. O. S. 227; 14 Jur. 578; 137 E. R. 1036.

*Annotations*:—*Refd.* *Petergate v. Milne & Smith* (1854), 23 L. T. O. S. 78; *Smith v. Neale* (1857), 2 C. B. N. S. 67; *Carlill v. Carbolic Smoke Ball Co.*, [1892] 2 Q. B. 484.

**522. Receipt—Bill of exchange payable after date.]**—An instrument given by an overseer of the poor to the reputed father of a bastard child, stating, that he had received a sum of money from the latter by a bill of exchange, payable after date, & which, when paid, would exonerate him from the expenses attending the birth & maintenance of such child, does not require an agreement stamp within Stamp Act, 1815 (c. 184), sched. Part I.; but a receipt stamp is sufficient for such a document.—*WATKINS v. HEWLETT* (1819), 1 Brod. & Bing. 1; 3 Moore C. P. 211; 129 E. R. 623.

**523. — For rent—Stipulation against waiver.]**—A receipt for rent, stipulating that acceptance of rent shall not operate as a waiver of a previous notice to quit, does not require an agreement stamp under Stamp Act, 1815 (c. 184).—*DOE d. WHEBLE v. FULLER* (1835), Tyr. & Gr. 17.

**524. — Goods held at another's disposal.]**—In *assumpsit* on a contract to redeliver, on request wine which had been placed in deft.'s care, pltf's. offered in evidence a writing, signed by deft., a wine merchant, in substance as follows, "this is to certify that M., deft., has in his cellar, belonging to H.," under whom pltf's. claimed, "that is paid for, twelve dozen of port wine, etc., Mar. 5, 1823. Received from H. five bottles of port, etc. making in the whole, etc. All the above wine paid for":—*Held*: such writing was admissible without a stamp not being an "agreement, or any minute or memorandum of an agreement," or "evidence of a contract," within Stamp Act, 1815 (c. 184), sched. Part I., Title Agreement.—*BLACKWELL v. McNAUGHTAN* (1841), 1 Q. B. 127; 113 E. R. 1078.

**525. — Sum written off on mortgage debt.]**—"Mr. J. having written off the sum of £72 3s. 9d. from his mtge. debt. being five quarters rent of his house, I hereby discharge the said rent to this June 24, 1841":—*Held*: to be improperly stamped as an agreement, & to require a receipt stamp.—*LUCAS v. JONES* (1844), 5 Q. B. 949; Dav. & Mer. 774; 13 L. J. Q. B. 208; 3 L. T. O. S. 101; 8 Jur. 422; 114 E. R. 1506.

*Annotation*:—*Mentd.* *Gingell v. Purkins* (1850), 4 Exch. 720.

**526. — Agreement to repay money on certain event.]**—A receipt for money, stating that it is to be repaid on a certain event, is an agreement, & requires a stamp as such.—*BATSON v. TRANCE* (1862), 3 F. & F. 320.

**527. Broker's note to principal—Statement of purchaser.]**—A note sent by a broker to his principal of a purchase he had made, does not require a stamp, as a minute or memorandum of an agreement; although the subject of the purchase be above £20 value, & not within any exemption from stamp duty.—*JOSEPHS v. PEBRER* (1824), 1 C. & P. 341; 170 E. R. 1223.

*Annotations*:—*Refd.* *Tomkins v. Savory* (1829), 9 B. & C. 704. *Mentd.* *London Grand Junction Ry. v. Freeman* (1841), 2 Man. & G. 606.

**528. — — —.]**—A note sent by a broker to his principal containing an account of a purchase of shares in a joint stock co., & the price paid for the same, does not require a stamp.—*TOMKINS v.*

*SAVORY* (1829), 9 B. & C. 704; 4 Man. & Ry. K. B. 538; 7 L. J. O. S. K. B. 334; 109 E. R. 262.

**529. Inventory of goods—Containing terms of letting.]**—*DUFFILL v. SPOTTISWOODE* (1828), 3 C. & P. 435, N. P.

*Annotation*:—*Mentd.* *Jones (Holloway) v. Woodhouse*, [1923] 2 K. B. 117.

**530. Agreement for work.]**—Pltf. entered into a written agreement, unstamped to do certain repairs in deft.'s house on specified terms. During the progress of the work the original plan was departed from, & additional work was done, not provided for by the written agreement:—*Held*: pltf. could not sue for the value even of such additional work without producing the agreement & it being unstamped, he could not use it to show that that work was not included in it.—*VINCENT v. COLES* (1829), 3 C. & P. 481; Dan. & I. l. 284; Mood. & M. 257; 7 L. J. O. S. K. B. 130.

*Annotations*:—*Refd.* *Fielder v. Ray* (1829), 6 Bing. 332; *Parton v. Cole* (1841), 11 L. J. Q. B. 70; *Buxton v. Cornish* (1844), 1 Dow. & L. 585. *Mentd.* *R. v. Arrton* (1844), 2 L. T. O. S. 309.

**531. —.]**—Pltf. may recover on proof of work done, on an implied contract, although it appear in the course of deft.'s case, that there was a written agreement relating to the matter, but which cannot be read for the want of a stamp. *Secus*, if the fact come out in the course of pltf.'s case.—*FIELDER v. RAY* (1829), 6 Bing. 332; 4 C. & P. 61; 3 Moo. & P. 659; 8 L. J. O. S. C. P. 65; 130 E. R. 1308.

*Annotation*:—*Refd.* *Crowther v. Solomons* (1848), 6 C. B. 758.

**532. —.]**—(1) If an agreement cannot be read in evidence for want of a stamp, pltf. cannot recover the value of the work & labour to which the agreement refers, although deft. may have had the benefit of it.

(2) An agreement signed by pltf. only is, as against him, valid in point of law as an agreement, & must, therefore, be stamped.—*HUGHES v. BUDD* (1840), 8 Dowl. 478; 4 Jur. 654.

*Annotations*:—As to (2) *Refd.* *Knight v. Barber* (1846), 16 M. & W. 66. *Generally, Refd.* *Wood v. Cockerell* (1846), 7 L. T. O. S. 469; *Gurr v. Scudds* (1855), 11 Exch. 190. *Mentd.* *Rawlins v. West Derby Overseers* (1846), 2 C. B. 72.

**533. Memorandum indorsed on conditions of sale.]**—A printed copy of the particulars of sale of certain freehold premises was sent to a third party by the purchaser who had written upon it the following memorandum. "This is the particular under which I purchased the bath rooms, in confirmation of my lease," but had not signed it:—*Held*: it might be given in evidence without a stamp in an action by such third party against the purchaser.—*MOTT v. DELANE* (1838), 2 Jur. 592.

**534. Rules for government of school—Prescribing terms of employment of master.]**—The trustees of a free school drew up rules for the government of the school, prescribing also the terms upon which the master should hold or be dismissed from his office. These were signed by the trustees & by the master, who was already in office; & were produced by the trustees on the trial of a cause between them & the master, then dismissed, as "rules agreed upon at a meeting of the trustees held," etc.:—*Held*: they were admissible without having been stamped as an agreement.—*BROWNE v. DAWSON* (1840), 12 Ad. & El. 624; 4 Per. & Dav. 355; 113 E. R. 950.

*Annotations*:—*Mentd.* *Whittington v. Boxall* (1843), 5 Q. B. 139; *Williams v. Hughes* (1843), 2 L. T. O. S. 208; *Jones v. Chapman* (1848), 2 Exch. 803; *Murray v. Hall* (1849), 18 L. J. C. P. 161; *Humphrey v. Nowland* (1862), 15 Moo. P. C. C. 343; *Scott v. Matthew Brown* (1884), 51 L. T. 746; *Hemmings v. Stoke Poges Golf Club*, [1920] 1 K. B. 720.

**535. Resolution of committee—Appointment of secretary.]**—A resolution of an unincorporated assocn., signed by the parties making it, for the appointment of an individual to the office of secretary to the assocn. for a specified period at a weekly salary, is not an agreement or memorandum of an agreement, requiring a stamp, within Stamp Act, 1815 (c. 184).

The words "whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument" are used to exclude the excuse that the agreement, of which some memorandum is given as evidence, need not have been made in writing (MAULE, J.).—*VAUGHTON v. BRINE* (1840), 1 Man. & G. 359; 1 Scott, N. R. 258; 9 L. J. C. P. 326; 4 Jur. 464; 133 E. R. 373.

*Annotations:—Folld.* *Beeching v. Westbrook* (1841), 1 Dowl. N. S. 18. *Refd.* *Bethell v. Blencowe* (1841), 3 Man. & G. 119; *Chanter v. Dickinson* (1843), 5 Man. & G. 253; *Knight v. Barber* (1846), 16 M. & W. 66; *Marshall v. Powell* (1846), 1 New Pract. Cas. 590; *Clay v. Crofts* (1851), 17 L. T. O. S. 231; *Ward v. Lonsborough* (1852), 12 C. B. 252; *Powers v. Fowler* (1855), 25 L. T. O. S. 203.

**536. ———.]—MILLS v. BRITISH PROVIDENT LIFE & FIRE ASSURANCE SOCIETY** (1859), 1 F. & F. 607.

**537. ——— Statement of acceptance of tender for work.]**—Pltf. entered into an express contract with a committee of individuals, associated together for the purpose of obtaining an Act of Parliament for making a turnpike road, to do certain work for a specified sum, he afterwards caused his name to be inserted in the list of subscribers for two shares:—*Held*: he was not thereby precluded from recovering upon such express contract. A minute of a resolution come to by a committee, that a tender for work was accepted, is not a minute or memorandum of an agreement requiring a stamp within Stamp Act, 1815 (c. 184), but a minute of a resolution which purported, on the face of it, to be an agreement that pltf. should have an additional sum for the extra trouble imposed on him by a deviation from the original line of road, & which was read over to pltf., & was assented to by him, requires an agreement stamp.—*LUCAS v. BEACH* (1840), 1 Man. & G. 417; 1 Scott, N. R. 350; 133 E. R. 396.

*Annotations:—Folld.* *Beeching v. Westbrook* (1841), 8 M. & W. 411. *Refd.* *Powers v. Fowler* (1855), 25 L. T. O. S. 203. *Mentd.* *Smith v. Archibald* (1849), 14 L. T. O. S. 174; *Clay v. Southan* (1852), 16 Jur. 1074.

**538. ——— Agreement for additional work—Read to & accepted by plaintiff.]—LUCAS v. BEACH**, No. 537, *ante*.

**539. ——— Result communicated to plaintiff.]**—In an action against a joint stock co. for breach of contract to employ & pay for services, the certificates for shares issued under its seal are sufficient evidence as against the co. that it is registered. Under resolutions before registration evidence, if ratified after registration, even though relating to fixtures, etc., the co. having taken to & partly paid for them, resolutions of which the result was communicated to pltf.:—*Held*: evidence of an agreement, but not requiring a stamp.—*MOSTYN v. CALCOTT HALL MINING CO.* (1858), 1 F. & F. 334.

**540. Offer to dispense with notice to quit.]**—Pending a negotiation for a tenancy, the terms of which were arranged by parol, the landlord signed & delivered to the tenant the following memorandum, "I shall be happy to allow Mr. B. to leave the apartments without any notice, if he finds anything which may at all lead him to suspect that there is any embarrassment in his landlord":—*Held*: this was not such an agreement or minute of an agreement as to require a

stamp.—*BETHELL v. BLENOWE* (1841), 3 Man. & G. 119; 3 Scott, N. R. 568; 10 L. J. C. P. 243; 133 E. R. 1081.

*Annotation:—Mentd.* *Howard v. Smith* (1841), 3 Man. & G. 254.

**541. Distress for rent—Offer to indemnify bailiff.]—Held**: an undertaking, whereby a party, describing a distress to be taken for rent claimed to be due to him, engages to indemnify the bailiff who makes the distress, does not require an agreement stamp.—*COX v. BAILEY* (1843), 6 Man. & G. 193; 6 Scott, N. R. 798; 134 E. R. 861.

*Annotations:—Refd.* *Taylor v. Steele* (1847), 16 M. & W. 665; *Temple v. Steinau* (1853), 8 Exch. 622.

**542. ——— Undertaking by tenant to give possession—In consideration of forbearance from sale of goods.]**—The following document was held not to require an agreement stamp: "I, N. F. do hereby request S. B. bailiff to my landlord, who on Nov. 4, 1848, having distrained my goods on the premises which I now hold, situate at, etc., for the sum of £100 as rent due to S. B.; & I request him to forbear the sale thereof until Feb. 2, 1849, to enable me to discharge the said rent; & I do hereby request, agree, & consent that the goods so distrained shall remain at my proper cost in his possession upon the premises until Feb. 2, 1849; & I undertake to give up the same goods, & not to replevy the same, & that this distress shall remain in full force during that time; & I do hereby undertake to give up peaceable possession of the premises & effects distrained on Feb. 2, 1849, & pay all costs & charges attending this distress."—*FISHWICK v. MILNES* (1850), 4 Exch. 825; 19 L. J. Ex. 153; 154 E. R. 1450.

**543. Accounts showing balance between partners.]**—In an action by a coach proprietor against his co-proprietor for the amount of certain monthly balances of accounts, it appeared that up to July 5, 1842, pltf. & another proprietor horsed the coach between them; that on that day the latter sold a part of his interest to deft., upon certain terms contained in a written agreement of that date, which, although not seen by pltf., was communicated to him; & that the business was afterwards carried on according to its terms. After July 5, the accounts between the three were settled every 28 days by a clerk who had formerly settled for the two; he made them out monthly, & sent them to deft., without ever hearing any complaint from him as to his not having received them, or of any incorrectness in them:—*Held*: these accounts were admissible in evidence, as tending to show the striking of a balance between the parties, & they need not be stamped either as awards or agreements.—*DIXON v. WING* (1843), 1 L. T. O. S. 647; *subsequent proceedings* (1844), 3 L. T. O. S. 159.

**544. Grant of licence.]—CHANTER v. DICKINSON**, No. 486, *ante*.

**545. ———.]—RIVER THAMES CONSERVATORS v. INLAND REVENUE COMRS.**, No. 647, *post*.

**546. Circular—Undertaking to return deposit.]—WARD v. LONDESBOURGH (LORD)**, No. 597, *post*.

**547. ———.]**—The provisional directors of a projected railway co. of whom deft. was one, after the subscribers' agreement had been prepared, issued a circular letter referring to certain arrangements made with another existing co., & stating that in the event of the Act not being obtained, the directors undertook to return the whole of the deposits without deduction. Upon the faith of this pltf. applied for, & obtained, an allotment of shares in the projected co. The letter of allotment was accompanied with a copy of the circular "

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& stated in the usual form that the bankers' receipt for the deposits would be exchanged for scrip on pltf. executing the subscribers' agreement. Pltf. paid the deposits on his shares, obtained the bankers' receipt, & signed the subscribers' agreement & obtained scrip certificates. The subscribers' agreement contained a clause fully indemnifying the provisional directors in respect of all contracts & things made & done in pursuance of the powers given to them, & authorised them to reimburse themselves out of the funds of the co. all costs & expenses which they might incur or be put to, in, or incident thereto, & to apply the deposits & calls, among other things, in defraying the preliminary expenses & the expenses of the application to Parliament. The deed also contained a general covenant of indemnity against all costs & charges incurred by the directors in the execution of their duty. The directors failed in obtaining an Act of Parliament, & £1 per share was returned to the shareholders, the rest of the funds having been spent in defraying the preliminary & parliamentary expenses. Afterwards, pltf., by letter, demanded repayment of the whole of the deposits on his shares, & adding that he should expect to be paid £5 per cent. interest from a certain date:—*Held*: (1) the contract upon which pltf. had paid his deposits was, that, in the event of an Act not being obtained, the whole of his deposits should be returned, & the express undertaking to that effect in the circular was not in any way affected by the terms of the subscribers' agreement executed by pltf., (2) the contract for the shares was not entirely evidenced by writing, & did not therefore require a stamp.—*MOWATT v. LONDESBOROUGH (LORD)* (1854), 3 E. & B. 307; 23 L. J. Q. B. 177; 22 L. T. O. S. 303; 18 Jur. 1094; 118 E. R. 1156; *on appeal*, 4 E. & B. 1, Ex. Ch.

*Annotation*:—*Generally*, *Mentd.* Johnson v. Goslett (1856), 18 C. B. 728; R. v. Saddlers' Co. (1861), 3 E. & B. 72; Geake v. Ross (1875), 44 L. J. C. P. 315; Tautz v. Archdale (1895), 11 T. L. R. 452.

**548. Memorandum stating purpose of deposit of title deeds.**—Where title deeds are deposited by way of equitable mtge., a memorandum merely stating the purpose for which they are deposited is not an agreement for a mtge., & need not be stamped.—*MEEK v. BAYLISS* (1862), 31 L. J. Ch. 448.

**549. Notice to treat**—In negotiations for compulsory purchase.]—A decree having been made for specific performance of a contract by the M. Ry. Co., founded upon the ordinary notice to treat, & assessment of value by a jury, the ct. will not require the notice to treat to be stamped as an agreement.—*RAWLINGS v. METROPOLITAN RY. CO.* (1868), 37 L. J. Ch. 824; 18 L. T. 871.

**550. Advertisement in newspaper**—Offer of reward.]—Defts. advertised that they would pay £100 reward to any person who contracted influenza after having used their Carbolie Smoke Ball according to the printed directions supplied. Pltf. purchased a smoke ball, used it according to the directions, but subsequently contracted influenza, & relying on the advertisement, claimed the £100:—*Held*: the offer or proposal in the advertisement, coupled with the performance by pltf. of the condition, created a contract on the part of defts. to pay the £100 in the event mentioned in the proposal. The advertisement did not require to be stamped as an agreement or memorandum of agreement under Stamp Act, 1891 (c. 39).—*CARLILL v. CARBOLIC SMOKE BALL CO.*, [1892] 2 Q. B. 484; 61 L. J. Q. B. 696; 50

J. P. 665; 8 T. L. R. 680; 36 Sol. Jo. 628; *on appeal*, [1893] 1 Q. B. 256, C. A.

*Annotations*:—*Reid.* Lyons v. Fox, [1919] 1 K. B. 11. *Mentd.* Stoddart v. Sagar, Sagar v. Stoddart (1895), 73 L. T. 215; World's Tea Co. v. Gardner, World's Tea Co. v. Gardner (1895), 50 J. P. 358; R. v. Tilley, [1896] 1 Q. B. 309; *Re* Consort, Deep Level Gold Mines, *Ex p.* Stark, [1897] 1 Ch. 575; Stollery v. Maskelyne (1898), 15 T. L. R. 79; Johnston v. Boyes, [1899] 2 Ch. 73; R. v. Stoddart (1900), 70 L. J. Q. B. 189; Hawke v. Hulton (1905), 22 T. L. R. 169; Chaplin v. Hicks (1911), 27 T. L. R. 244; Western Electric Co. v. G. E. Ry., [1914] 3 K. B. 554; Reynolds v. Atherton (1921), 125 L. T. 690.

— **Of agreement to dissolve partnership.**—*See* PARTNERSHIP, Vol. XXXVI., p. 512, Nos. 1803, 1804.

**Agreement pursuant to Highway Acts.**—*See* HIGHWAYS, Vol. XXVI., p. 357, Nos. 832, 833.

**C. Exemptions.**

(a) "Agreement or memorandum, the matter whereof is not of the value of £5."

*See, now*, Stamp Act, 1891 (c. 39), ss. 22, 23, sched. I.

**551. General rule.**—*YATES v. EVANS*, No. 431, *ante*.

**552. Value must be proved affirmatively.**—(1) Where the subject-matter of an agreement is a limited interest worth less than £20, in a thing worth more than £20, the agreement does not require a stamp.

The right of occupation could not be worth £20, because the occupation was determinable at any time upon giving six months' notice, & the right of occupation was the subject-matter of the agreement, & consequently no stamp was requisite (*LORD TENTERDEN, C.J.*).

(2) As a stamp is required only where the value of the subject-matter exceeds £20, it was for debt., who relied upon the objection, to make out the affirmative of that proposition (*LORD TENTERDEN, C.J.*).—*DOE d. MORGAN v. AMOS* (1828), 2 Man. & Ry. K. B. 180; 6 L. J. O. S. K. B. 226.

*Annotation*:—*As to* (1) *Reid.* Doe d. Marlow v. Wiggins (1843), 4 Q. B. 367.

**553. —**Deft. having distrained the goods of pltf. for arrears of rent, the latter signed the following undertaking: "In consideration of C. giving me the household furniture distrained for rent due to him, but the furniture only, I undertake to give him possession of the premises held by my late husband, on or before one week from this date. At the expiration of the week, pltf. having in the meantime acted upon agreement by removing part of the furniture, & selling other part, debt. & others entered took possession. In an action of trespass for such entry:—*Held*: the memorandum did not require a stamp, it not appearing affirmatively that it related to a matter amounting in value to £20.—*FELTHAM v. CARTWRIGHT* (1839), 5 Bing. N. C. 569; 7 Scott, 695; 9 L. J. C. P. 67; 3 Jur. 606; 132 E. R. 1219.

**554. Aggregate value exceeding statutory limit**—Sale by auction in separate lots—To one person.]—*EMMERSON v. HEELIS*, No. 435, *ante*.

**555. — Agreement to take payment in instalments.**—A paper as follows: Memorandum, I., J. R., consent to take 10s. per month from W. in discharge of a sum of £32 W. intends giving him, & upon the sum being paid, he engages giving a receipt in full of all demands," signed by J. R., & dated, requires a stamp under Stamp Act, 1815 (c. 184), sched. Part I., Title Agreement, as an agreement whereof the matter is of the value of £20.—*REMON v. HAYWARD* (1835), 2 Ad. & El. 666; 111 E. R. 256.

*Annotation*:—*Distd.* Doe d. Marlow v. Wiggins (1843), 4 Q. B. 367.

**556.** — Two agreements relating to same matter.—On one paper—Value of each below statutory limit.]—An unstamped paper containing two several agreements relating to same matter, & made with same object, was attested at the foot of it by a witness, who had been called in by the parties to attest it. The value of the subject matter of each was below £20; the aggregate value of the subject matter of the two was above £20:—*Held*: the paper required a stamp.—*ANGOLD v. MUSKETT* (1850), 15 L. T. O. S. 110.

**557.** Value of agreement below statutory limit—Agreement relating to property above statutory limit.—Contract of bailment.]—A memorandum by a wharfinger of the receipt of goods to be shipped in a particular manner, may be given in evidence to show the terms on which they were received, without a stamp, although the value of the goods was above £20; the wharfage being of a less amount.—*CHADWICK v. SILLS* (1821), Ry. & M. 15; 171 E. R. 927, N. P.

*Annotations*:—*Folld.* Latham v. Rutley (1824), Ry. & M. 13. *Consd.* Cox v. Bailey (1843), 6 Man. & G. 193. *Folld.* Baldwin v. Alsager (1844), 13 M. & W. 365; *Semple v. Steinau* (1853), 8 Exch. 622. *Refd.* Doe d. Marlow v. Wiggins (1843), 4 Q. B. 367; Taylor v. Steele (1847), 11 Jur. 806.

**558.** — — — — —.]—The following memorandum, “received of L. & co. a paper parcel directed to H. & co., 62 Lombard street, value £260, which we agree to deliver to them to-morrow, fire & robbery excepted; carriage paid here,” given by a carrier, on the receipt of goods, was admissible in evidence, without a stamp, as being an agreement, the subject matter of which did not exceed £20.—*LATHAM v. RUTLEY* (1824), Ry. & M. 13; 171 E. R. 925, N. P.

*Annotations*:—*Consd.* Cox v. Bailey (1843), 6 Man. & G. 193. *Folld.* Hill v. Bamm (1843), 5 Man. & G. 789; *Semple v. Steinau* (1853), 8 Exch. 622. *Refd.* Doe d. Marlow v. Wiggins (1843), 4 Q. B. 367; Taylor v. Steele (1847), 11 Jur. 806.

**559.** — — — — —.]—In an action of trover to recover the value of certain barrels of ale, the following instrument was received in evidence on behalf of pltf. “Memorandum. B., pltf., has left in the cellar at, etc., seventy two barrels containing ale, in H.’s casks, which I agree to allow H. to take from my cellar at any time within three months from this date, by receiving one day’s notice; & if left in the cellar beyond that time, B., or H., or whom it may concern, to pay rent or warehouse room for same. Dated Aug. 4, 1842. S.” def’t.—*Held*: this was properly received in evidence without a stamp, although the value of the goods exceeded £20, the amount of rent, if any, being less.—*BALDWIN v. ALSAGER* (1844), 13 M. & W. 365; 14 L. J. Ex. 34; 4 L. T. O. S. 117; 153 E. R. 151.

*Annotation*:—*Folld.* Semple v. Steinau (1853), 8 Exch. 622.

**560.** Right of occupation.—Tenancy determinable on six months’ notice.]—*DOE d. MORGAN v. AMOS*, No. 552, ante.

**561.** — — — — —.]—An agreement to let certain premises for a specific period at a sum of £10 does not require a stamp, inasmuch as the matter of it cannot be looked upon as of the value of £20 or upwards, within Stamp Act, 1815 (c. 184), sched., Part I.—*DOE d. MARLOW v. WIGGINS* (1843), 4 Q. B. 367; 3 Gal. & Dav. 504; 12 L. J. Q. B. 177; 7 Jur. 529; 114 E. R. 937.

*Annotations*:—*Mentd.* Accidental Death Insee. v. Mackenzie (1861), 5 L. T. 20; Swinfen v. Bacon, Swinfen v. Lewis (1861), 5 L. T. 83; Carlton v. Bowcock (1884), 51 L. T.

**562.** — — — — —.]—Agreement for continuance of tenancy.]—An agreement signed in Sept. 1840, by a tenant in possession, to retake the premises from

Oct. 10, 1840, when his tenancy expired, until Mar. 25, 1841, for the sum of £10, is not an agreement the matter whereof is of the value of £20, & does not require a stamp.—*MARLOW v. THOMPSON* (1842), 1 Dowl. N. S. 575; 11 L. J. Q. B. 150; 6 Jur. 300.

*Annotation*:—*Apprvd.* Doe d. Marlow v. Wiggins (1843), 4 Q. B. 367.

**563.** Lease of ferry.—Sale of ferry boat.]—*MAYFIELD v. ROBINSON*, No. 690, post.

**564.** — — — — —.]—Payment of interest.]—The following document held not to require a stamp, either as an agreement or a promissory note: “1839, Nov. 11, I.O.U. £45 13s. which I borrowed of Mrs. M. & to pay her 5 per cent. till paid.—R. T.”

The only agreement of which the paper is evidence, is an agreement to pay £5 per cent. interest on £45, which is not necessarily of the value of £20. It is not enough that the agreement should be possibly of that value, it must be so in its nature & inception (*POLLOCK, C.B.*).—*MELANOTTE v. TEASDALE* (1844), 13 M. & W. 216; 1 New Pract. Cas. 17; 13 L. J. Ex. 358; 3 L. T. O. S. 222; 153 E. R. 90.

*Annotations*:—*Folld.* Taylor v. Steele (1847), 16 M. & W. 665. *Refd.* Richardson v. Green (1847), 9 L. T. O. S. 435; Smith v. Smith (1859), 1 F. & F. 539.

**565.** — — — — —.]—In an action for money lent, etc., the following document was tendered in evidence: “Berwick Mar. 16, 1841, £170 Received from Mrs. B. Taylor the sum of £170 for value received, for which I promise to pay her at the rate of £5 per cent. from the above date. A. N. S.:—*Held*: not to require a stamp, either as a receipt, a promissory note, or an agreement of the value of £20.

It must appear on the face of the instrument or with reference to the subject-matter be capable of being ascertained, that the agreement was of the value of £20 at the time it was entered into. Applying that rule to the present case, it is impossible to say that this instrument was an agreement of the value of £20 at the time it was signed, for the interest might never have amounted to £20 (*PARKE, B.*).—*TAYLOR v. STEELE* (1847), 16 M. & W. 665; 16 L. J. Ex. 177; 11 Jur. 806; 153 E. R. 1357; *sub nom.* TAYLOR v. FIELD, 2 New Pract. Cas. 221; 9 L. T. O. S. 79.

**566.** — — — — —.]—In an action for a breach of contract in not paying interest on an overdue bill of exchange pltf. tendered in evidence the following unstamped agreement, addressed to him, & signed by def’t.: “In consideration of your discounting for me a bill of exchange of £100 drawn by J. on E. dated Aug. 5 payable at one month after date, I hereby undertake & agree, that if the bill is not paid at maturity, to pay you interest at the rate of 1s. in the pound per month, till the whole is fully paid & satisfied”:—*Held*: the agreement was admissible without a stamp, the subject-matter of it being the payment of interest of less value than £20.—*SEMPLE v. STEINAU* (1853), 8 Exch. 622; 22 L. J. Ex. 224; 17 Jur. 628; 155 E. R. 1501.

**567.** Agreement of indemnity.]—The son of J. having been arrested, & W. becoming his bail, J. signed an agreement to indemnify W. from all liability which he might incur in consequence:—*Held*: as one of the liabilities to which J. thereby subjected himself was to pay the debt for which the son of J. had been arrested, & as that must have amounted to £20, the subject-matter of the agreement must have been of that value, & the agreement therefore required a stamp within Stamp Act, 1815 (c. 184), sched. Part 1.—*WRIGLEY v.*

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SMITH (1834), 5 B. & Ad. 1117; 3 Nev. & M. K. B. 181; 3 L. J. K. B. 116; 110 E. R. 1106.

*Annotation*.—**Distd.** Taylor v. Steele (1847), 16 M. & W. 665.

568. —.]—If a sheriff, under a *fi. fa.*, levy on goods worth £14 & the sheriff be sued, & execution creditor give the sheriff an agreement of indemnity, this agreement requires a stamp, unless the indemnity be limited to a sum under £20.—SHEPHERD v. WHEBLE (1838), 8 C. & P. 534, N. P.

*Annotations*.—**Dbtd.** Taylor v. Steele (1847), 16 M. & W. 665. **Refd.** Brown v. Copley (1844), 7 Man. & G. 558.

569. **Value not appearing on face of agreement.]**—A written undertaking by a builder to do certain works for “a sum to be fixed by the architect,” the value not appearing on the face of it, held not to require a stamp.—ROWLAND v. LAZARUS (1859), 1 F. & F. 466, N. P.

570. **Agreement to surrender business.—For sum below statutory limit.—Under forfeiture of sum above statutory limit.]**—An agreement to give up a house & goodwill of a business for £7 & not to open a shop in the same line of business within one mile of the house under a forfeiture of £20 is not illegal on the ground that the restraint of trade is unlimited in point of time & may continue though the purchaser ceases to carry on the business. Nor does the agreement require a stamp as being for a subject-matter of the value of £20.—PEMBERTON v. VAUGHAN (1847), 10 Q. B. 87; 16 L. J. Q. B. 161; 11 Jur. 411; 116 E. R. 35.

*Annotations*.—**Mentd.** Elves v. Crofts (1850), 10 C. B. 241; Maxim Nordenfellt Guns & Ammunition Co. v. Nordenfellt, [1893] 1 Ch. 630.

571. **Subject-matter within statutory limit at time of agreement.—Subsequent accretion in value.]**—Pltf. agreed in writing with deft. to do the brickwork of a certain building for the sum of £1 14s. per rod, deft. to find all materials:—**Held**: the agreement did not require a stamp, it not appearing at the time of making it that its value amounted to £20, though the work done ultimately exceeded that amount.—LIDDIARD v. GALE (1850), 4 Exch. 816; 19 L. J. Ex. 160; 14 L. T. O. S. 423; 154 E. R. 1446.

*Annotation*.—**Foldd.** Rowland v. Lazarus (1859), 1 F. & F. 466.

(b) “*Agreement or memorandum for the hire of any labourer, artificer, manufacturer or menial servant.*”

See MASTER & SERVANT, Vol. XXXIV., pp. 45, 46, Nos. 212–217.

(c) “*Agreement relating to the sale of any goods, wares or merchandise.*”

See Stamp Act, 1891 (c. 39), ss. 22, 23, sched. I.

572. **Agreement containing additional stipulations.]**—An agreement respecting the sale of goods need not be stamped, though it contains stipulations concerning the mode of payment & other things.—HERON v. GRANGER (1805), 5 Esp. 269; 170 E. R. 808, N. P.

573. —.]—MEERING v. DUKE, No. 429, *ante*.

574. **Agreement for future delivery of existing goods.]**—Declaration stated that pltf., at request of deft., bargained & agreed with deft. to buy of, & deft. then sold to, pltf. divers goods at certain prices, & to be delivered by deft. to pltf. within a reasonable time; & in consideration thereof, deft. undertook & promised pltf. to deliver the said

goods to pltf. within such reasonable time. Breach, that, although deft., in part performance of his promise, had delivered to pltf. part of said goods, he did not, nor would, within such reasonable time, deliver the said residue of the said goods. On the trial, pltf. relied upon the following contract: “Mr. J. D. April 20, 1843. Cr. from L. & B.” (Here followed an enumeration of the articles, with the prices annexed.) “This order to be executed at above prices. J. B.”:—**Held**: this was a contract relating to the sale of goods, within the exemption in the Stamp Act.—DEFRIES v. LITTLEWOOD (1845), 5 L. T. O. S. 285; 9 Jur. 988. *Annotation*.—**Refd.** Heseltine v. Siggers (1848), 1 Exch. 856.

575. **Ship—Share in outfit & adventure.]**—An agreement between merchants, that one shall take a share in the outfit of a ship & the adventure, is not an agreement for the sale of goods with the proviso of the statute requiring a stamp of agreements.—LEIGH v. BANNER (1795), 1 Esp. 403; 170 E. R. 399, N. P.

576. —.]—MEERING v. DUKE, No. 429, *ante*.

577. **Goods to be made—Making & putting up machines.]**—An executory agreement for the making & putting up of certain machines in the party's house is required to be stamped like any other agreement, not being within the exception in Stamp Acts in favour of agreements, etc., for or relating to the sale of goods.—BUXTON v. BEDALL (1803), 3 East, 303; 102 E. R. 613.

*Annotations*.—**N.F.** Pinner v. Arnold (1835), 2 Cr. M. & R. 613. I consider the case of *Buxton v. Bedall* as overruled by the subsequent case of *Wilks v. Atkinson*, No. 578, *post* (PARKE, B.). **Consd.** De Fries v. Littlewood (1845), 9 Jur. 988. **Refd.** Marson v. Short (1835), 2 Bing. N. C. 118.

578. —.]—**Oil not yet pressed from seed.]**—A contract for selling & delivering oil, not yet expressed from seed in the vendor's possession is exempted from stamp duty as a contract relating to the sale of goods within 48 Geo. 3, c. 149, sched. Part I., Title Agreement. Exemption.—WILKS v. ATKINSON (1815), 6 Taunt. 11; 1 Marsh. 412; 128 E. R. 935.

*Annotations*.—**Foldd.** Pinner v. Arnold (1835), 2 Cr. M. & R. 613. **Refd.** De Fries v. Littlewood (1845), 9 Jur. 988. **Mentd.** Squier v. Hunt (1816), 3 Price, 68; Levy v. Herbert (1817), 7 Taunt. 314; Pickford v. Grand Junction Ry. (1841), 8 M. & W. 372.

579. —.]—“**To finish goods in a tradesmanlike manner.**”]—If a written paper contain a specification of goods, & the vendor by it agree “to finish the goods in a tradesmanlike manner.” This agreement does not require any stamp, as it is an agreement for the sale of goods, & not for the doing of work; & it need not be specially declared on.—HUGHES v. BREEDS (1826), 2 C. & P. 159; 172 E. R. 72, N. P.

*Annotation*.—**Foldd.** Pinner v. Arnold (1835), 2 Cr. M. & R. 613.

580. —.]—Pltf. contracted to make for defts. a copper plate press, to be ready in three months, defts. to pay part of the price by instalments, up to the delivery of the press, the remainder in six months:—**Held**: this was a contract relating to the sale of goods, within the exception of Stamp Act, 1815 (c. 184).—PINNER v. ARNOLD (1835), 2 Cr. M. & R. 613; Gale, 271; Tyr. & Gr. 1; 5 L. J. Ex. 1.

*Annotations*.—**Foldd.** Gurr v. Scudgs (1855), 11 Exch. 190. **Refd.** Chanter v. Dickinson (1843), 5 Man. & G. 253. **Mentd.** Santos v. Illidge (1859), 6 C. B. N. S. 841.

581. **Share of goods—& of profit or loss.]**—Deft. agreed in writing to take one half share of

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t. **Agreement to purchase dung & sweepings.]**—FISKEN v. GLASGOW CITY GAS CO. (1850), 12 Duml. (Ct. of Sess.) 757; 22 Sc. Jur. 262.—SCOT.



certain goods bought by pltf. on their joint account; half in the profit or loss, & to furnish pltf. with half the amount in time for the payment thereof; the goods being to be paid for by bills:—*Held*: this was an agreement relating to the sale of goods, within the exemption in the Stamp Act, 1804 (c. 98), sched. A, & did not require a stamp.—*VENNING v. LIECKIE* (1810), 13 East, 7; 104 E. R. 267.

*Annotations*:—*Apld.* Marson v. Short (1835), 2 Bing. N. C. 118. *Mentd.* Helme v. Smith (1831), 5 Moo. & P. 744; Sharpe v. Cummings (1844), 2 Dow. & L. 504.

**582. Variation of prior agreement for sale of goods.**—After breach of a contract for the sale & delivery of goods, deft. enters into a fresh agreement in writing, to cancel the former agreement; & for the future sale of goods upon different terms, the second agreement relates to the sale of goods, & does not require an agreement stamp.—*WHITWORTH v. CROCKETT* (1818), 2 Stark. 431; 171 E. R. 695, N. P.

**583. Advance of money on goods.**—A letter from a principal to his factor containing bills of exchange drawn upon the latter, & in which the principal promised to provide for the bills, if certain goods, then either in the factor's possession or about to be placed in his hands, should remain unsold at the time of the bills falling due, requires to be stamped, & does not come within the exception in the Stamp Act, as a letter for or relating to the sale of goods. The primary object of such letter not being the sale of goods, but the obtaining of an advance of money on the goods.—*SMITH v. CATOR* (1819), 2 B. & Ald. 778; 106 E. R. 549.

*Annotations*:—*Distd.* Southgate v. Bohn (1846), 16 M. & W. 35; Chatfield v. Cox (1852), 18 Q. B. 321. *Refd.* Kilbeck v. Vander Vyser (1847), 8 L. T. O. S. 451; Rein v. Lane (1867), L. R. 2 Q. B. 144. *Mentd.* Horsey v. Graham (1869), 21 L. T. 530.

**584. Water supply — Laying of pipes.**—An agreement to supply a house & buildings with water by means of pipes to be laid in a certain manner & to a certain height, is an agreement relating to the sale of goods & need not be stamped.—*WEST MIDDLESEX WATERWORKS CO. v. SUWERKROP* (1829), 4 C. & P. 87; Mood. & M. 408, N. P.

*Annotations*:—*Folld.* Gurr v. Scudds (1855), 11 Exch. 190. *Mentd.* Church v. Imperial Gas Light & Coke Co. (1837), 6 Ad. & El. 846.

**585. Undivided moiety of horse.**—An agreement for the sale of an undivided moiety of a horse, is an agreement for the sale of goods, within the exception in Stamp Act, 1815 (c. 184).—*MAKSON v. SHORT* (1835), 2 Bing. N. C. 118; 2 Scott, 243; 1 Hodg. 260; 4 L. J. C. P. 270; 132 E. R. 47.

**586. Goods & goodwill.**—An agreement for the sale of goods & goodwill for £60:—*Held*: to require a stamp.—*SOUTH v. FINCH* (1837), 3 Bing. N. C. 506; 4 Scott, 293; 1 Jur. 167; 132 E. R. 505.

*Annotation*:—*Apld.* Chanter v. Dickinson (1843), 5 Man. & G. 253.

**587. Licence to use patented goods.**—*CHANTER v. DICKINSON*, No. 486, *ante*.

**588. Scrip.**—Scrip in a railway co. is not "goods, wares, or merchandise," within the exemption in Stamp Act, 1815 (c. 184), sched. Part III., Title Agreement.

In the morning of a day, deft. gave pltf. a verbal order for fifty shares in a railway co. In the afternoon of the same day, deft. signed a memorandum, that he had bought of pltf. fifty shares in the co., at £10 a share; which memorandum was handed to pltf. :—*Held*: it required an agreement stamp.—*KNIGHT v. BARBER* (1846), 2 Car. & Kir. 333; 16 M. & W. 66; 1 New Pract. Cas. 557; 4 Ry. &

Can. Cas. 674; 16 L. J. Ex. 18; 8 L. T. O. S. 121; 10 Jur. 929; 153 E. R. 1101.

*Annotation*:—*Refd.* Clay v. Crofts (1851), 17 L. T. O. S. 231.

**589. Sale by auction.**—The following memorandum was handed by deft. a trader, to pltf. an auctioneer: "Memorandum of £107, had by me of S., pltf., being an advance on books sent in for immediate sale by auction": signed by deft. The books were sold, & an action having been brought by the auctioneer for a balance due to him on the sale, the above memorandum:—*Held*: to relate to the sale of goods, & therefore to be admissible in evidence without a stamp, under the exemption in Stamp Act, 1815 (c. 184), sched. Title Agreement.—*SOUTHGATE v. BOHN* (1846), 16 M. & W. 31; 16 L. J. Ex. 50; 8 L. T. O. S. 170; 153 E. R. 1087.

*Annotation*:—*Refd.* Clay v. Crofts (1851), 17 L. T. O. S. 231.

**590.**—[An agreement with an auctioneer, in a letter to him, employing him to sell goods in consideration of an advance obtained by him:—*Held*: within the exemption in Stamp Act, as relating to the sale of goods.—*TOPPING v. BULL* (1861), 2 F. & F. 408, N. P.]

**591. Manure**—"To be cleared away every week."—The following agreement was held to be a contract relating to the sale of goods within the exemption in the Stamp Act, 1815 (c. 184), sched. Part I., Title Agreement. "I do agree to take all the manure at 4d. each horse, a week, for forty-five horses by the year, & to keep it cleared away every week; & likewise to let the few gardeners have a few loads at the same price, & serve them; & to let me have during the year sixty loads of straw at £1 9s. per load; begun the year July 23, 1853, & ends July 23, 1855."—*GURR v. SCUDDS* (1855), 11 Exch. 190; 25 L. T. O. S. 130; 3 W. R. 457; 156 E. R. 795.

**592. Straw.**—(*GURR v. SCUDDS*, No. 591, *ante*. **Growing crops.**)—*See* AGRICULTURE, Vol. II., pp. 53, 54, Nos. 287, 288.

**Supply of electricity.**—*See* ELECTRIC LIGHTING, Vol. XX., pp. 206, 207, Nos. 44-46.

**Guarantees on goods.**—*See* GUARANTEE & INDEMNITY, Vol. XXVI., p. 52, Nos. 358-363.

**Fixtures.**—*See* LANDLORD & TENANT, Vol. XXX., p. 448, Nos. 1096, 1097.

**Hire-purchase agreements.**—*See* Finance Act, 1907 (c. 13), s. 7.

#### SUB-SECT. 1.—ALLOTMENT OF SHARES, LETTERS OF.

*See* Stamp Act, 1891 (c. 39), S. 79 sched. I.; Finance Act, 1899 (c. 9), s. 9; Revenue Act, 1909 (c. 43), s. 9.

**593. Whether admissible in evidence without stamp.**—A. applied by letter for shares in a railway co., & thereby undertook to accept the shares which might be allotted to him, to pay the deposit, & to sign the Parliamentary contract & subscribers' agreement. In answer to this he received a letter, allotting to him a certain number of shares, & requiring him to pay the deposit thereon on a certain day, & stating that the committee reserved the power to cancel the allotment, without notice, on non-payment. In an action by A. to recover the deposit, the scheme having failed:—*Held*: the letter of allotment did not require a stamp.—*VOLLANS v. FLETCHER* (1847), 1 Exch. 20; 2 New Pract. Cas. 303; 5 Ry. & Can. Cas. 73; 16 L. J. Ex. 173; 9 L. T. O. S. 177; 11 Jur. 416; 154 E. R. 9.

*Annotations*:—*Consd.* Clarke v. Chaplin (1848), 11 L. T. O. S. 6. *Apld.* Willey v. Parratt (1848), 3 Exch. 211. *Distd.*



*Sect. 6.—Duties upon particular instruments: Sub-sects. 4, 5, 6, 7, 8, 9, 10, 11, 12 & 13.]*

*Hegarty v. Milne* (1854), 14 C. B. 627. *Refd.* *Clay v. Crofts* (1851), 20 L. J. Ex. 361; *Ward v. Londesborough* (1852), 12 C. B. 252. *Mentd.* *Reuss v. Picklesley* (1866), 15 L. T. 25.

**594.** —[.]—To a letter in the ordinary form, applying for shares in a projected railway co., pltf. received in answer a letter of allotment, headed "not transferable," & requiring him to pay a deposit of £2 2s. per share. The words relating to the deposit were erased, & the letter was indorsed with a memorandum, that the committee of management being of opinion, that it would be an accommodation to the subscribers if they were allowed the option of either paying the whole or a portion of their deposits at that time, & the remainder at a future day, & considering it unnecessary to lock up the large sum of money over & above what any expenses could require in the then state of the money market, there being no necessity for so doing, proceeded to state that pltf. was directed to pay 10s. per share on a certain day, & £1 12s. on a subsequent day. The scheme failed, the money having been expended in preliminary expenses. In an action by pltf. to recover back his deposit of 10s. per share:—*Held*: the letter of allotment did not require a stamp.—*WILLEY v. PARRATT* (1848), 3 Exch. 211; 6 Ry. & Can. Cas. 32; 18 L. J. Ex. 82; 13 L. T. O. S. 141; 154 E. R. 819.

*Annotations*:—*Apld.* *Ward v. Londesborough* (1852), 12 C. B. 252. *Distd.* *Hegarty v. Milne* (1854), 14 C. B. 627. *Refd.* *Moore v. Garwood* (1849), 4 Exch. 681. *Mentd.* *Re Direct London Portsmouth & Chichester & Direct Portsmouth & Chatham Ry., Ex p. Goldsmith* (1850), 14 Jur. 734.

**595.** —[.]—In an action for money had & received by an allottee of railway scrip, for the recovery of his deposit on the abandonment of the scheme, the letter of allotment was offered in evidence by pltf., who called upon deft. to produce the letter of application, which he refused to do:—*Held*: under such circumstances, the letter of allotment was receivable in evidence without a stamp.—*MOORE v. GARWOOD* (1849), 4 Exch. 681; 19 L. J. Ex. 15; 14 L. T. O. S. 224; 154 E. R. 1388, Ex. Ch.

*Annotations*:—*Apld.* *Hudspeth v. Yarnold* (1850), 9 C. B. 625; *Ward v. Londesborough* (1852), 12 C. B. 252. *Distd.* *Hegarty v. Milne* (1854), 14 C. B. 627. *Mentd.* *Foster v. Mentor Life Asso.* (1854), 3 E. & B. 48.

**596.** —[.]—In an action by an allottee of shares in a projected joint stock co. to recover back the deposit, pltf. gave secondary evidence of the letter of allotment, the original having been lost, but did not produce the letter of application. Pltf. also gave in evidence the banker's receipt, stamped with a 20s. stamp:—*Held*: (1) the banker's receipt so stamped was admissible in evidence.

It is argued that the document given by the bankers, on receipt of the deposit, required a receipt stamp. It is not necessary to decide whether that document was an accountable receipt within the exemption of Stamp Act, 1815 (c. 184), because assuming it to be a receipt for a debt it is clear that by sect. 10 of that Act, where a document is not required to be stamped with a stamp of a particular denomination, it is sufficient if any stamp be impressed provided it be the right amount & is not specifically appropriated to any other instrument (*PATTESON, J.*).

(2) If the contract was made by the letter of allotment, coupled with the payment of the deposit, then it was not an agreement within Stamp Act. An offer in writing accepted by parol does not require a stamp (*MAULE, J.*).—*CHAPLIN*

*v. CLARKE* (1849), 4 Exch. 403; 6 Ry. & Can. Cas. 193; 154 E. R. 1269; *sub nom.* *CLARKE v. CHAPLIN*, 13 L. T. O. S. 286, Ex. Ch.

*Annotations*:—*As to* (1) *Apld.* *Mowatt v. Londesborough* (1854), 3 E. & B. 307. *Refd.* *Moore v. Garwood* (1849), 4 Exch. 681; *Ward v. Londesborough* (1852), 12 C. B. 252. *Generally, Mentd.* *Carill v. Carbolic Smoke Ball Co.*, [1892] 2 Q. B. 484.

**597.** —[.]—Pltf. received a letter of allotment, allotting him 100 shares in a projected railway, upon which he paid a deposit of £2 2s. per share. With the letter of allotment, the board of directors, one of whom was deft., caused to be sent to pltf. a circular containing, amongst others, the following provision, "In the event of the Act not being obtained, the directors undertake to return the whole of the deposits, without deduction." There was no evidence of any application by pltf. for shares, or that his allotted shares had been exchanged for scrip; & it appeared that he had never signed the parliamentary contract or subscribers' agreement. The project proving abortive:—*Held*: the letter of allotment & circular were admissible in evidence without being stamped, inasmuch as they did not constitute the whole agreement between the directors & the allottees.—*WARD v. LONDESBOROUGH (LORD)* (1852), 12 C. B. 252; 18 L. T. O. S. 209; 138 E. R. 900.

*Annotation*:—*Apld.* *Mowatt v. Londesborough* (1854), 3 E. & B. 307.

**598.** —[.]—*MOWATT v. LONDESBOROUGH (LORD)*, No. 547, *ante*.

SUB-SECT. 5.—APPRAISEMENT.

*See Stamp Act, 1891 (c. 39), s. 24, Sched. I.*

**599. Compensation due to outgoing tenant—Agricultural lease.**—Where an agreement between an outgoing & an incoming tenant was that the latter should buy the hay, etc. of the former upon the farm, & that the former should allow to the latter the expense of repairing the gates & fences of the farm; & that the value of the hay, etc. & of the repairs, should be settled by third persons:—*Held*: having failed upon his count on the special agreement, for want of including in it that part of the agreement which related to the valuation of the repairs, & nothing being referred to the appraisers except the mere value of the goods & of the repairs, an appraisalment stamp upon the written valuation is sufficient under 46 Geo. 3, c. 43, & an award stamp is not necessary.—*LEEDS v. BURROWS* (1810), 12 East, 1; 104 E. R. 1.

*Annotations*:—*Distd.* *Jebb v. McKiernan* (1829), Mood. & M. 340. *Refd.* *Clayton v. Burtenshaw* (1826), 7 Dow. & Ry. K. B. 800. *Mentd.* *Sheldon v. Cox* (1824), 5 Dow. & Ry. K. B. 277; *Collins v. Collins* (1858), 26 Beav. 306; *Boss v. Holsbam* (1866), 15 L. T. 481; *Re Hopper* (1867), 8 B. & S. 100.

**600. Valuation only for information of parties.]**

—A valuation made of the parish lands by two resident parishioners, appointed for that purpose at a parish meeting by the parish officers, with a view of equalising the rate to the relief of the poor, was held not to require an appraisalment stamp, it being merely for the information of the parties employing the valuers.—*ATKINSON v. FELL* (1816), 5 M. & S. 240; 105 E. R. 1039.

*Annotation*:—*Refd.* *Palk v. Force* (1848), 12 Q. B. 666.

**601.** —[.]—A valuation made for the information of parties, & not binding on them, is not made liable to an appraisalment stamp, by Stamp Act, 1815 (c. 184), Sched. Part 1, Title Appraisalment, though an agreement is afterwards founded on its data.—*JACKSON v. STOPHERD* (1834), 2 Cr. & M. 361; 4 Tyr. 330; 3 L. J. Ex. 95; 149 E. R. 800.

**602. List of articles in inventory—Not containing values.]—***SELLS v. HOARE* (1823), 1 C. & P. 28; 171 E. R. 1089, N. P.

**603. Agreement to take over stock at a valuation—No written valuation or inventory.]—**An agreement to take stock, etc., at a valuation, there being no written valuation or inventory of the things valued, requires no stamp.—*BUNYARD v. SEABROOK* (1858), 1 F. & F. 321.

#### SUB-SECT. 6.—APPRENTICESHIP INSTRUMENTS.

See *MASTER & SERVANT*, Vol. XXXIV., pp. 509, 524, Nos. 4227–4230, 4428–4430.

#### SUB-SECT. 7.—ARTICLES OF CLERKSHIP.

See Stamp Act, 1891 (c. 39), ss. 26–28, Sched. I., generally, *SOLICITORS*.

#### SUB-SECT. 8.—AWARD.

**On inclosure of commons.]—**See *COMMONS*, Vol. XI., p. 75, No. 972.

**Arbitration awards.]—**See *ARBITRATION*, Vol. II., pp. 315, 498, 531, 532, Nos. 27–29, 1393, 1676–1684.

**Reference to counsel.]—**See *ARBITRATION*, Vol. II., p. 318, Nos. 46, 47.

**Balance of partnership accounts.]—**See *PARTNERSHIP*, Vol. XXXVI., p. 475, No. 1392.

#### SUB-SECT. 9.—BANKRUPTCY, DOCUMENTS CONNECTED WITH.

**NOTE.—***The following volume, page & number references are to Bankruptcy, Vols. IV. & V.*

**Accounts of trustee—Personal liability to pay where no assets.]—**See Vol. V., p. 1101, Nos. 8988, 8989.

**Unstamped document as evidence of act of bankruptcy.]—**See Vol. IV., p. 52, Nos. 431–436.

**Contract of sale by trustee.]—**See Vol. V., p. 969, No. 7937.

**Special resolution to wind up affairs.]—**See Vol. V., p. 1064, Nos. 8698–8699.

**Composition deed, scheme, or deed of arrangement.]—**See Vol. V., p. 1071, No. 8771.

#### SUB-SECT. 10.—BILLS OF EXCHANGE, PROMISSORY NOTES, ETC.

**NOTE.—***The following page & number references are to Bills of Exchange, Vol. VI.*

See Stamp Act, 1891 (c. 39), ss. 20–39, Sched. I., & Finance Act, 1918 (c. 15), s. 36; & generally, pp. 493 *et seq.*; Supp. III., No. 3146a.

**Requirements of form, generally.]—**See pp. 14–46, Nos. 38–336.

**Promissory note—Issued by loan society.]—**See p. 50, No. 371.

**Post dated cheques.]—**See pp. 52, 54, Nos. 389–414.

**Re-issue of bill—Necessity for new stamp.]—**See p. 357, No. 2358.

**Receipt on payment of bill.]—**See p. 360, No. 2379.

**Assent to giving time.]—**See p. 401, No. 2621.

**Effect of conflict of laws.]—**See pp. 439–441, Nos. 2820–2836.

**I.O.U.'S.]—**See p. 460, Nos. 2935–2942.

**Effect of notice to admit.]—**See p. 483, Nos. 3064.

**Admissibility of unstamped document—To show that acceptance is only accommodation acceptance.]—**See p. 485, No. 3077.

#### SUB-SECT. 11.—BILLS OF LADING.

See *SHIPPING*.

#### SUB-SECT. 12.—BILLS OF SALE.

See Stamp Act, 1891 (c. 39), s. 41, sched. I.; & *BILLS OF SALE*, Vol. VII., pp. 104, 105, Nos. 624–627.

#### SUB-SECT. 13.—“BOND, COVENANT OR INSTRUMENT.”

See Stamp Act, 1891 (c. 39), s. 42, sched. I.; Finance Act, 1905 (c. 46), s. 5 (1); & generally, *BONDS*, Vol. VII., pp. 256–259, Nos. 973–1005.

**604. Covenant with penalty for breach.]—**An indenture which covenants for the performance or the forbearance of a particular act, under a certain penalty, is not chargeable with the *ad valorem* duty on the sum secured as a penalty, but only with the duty of £1 15s. treated as a “bond not otherwise specifically charged,” or a “deed not otherwise specifically charged,” under the heads “Bond” & “Deed” by Stamp Act, 1815 (c. 184).—*MOUNSEY v. STEPHENSON* (1827), 7 B. & C. 403; 6 L. J. O. S. K. B. 119; 108 E. R. 773.

**605. Annuity deed—Sub-division of annuity—Duty in respect of aggregate sum.]—**In replevin, debts avowed for a distress under an annuity deed; which recited that F., who was the beneficial lessee of certain salt works, in order to raise money for carrying them on, contracted with K. to grant him an annuity of £1,050, in consideration of £14,500, & that K., being unable to provide the whole sum himself, had entered into sub-contracts with seven other persons to take portions of the annuity, each advancing a part of the consideration money; & after reciting all these contracts, & the payment by the different parties of their respective proportions of the £14,500, the deed contained a grant by F. to C. & D. of eight several annuities, making together an annuity of £1,050 in trust for the several persons advancing the money, with the usual powers of distress:—*Held*: the annuity deed only required a stamp in respect of the aggregate sum paid to F. for the annuity of £1,050, & it need not be the aggregate of the stamps required on each of the several annuities into which it was divided.—*HOGARTH v. PENNY* (1845), 14 M. & W. 494; 14 L. J. Ex. 345; 153 E. R. 570.

**606. Licence—To construct jetty in river—Revocable at any time.]—***RIVER THAMES CONSERVATORS v. INLAND REVENUE COMRS.*, No. 617, *post*.

#### PART IX. SECT. 6, SUB-SECT. 13.

**a. Promise to pay on demand.]—**Deft. passed to plff. a document to this effect: “I have this day taken from you in cash Rs48. I have received

this amount. I shall repay this money without taking any objection, when you should demand [it].” The document was attested by two witnesses. It bore a one anna adhesive stamp. On a construction of the document:—

*Held*: it was a bond within Indian Stamp Act (11 of 1899), s. 2 (5) (b).—*VENKU R. SITARAM* (1905), 1 L. R. 29 Bom. 82.—*IND.*

**b. Whether single stamp sufficient.]—**

*Sect. 6.—Duties upon particular instruments: Sub-sects. 13, 14, 15, 16 & 17.]*

**607. Agreement securing annual payments—Agreement for telephonic communication.]**—

(1) By an agreement under seal between a theatrical ticket agent & a telephone co. for the supply of the means of telephonic communication between the ticket agent's head office & branch offices & other places, the co. undertook to erect & maintain in working order the telephonic lines & apparatus, & the ticket agent covenanted to pay by quarterly instalments in advance to the co. for the use of the lines & apparatus & for the telephonic communication an annual sum per line, the minimum amount payable to be calculated on the rent of forty-five lines. The agreement was to continue for ten years, & thereafter from year to year, determinable by either party giving three months' notice in writing, power being reserved to the co. to determine it at any time in certain events.

(2) By an agreement under seal between a railway co. & an automatic machine co., the former agreed to permit the latter to place automatic machines on the platforms of certain of their stations, the machines to be placed &, until otherwise directed, kept in the positions directed by the railway co.; the automatic machine co. to pay the railway co. a yearly rent by equal quarterly payments on the usual quarter days. The agreement contained a provision enabling either party to determine it by three months' written notice expiring at any time:—*Held*: in each case, the agreement did not come within the exception in favour of a "lease or tack," but was chargeable with an *ad valorem* duty under the head "bond, covenant, or instrument of any kind whatsoever," as being the only, principal, or primary security for an annuity, or for a sum of money at stated periods, for an indefinite period.—*JONES v. INLAND REVENUE COMRS., SWEETMEAT AUTOMATIC DELIVERY CO. v. INLAND REVENUE COMRS., [1895] 1 Q. B. 484; 64 L. J. Q. B. 84; 71 L. T. 763; 43 W. R. 318; 11 T. L. R. 78; 39 Sol. Jo. 97; 15 R. 136, D. C.*

*Annotations:—As to (1) Distd. Clifford v. I. R. Comrs. [1896] 2 Q. B. 187. Follid. National Telephone Co. v. I. R. Comrs., [1899] 1 Q. B. 250. Consd. Gartside (Brookside Brewery) v. I. R. Comrs. (1900), 82 L. T. 686; Jackson v. I. R. Comrs. (1902), 87 L. T. 269; British Oil & Cake Mills v. I. R. Comrs., [1903] 1 K. B. 689; Underground Elec. Rys. of London, & Glyn, Mills, Currie v. I. R. Comrs., [1916] 1 K. B. 306. Apld. British Italian Corp'n. v. I. R. Comrs., [1921] W. N. 220. As to (2) Distd. Clifford v. I. R. Comrs., [1896] 2 Q. B. 187. Consd. Jackson v. I. R. Comrs. (1902), 87 L. T. 269; Underground Elec. Rys. of London, & Glyn, Mills, Currie v. I. R. Comrs., [1916] 1 K. B. 306.*

**608. ———.]**—By an agreement in writing not under seal it was agreed between a telephone co. & R. that the latter should pay to the co. £12 *per annum* in advance for hire of a private wire between his premises & the co.'s exchange system & the telephonic apparatus relating thereto, & either the co. or the lessee might put an end to the agreement by giving three calendar months' notice in writing expiring on the day previous to the rent being due in any year, & the co. agreed to erect & maintain in working order the wire & telephonic apparatus:—*Held*: the agreement was chargeable with an *ad valorem* duty under clause 1 of the heading "Bond, Covenant or Instrument or any kind whatsoever" in Schedule I. to Stamp Act, 1891 (c. 39), & not merely with a stamp duty

of 6d. as an agreement.—*NATIONAL TELEPHONE CO. v. INLAND REVENUE COMRS., [1899] 1 Q. B. 250; 68 L. J. Q. B. 222; 79 L. T. 514; 47 W. R. 247; 15 T. L. R. 98; 43 Sol. Jo. 124, C. A.; affd., [1900] A. C. 1, H. L.*

*Annotations:—Consd. Gartside (Brookside Brewery) v. I. R. Comrs. (1900), 82 L. T. 686; British Oil & Cake Mills v. I. R. Comrs., [1903] 1 K. B. 689; County of Durham Electrical Power Distribution Co. v. I. R. Comrs.,*

*& Glyn Mills, Currie v. I. R. Comrs., [1916] 1 K. B. 306.*

**609. — Agreement permitting installation of automatic machines.]**—*JONES v. INLAND REVENUE COMRS., SWEETMEAT AUTOMATIC DELIVERY CO. v. INLAND REVENUE COMRS., No. 607, ante.*

**610. — Will.]**—A will is not a security for an annuity given & charged by a will on real property within Schedule I. to Stamp Act, 1891 (c. 39).—*KENNEDY v. INLAND REVENUE COMRS. (1900), 65 J. P. 9, D. C.*

**611. — Separation deed.]**—By the Schedule to the Stamp Act, 1891, "Bond, covenant, or instrument of any kind whatsoever (1) Being the only or principal or primary security for any annuity . . . or for any sum or sums of money at stated periods . . . for the term of life or any other indefinite period. For every £5 of the annuity or sum periodically payable 2s. 6d."

By a deed of separation between a husband & wife, the husband agreed that so long as the wife observed the stipulations of the deed he would pay her every three months £625 by quarterly payments on Sept. 29, Dec. 25, Mar. 25, & June 24 in every year:—*Held*: this was an annuity of £2,500 & that *ad valorem* duty was payable on that sum, & not on £625.—*LEWIS v. INLAND REVENUE COMRS., [1898] 2 Q. B. 290; 67 L. J. Q. B. 694; 78 L. T. 745, D. C.*

*Annotations:—Consd. Jackson v. I. R. Comrs. (1902), 87 L. T. 269; Underground Elec. Rys. of London, & Glyn, Mills, Currie v. I. R. Comrs., [1916] 1 K. B. 306.*

**612. — Agreement for supply of electricity.]**—*BRITISH ELECTRIC TRACTION CO. v. INLAND REVENUE COMRS., No. 701, post.*

**613. — ———.]**—By an agreement in writing, not under seal, between the co. & a customer, the co. agreed to supply to the customer for a period of seven years electric energy for motive power, heating, & lighting purposes on the customer's premises at a fixed charge of £57 10s. per quarter & an additional penny per unit as indicated by meter:—*Held*: the agreement was chargeable with an *ad valorem* duty of 2s. 6d. per cent. on the aggregate amount of the minimum quarterly payments for seven years as being a "security" for sums of money at stated periods under clause 1 of the heading "Bond, Covenant or Instrument of any kind whatsoever" in Schedule I. to the Stamp Act, 1891 (c. 39).—*COUNTY OF DURHAM ELECTRICAL POWER DISTRIBUTION CO. v. INLAND REVENUE COMRS., [1909] 2 K. B. 604; 78 L. J. K. B. 1158; 101 L. T. 51; 73 J. P. 425; 25 T. L. R. 672; 8 L. G. R. 1088, C. A.*

*Annotations:—Expld. Underground Elec. Rys. of London, & Glyn, Mills, Currie v. I. R. Comrs., [1914] 3 K. B. 210. Apld. British Italian Corp'n. v. I. R. Comrs., [1921] W. N. 220.*

**614. — Agreement to guarantee interest.]**—By a deed executed by them the Underground co. agreed provided a sufficient number of the holders of ordinary stock of the Central London Rty. co. would take guaranteed stock in exchange for their

An obligation in security granted by several persons, for payment of the sums due to the creditors of a common debtor, may be executed upon a single

stamp, whatever be the number of the creditors.—*JOHNSTONE & CO. v. ATWELL (1801), 13 Fac. Coll. 617.—SCOT.*  
c. Agreement in nature of family

arrangement or compromise.]—*COR-MACK'S TRUSTEES v. INLAND REVENUE COMRS., [1924] S. C. 819; 61 Sc. L. R. 580; [1924] S. L. T. 616.—SCOT.*

ordinary stock, to guarantee interest at 4 per cent. *per annum* on such guaranteed stock, payable half-yearly if, & to the extent that the profits of the Central London Ry. co. were not sufficient to pay that amount of interest. At the date of the deed it was not known whether a sufficient number of holders of ordinary stock would accede to the arrangement or whether all would so accede, but it they all acceded & if the Central London Ry. co made no profits in any year, appts. would be liable to pay £120,000 in that year, being 4 per cent. on £3,000,000 stock:—*Held*: (1) the deed was chargeable with *ad valorem* stamp duty under the heading "Bond, Covenant, or Instrument of any kind whatsoever, being the only or principal or primary security for any annuity . . . or for any sum or sums of money at stated periods . . . for . . . [an] indefinite period," [Stamp Act, 1891 (c. 39), sched. I.] on the maximum sum which might become payable under the deed; (2) the amount on which the duty was chargeable was the yearly sum that might be payable, namely £120,000, notwithstanding that it was payable at half-yearly periods.—*UNDERGROUND ELECTRIC RYS. Co. OF LONDON, LTD., & GLYN, MILLS, CURRIE & Co. v. INLAND REVENUE COMRS.*, [1916] 1 K. B. 306; 85 L. J. K. B. 356; 114 L. T. 111, C. A.

615. — *Purchase-money by instalments with interest.*—*BRITISH ITALIAN CORPN., LTD. v. INLAND REVENUE COMRS.*, [1921] W. N. 220, C. A.

616. — *Collateral security.*—*BRITISH ITALIAN CORPN., LTD. v. INLAND REVENUE COMRS.*, [1921] W. N. 220, C. A.

617. *Agreement not under seal.*—*NATIONAL TELEPHONE Co. v. INLAND REVENUE COMRS.*, No. 608, *ante*.

618. *Agreement securing weekly payments.*—*CLIFFORD v. INLAND REVENUE COMRS.*, No. 372, *ante*.

619. — *Indefinite period.*—By a deed of separation between a husband & wife, the husband agreed that so long as the wife should perform the stipulations of the deed he would pay her a weekly sum of £1 to be paid every week, & that if she survived him without having incurred a forfeiture in his lifetime she should be paid the £1 a week during her life, but in the event of the wife doing certain specified things the weekly payment was to cease:—*Held*: upon the authority of *Clifford v. Inland Revenue Comrs.*, No. 372, *ante*, this deed was a security for the payment of a sum of money at weekly periods & not of an annuity or yearly sum payable by weekly instalments, & it was, as regards that payment, liable only to the duty of 2s. 6d. upon the sum agreed to be paid weekly, & not upon the £52, the total amount of the weekly payments for a year.—*JACKSON v. INLAND REVENUE COMRS.* (1902), 87 L. T. 269; 66 J. P. 630; 50 W. R. 666; 18 T. L. R. 678; 46 Sol. Jo. 725.

#### SUB-SECT. 14.—BUILDING CONTRACTS.

*See BUILDING CONTRACTS*, Vol. VII., p. 451, Nos. 488–490.

#### SUB-SECT. 15.—BUILDING SOCIETIES—ADVANCES BY.

*See BUILDING SOCIETIES*, Vol. VII., pp. 483, 484, Nos. 175–182.

#### SUB-SECT. 16.—CHARTERPARTY.

*See SHIPPING.*

#### SUB-SECT. 17.—COMPANIES AND CORPORATIONS.

*See Stamp Act, 1891 (c. 39), ss. 112, 113.*

620. *Transfer of shares.*—The residuary personal estate consisted (*inter alia*) of certain shares in the L. Gaslight co., & of several principal sums of money secured on several mtges., transfers of mtges., further charges, bonds, notes, & other securities, & it had not been necessary for any of the purposes of the will to call in, sell, or convert into money any portion of such residuary estate.

At the request of R. H., the residuary legatee, A. & B. agreed as trustees & exors., to transfer to him the above mentioned shares & principal sums of money, & a deed dated June 1, 1866, & made between the said A. & B. of the one part, & R. H. of the other part, was accordingly prepared & executed, which recited all the facts & matters above stated. By the first *testatum* clause of the deed, all the said gas shares & also all the several principal sums of money secured by the said several mtges., etc., specified in three several schedules therein underwritten, & all interest, etc., together with the said several mtge. deeds, were assigned & transferred by the said A. & B., unto the said R. H., his exors., administrators, & assigns absolutely. By a second *testatum* clause, "to the intent that the several hereditaments comprised in the said several mtges., etc., might be duly vested in the said R. H., his heirs & assigns," all the messuages, etc., comprised in the said several mtges., etc., were granted & conveyed by the said A. & B. unto & to the use of the said R. H., his heirs & assigns for ever, subject to the equity of redemption then subsisting therein respectively. The aggregate amount of the several principal sums secured by the several mtge. deeds was £32,499:—*Held*: the deed on the face of it was a technical, substantial, & real transfer both of the gas shares & the mtges. specifically to R. H. & as such came within the description of the Act of Parliament, & was therefore liable to the stamp duty of £10 12s. 6d., assessed as follows: As a transfer of shares in the stock of the L. Gas co., "not otherwise charged under the heads of mtge. or of conveyance," Stamp Act, 1815 (c. 184), Sched., Title Transfer, to a duty of £1 10s.; as a transfer of mtges. for £32,499, to an *ad valorem* duty, under Revenue, No. 2, Act, 1865 (c. 96), s. 17, of 6d. per £100, £8 2s. 6d., & to a progressive duty of £1.—*HALL v. INLAND REVENUE COMRS.* (1869), 21 L. T. 151.

—*See COMPANIES*, Vol. IX., pp. 359, 404, No. 2280, 2281, 2586–2590.

*Relating to capital.*—*See COMPANIES*, Vol. IX., p. 177, Nos. 1125, 1126; Vol. X., p. 1103, Nos. 7743, 7744.

*Issue of shares.*—*See COMPANIES*, Vol. IX., p. 316, No. 1964.

*Acquisition & disposition of property.*—*See COMPANIES*, Vol. IX., pp. 658, 659, Nos. 4387–4389.

*Borrowing & securing money.*—*See COMPANIES*, Vol. X., pp. 784–786, Nos. 4907–4917.

*Voluntary winding-up.*—*See COMPANIES*, Vol. X., p. 1032, Nos. 7154, 7155.

*Statutory company for public purposes.*—*See COMPANIES*, Vol. X., pp. 1114, 1115, 1192, 1193, Nos. 7840–7845, 8463–8465.

*Letters of allotment.*—*See Sub-sect. 4, ante.*

*Issue of corporation loan.*—*See LOCAL GOVERNMENT*, Vol. XXXIII., p. 18, No. 71.

*Sect. 6.—Duties upon particular instruments: Sub-section 18, A. (a).]*

**SUB-SECT. 18.—CONVEYANCE ON SALE.**

*A. Meaning of Conveyance on Sale.*

*(a) Property.*

See Stamp Act, 1891 (c. 39), ss. 54–61, Sched. I.

**621. Goodwill.]**—A deed by which pltf. covenants to give up his trade to deft., & to allow him to carry it on in his house for ten years, deft. paying £1,000 for the fixtures, etc., at the time of executing the deed & covenanting to pay £1,000 *per annum* for ten years, does not require an *ad valorem* stamp.—**LYBURN v. WARRINGTON** (1816), 1 Stark. 162; 171 E. R. 434, N. P.

*Annotation:—Distd. Potter v. I. R. Comrs. (1854), 10 Exch. 147.*

**622. —.]—POTTER v. INLAND REVENUE COMRS., No. 632, post.**

**623. —.]—INLAND REVENUE COMRS. v. ANGUS, SAME v. LEWIS, No. 378, ante.**

**624. —.]—TROUP v. INLAND REVENUE COMRS. (1891), 7 T. L. R. 610, D. C.**

**625. —.]—**By an agreement made in England, applts., a limited co., bought from a firm of soap manufacturers in the United States their freehold works, book & other debts, together with the goodwill of the business & the trade marks used in connection therewith. The vendors were the owners of a trade mark, registered in England, relating to their soap, which trade mark was extensively circulated throughout England in newspapers & pictorial advertisements at the expense of the vendors, who had an office in London for that purpose, & by this means a large demand for the soap had been created in the United Kingdom. The vendors did not sell direct to the retail dealers in the United Kingdom but to a syndicate of three firms, who gave orders for soap which was despatched to them in England & paid for by them by remittances sent to the vendors; the syndicate then resold it to retail dealers, & others at such prices as they thought fit; about two-thirds of the total sales of the vendors were made to the English syndicate:—*Held*: the English trade mark & goodwill were “property” within Stamp Act, 1891 (c. 39), s. 59 (1), & the agreement was liable in respect of them to *ad valorem* stamp duty.—**BROOKE (BENJAMIN) & CO. v. INLAND REVENUE COMRS., [1896] 2 Q. B. 350; 65 L. J. Q. B. 657; 44 W. R. 670; 12 T. L. R. 418; 40 Sol. Jo. 517, D. C.**

*Annotation:—Consd. Velazquez v. I. R. Comrs., [1914] 2 K. B. 404.*

**626. —.]—**(1) A contract for the sale of leasehold premises contained a proviso that in the event of the consent of the landlord to the assignment of the lease not being obtained the vendor should, at the option of the purchaser, execute a declaration of trust of the lease in his favour. Two days afterwards a declaration of trust was executed, by which the equitable interest in the premises vested in the purchaser:—*Held*: the contract being one for the sale of a legal estate, & there being no obligation on the purchaser to accept a declaration of trust, it was not a contract for the sale of an equitable estate or interest in property within Stamp Act, 1891 (c. 39), s. 59 (1).

(2) The goodwill of a public-house is not neces-

sarily a mere enhancement of the value of the licensed premises, & so attached to the possession of the premises as to constitute “land” within Stamp Act, 1891 (c. 39), s. 59 (1). It may, therefore, be “property except lands” within the meaning of the sect.; & upon an agreement for the sale of the lease & goodwill of a public-house the instrument may be chargeable with *ad valorem* duty.

(3) The question as it appears to me is, what was the document of Mar. 19 when it was signed, that being the document which had to be stamped (A. L. SMITH, L.J.).—**WEST LONDON SYNDICATE v. INLAND REVENUE COMRS., [1898] 2 Q. B. 507; 67 L. J. Q. B. 956; 79 L. T. 289; 47 W. R. 125; 14 T. L. R. 569; 42 Sol. Jo. 714, C. A.**

*Annotations:—As to (1) Consd. Chesterfield Brewery Co. v. I. R. Comrs., [1899] 2 Q. B. 7. Refd. Maples v. I. R. Comrs., [1914] 3 K. B. 303. As to (2) Distd. Muller's Margarine v. I. R. Comrs., [1900] 1 Q. B. 310. Apld. Danubian Sugar Factories v. I. R. Comrs., [1901] 1 K. B. 245. Refd. Baglioni v. Cavalli (1900), 83 L. T. 500.*

**627. — Foreign business.]**—An agreement is “made” in the United Kingdom within Stamp Act, 1891 (c. 39), s. 59, if it is executed in the United Kingdom by a party to the agreement whose execution is required to make the instrument on the face of it complete.

An agreement in writing to sell the premises of a wholesale manufacturing business carried on abroad together with the goodwill of the business for a lump sum was executed by the vendor abroad & by the purchaser in England. The vendor covenanted not to engage in any similar trade within fifty miles of the existing premises. All the customers of the business were abroad:—*Held*: (1) the agreement was “made” in England, but (2) the goodwill was “property locally situate out of the United Kingdom” within Stamp Act, 1891 (c. 39), s. 59, & the agreement was therefore not chargeable with the *ad valorem* duty.—**INLAND REVENUE COMRS. v. MULLER & CO.'S MARGARINE, LTD., [1901] A. C. 217; 70 L. J. K. B. 677; 84 L. T. 729; 49 W. R. 603; 17 T. L. R. 530, H. L.; affy. S. C. sub nom. MULLER & CO.'S MARGARINE, LTD. v. INLAND REVENUE COMRS., [1900] 1 Q. B. 310, C. A.**

*Annotations:—As to (2) Distd. Danubian Sugar Factories v. I. R. Comrs., [1901] 1 K. B. 245. Consd. Urban v. I. R. Comrs. (1913), 29 T. L. R. 476. Expld. Velazquez v. I. R. Comrs., [1914] 3 K. B. 458. Generally, Mendt. Lickerby v. Reay (1903), 20 R. P. C. 580; Rey v. Leconturier (1907), 98 L. T. 197; Pink v. Sharwood (No. 2), Re Ord's Trade Mk. (1913), 109 L. T. 594.*

**628. Debts — Judgment debt.]**—An assignment by indenture of a judgment debt is not an assignment of property within Stamp Act, 1815 (c. 184), Sched. Part I., Title Conveyance, & does not therefore require an *ad valorem* stamp; but must have the ordinary deed stamp.—**WARREN v. HOWE** (1823), 2 B. & C. 281; 3 Dow. & Ry. K. B. 494; 2 L. J. O. S. K. B. 8; 107 E. R. 388.

*Annotations:—Apld. Belcher v. Sikes (1827), 6 B. & C. 234. Distd. Caldwell v. Dawson (1850), 5 Exch. 1. Dtd. Potter v. I. R. Comrs. (1854), 10 Exch. 147.*

**629. — Book debts.]—TROUP v. INLAND REVENUE COMRS. (1891), 7 T. L. R. 610, D. C.**

**630. —.]—**A. co. agreed to sell their entire undertaking together with the book debts owing to them to B. co. By the agreement the book debts were to be taken as they were at the making up of the books of the A. co. at the

**PART IX. SECT. 6, SUB-SECT. 18.—**

**A. (a).**

**d. Debts.]—STAMPS COMRS. v. QUEENSLAND MEAT EXPORT CO., LTD., [1917] A. C. 624, P. C.—AUS.**

**e. Conveyance of mortgaged land—In consideration of amount due under**

*mortgage—Whether stamp duty payable on full consideration less mortgage debt.]—Re IRVING (1898), 19 N. S. W. L. R. 269; 15 N. S. W. W. N. 63.—AUS.*

**f. Conveyance made direct to sub-purchaser—Whether Stamp Act, 1924, retrospective.]—BARNETT v. COLLECTOR OF STAMP DUTIES (1924), 22 Tas. L. J.**

**16.—AUS.**

**g. — Recital in conveyance of verbal agreement with original purchaser—Whether agreement & conveyance dutiable.]—HULSE v. MINISTER OF STAMP DUTIES, [1920] N. Z. L. R. 869.—N.Z.**

**h. Trust for sale & conversion—**



end of the following year, & the A. co. gave a guarantee that they would be paid in full before the date fixed for completion of the conveyance; & the A. co. were to be taken as conducting the business as agents for the B. co. since the end of the preceding year till completion. At the date of the agreement only a small part of the debts due at the end of the preceding year was still owing, & they were all in fact paid before completion of the conveyance:—*Held*: the sale of book debts was a sale of property within Stamp Act, 1891 (c. 39), s. 59 (1), liable to pay stamp duty on that part of the consideration appropriated as representing the consideration given for those debts.—*MEASURES BROTHERS, LTD. v. INLAND REVENUE COMRS.* (1900), 82 L. T. 689, D. C.

**631. Partnership property—Transfer of share by partner.**—An assignment, in consideration of money, from one partner to another, of his share of the partnership property in matters of contract, is not subject to the *ad valorem* duty.—*BELCHER v. SIKES* (1827), 6 B. & C. 234; 9 Dow. & Ry. K. B. 231; 108 E. R. 439; *sub nom.* *BELCHER v. BRYMER*, 5 L. J. O. S. K. B. 93.

*Annotations*:—*Dbtd.* *Potter v. I. R. Comrs.* (1854), 10 Exch. 147. *Reid.* *Christie v. I. R. Comrs.* (1866), 36 L. J. Ex. 11.

**632.** ———.]—A dissolution deed, whereby the outgoing partner bargained, sold, & assigned to the remaining partners, in consideration of £22,000, all his "trade or share in the trade carried on by the parties to the deed in copartnership together, & the goodwill of the same trade or business" is a conveyance of property within 13 & 14 Vict. c. 97, Sched. Title, Conveyance, & is subject to an *ad valorem* stamp duty of 10s. per cent. on the consideration for such transfer.—*POTTER v. INLAND REVENUE COMRS.* (1854), 10 Exch. 147; 23 L. J. Ex. 345; 18 Jur. 778; 2 W. R. 561; 156 E. R. 392; *sub nom.* *Re STAMP DUTY ON POTTERS' DEED*, 2 C. L. R. 1131; *sub nom.* *A.-G. v. POTTER*, 23 L. T. O. S. 269.

*Annotations*:—*Apld.* *Limmer Asphalt Paving Co. v. I. R. Comrs.* (1872), L. R. 7 Exch. 214. *Expld.* *I. R. Comrs. v. Same v. Lewis* (1889), 23 Q. B. D. 579. *Consd.* *Smelting Co. of Australia v. I. R. Comrs.*, [1896] 2 Q. B. 179. *Apld.* *West London Syndicate v. I. R. Comrs.*, [1898] 2 Q. B. 507; *Danubian Sugar Factories v. I. R. Comrs.*, [1901] 1 K. B. 245. *Consd.* *I. R. Comrs. v. Muller's Margarine*, [1901] A. C. 217.

**633.** ———.]—A dissolution of partnership being in contemplation between two persons, one of whom was desirous of retiring from business, a deed was entered into whereby after reciting an agreement for dissolution & that the property of the firm & the share due to the retiring partner had been ascertained, that in respect of such share a specified sum had been paid in cash, & that the remainder was to be secured by a mtge. & by assignment of certain policies of insurance, it was witnessed that the partnership was dissolved & that the retiring partner should forthwith release to the remaining partner all his estate in the partnership property real or personal & obtain the concurrence in the conveyance of all necessary parties. By an indenture of later date, reciting the previous deed, the retiring partner "in pursuance of the agreement & in consideration of the premises" conveyed to the remaining partner all his estate & interest in the partnership property & assets:—*Held*: the indenture was liable to *ad valorem* stamp duty, as a "conveyance upon the sale of property" within 13 & 14 Vict. c. 97, Sched. Title Con-

veyance.—*CHRISTIE v. INLAND REVENUE COMRS.* (1866), L. R. 2 Exch. 46; 4 H. & C. 664; 36 L. J. Ex. 11; 15 L. T. 282; 15 W. R. 258.

*Annotation*:—*Follid.* *Phillips v. I. R. Comrs.* (1867), L. R. 2 Exch. 399.

**634.** ———.]—On a dissolution of partnership a deed was executed, by which, after reciting that it had been agreed that the share of the retiring partner, in the real assets of the firm should be taken by the continuing partners, & that he should be allowed in account the sum of £17,313 as an equivalent for the value of his share; the retiring partner, in consideration of the sum of £17,313, "part of the moneys & assets of the said dissolved copartnership to the said P. so allowed in account, appropriated, & paid as aforesaid," conveyed his share of the real assets to the continuing partners:—*Held*: the indenture was liable to *ad valorem* stamp duty, as a conveyance upon a sale within 13 & 14 Vict. c. 97, Sched. Title, Conveyance.—*PHILLIPS v. INLAND REVENUE COMRS.* (1867), L. R. 2 Exch. 399; 36 L. J. Ex. 199; 16 L. T. 839.

**635.** ———.]—*TROUP v. INLAND REVENUE COMRS.* (1891), 7 T. L. R. 610, D. C.

**636.** ———.]—J. F. & his brother J. W. carried on business in partnership. J. F. in pursuance of the power for that purpose contained in the articles of partnership, gave J. W. notice to determine it, & J. W. gave J. F. notice of taking over his share in the partnership upon the terms prescribed by the articles. Two instruments were executed to give effect to the dissolution of the partnership, the first a conveyance, whereby the share & interest of J. F. in the real estate of the partnership was released & transferred to J. W. This deed was duly stamped with an *ad valorem* duty. The other instruments, of even date, after reciting that accounts of the partnership had been made up, & that the amount standing to the credit of J. F. was £11,752 4s. 7d. & that, by the above mentioned deed of even date, the real estate had been conveyed to J. W. & that the chattel property of the partnership was then in the exclusive possession of J. W. & that the said J. W. had given his promissory note bearing even date therewith for the above said sum, witnessed that J. F. & J. W. declared that the partnership between them should be considered as determined, & J. F. declared that he accepted the said promissory note in full satisfaction of all claims against J. W. in respect of his share & interest in the said partnership & the assets & properties thereof. The comrs. claimed that this last mentioned instrument was chargeable with an *ad valorem* conveyance duty:—*Held*: the instrument was chargeable in accordance with the assessment of the comrs.—*GARNETT v. INLAND REVENUE COMRS.* (1899), 81 L. T. 633; 48 W. R. 303, D. C.

**637. Land & buildings.**—*INLAND REVENUE COMRS. v. ANGUS, SAME v. LEWIS*, No. 378, *ante*.

**638. Trade mark.**—*BROOKE (BENJAMIN) & Co. v. INLAND REVENUE COMRS.*, No. 625, *ante*.

**639. Equitable interest.**—*WEST LONDON SYNDICATE v. INLAND REVENUE COMRS.*, No. 626, *ante*.

**640. Benefit of contract—Sale of interest in foreign land.**—By a contract in writing V. agreed to transfer or lease to R. a piece of land in Roumania, which was to be forty hectares in

*Conveyance of land to one beneficiary—Family arrangement.*—*WATT v. STAMPS COMR.* (1900), 19 N. Z. L. R. 123.—N.Z.

*k. Application of Stamp Act, 1882, s. 94.*—The above sect. providing for

the payment of only one duty on a conveyance of land to a sub-purchaser, applies only where the subsale is a sale for cash or its equivalent, & not where the later transaction is an exchange of properties.—*PITCHER v.*

*STAMPS COMR.* (1906), 26 N. Z. L. R. 58.—N.Z.

*l. Sale of partitioned property—Whether series of transactions.*—*BRAND v. MINISTER OF STAMP DUTIES* (1914), 33 N. Z. L. R. 612.—N.Z.



**Sect. 6.—Duties upon particular instruments: Subsect. 18, A. (a) & (b).]**

extent & situate within a defined area & to be selected by F. or his nominees, for the erection of a sugar factory; & V. further agreed that he would cultivate beetroots, to a specified extent & in a specified manner, which he would supply to the sugar factory at stipulated prices. Subsequently F. agreed, by a deed made in England, to sell to an English co. the benefit of the contract which he had made with V.:—*Held*: the contract was a contract for the sale of an interest in "property" which was not "locally situate out of the United Kingdom," within Stamp Act, 1891 (c. 39), s. 59 (1).—**DANUBIAN SUGAR FACTORIES v. INLAND REVENUE COMRS.**, [1901] 1 K. B. 245; 70 L. J. Q. B. 211; 84 L. T. 101; 65 J. P. 212, C. A.

*Annotation*:—**Apld.** Velazquez v. I. R. Comrs., [1914] 3 K. B. 458.

**Patent.**—See PATENTS, Vol. XXXVI., pp. 676, 677, Nos. 1577, 1578.

(b) *Sale.*

See Stamp Act, 1891 (c. 39), ss. 54–61, sched. I.

**641. General rule—Any instrument operating as transfer.**—"Memorandum, that T. has sold to G. all the goods, stock-in-trade, & fixtures in a certain shop":—*Held*: to require an *ad valorem* stamp as a conveyance.

Any instrument which operates as a record of the transfer of property is a conveyance within the Stamp Act.—**HORSFALL v. HEY** (1848), 2 Exch. 778; 17 L. J. Ex. 266; 11 L. T. O. S. 271; 154 E. R. 705.

*Annotations*:—**Expld. & Apld.** Garnett v. I. R. Comrs. (1899), 81 L. T. 633. **Mentd.** Graham v. Wilcockson & Munslow (1876), 35 L. T. 601.

**642. Family arrangement.**—**DENN d. MANIFOLD v. DIAMOND**, No. 367, *ante*.

**643.** —. —. By two deeds made between B. & H., who was the heir to B.'s settled estates, after reciting that H. had undertaken the payment of the mtges. on the estates, & that B. was indebted to H. in certain sums, it was witnessed that in pursuance of a family arrangement B. conveyed to H. his unsettled estates subject to the mtges. & also certain specified chattels; but power was reserved to B. & H. to cancel, alter, or make void the family arrangements at any time:—*Held*: the deeds were conveyances on sale, & were chargeable with *ad valorem* stamp duty.—**BRISTOL (MARQUESS) v. INLAND REVENUE COMRS.**, [1901] 2 K. B. 336; 70 L. J. K. B. 759; 84 L. T. 659; 65 J. P. 360; 49 W. R. 718; 17 T. L. R. 488; 45 Sol. Jo. 539, D. C.

**644. Partition.**—Debt on bond. Plea: that it was given to secure the payment of £660 & interest agreed, after the passing of Stamp Act, 1815 (c. 184), to be paid for equality of partition of certain lands in which pltf. & deft. were interested; & that on the principal deed, by which pltf. conveyed to deft. her interest in the estate taken in severalty by deft., no mention was made of this sum. On demurrer:—*Held*: Probate & Legacy

Duties Act, 1808 (c. 149), s. 24, incorporated by Stamp Act, 1815 (c. 184), s. 8, applied only to sales properly so called; & an exchange upon which money was paid for equality of partition was not a sale; & therefore, the enactment in that sect., enabling the purchaser to recover from the seller any part of the purchase-money not expressed in the deed of sale, was inapplicable; though the deed ought to have been stamped with an *ad valorem* stamp as an exchange, the improper stamping of the conveyance was no bar to an action on the bond given to secure the price.—**HENNIKER v. HENNIKER** (1852), 1 E. & B. 54; 22 L. J. Q. B. 94; 20 L. T. O. S. 125; 17 Jur. 436; 118 E. R. 357.

*Annotation*:—**Distd.** Christie v. I. R. Comrs. (1866), 36 L. J. Ex. 11.

**645. Amalgamation of companies.**—It was agreed between the U. & L. Ry. co. & the F. Ry. co., under the powers of the U. & L. co.'s Act, that the U. & L. Ry. co. should sell the whole of their railway & undertaking, subject to its debts & liabilities, to the F. Ry. co., & that the latter should create preferential stock to the nominal amount of £298,000 to be allotted to the shareholders of the U. & L. Ry. co. as fully paid-up stock, with a perpetual preference dividend of 6 per cent. *per annum*, & that thereupon the U. & L. Ry. co.'s capital of £298,000 should be extinguished, & the F. Ry. co.'s preferential stock of £298,000 be substituted for it, & it was directed by the Act that the transfer should be evidenced by a deed of transfer, duly stamped, wherein the full consideration for the deed should be fully & truly stated. The transaction was carried into effect & a deed was executed, whereby, in consideration of the agreement, the whole undertaking of the U. & L. Ry. co., subject to their debts, was, by virtue of the Act, transferred to & vested in the F. Ry. co., absolutely & for ever, & the Comrs. of Inland Revenue having charged *ad valorem* duty on the deed as a "conveyance upon sale" in consideration of £390,380 the admitted average selling price of the £298,000 preferential stock at the date of the deed:—*Held*: part of the consideration for the sale was "stock within the second paragraph in Schedule to 13 & 14 Vict. c. 97, Title Conveyance, & the deed was rightly stamped with *ad valorem* duty in respect of such stock.—**ULVERSTONE & LANCASTER RY. CO. v. INLAND REVENUE COMRS.** (1864), 2 H. & C. 855; 159 E. R. 354; *sub nom.* INLAND REVENUE COMRS. v. FURNESS RY. CO., 5 New Rep. 92; *sub nom.* FURNESS RY. CO. v. INLAND REVENUE COMRS., 33 L. J. Ex. 173; 10 L. T. 161; 10 Jur. N. S. 1133; 13 W. R. 10.

*Annotation*:—**Folld.** G. W. Ry. v. I. R. Comrs., [1894] 1 Q. B. 507.

**646.** —. —. An amalgamation of railways under an Act, incorporating Railway Clauses Act, 1863 (c. 92), is a transaction which comes within the description of transfer & sale, & stamp duty is payable under that head.—**GREAT WESTERN RY. CO. v. INLAND REVENUE COMRS.**, [1894] 1 Q. B. 507; 63 L. J. Q. B. 405; 70 L. T. 86; 58 J. P.

**PART IX. SECT. 6, SUB-SECT. 18.—A. (b).**

**642 i. Family arrangement.**—Transactions which are in a sense family arrangements may also involve & be, so far as the documents are concerned, "conveyances or transfers on sale" within Stamps Acts; it is not essential that there should be anything in the nature of adverse bargaining to constitute a "sale" within Stamps Act, 1890, s. 93.—**DAVIES v. COLLECTOR OF IMPOSTS** [1908] V. L. R. 272.—**AUS.**

**642 ii.** —. —. —. **CARTER v. STAMP DUTIES COMR.**, [1926] S. R. Q. 117.—**AUS.**

**642 iii.** —. —. —. **HUME v. STAMP'S COMR.** (1893), 14 N. Z. L. R. 291.—**N.Z.**

**m. Sale of land—Resale of portion & payment of duty upon transfer direct from vendor to sub-purchaser—Duty payable on transfer of residue to original purchaser.**—**NATIONAL LAND CO. v. COMPTROLLER OF STAMPS** (1883), 9 V. L. R. (Law) 87.—**AUS.**

**n.** —. —. *After transfer to purchaser re-transfer to vendor on cancellation of contract—Whether re-transfer dutiable.*—*See p.* MILLER & GRAY (1892), 18 V. L. R. 31.—**AUS.**

**o.** —. —. *By beneficiaries advanced during testator's lifetime—to trustees of will—Whether dutiable as on sale or settlement.*—**BYRNES v. STAMP'S COMR.** (1911), 11 S. R. N. S. W. 499; 28 N. S. W. W. N. 14.—**AUS.**

**p.** —. —. *To War Service Home Commissioner.*—**WAR SERVICE HOMES**

397; 42 W. R. 211; 10 T. L. R. 128; 38 Sol. Jo. 90; 9 R. 122, C. A.

*Annotations* :—*Apld.* Coats v. I. R. Comrs., [1897] 2 Q. B. 423. *Consd.* A.-G. v. Felixstowe Gas Light Co., [1907] 2 K. B. 984. *Refd.* Foster v. I. R. Comrs. (1893), 42 W. R. 259.

**647. Licence to construct jetty in river.**—By a writing not under seal the Conservators of the River Thames, pursuant to the powers conferred upon them by Thames Conservancy Act, 1857 (c. cxlvii), agreed to grant permission, during pleasure of the Conservators, to the S. co. to construct a jetty, etc., upon the foreshore & bed of the River Thames in consideration of an annual payment of £77 to the Conservators by the S. co. who thereby agreed to pay the sum & to remove the jetty, etc., upon receiving notice from the Conservators requiring them so to do:—*Held*: under Stamp Act, 1870 (c. 97), the document was chargeable only with stamp duty as an agreement; it was not a “conveyance on sale” or a “conveyance” within either sect. 70 or sect. 78 of the Stamp Act because it did not transfer to the S. co. any of the property vested in the Conservators by Thames Conservancy Act, 1857; neither was it chargeable as a “lease or tack,” for nothing was thereby demised to the S. co., who were mere licencees; & it was not chargeable as a “bond, covenant, or instrument of any kind whatsoever” because it was not an instrument of the same nature as a bond or covenant for securing payment of a sum of money.—*RIVER THAMES CONSERVATORS v. INLAND REVENUE COMRS.* (1886), 18 Q. B. D. 279; 56 L. J. Q. B. 181; 56 L. T. 198; 35 W. R. 274; 3 T. L. R. 190, D. C.

*Annotations* :—*Consd.* Sweetmeat Automatic Delivery Co. v. I. R. Comrs., Jones v. I. R. Comrs. (1894), 64 L. J. Q. B. 84; [1895] 1 Q. B. 484. In the latter report *Thames Conservators v. J. R. Comrs.* is referred to in error as *Taylor v. Tondleton Overseers*—*See*, [1899] 1 Q. B. at p. 260 (COLLINS, L.J.). *Refd.* National Telephone Co. v. I. R. Comrs., [1899] 1 Q. B. 250.

**648. Conversion of partnership into company.**—Eight persons who had been carrying on business in partnership determined the partnership & transferred the business to a limited co., formed exclusively of themselves; & they by deed conveyed the partnership property to the co., & the shares & debenture-stock of the company were allotted to them in certain proportions:—*Held*: the deed was “a conveyance on sale” within Stamp Act, 1870 (c. 97), ss. 70, 71 (1), & chargeable as such with an *ad valorem* duty under the schedule to the Act.—*FOSTER (JOHN) & SONS v. INLAND REVENUE COMRS.*, [1894] 1 Q. B. 516; 63 L. J. Q. B. 173; 69 L. T. 817; 58 J. P. 444; 42 W. R. 259; 10 T. L. R. 152; 38 Sol. Jo. 128; 9 R. 161, C. A.

*Annotations* :—*Apld.* Coats v. I. R. Comrs., [1897] 2 Q. B. 423. *Consd.* G. N. Ry. v. I. R. Comrs., [1899] 2 Q. B. 652.

**649. Undertaking not to work minerals—Receipt for compensation.**—A colliery co., who were the owners of coal under & adjacent to a railway, gave notice to the railway co. under Railways Clauses Consolidation Act, 1845 (c. 20), s. 78, of their intention to work the coal. The railway co. thereupon gave notice to the colliery co. under Railways Clauses Consolidation Act, 1845 (c. 20),

s. 78, that they were willing to make compensation for the coal. The amount of the compensation having been fixed by arbn., the railway co. paid that amount, & the colliery co. executed an instrument under seal by which they acknowledged receipt of the amount in satisfaction of all claims by them in respect of the coal, & undertook to leave the coal unworked:—*Held*: the instrument so executed was not chargeable with the *ad valorem* stamp duty payable upon a “conveyance on sale” under the Stamp Act, 1891 (c. 39).

To come within Stamp Act, 1891 (c. 39), s. 60, there must be a right not before in existence, & there must be a sale of such right which is secured by bond, contract, or otherwise (SMITH, M.R.).—*GREAT NORTHERN RY. CO. v. INLAND REVENUE COMRS.*, [1901] 1 K. B. 416; 70 L. J. K. B. 336; 84 L. T. 183; 65 J. P. 275; 49 W. R. 261; 17 T. L. R. 218; 45 Sol. Jo. 237, C. A.

*Annotations* :—*Refd.* Richard v. G. W. Ry., [1905] 1 K. B. 68. *Mentd.* *Re* Bwlfa & Merthyr Dare Steam Collieries (1891), Ltd. & Pontypridd Waterworks Co., [1901] 2 K. B. 798.

**650. Dissolution of company—Reincorporation—Vesting of property of old company in new company.**—By a special Act of Parliament a limited co. was dissolved & reincorporated with additional powers, the property of the dissolved co. being thereby vested in the new co., & the shareholders being given stock of the new co. in substitution for the stock of the dissolved co. theretofore held by them:—*Held*: the property of the dissolved co. “vested by way of sale” in the new co. within the meaning of Finance Act, 1895 (c. 16), s. 12, notwithstanding that there was no contract of sale between the two cos. by reason of their never having been in existence at the same time.—*A.-G. v. FELIXSTOWE GAS LIGHT CO.*, [1907] 2 K. B. 984; 76 L. J. K. B. 1107; 97 L. T. 340; 14 Mans. 291.

**651. “Acte d’apport”—Transfer of property abroad—In return for issue & delivery of shares in English company.**—By an instrument in French called an “*acte d’apport*,” executed in France, an English co. transferred certain property in France to another English co. in consideration of the allotment by the latter to the former of a certain number of its shares in the former:—*Held*: the instrument related to “property situate” & to a matter or thing done or to be done in the United Kingdom within Stamp Act, 1891 (c. 39), s. 14 (4), & was a “conveyance on sale” within section 54 of that Act.—*INLAND REVENUE COMRS. v. MAPLE & CO. (PARIS) LTD.*, [1908] A. C. 22; 77 L. J. K. B. 55; 97 L. T. 814; 24 T. L. R. 140; 52 Sol. Jo. 92; 14 Mans. 302, H. L.; *reversg.* S. C. *sub nom.* MAPLE & CO. (PARIS), LTD. v. INLAND REVENUE COMRS., [1906] 2 K. B. 834, C. A.

**Exchange of shares.**—*See* COMPANIES, Vol. IX., p. 404, No. 2589; Vol. X., p. 1032, No. 7155.

**Purchase of property under statutory powers.**—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 236, No. 1267.

**Order for foreclosure.**—*See* MORTGAGE, Vol. XXXV., p. 585, Nos. 3225–3228.

COMR. v. COLLECTOR OF IMPOSTS (VICTORIA) (1920), 27 C. L. R. 334.—**AUS.**

**q.**—*Sub-sale of part by agreement—Whether duty payable on balance retained by purchaser.*—*NEILSEN v. STAMPS COMR.* (1907), 26 N. Z. L. R. 678.—**N.Z.**

**r.** *Equitable conveyance.*—*Ex p. CLISSOLD* (1884), 5 N. S. W. L. R. 176.—**AUS.**

**t.** *Purchase by one partner of other partners’ share.*—*MCCAUGHY v. STAMP*

DUTIES COMR., NEW SOUTH WALES (1914), 18 C. L. R. 475; 31 N. S. W. L. N. 53.—**AUS.**

**a.** *Agreement by legatee—To take payment of legacy in stock or securities.*—Where a legatee under a will agrees with exor. to take payment or part payment of the legacy in stock or securities of testator, the transfer deed executed in pursuance of the agreement is a conveyance or transfer on sale within Stamp Act, 1891, & is chargeable with *ad valorem* duty to

be assessed in accordance with the provisions of that Act.—*DAWSON v. INLAND REVENUE COMRS.*, [1903] 2 I. R. 69.—**IR.**

**b.** *Devise of land for sale & conveyance of land to residuary legatees subject to charges—Whether conveyance on sale.*—*MORRISON v. STAMPS COMR.* (1907), 26 N. Z. L. R. 1009.—**N.Z.**

**c.** *Instrument purporting to be agreement for sale.*—*DON FRANCESCO v. DE MEO*, [1908] S. C. 7.—**SCOT.**

*Sect. 6.—Duties upon particular instruments: Subsect. 18, B., C., D., E. & F.]*

*B. Consideration Consisting of Periodical Payments.*

See Stamp Act, 1891 (c. 39), s. 56.

**652. Annual rentcharge—Redeemable on payment of lump sum.]**—A deed made between E. of the first part; G. of the second part; the Plymouth Great Western Dock co. of the third part, & P. of the fourth part, recited (*inter alia*) that G. had, pursuant to an Act of Parliament, constructed certain piers, & was entitled to take tolls thereon, & that it had been agreed between G. & the Plymouth Great Western Dock co. that the piers, etc., should be purchased of G. by the Plymouth Great Western Dock co., & that the consideration for the purchase should be the sum of £37,000, & that £10,000 only, part of the sum of £37,000, should be paid in gross by the co. & that £15,000, further part of the £37,000, should be represented by an annual rentcharge of £750, subject to redemption at any time thereafter, on payment of £15,000, after twelve calendar months' notice given by the co., & that £12,000, residue of the £37,000, should be represented by an annual rentcharge of £600, subject to the power of redemption hereinafter mentioned. The pier, etc., were for the consideration aforesaid, by the deed conveyed by G. to the co., subject to the rentcharges of £750 & £600 before mentioned. The deed contained a proviso for redemption of the rentcharges of £750 at the option of the co. pursuant to the agreement recited, & also a proviso that if at any time after Sept. 29, '858, G., or his heirs or assigns, should desire to have the rentcharge of £600 redeemed, & should give twelve months' notice to the co., the co., should pay G. £12,000 for the redemption or repurchase thereof, & a further proviso that, if no such notice should be given after Sept. 29, 1858, then that the co. might, at any time after Sept. 29, 1868, redeem the rentcharge of £600 for £12,000 on giving to G. twelve months' notice:—*Held*: an *ad valorem* duty was payable as if the £12,000 had been a payment in money; but that no *ad valorem* duty was payable in respect of the rentcharge of £750.—*PLYMOUTH GREAT WESTERN DOCK CO. v. INLAND REVENUE COMRS.* (1853), 22 L. J. Ex. 188.

**653. Licence to use materials—Payment by instalments.]**—*LIMMER ASPHALTE PAVING CO. v. INLAND REVENUE COMRS.*, No. 433, *ante*.

**654. Sale of land—Annual sum payable to vendor for tithe—Vendor liable for tithe.]**—The owners in fee simple of a certain piece of land offered the land for sale in lots as a building estate, & by an indenture which recited that the vendors had agreed with the purchaser for the sale to him of a certain lot or piece of the land for the sum of £50, the vendors granted the lot to the purchaser in fee simple in consideration of the sum of £50 then paid by the purchaser, amongst other conditions, subject to & charged with the payment to the vendors & their assigns of the annual sum of 1s. in accordance with a stipulation providing that the piece of land thereby conveyed was in consideration of the vendors paying the whole of the tithe in respect of the land of which the plot formed part, subjected & charged with the payment to the vendors of the perpetual sum of 1s. *per annum*; & the purchaser for himself & his assigns covenanted to make this annual payment of 1s. to the vendors & to perform the other stipulations of the agree-

ment. The payment of the 1s. was in consideration of the vendors paying the whole of the tithe. In assessing the stamp duty upon the indenture:—*Held*: the annual payment of 1s. *per annum* was part of the consideration for the sale; the consideration for the sale was therefore the £50 plus the annual sum of 1s. & having regard to Stamp Act, 1891 (c. 39), s. 56 (2), the whole consideration for the sale was £50, plus 1s. multiplied by twenty, namely, £51, & the indenture was to be stamped as a conveyance on sale for a consideration of £51, namely, with a stamp of 7s. 6d.; but even if the annual payment was not part of the consideration, the stipulation to pay it would be a separate collateral covenant which would require to be stamped as such.—*MARTIN v. INLAND REVENUE COMRS.* (1904), 91 L. T. 453.

**655. Part of consideration payable on contingency—Periodical payment of money.]**—Part of the consideration for the sale of a co.'s assets to another co. was that the buying co. should pay out of its profits to the selling co. an annual dividend of 3 per cent. upon capital issued, after paying to its own shareholders a 5 per cent. dividend upon its shares:—*Held*: the dividend of 3 per cent., though payable on a contingency or more than one contingency, was "money payable periodically" within Stamp Act, 1891 (c. 39), s. 56 (2).—*UNDERGROUND ELECTRIC RYS. v. INLAND REVENUE COMRS.*, [1906] A. C. 21; 75 L. J. K. B. 117; 93 L. T. 819; 54 W. R. 381; 22 T. L. R. 160, H. L.

*Annotation*:—*Reid*, *Underground Electric Rys. of London & Glyn, Mills, Currie v. I. R. Comrs.*, [1916] 1 K. B. 306.

*C. Conveyance in Consideration of Debt.*

See Stamp Act, 1891 (c. 39), s. 57.

**656. Amalgamation of companies—Debentures & simple contract debts taken over.]**—The consideration for the transfer of the whole undertaking of one railway co. to another consisted of the purchasing co. taking on themselves the liabilities of the vendors, & creating & allotting to the shareholders of the selling co. preference stock of the purchasing co. equal in amount to the capital of the other, which was to be extinguished:—*Held*: this preference stock was to be stock within Stamp Act, 1850 (c. 97), Sched., Title "Conveyance," & therefore liable to pay duty on its market value.—*ULVERSTONE & LANCASTER RY. CO. v. INLAND REVENUE COMRS.* (1864), 2 H. & C. 855; 159 E. R. 354; *sub nom.* *FURNESS RY. CO. v. INLAND REVENUE COMRS.*, 33 L. J. Ex. 173; 10 L. T. 161; 10 Jur. N. S. 1133; 13 W. R. 10; *sub nom.* *INLAND REVENUE COMRS. v. FURNESS RY. CO.*, 5 New Rep. 92.

*Annotation*:—*Apld.* *G. W. Ry. v. I. R. Comrs.*, [1894] 1 Q. B. 507.

**657. Assignment of leaseholds—Apportioned rent payable by assignee.]**—The lessee, for a term of ninety-nine years at a yearly rent, of a piece of land with three houses thereon, assigned & conveyed two of the houses, in consideration of £503 for the residue of the term subject to an apportioned rent representing two-thirds of the rent reserved by the lease. By the deed of assignment the assignee covenanted to pay such apportioned rent, & to keep the assignor indemnified in respect of it, & the assignor covenanted to pay the remaining one-third of the rent reserved by the lease, & to keep the assignee indemnified in respect of it. The three houses were of the same annual value:—*Held*: for the

PART IX. SECT. 6, SUB-SECT. 18.—C.

*d. Trust deed for behoof of creditors.]*—*SCOTTISH EQUITABLE LIFE ASSURANCE SOCIETY v. INLAND REVENUE COMRS.* (1894), 22 R. (Ct. of Sess.) 85.—*SCOT.*

purpose of fixing the *ad valorem* duty chargeable under the heading "Conveyance or Transfer on Sale of any Property" in Stamp Act, 1891 (c. 39), Sched. I., the payment of rent by the assignee was not part of the consideration for the assignment, & duty was chargeable upon the £503 only.—*SWAYNE v. INLAND REVENUE COMRS.*, [1900] 1 Q. B. 172; 69 L. J. Q. B. 63; 81 L. T. 623; 48 W. R. 197; 16 T. L. R. 67; 44 Sol. Jo. 99, C. A.  
*Annotation*.—*Distd. Martin v. I. R. Comrs.* (1904), 91 L. T. 453.

**Foreclosure order.**—See MORTGAGE, Vol. XXXV., p. 585, Nos. 3225–3228.

#### D. Conveyance by Several Instruments.

See Stamp Act, 1891 (c. 39), s. 58.

**658. Conveyance by attorney—Power of attorney defective—Confirmation of conveyance by separate deed—Whether additional conveyance stamp necessary.**—If A. profess to execute a conveyance by attorney, & afterwards, finding that such attorney is not authorised, execute personally a confirmation by a separate deed, it is enough, under Stamp Act, 1815 (c. 184), sched., part 1, "Conveyance" & "Deed," that the first conveyance have an *ad valorem* stamp on the consideration, & the confirmation a deed stamp, though not amounting to an *ad valorem* stamp on the original consideration.—*DOE d. PRIEST v. WESTON* (1841), 2 Q. B. 249; 1 Gal. & Dav. 582; 11 L. J. Q. B. 17; 6 Jur. 600; 114 E. R. 97.

#### E. Conveyance in Separate Parcels.

See Stamp Act, 1891 (c. 39), s. 58.

**659. Apportionment of stamp duty—Sub-sale of part of property purchased before conveyance—Conveyance by vendor to sub-purchaser—Remainder conveyed to purchaser.**—Applt. agreed to purchase certain property from F., the consideration being (a) a payment of £45,000, & (b) the assumption by applt. of certain charges of which the agreed amount was £997 5s. 9d. Applt., not having obtained a conveyance, contracted to sell portions of the property to sub-purchasers, & in consequence, F. by divers conveyances conveyed those portions to the various sub-purchasers, each of the conveyances being stamped with *ad valorem* conveyances duty on the purchase-money paid by each sub-purchaser, the total consideration stated in these various conveyances amounting to £45,000 & upwards. Applt. then took a conveyance to himself from F. of the remaining portion of the property. By that conveyance, which recited the agreement for sale between F. & applt. & that the £45,000 had already been paid to F. by or under the direction of applt. on the execution

of the conveyances to the sub-purchasers, applt. covenanted to assume liability for the charges of £997 5s. 9d. :—*Held*: the conveyance to applt. was liable to stamp duty on so much of the original purchase-money, £45,997 5s. 9d., as, having regard to the relative values of the property sub-sold & not sub-sold, was apportionable to that part of the property conveyed to applt.—*MAPLES v. INLAND REVENUE COMRS.*, [1914] 3 K. B. 303; 83 L. J. K. B. 1647; 111 L. T. 764.

#### F. Contracts Chargeable as Conveyances on Sale.

See Stamp Act, 1891 (c. 39), s. 59.

**660. "Property locally situate out of the United Kingdom"—Equity of redemption—Mortgaged lands situate abroad.**—Appls. entered into a written agreement in England to purchase property in New South Wales subject to a mtge. On a case stated by the Comrs. of Inland Revenue pursuant to Stamp Act, 1891 (c. 39), s. 13 :—*Held*: (1) the words of exception in sect. 59 (1) of that Act, do not apply to an equitable estate or interest in property locally situate out of the United Kingdom & therefore the general words "any equitable estate or interest in any property whatsoever" apply, & *ad valorem* duty is payable on an agreement made in England for the purchase of such an estate; (2) also New South Wales Trust Property Act, 1862, does not confer the legal estate in mtged. property on the mtgor.; therefore *ad valorem* duty was payable on the purchase by appls. of the equity of redemption.—*FARMER & CO. v. INLAND REVENUE COMRS.*, [1898] 2 Q. B. 141; 67 L. J. Q. B. 775; 79 L. T. 32; 14 T. L. R. 408, D. C.

**661. — Book debts of foreign business.**—An agreement was made & executed in England for the sale of a business carried on at Buenos Ayres in Argentina & its assets, which included certain book debts owing by persons resident in Argentina to the vendor of the business :—*Held*: the book debts were not property "locally situate out of the United Kingdom" within the meaning of the exception in Stamp Act, 1891 (c. 39), s. 59 (1), & *ad valorem* duty was, therefore, payable on the apportioned consideration for the sale of the book debts.—*VELAZQUEZ, LTD. v. INLAND REVENUE COMRS.*, [1914] 3 K. B. 458; 83 L. J. K. B. 1108; 111 L. T. 417; 30 T. L. R. 539; 58 Sol. Jo. 554, C. A.

— **Goodwill.**—See Nos. 625, 627, *ante*.

— **Trade mark.**—See No. 625, *ante*.

— **Patent rights.**—See PATENTS, Vol. XXXVI., pp. 676, 677, Nos. 1577, 1578.

— **Benefit of contract—Contract to provide land suitable for factory abroad.**—See No. 640, *ante*.

#### PART IX. SECT. 6, SUB-SECT. 18.—D.

**e. Amount of exemption from duty allowed.**—Where different parcels of land the subject matter of one sale are conveyed by different instruments to the purchaser, & a specific portion of the total consideration is appropriated to each parcel of the land so conveyed, the first £50 of each of such specific portions is, by virtue of Stamp Act, 1890, s. 98 (1), & 3rd Sched., exempt from duty.—*HENDY v. COLLECTOR OF IMPOSTS*, [1907] V. L. R. 704.—AUS.

#### PART IX. SECT. 6, SUB-SECT. 18.—E.

**f. Sale by natives for separate sums—Whether stamp duty payable on each sum.**—A number of aboriginal natives conveyed to L. all their undivided shares & interests in a block of land. In the deed of transfer the vendors severally transferred to L. all their estate & interest in the block

in consideration of the several sums set opposite to their respective signatures, the receipt of which they acknowledged respectively :—*Held*: each separate sum acknowledged to be received formed a separate consideration in respect of which stamp duty was payable by the purchaser.—*RE LOISEL* (1894), 12 N. Z. L. R. 323.—N.Z.

#### PART IX. SECT. 6, SUB-SECT. 18.—F.

**g. Assignment of stocks & shares—In consideration of indemnification of assignor—Against certain debts.**—*PEET v. REVENUE COMRS.* (1925), 59 L. T. 93.—IR.

**h. Assignment of money.**—An order which amounts to an absolute assignment of money must be stamped *ad valorem* as a conveyance on sale.—*WHITE v. ENSOR* (1893), 11 N. Z. L. R. 586.—N.Z.

**k. Sale of land, stock, & stock-in-trade.**—*ELSWORTH v. STAMPS COMR.*

(1920), 20 S. R. N. S. W. 305; 37 N. S. W. N. 96.—AUS.

**l. —.**—In order to make stock & stock-in-trade taxable under Stamp Act, 1882 (Amendment) Act, 1885, s. 18, it must appear that the stock or stock-in-trade contracted to be sold was contracted to be sold as being on the land sold at the time of sale.—*RE DUTHIE* (1900), 19 N. Z. L. R. 359.—N.Z.

**m. —.**—*DOUGLAS v. STAMPS COMR.* (1904), 24 N. Z. L. R. 716.—N.Z.

**n. —.**—*PHARAZYN v. STAMPS COMR.* (1904), 23 N. Z. L. R. 1058.—N.Z.

**o. —.**—*GODFREY v. STAMPS COMR.* (1904), 23 N. Z. L. R. 937.—N.Z.

**p. Transfer of undertaking—Consideration being payment of debts, liabilities, & expenses of transferor.**—*INLAND REVENUE COMRS. v. NORTH*

*Sect. 6.—Duties upon particular instruments: Sub-sect. 18, F., G., H. & I.; sub-sects. 19, 20, 21*

662. "Agreement 'made' in the United Kingdom"—Execution in England by party whose execution required for completion of agreement.]—INLAND REVENUE COMRS. v. MULLER & Co.'s MARGARINE, LTD., No. 627, *ante*.

"Equitable estate or interest"—Equity of redemption of mortgaged land abroad.]—See No. 627, *ante*.

*G. Sale of Annuity or Right Not Before in Existence.*

See Stamp Act, 1891 (c. 39), s. 60.

663. Annuity—Life interest & reversion in stocks—Consent to sale of stock by holder of life interests—Covenant by reversioner to pay annuity.]—Where two parties were interested in a sum invested in the funds, one having a life interest, & the other a reversion, & a deed was executed between them by which in consideration of the person entitled for life consenting to a sale of part of the stock for the benefit of the reversioner, the latter covenanted to pay an annuity to the person entitled for life:—*Held*: such deed was not a conveyance upon the sale of an annuity, so as to render it liable to the *ad valorem* duty, according to Stamp Act, 1815 (c. 184), sched. Part I., Title Conveyance.—BLANDY v. HERBERT (1829), 9 B. & C. 396; 7 L. J. O. S. K. B. 223; 109 E. R. 147.

*Annotations*:—*Apld.* Mestayer v. Biggs (1834), 1 Cr. M. & R. 110. *Refd.* Caldwell v. Dawson (1850), 5 Exch. 1. *Mentd.* Potter v. I. R. Comrs. (1854), 10 Exch. 147.

664. — Marriage settlement—Covenant to pay annuity to use of husband & wife.]—By a marriage settlement, *deft.*, in consideration of £4,000 paid by the father of the intended wife as a marriage portion & in consideration of the marriage, covenanted to pay an annuity of £800 a year to *pltf.* to the use of the intended husband & wife, during their joint lives:—*Held*: the deed did not require a £15 *ad valorem* stamp as upon the sale of an annuity.—MASSY v. NANNEY (1837), 3 Bing. N. C. 478; 4 Scott, 258; 6 L. J. C. P. 185; 132 E. R. 494.

*Annotations*:—*Refd.* Christie v. I. R. Comrs. (1866), 15 L. T. 282. *Mentd.* A.-G. v. Wolvorton, [1896] 2 Q. B. 389.

665. — Grant of perpetual annuity—Repayment of loan.]—(1) Stamp Act, 1891 (c. 39), s. 87 (2), which provides for the stamping of a security for the payment of any annuity "by way of repayment or in satisfaction or discharge of any loan, advance, or payment intended to be so repaid, satisfied, or discharged," applies to the case of terminable annuities, & does not apply to the grant of a perpetual annuity in consideration of a sum of money paid by way of purchase.

(2) Sect. 60 distinctly refers, as I think, to such annuities as are granted here (GRANTHAM, J.).—MERSEY DOCKS & HARBOUR BOARD v. INLAND REVENUE COMRS., [1897] 1 Q. B. 786; 66 L. J. Q. B. 480; 76 L. T. 596; 45 W. R. 448; 13 T. R. 328.

666. Right not before in existence—Undertaking by mine owner not to work coal under railway—

BRITISH RY. Co. (1901), 4 F. (Cl. of Sess.) 27.—SCOT.

g. —.—.]—INLAND REVENUE v. IRVINE & DISTRICT WATER BOARD (1905), 43 Sc. L. R. 649.—SCOT.

r. Agreement guaranteeing real estate—For fixed price.]—An agreement "guaranteed" real estate for a fixed price, & gave all the rights of a vendor to one party, & all those of a purchaser

to the other party:—*Held*: this agreement constituted a sale, & was liable to the duties payable on a sale of realty.—HUTTON v. LIPPERT (1883), 52 L. J. P. C. 54.—S. AF.

PART IX. SECT. 6, SUB-SECT. 18.—I. t. Instrument executed by father—"In consideration of natural love & affection."—A father, by an instrument expressed to be executed in considera-

Receipt for compensation.]—GREAT NORTHERN RY. Co. v. INLAND REVENUE COMRS., No. 649, *ante*.

*H. Compulsory Purchase.*

See COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 236, 255, 271, Nos. 1266, 1267, 1624, 1965-1967.

*I. Voluntary Dispositions inter vivos.*

See Finance (1909-10) Act, 1910 (c. 8), s. 74; Finance Act, 1920 (c. 18), ss. 36 (1), (2), 64, sched. IV.

667. How duty calculated.]—The *ad valorem* stamp duty payable on a voluntary disposition, such as a resettlement, including cases where a substantial benefit is conferred upon the parties taking under it, for an inadequate consideration, is to be calculated upon the value of the property conveyed or transferred, & not only on the value of the interests taken by the persons to whom it is transferred.—WESTMORELAND (EARL) v. INLAND REVENUE COMRS. (1927), 71 Sol. Jo. 946, C. A.

668. Conveyance for consideration less than full value—Duty only on consideration mentioned—Effect on purchaser for value.]—When property has been conveyed for a consideration less than its full value, the fact that stamp duty has only been paid in respect of the consideration mentioned in the conveyance, & not, as required by Finance (1909-1910) Act, 1910 (c. 8), s. 74, in respect of the value of the property, will not affect a subsequent purchaser for value.—*Re WEIR & PITT'S CONTRACT* (1911), 55 Sol. Jo. 536.

669. Resettlement of real estate—Conveyance of land subject to mortgages—Whether charges to be regarded as purchase-money.]—By deed of conveyance or settlement, dated May 27, 1847, between A., B. & C. A. conveyed his life interests in some estates, & his reversion in fee in others, to B. & C. subject to mtges. & other incumbrances of nearly £1,500,000, B. having before cut off the entail of a large portion of the estates of which he was tenant in tail in remainder for the purpose of raising a large part of that sum; no price or purchase-money was stipulated to be paid by B. or C. to A., but the debts of A. were to be paid off out of the rents & profits by B. & C. The comrs. were of opinion that as the estates were conveyed subject to the mtge., etc., the deed ought to be stamped with an *ad valorem* stamp upon the amount of those charges as if the purchase-money had been to that amount. Upon appeal:—*Held*: (1) the determination of the comrs. was wrong: in the clause [Stamp Act, 1815 (c. 184), sched., Part I., Title Conveyance] which is to define what is the consideration or purchase-money, the terms "to be paid by the purchasers" mean where it is stipulated that he is to pay it; the provision applies only to those cases where, in consideration of the conveyance of the estate, the vendee agrees to pay a certain sum to the mtgee., or other incumbrancer; where the purchaser does not bind himself to pay it, but is left to pay it or not, as he pleases, it cannot be a part of the consideration money.

(2) In the construction of revenue Acts a duty

tion of natural love & affection, transferred certain lands to his two sons as tenants in common. The land was subject to two mtges. securing the repayment of sums amounting to £5,000:—*Held*: the transaction was not a conveyance on sale, & *ad valorem* stamp duty was not payable.—BREWER v. STAMPS COMRS., [1903] S. R. Q. 143.—AUS.

a. Money expended on buildings by



cannot be imposed upon the subject except by clear words. The meaning of the legislature must be distinctly made out from the terms of the statute (POLLOCK, C.B.).—**CHANDOS (MARQUIS) v. INLAND REVENUE COMRS.** (1851), 6 Exch. 464; 20 L. J. Ex. 269; 17 L. T. O. S. 128; 155 E. R. 624.

*Annotations*:—*As to* (1) **Reid**. *Mortimore v. I. R. Comrs.* (1864), 2 H. & C. 838. *Generally*, **Reid**. *Eglington's Trustees v. I. R. Comrs.* (1865), 3 H. & C. 880, n.; *Christie v. I. R. Comrs.* (1866), 15 L. T. 282; *De Lancey's Succession* (1869), 21 L. T. 58; *Truman, Hanbury, Buxton v. I. R. Comrs.*, [1912] 3 K. B. 377.

**670. — Valuable consideration of small amount**  
—**Substantial benefit conferred on transferees.**—The life interest of E. in certain settled estates having been mortgaged by him & the mtgees. having foreclosed, an arrangement was proposed for the repurchase of E.'s life interest by means of moneys to be raised out of the fee of the settled estates. His eldest son F., the tenant in tail in remainder, being then a minor, an application was made to the ct. for the approval of a scheme for carrying out the arrangement & the resettlement of the estates. On coming of age F., with the consent of E. as protector of the settlement, executed a disentailing deed, & thereafter the indenture of resettlement was executed, under which F. received, an allowance during the joint lives of E. & himself, a right to £5,000 if he married, & a power to jointure:—**Held**: Finance (1909–1910) Act, 1910 (c. 8), s. 74, applied to a settlement of real estate, & though there was some valuable consideration for the deed of resettlement, such consideration could not, having regard to the terms of the latter part of Finance (1909–1910) Act, 1910 (c. 8), s. 74 (5), & to the opinion of the comrs., with which the House agreed, that the deed of resettlement conferred a substantial benefit upon the persons to whom the settled property was transferred, be deemed to be a valuable consideration within the exception contained in the former part of Finance (1909–1910) Act, 1910 (c. 8), s. 74 (5).—**BAKER v. INLAND REVENUE COMRS.**, [1924] A. C. 270; 93 L. J. K. B. 211; 130 L. T. 513, H. L.

**671. — — — — —**—**WESTMORELAND (EARL) v. INLAND REVENUE COMRS.**, No. 667, *ante*.

#### SUB-SECT. 19.—CONVEYANCE OTHER THAN CONVEYANCE ON MORTGAGE OR SALE.

*See* Stamp Act, 1891 (c. 39), s. 62, sched. I.

**672. Assent in writing to devise of realty**—**Land transfer Act, 1897 (c. 65), s. 3.**—An assent in writing made in pursuance of sub-sect. 1 of above sect. under the hand but not under the seal of the exor. is not "an instrument . . . whereby any property on any occasion, except a sale or mtge., is transferred to or vested in any person" within Stamp Act, 1891 (c. 39), s. 62, & is, therefore, not liable to stamp duty as a conveyance or transfer.—**KEMP v. INLAND REVENUE COMRS.**, [1905] 1 K. B.

*life tenant—Voluntary disposition—Dutiable.*—**CHADWICK v. STAMPS COMR.** (1919), 19 N. S. W. L. R. 39; 19 S. L. N. S. W. 39; 36 N. S. W. W. N. 26.—**AUS.**

**b. Deed of partnership between brothers & sisters by way of family arrangement—Whether liable to stamp duty.**—**STAMPS COMRS. v. GIRLING (W. B.) & Co.** (1901), 20 N. Z. L. R. 259.—**N.Z.**

**c. Transaction partly gift—Duty payable on what has really been given.**—**WILLIAMS v. STAMPS COMR.** (1904), 24 N. Z. L. R. 658.—**N.Z.**

#### PART IX. SECT. 6, SUB-SECT. 22.

**d. Necessity for stamp—Deed executed in England—Property in Province.**—Deeds executed in England, conveying land in this Province, do not require to be stamped under English Stamp Acts, but are valid in this Province though unstamped.—**MURRAY v. VAN BROCKLIN** (1857), 1 Ch. Ch. 300.—**CAN.**

**e. Sale of redeemable heritable annuity.**—A party holding a redeemable heritable annuity sold & assigned it to a purchaser; the deed of conveyance was not stamped with an *ad valorem* stamp,

581; 74 L. J. K. B. 112; 92 L. T. 92; 53 W. R. 479; 21 T. L. R. 168; 49 Sol. Jo. 147.

*See, now, Land Registration Act, 1925 (c. 21), s. 147.*

**Order of Charity Commissioners appointing & vesting property in new trustees.**—*See* CHARITIES, Vol. VIII., p. 374, No. 1842.

#### SUB-SECT. 20.—COPIES AND EXTRACTS.

*See* Stamp Act, 1891 (c. 39), s. 63, & sched. I.

**673. What copies or extracts liable—Copies made admissible on non-production of original—Used to refresh memory of writers.**—Where on the non-production of a deed after notice to produce, the opposite party calls a witness who proves a copy compared by him with the original deed, such copy may be read without being stamped; for it is only used, in point of law, to refresh the witness's memory as to the contents of the deed.—**BRAYTHWAYTE v. HITCHCOCK** (1842), 10 M. & W. 494; 2 Dowl. N. S. 444; 12 L. J. Ex. 38; 152 E. R. 565.

*Annotations*:—**Reid**. *Stowe v. Querner* (1870), L. R. 5 Exch. 155. **Mentd.** *Coatsworth v. Johnson* (1886), 54 L. T. 520.

**674. — — — — —**—**BALL v. BALL** (1844), 3 L. T. O. S. 105.

**Admissibility of copies.**—*See* EVIDENCE, Vol. XXII., pp. 270, 271, Nos. 2553–2558.

#### SUB-SECT. 21.—COPYHOLD AND CUSTOMARY ESTATES—INSTRUMENTS RELATING THERETO.

*See* Stamp Act, 1891 (c. 39), ss. 65–67, & sched. I. **Copy of court rolls.**—*See* COPYHOLDS, Vol. XIII., pp. 40, 133, Nos. 465, 466, 1655.

**Admittance of purchaser claiming through unadmitted persons—Purchaser from several tenants in common.**—*See* COPYHOLDS, Vol. XIII., p. 86, No. 1078.

#### SUB-SECT. 22.—DEEDS.

*See* Stamp Act, 1891 (c. 39), sched. I.

**675. What amounts to deed for purposes of Stamp Act—Instrument operating as lease—Stipulation that landlord should insure premises—Premiums to be added to rent.**—(1) An instrument, which operated as a lease, reserved a rent of £50, but contained a stipulation that the landlord should insure the premises for £1,000, & that the premiums of insurance should be added to the rent of £50, & become due & payable in like manner as the rent:—**Held**: this was not a "deed not otherwise charged" within the meaning of Stamp Act, 1815 (c. 184), Title Deed, but was properly stamped with an *ad valorem* lease stamp of £1 10s., as on a rent exceeding £20 & not exceeding £100; & if the premiums of insurance, added to the rent, exceeded £100, it lay upon the party seeking to impeach the instrument to show that

but only with the common deed stamp:—**Held**: in respect that the annuity was redeemable by its original constitution, no higher stamp than the common deed stamp was required, & the conveyance was valid.—**SCOTTISH UNION INSURANCE CO. v. BONTINE** (1838), 16 Sh. (Ct. of Sess.) 1241.—**SCOT.**

**f. Minute of acceptance of office.**—A minute of acceptance of office by trustees, ingressed upon a trust disposition & settlement & signed by the trustees before two subscribing witnesses, is not a "deed" within Stamp



## REVENUE.

**Sect. 6.—Duties upon particular instruments: Sub-sects. 22, 23, 24, 25, 26 & 27.]**

they did so.—*WILSON v. SMITH* (1844), 12 M. & W. 401; 1 Dowl. & L. 633; 13 L. J. Ex. 113; 2 L. T. O. S. 285; 8 J. P. 522; 152 E. R. 1253.

676. — Licence to use patent.]—*Semble*: a licence, under seal, to use a patented article, does not require a stamp.—*CHANTER v. JOHNSON* (1845), 14 M. & W. 408; 14 L. J. Ex. 289; 5 L. T. O. S. 331; 153 E. R. 534.

677. — Lease indorsed upon prior lease—Addition of rent in consideration of improvements.]

—By lease between W. & C., indorsed on a prior lease between the same parties, reciting, that in consideration of money laid out upon the premises by W., C. had agreed to pay a further rent, it was witnessed, that, in consideration of the rent reserved by the within-written indenture, & of the covenants, provisoes, & agreements therein contained, & also in consideration of the further yearly rent, W. demised to C. the premises for the residue of the term granted by the within-written indenture, subject to the provisoes, covenants, & agreements therein contained, yielding the rent, in addition to the rent reserved by the same indenture:—*Held*: the original lease did not require an additional stamp on account of the lease indorsed upon it, & the indorsed lease did not require a progressive duty, within Stamp Act, 1815 (c. 184), sched. Part I., "Deed."—*WEEDON v. WOODBRIDGE* (1848), 13 Jur. 630, n.

678. — Agreement under seal for sale of goodwill.]—*INLAND REVENUE COMRS. v. ANGUS, INLAND REVENUE COMRS. v. LEWIS*, No. 378, *ante*.  
Unstamped deed of assignment—Admissibility to prove act of bankruptcy.]—*See* *BANKRUPTCY*, Vol. IV., p. 52, Nos. 431–436.

—Agreements under seal relating to maintaining & repairing highways.]—*See* *HIGHWAYS*, Vol. XXVI., p. 357, Nos. 832, 833.

**SUB-SECT. 23.—DUPLICATE OR COUNTERPART.**

*See* Stamp Act, 1891 (c. 39), ss. 11, 72, sched. I., LANDLORD & TENANT, Vol. XXX., pp. 445, 449, Nos. 1064, 1065, 1106–1109.

Admissibility of unstamped duplicates.]—*See* *EVIDENCE*, Vol. XXII., pp. 270, 271.

**SUB-SECT. 24.**

*See* Stamp Act, 1891 (c. 39), sched. I.

679. Exemplification of other letters of administration.—In addition to letters of administration in question.]—Where, to prove the title of an administrator, an exemplification was offered in evidence, which was an exemplification not only of the letters of administration in question, but also of certain other letters of administration, on one piece of parchment, & covered by one £3 stamp:—*Held*: the exemplification was sufficiently stamped.—*DOE d. EDWARDS v. GUNNING* (1837), 7 Ad. & El. 240; 2 Nev. & P. K. B. 260;

Act, 1891, Sched. 1, & is not chargeable with a stamp duty of 10s. or with any stamp duty.—*HEWDEEN v. INLAND REVENUE COMRS.*, [1913] S. C. 987; 50 So. L. R. 782 2 S. L. T. 75.—*SCOT*.

**PART IX. SECT. 6, SUB-SECT. 23.**

g. Receipt for rent & goods sold—Separate document for book keeping

N. a duly stamped receipt for a sum paid by N. for rent & goods supplied, & at the same time gave N. (as debt. alleged, for book keeping purposes only) a separate document, purporting to be a receipt for the rent alone, which exceeded £3:—*Held*: the latter document required a stamp.—*A. G. v. ROSS*, [1909] 2 L. R. 246.—*IR*.

*Will. Woll. & Dav.* 460; 6 L. J. K. B. 229; E. R. 462.

**SUB-SECT. 25.—GUARANTEE.**

*See* *GUARANTEE*, Vol. XXVI., pp. 50–52, Nos. 346–366.

**SUB-SECT. 26.—INSURANCE POLICIES.**

*See* Stamp Act, 1891 (c. 39), ss. 91–100, & sched. I. & generally, *INSURANCE*, Vol. XXIX., pp. 442, 443, Nos. 3409–3416.

680. Policy sufficiently stamped at trial—Admissibility of evidence—Proving absence of stamp when executed.]—*RODERICK v. HOVIL*, No. 382, *ante*.

Marine insurance.]—*See* *INSURANCE*, Vol. XXIX., pp. 68 *et seq.*

—Stamp on mutual insurance policies.]—*See* *INSURANCE*, Vol. XXIX., pp. 434, 441, Nos. 3372–3374, 3405, 3406.

**SUB-SECT. 27.—LEASES.**

*See* Stamp Act, 1891 (c. 39), ss. 75–78, & sched. I.; Finance (1909–1910) Act, 1910 (c. 8), s. 75; Revenue Act, 1911 (c. 2), s. 15; & generally, LANDLORD & TENANT, Vol. XXX., pp. 446–449.

681. What amounts to lease for purposes of Act—Agreement for lease—Possession taken.]—An instrument, dated in Mar., 1798, whereby the landlord agreed to let, & also, upon demand, to execute to the tenant a lease of a farm; & the tenant agreed to take, & upon demand, to execute a counterpart of a lease of the farm from Apr. 5, 1798, for fifteen years, under a certain yearly rent; which lease was to contain the usual covenants, & an agreement for re-entry in case of non-payment of rent, & also the further covenants, etc.; & this agreement was to bind until the lease was made & executed, etc.; under which agreement the tenant entered on Apr. 5, 1798; was held to be a present demise, & therefore requiring a lease stamp; the agreement for a future lease with further covenants being for the better security of the parties.—*DOE d. WALKER v. GROVES* (1812), 15 East, 244; 104 E. R. 837.

Annotation:—*Reid. Warmen v. Faithfull* (1834), 5 B. & Ad. 1042.

682. — — — Words signifying present demise.]—By an instrument in writing, dated Sept. 11, 1830, debt. agreed that day to let to pltf. the whole of his premises, situate, etc., for ten ars; he further agreed to build a brewing house make a cellar at his own expense, at the yearly rent of £35, to be paid half-yearly. He further agreed to pay the ground rent, which was £4 yearly; & acknowledged that he had that day received from pltf., £4 in earnest:—*Held*: to be an actual & present demise, & not any agreement for a lease; & therefore, that it required a lease stamp.—*STANFORTH v. FOX* (1831), 7 Bing. 590;

**PART IX. SECT. 6, SUB-SECT. 27.**

h. Ad valorem duty on consideration—Sale of lease, license & goodwill—Whether license passed under transfer.]—*TOOTH & CO., LTD. v. STAMP DUTIES COMR.* (1909), 9 S. B. N. S. W. 652; 26 N. S. W. W. N. 162.—*AUS*.

k. Cash, debentures & allotment of shares.]—*BRITISH PETROLEUM*

5 Moo. & P. 589; 9 L. J. O. S. C. P. 175; 181 E. R. 228.

*Annotations*.—*Reid*. Doe d. Pearson v. Ries (178; Doe d. Phillip v. Benjamin (1839), 9 L. J. 118; Doe d. Wood v. Clarke (1845), 7 Q. B. 211.

683. ——— Future lease contemplated.]—A document by which A. agrees to grant, & B. to take, a lease of certain premises for a certain term, at a certain yearly rent, is to be considered merely as an agreement, not requiring a lease stamp, although no lease be prepared, & B. occupies during the whole of the term under such document, & pays the rent specified in it.—*PHILLIPS v. HARTLEY* (1827), 3 C. & P. 121; 172 E. R. 351, N. P.

684. ———]—By a written agreement, A. agreed with B. that B. should have his, A.'s, farm for his life for £20 a year rent, & the whole of A.'s keep & maintenance; B. to take off the stock at £75 10s.—*Held*: inasmuch as the instrument could operate only as an agreement to grant B. a future lease of the farm for his life, it was properly stamped with a £1 stamp.—*STONE v. ROGERS* (1837), 2 M. & W. 443; *Murp. & H.* 146; 6 L. J. Ex. 145; 1 Jur. 455; 150 E. R. 831.

*Annotation*.—*Mentd.* *Irving v. Veitch* (1837), 3 M. & W. 90.

685. ———]—By an instrument dated Dec. 13, 1834, A., in consideration of the rents, covenants, & agreements thereafter mentioned, agreed to grant a lease to B., his exors., etc., of certain premises, to hold the same for the term of two years & three-quarters, wanting seven days from Dec. 27, instant, yielding & paying a certain rent, payable quarterly, the first payment to be made on Mar. 25 then next; which indenture should contain covenants on the part of B. to pay the rent, etc., & all such other covenants as were contained in a lease therein referred to; & B. agreed that he would, if & when requested so to do by A., accept such lease; & that until such lease should have been granted as aforesaid, it should be lawful for A., his exors., etc., to distrain for all or any part of the rent which might become due from B., for or in respect of the premises thereby agreed to be demised, at any time after the execution of that agreement.—*Held*: the instrument operated as an agreement only, & not as an actual demise; & consequently, an agreement stamp was sufficient for it.—*BICKNELL v. HOOD* (1839), 5 M. & W. 104; 2 Horn & H. 86; 8 L. J. Ex. 193; 3 Jur. 774; 151 E. R. 45.

686. ———]—The following document held to be a mere agreement for a future tenancy, not an actual demise, & therefore properly stamped with a £1 stamp:—"Memorandum of an agreement entered into Jan. 31, 1840, between R., of the one part, & T., of the other part. T. hereby agrees to become the tenant of G. farm, at the customary time of entry, under the following conditions: viz. that the sum of £260 annual rent shall be paid at the usual time for the house, premises, & lands, as agreed upon; & R. agrees to lay out in the improvement & alterations of the farmhouse & new sheds a sum not exceeding £200, with the understanding that spars for rafters shall be found from the estate; cartage of all materials, except stones for walls, to be done or found by T. (Signed) R., T."—*GORE v. LLOYD* (1844), 12 M. & W. 463; 13 L. J. Ex. 366; 152 E. R. 1279; *sub nom.* *GORE v. LLOYD, EVANS v. LLOYD*, 2 L. T. O. S. 108, 329.

*Annotation*.—*Reid*. Doe d. Wood v. Clarke (1845), 7 Q. B. 211.

DEVELOPMENT CO., LTD. v. STAMP DUTIES MINISTER, [1920] N. Z. L. R. 898.—N.Z.

1. *Sufficiency of stamp*.—Where leasehold premises were conveyed to a trustee, in order out of the rents to

pay head rent, & the costs incurred in an equity suit, & also the deed of conveyance & of registering the same, & then to pay the sum of £300, with interest.—*Held*: a stamp for £1 10s. was sufficient on such

agreement, dated June 23, 1842, made between A., as agent for and on behalf of the churchwardens of the parish of M., not naming them, of the one part, & B. of the other part, it was agreed, provided a licence could be obtained from the lord of the manor, & upon B. putting the premises into repair, that the churchwardens should grant a lease to B. for twenty-one years from Midsummer Day then next, under the clear yearly rent of £30; such lease to contain covenants for payment of rent & taxes, & to repair, insure, not to commit waste, etc., & all other usual & proper covenants, etc.; & B. agreed to accept such lease, & execute a counterpart, etc., & that until such lease & counterpart should be granted, the yearly rent should be payable & recoverable by distress or otherwise, in like manner as if such lease & counterpart had been executed.—*Held*: this instrument was properly stamped as an agreement.—*DOE d. BAILEY v. FOSTER* (1846), 3 C. B. 215; 15 L. J. C. P. 263; 7 L. T. O. S. 208; 136 E. R. 86.

*Annotation*.—*Mentd.* *Ford v. Ager* (1863), 8 L. T. 546.

688. ———]—A. & B. entered into the following agreement with C.:—"We hereby agree to hire your cottages & premises known as, etc., from Sept. 27 next, at the rent of £40 *per annum*, payable quarterly, free from all deductions, & agree to pay £10 on Oct. 30, & in case any one quarter's rent shall be in arrear, & unpaid for the space of fourteen days, we hereby engage to quit possession of the same, upon a notice to that effect, giving us seven days' further time, being left upon the premises aforesaid; & in the event of our non-compliance with such notice, we hereby authorise you, or your agent, to clear the premises as if you were the occupier thereof & to resume the possession accordingly without the aid of legal authority, this right to be without prejudice to any remedy for enforcing payment of the rent that may be in arrear; & further, we engage to preserve the mills, cottages, & premises from damage, & to deliver them up in good condition, together with all fixtures belonging to you when our tenancy expires, reasonable wear & tear being allowed us"—*Held*: the above agreement did not require a lease stamp.—*GLEN v. DUNGEY & FARRANT* (1849), 4 Exch. 61; 18 L. J. Ex. 359; 13 L. T. O. S. 284; 154 E. R. 1125.

689. ———]—*RIVER THAMES CONSERVATORS v. INLAND REVENUE COMRS.*, No. 647, ante.

690. Yearly rent not within statutory provision.]—Agreement, dated Apr. 14, 1804, not under seal, between M. & N., that N. shall rent of M. the ferry called D. for £6 *per annum*, to be paid half-yearly, for which N. is to have the sole use of the ferry & whatever profit may accrue from it for the time he holds the same. "Be it also known that N. has this day bought of M. the great ferry boat for the sum of £20, of which £5 shall be paid" etc.; instalments of £5 to be paid yearly, on Apr. 6, the first in 1805.—*Held*: (1) the instrument, purporting to convey an incorporeal hereditament, was not a lease, because not under seal, & therefore did not require a lease stamp; (2) as an agreement for a lease, it was not subjected to duty by the clause of Stamp Act, 1815 (c. 184), sched., Part I. Title Agreement, exempting agreements for leases under the yearly

conveyance.—*LYSAGHT v. WARREN* (1846), 10 L. L. R. 269.—IR.

m. *What amounts to lease for purposes of Act*.—*Proposal by tenant* A proposal purporting to come from the tenant, without any

**Sect. 6.—Duties upon particular instruments: Sub-sects. 27, 28 & 29.]**

rent of £5; for a duty could not be imposed by implication from this exempting clause; (3) if the rent only were considered, the subject-matter of the agreement was not of the value of £20, & therefore no stamp was necessary; (4) the price of the boat could not be taken into consideration, the agreement as to that not being ancillary to the contract for letting, but being a distinct & separate memorandum of a bygone purchase of goods, & in itself, subject to no stamp duty.—**MAYFIELD v. ROBINSON** (1845), 7 Q. B. 486; 14 L. J. Q. B. 265; 5 L. T. O. S. 389; 9 Jur. 826; 115 E. R. 572.

**Annotation:—**As to (1) **Reid. Stratton v. Pettit** (1855), 16 C. B. 420.

Stamps on agreements for leases generally, see **LANDLORD & TENANT**, Vol. XXX., pp. 427 *et seq.*

**691. — Lease at peppercorn rent.]**—A lease for years in consideration of a sum certain, & at a peppercorn rent, does not require an *ad valorem* stamp.—**ROE d. LARKIN v. CHENHALLS** (1815), 4 M. & S. 23; 105 E. R. 743.

**692. — Lease in consideration of premium.]**—Deft. became the purchaser at an auction of a lot described as “the herbage of Upper Townshend’s Close, Lower Townshend’s Close, & the Priory,” at the price of £45; by the conditions of sale it was agreed that a deposit of 10 per cent. should be paid, & a bill given for the residue, & that the purchaser should be entitled to possession of the lot until Sept. 29. The contract of purchase at the foot of the conditions, signed by deft., was stamped with a £1 stamp.—**Held**: this was a lease of hereditaments granted in consideration of a sum of money by way of premium under £50, without any yearly rent; & therefore properly stamped with a £1 stamp.—**CATTLE v. GAMBLE** (1838), 5 Bing. N. C. 46; 7 Dowl. 98; 6 Scott, 733; 1 Arn. 405; 8 L. J. C. P. 162; 2 Jur. 922; 132 E. R. 1021.

**693. — Occupation of premises mere remuneration for services.]**—A. being owner of a farm, let it for seven years to B., & by a written agreement of the same date it was agreed, that A. should manage the farm for B., B. allowing A. 12s. a week, “& allowing him & his family to reside & have the use of the dwelling-house & furniture therein, free of rent,” & this agreement was to be put an end to by three months’ notice or three months’ wages.—**Held**: this agreement did not require a lease stamp, as it did not contain a demise of the house, the occupation of it being a mere remuneration for services.—**DOE d. HUGHES & CORBETT v. DERRY** (1840), 9 C. & P. 494, N. P. **Annotation:—****Reid. Curling v. Mills** (1843), 7 Scott, N. R. 709.

**694. — Crown lease.]**—A lease from the Board of Ordnance, which purported to be signed, sealed & delivered, being first duly stamped, was not stamped; & the ct. held, that, being a lease from the Crown, it was not necessary that it should be.—**PETRIE v. LAMONT** (1841), Car. & M. 93.

**Annotations:—****Mentd. Pratt v. British Medical Assocn.**, [1919] 1 K. B. 244; **The Koursk**, [1924] P. 140; **Performing Right Soc. v. Mitchell & Booker Palais de Danse**, [1924] 1 K. B. 762; **Falcon v. Famous Players Film Co.**, [1926] 1 K. B. 393.

**695. — Lease with covenant for insurance by landlord—Premiums added to rent.]**—**WILSON v. SMITH**, No. 675, *ante*.

**696. — Conveyance of incorporeal heredita-**

**ment—Not under seal—Ferry.]**—**MAYFIELD v. ROBINSON**, No. 690, *ante*.

**697. — Agreement to let apartments.]**—By 7 & 8 Vict. c. 76, s. 4, in force from & after Dec. 31, 1844, & repealed by Real Property Act, 1845 (c. 106), from Oct. 1, 1845, it was enacted that no lease in writing of any freehold, copyhold, or leasehold land should be valid, unless the same should be made by deed, but that any agreement in writing to let any such lands should be valid & take effect as an agreement to execute a lease. By a document dated July 3, 1845, & purporting to be a memorandum of agreement made while that sect. was in force, H. agreed to let & B. to take certain rooms in a house from July 7, for the monthly rent of 36s. to be paid every four weeks:—**Held**: it was only an agreement to execute a lease, & was well admitted in evidence as such agreement, without a stamp, being of no certain value above £1 18s. **Qu.**: whether, since the repeal of 7 & 8 Vict. c. 76, s. 4, by Real Property Act, 1845 (c. 106), such a memorandum would require a stamp of £1 15s. as a lease under Stamp Act, 1815 (c. 184), sched. Part I, Title Leases.—**BURTON v. REEVELL** (1847), 16 M. & W. 307; 16 L. J. Ex. 85; 8 L. T. O. S. 367; 11 Jur. 71.

**Annotations:—****Reid. Stratton v. Pettit** (1855), 16 C. B. 420; **Bond v. Rosling** (1861), 1 B. & S. 371. **Mentd. R. v. Income Tax Comrs.** (1888), 22 Q. B. D. 296.

**698. Ad valorem duty on consideration — To what consideration applicable.]**—Declaration in consideration that pltf. would procure A. to grant a lease to deft.; the latter promised to pay pltf. £170. The proof was, that A. having agreed to grant a lease to pltf., the latter undertook originally to assign it to deft., for the consideration mentioned; but that afterwards, a lease, to which pltf. was a party & assented, was granted immediately by A. to deft. The consideration to be paid by deft. to pltf. was not mentioned in that lease:—**Held**: the lease was not void on account of this omission, the *ad valorem* duty imposed by Stamp Act, 1815 (c. 184), applying only to considerations passing between lessor & lessee.—**BOONE v. MITCHELL** (1822), 1 B. & C. 18; 1 L. J. O. S. K. B. 25; 107 E. R. 8.

**Annotation:—****Expld. A.-G. v. Brown** (1849), 3 Exch. 662.

**699. — Uncertainty of amount.]**—Where the covenant in a lease, or in an agreement for a lease, runs thus:—“& that the premium for the said insurance shall be added to the rent,” this makes the rent uncertain & liable to the higher stamp duty.

Where the rental is certain, say £50 *per annum*, on an ordinary lease, without any uncertainty as to amount, £1 10s. would be the proper stamp; but if the wording of the covenant bears the character of uncertainty, £1 15s. will be the amount.—**WATSON v. SMITH** (1843), 1 L. T. O. S. 507.

**700. — Demise of land & other interests.]**—Where an instrument demises several matters, consisting of land & other interests, some of which are incorporated tenements, at one fixed rent, an *ad valorem* stamp is sufficient.—**R. v. HOCKWORTHY INHABITANTS** (1837), 7 Ad. & El. 492; Nev. & P. M. C. 372; 2 Nev. & P. K. B. 383; Will. Woll. & Dav. 707; 7 L. J. M. C. 25; 1 J. P. 249; 112 E. R. 555.

**701. — Lease of tramways — Annual payment by lessees in lieu of repairs.]**—By a lease of tramways to a traction co. by a municipal corpn.

words of acceptance or contract on the part of the landlord, but containing all the terms necessary to constitute a lease, & signed by both parties:—**Held**: to be a lease, & to require a

lease stamp.—**FITZPATRICK v. KING** (1854), 6 Ir. Jur. 314.—**IR.**

**n. Letter of renunciation.]**—The tenant under a lease by which he was bound to remove at a certain term on receiving

legal warning, having granted a letter dispensing with the same:—**Held**: the lease being stamped, the letter did not require a stamp.—**BAIN v. STUART** (1852), 24 Sc. Jur. 621.—**SCOT.**

made pursuant to Tramways Act, 1870 (c. 78), the co. were to pay rent at a fixed rate per cent. on the cost of the original purchase. They were also to pay to the lessors a given sum per mile of road along which the tramways were laid, in lieu of repairing any portion of such road & maintaining the tramways, except the rails & electrical bonds laid thereon. The minimum amount payable under this clause was £900 *per annum* & power of distress was reserved in respect of it. They were also bound to purchase from the vendors all electrical energy required for the purpose of the tramways & to pay for the same at a given rate, the minimum sum payable in any one year being £4,000. On a case stated:—*Held*: (1) the £900 payable in respect of the repair of the road was rent, & *ad valorem* duty was payable upon it under Stamp Act, 1891 (c. 39), s. 4; (2) the £4,000 payable in respect of the supply of electrical energy was not rent, but it was payable under a covenant made in further consideration for the lease, & relating to the matter of the lease within Stamp Act, 1891 (c. 39), s. 77 (2), & the instrument was not chargeable with *ad valorem* duty in respect of it.—*BRITISH ELECTRIC TRACTION CO. v. INLAND REVENUE COMRS.*, [1902] 1 K. B. 441; 71 L. J. K. B. 92; 85 L. T. 663; 60 J. P. 83; 50 W. R. 280; 18 T. L. R. 105, C. A.

702. — Minimum rent for purchase of electricity.]—*BRITISH ELECTRIC TRACTION CO. v. INLAND REVENUE COMRS.*, No. 701, *ante*.

Stamp on attornments.]—*See LANDLORD & TENANT*, Vol. XXX., p. 347, Nos. 58–62.

Stamps on assignments of leases.]—*See LANDLORD & TENANT*, Vol. XXXI., pp. 398, 399, Nos. 5444–5449.

#### SUB-SECT. 28.—LETTERS AND POWERS OF ATTORNEY.

*See AGENCY*, Vol. I., pp. 293, 294, Nos. 216–230.

#### SUB-SECT. 29.—MARKETABLE SECURITIES.

*See Stamp Act*, 1891 (c. 39), ss. 82, 83, 84, 85, sched. I.; *Finance Act*, 1899 (c. 9), ss. 4 (1), 6; *Finance* (1909–1910) Act, 1910 (c. 8), s. 76; *Finance Act*, 1911 (c. 48), s. 13 (1); *Finance Act*, 1920 (c. 18), 38.

703. What securities must be stamped—Foreign securities made or issued in the United Kingdom—Bonds of company issued abroad & resold in England.]—*GRENFELL v. INLAND REVENUE COMRS.*, No. 376, *ante*.

704. — Bond of company issued abroad & exchanged in England for old debenture.]—Under a binding scheme of arrangement for reconstruction the property & assets of an English company were transferred to a new American co. & it was agreed that the debenture-holders of the old co. should receive bonds of the new co. in exchange for their debentures.

The holder of a debenture in England received a circular from the London office of the new co., signed by its London agent, saying: "Your debenture will have to be sent to Chicago to be exchanged there for the new bond. I shall be pleased to forward your debenture to Chicago free of all cost to yourself if you will lodge the same at this office, taking my receipt for the same." The

debenture-holder sent his debenture to the London agent, who sent it to the officials of the new co. in America; a bond of the new co. was transmitted by them to the London agent, who delivered it to the debenture-holder in England:—*Held*: the bond was not "issued," or "offered for subscription & given or delivered to a subscriber," or "assigned or transferred," in the United Kingdom, within Stamp Act, 1891 (c. 39), s. 82 (1) (b).—*CHICAGO RAILWAY TERMINAL ELEVATOR CO. v. INLAND REVENUE COMRS.* (1896), 75 L. T. 572; 45 W. R. 242; 13 T. L. R. 124, C. A.

*Annotations*:—*Distd. Brown v. I. R. Comrs.*, Gordon v. Same (1899), 16 T. L. R. 94. *Refd. Speyer v. I. R. Comrs.* (1902), 66 J. P. 551.

705. — Bearer bonds invalid without indorsement of certificate—Indorsement in England.]—Bonds of a foreign co. payable to bearer were executed by the co. abroad & delivered abroad to a foreign trustee for the bondholders. The bonds were expressed not to be valid for any purpose unless authenticated by the certificate of the trustee. Some of the bonds were sent to England & the trustee having come to England there certified them & delivered them to the persons entitled to them:—*Held*: since the bonds were not marketable till they were certified, the bonds certified in England were "marketable securities" by a foreign co. which were made & issued in the United Kingdom within Stamp Act, 1891 (c. 39), s. 82, (1) (b) (i.), & liable to the stamp duty imposed by that Act upon such securities.—*REVELSTOKE (LORD) v. INLAND REVENUE COMRS.*, [1898] A. C. 565; 67 L. J. Q. B. 855; 79 L. T. 227; 62 J. P. 740; 47 W. R. 210; 14 T. L. R. 525, H. L.; *affg. S. C. sub nom. BARING v. INLAND REVENUE COMRS.*, [1898] 1 Q. B. 78, C. A.

*Annotation*:—*Refd. Brown v. I. R. Comrs.*, Gordon v. I. R. Comrs. (1900), 84 L. T. 71.

706. — Bonds "offered for subscription"—Exchange of bonds under reconstruction scheme.]—A scheme for the reorganisation of an American railway co. was prepared, by which it was proposed that an executive committee should be formed in America to carry out the scheme, that a new co. should be formed in America to take over the undertaking of the old co., & that the new co. should issue new bonds in order to take up the bonds of the old co. & provide further capital for the new co.

The English holders of bonds of the old co. were invited by circular to accept the scheme & to deposit their bonds with named depositaries in London, in exchange for which they would subsequently receive bonds of the proposed new co.

The scheme was carried out. The new co. executed & delivered to the appointed trustee in America the stipulated number of new bearer bonds, which were duly certified by the trustee & then handed to the executive committee. The executive committee had full power to deal with any of the new bonds, by sale, pledge, or otherwise, for the purposes of the scheme & for the uses of the new co., in its discretion & without accountability to the new co.

The new bonds in question were forwarded by the executive committee to the depositaries in London, by whom they were handed to the persons who had deposited bonds of the old co.:—*Held*: the new bonds given to the holders of old bonds in England were neither "issued" nor "offered for subscription" in England within Stamp Act, 1891 (c. 39), s. 82 (1) (b) (i), (ii).—

#### PART IX. SECT. 6, SUB-SECT. 29.

o. What securities must be stamped—"Warrant for goods."—*DISTILLERS CO., LTD. v. INLAND REVENUE COMRS.* (1899), F. (Ct. of Sess.) 737; 36 So. L. R. 538; 6 S. L. T. 366.—*SCOT.*  
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**Sect. 6.—Duties upon particular instruments: Sub-sects. 29 & 30.]**

**BROWN v. INLAND REVENUE COMRS., GORDON v. INLAND REVENUE COMRS. (1900), 84 L. T. 71; 17 T. L. R. 177, C. A.**

**707. — “Instrument to bearer whereby stock is transferred or assigned”—Bond of company issued abroad & exchanged in England for old debenture.]—CHICAGO RAILWAY TERMINAL ELEVATOR Co. v. INLAND REVENUE COMRS., No. 704, *ante*.**

**708. — — — Certificate for debenture stock in foreign railway—Transferable by delivery.]—**A certificate for 4 per cent. debenture stock of a foreign railway certified that applt. was the owner of a certain amount of such stock, & there was indorsed on such certificate a form of transfer signed by applt., the name of the transferee being left in blank. It was admitted that such certificate with the transfer in blank therein were by usage treated as sufficient for the purpose of effecting the sale in the stock markets of the United Kingdom of the stock referred to therein; but such stock was really transferable only in the books of the railway co. upon production of such certificate. The debenture stock was share capital of the railway co., enabling the holder to vote at the election of directors, but it was secured or preferred under a trust deed which enabled the holders of the debenture stock, if the interest on their stock was not duly paid, to take the management of the railway out of the hands of the directors, & vest it in a finance committee elected by themselves:—*Held*: the certificate as indorsed was a marketable security within Finance Act, 1891 (c. 9), s. 4 (1).—**NOAKES v. INLAND REVENUE COMRS. (1900), 83 L. T. 714; 17 T. L. R. 99, D. C.**

*Annotation*:—**Reid. Speyer v. I. R. Comrs., [1907] 1 K. B. 246.**

**709. — — — Reconstruction of company—Certificate for shares in new company.]—**In order to facilitate the reconstruction of a co. certificates for shares in the new co. were given to some London agents, who transferred them to the persons beneficially entitled when called upon:—*Held*: by the assignment of the legal title & appropriation of the shares to the several beneficial owners, these certificates were assigned or transferred within Finance Act, 1891 (c. 9), s. 4.—**SPEYER BROTHERS v. INLAND REVENUE COMRS. (1902), 66 J. P. 551.**

**710. — “Security given in substitution for a like security”—Debenture in English company—Exchange for debenture in new colonial company.]—**Applt. co., incorporated under the laws of Victoria, was formed to take over the assets & liabilities of two existing cos., one of which was a co. registered in England having an issue of debentures. The holders of these debentures by agreement delivered them up, & accepted in lieu thereof debentures of an equivalent amount issued by applt. co.:—*Held*: the debentures of applt. co. were not “given in substitution for a like security” within the meaning of sub-head 4 of the heading “Marketable Security” in schedule I. to Stamp Act, 1891 (c. 39), & were therefore liable to bear stamp duty to the full amount.—**MOUNT LYELL MINING & RY. Co. v. INLAND REVENUE COMRS., [1905] 1 K. B. 161; 74 L. J. K. B. 4; 92 L. T. 134; 53 W. R. 225; 21 T. L. R. 112; 49 Sol. Jo. 117, C. A.**

**711. — Debenture of foreign company.]—**An American railway co., as security for a temporary loan, handed through their agents in England to the lender an instrument which stated that for value received they promised to pay twelve

months after date to the order of themselves the amount named in it. It also contained a statement that it was one of a series, & was secured by a deposit of gold bonds which, or a sufficient amount of their proceeds, were under an existing trust deed to be held in trust for the benefit of the holders of the instruments. The instruments, which had been indorsed before issue, were dealt in upon the London Stock Exchange, but were not officially quoted there:—*Held*: the instrument was not a mere promissory note; it contained a contract that the holder should be entitled to the benefit of the security mentioned in it; it was, therefore, a security for the money lent upon it, & it required to be stamped as a “marketable security” within Stamp Act, 1891 (c. 39), ss. 82 (1) (b), 122.—**BROWN, SHIPLEY & Co. v. INLAND REVENUE COMRS., [1895] 2 Q. B. 598; 64 L. J. M. C. 241; 73 L. T. 377; 11 T. L. R. 585; 39 Sol. Jo. 720; 14 R. 661, C. A.**

*Annotations*:—**Reid. Speyer v. I. R. Comrs., [1907] 1 K. B. 246; Midland Bank v. I. R. Comrs., [1927] 2 K. B. 465.**

**712. — Foreign treasury note—Promise to pay on date specified.]—SPEYER BROTHERS v. INLAND REVENUE COMRS., No. 390, *ante*.**

**713. — Debenture charged on ships—Equitable interests.]—**A co. gave legal mtges., duly registered, of three steamships to trustees for debenture-holders as a security for sums to be borrowed on the issue of debentures. The trustees also executed a debenture trust deed in the usual form. Debentures were then issued, in each of which the co. covenanted to pay the registered holder thereof the amount for which it was issued, & did “hereby charge” with the payment of such sum the three steamships:—*Held*: the substance of the transaction was the creation of negotiable securities, & a debenture, one of the above-mentioned issue, although incidentally it gave the holder the benefit of the registered charge under the trust deed, was not an instrument for the sale, transfer, or other disposition of any interest in any ship within the second of the “General Exemptions from all Stamp Duties” in schedule I. to Stamp Act, 1891 (c. 39), but was liable to duty under the head of “Marketable Security” in the same schedule. *Qu*: whether the second exemption has any application to an “equitable interest.”—**DEDDINGTON S.S. Co., LTD. v. INLAND REVENUE COMRS., [1911] 2 K. B. 1001; 81 L. J. K. B. 75; 105 L. T. 482; 18 Mans. 373, C. A.**

**714. Amount of duty—Dependent on money secured—Debenture—Undertaking to repay principal moneys & premium.]—**A co. issued a series of debentures of £100 each, each debenture containing an undertaking by the co., to pay to the registered holder upon a specified date “the sum of £100 together with a premium thereon at £7 10s.” The debentures were marketable securities not transferable by delivery within Stamp Act, 1891 (c. 39), sched. I.:—*Held*: each debenture was a security for the payment by the co., of £107 10s. the amount of the principal & the premium & was therefore liable to *ad valorem* stamp duty upon that amount.—**ROWELL v. INLAND REVENUE COMRS., [1897] 2 Q. B. 194; 66 L. J. Q. B. 528; 13 T. L. R. 324; 41 Sol. Jo. 407, D. C.**

*Annotation*:—**Reid. Knights Deep v. I. R. Comrs., [1900] 1 Q. B. 217.**

**715. — — — Option to redeem at premium.]—**A limited co. issued a series of debentures for £100 each redeemable at par by annual drawings on & after July 1, 1902. Each debenture contained a stipulation that the co. might, at any time after July 1, 1900, on giving six months’ previous notice in writing to the registered ‘ ‘



redeem the debenture at £103 which sum, at the expiration of the six months, should become payable, as if the same were the amount of the principal moneys thereby secured:—*Held*: *ad valorem* stamp duty was chargeable on each debenture under the head of "Marketable Security" in sched. I. to Stamp Act, 1891 (c. 39), upon £100 only, as being the "money secured" by the debenture within the meaning of the sched. —*KNIGHTS DEEP, LTD. v. INLAND REVENUE COMRS.*, [1900] 1 Q. B. 217; 69 L. J. Q. B. 66; 81 L. T. 625; 48 W. R. 198; 18 T. L. R. 68; 44 Sol. Jo. 99, C. A.

## SUB-SECT. 30.—MORTGAGES, ETC.

See Stamp Act, 1891 (c. 39), ss. 86–89, & sched. I.; Revenue Act, 1903 (c. 46), s. 7; & generally, *MORTGAGE*, Vol. XXXV., pp. 314–318.

**716. Security by way of mortgage—Conveyance to creditors generally.**—By a deed of assignment, five persons conveyed all their crops, goods & effects to trustees, in trust to sell, & with the proceeds to be produced by such sale, to discharge first, debts due to the trustees, with interest from the date of the deed; then debts due to other creditors, with a resulting trust as to the residue to the parties conveying:—*Held*: such deed did not require an *ad valorem* stamp, as upon a "conveyance" or "mtge." under Stamp Act, 1815 (c. 184), Sched. Part I., as the former clause operated only as to actual sales between vendor & vendee; & it fell within the exception in the latter, viz: "where such conveyance shall be made for the benefit of creditors generally" & therefore a common deed stamp was sufficient. —*COATES v. PERRY* (1821), 3 Brod. & Bing. 48; 6 Moore, C. P. 188; 129 E. R. 1200.

**717. — Conveyance for benefit of creditors exceeding five in number—Deed of lease & release & accompanying deed of trust.**—Where, by deeds of lease & release, & an accompanying deed of trust, property is conveyed for the benefit of creditors exceeding five, the whole forming but one assurance, an *ad valorem* stamp is not requisite, as they fall within the exception in Stamp Act, 1815 (c. 184), Sched. Part I., Title Mortgage. —*HUDSON v. REVERT* (1829), 5 Bing. 368; 2 Moo. & P. 663; 7 L. J. O. S. C. P. 145; 130 E. R. 1103.

*Annotations*:—*Mentl. Hibblewhite v. M'Morine* (1840), 6 M. & W. 200; *West v. Steward* (1845), 14 M. & W. 47; *Cherry v. Henning & Needham* (1849), 19 L. J. Ex. 63; *Fazakerly v. M'Knight* (1856), 26 L. J. Q. B. 30; *Tupper v. Foulkes* (1861), 9 C. B. N. S. 797; *Soc. Générale de Paris v. Tramways Union Co.* (1884), 14 Q. B. D. 424; *Powell v. London & Provincial Bank*, [1893] 2 Ch. 555; *Crediton (Bp.) v. Exeter (Bp.)*, [1905] 2 Ch. 455; *Rudd v. Bowles*, [1912] 2 Ch. 60; *Re Seymour, Fielding v. Seymour*, [1913] 1 Ch. 475.

See, now, Stamp Act, 1891 (c. 39), s. 86 (1) (c).

**718. — Security for repayment of money to be thereafter lent, advanced or paid—Assignment of personality to indemnify surety on bond.**—Where A. had entered into a bond as surety for B., & B., by a deed assigned personal property to A. for the purpose of indemnifying him against any liability by reason of his having become surety for B. in the bond:—*Held*: the deed required an *ad valorem* stamp as a "security for the repayment of money to be thereafter lent, advanced or paid" within Stamp Act, 1815 (c. 184), sched. "Mortgage." —*CANNING (LORD) v. RAPER* (1852), 1

E. & B. 164; 22 L. J. Q. B. 87; 20 L. T. O. S. 218; 17 Jur. 390; 118 E. R. 400.

*Annotations*:—*Apld. Mutual Property Insee. v. I. R. Comrs.* (1926), 136 L. T. 354. *Reid. Underground Elec. Ry. of London v. I. R. Comrs.*, [1905] 1 K. B. 174; *Underground Elec. Rys. of London & Glyn, Mills, Currie v. I. R. Comrs.*, [1916] 1 K. B. 306.

**719. — Trust deed for securing debenture stock.**—A limited co. issued in 1892 £500,000 4 per cent. debenture stock, secured by a trust deed duly stamped, by which freehold & leasehold property of the co. were conveyed to trustees to secure payment of the amount of the stock & interest as provided for by the deed. By a subsequent trust deed for securing debenture stock made in 1897, the trustees of which were the same as those of the deed of 1892, after reciting that the £500,000 debenture stock was still outstanding & that the co. were intending to issue further irredeemable 3½ per cent. debenture stock, it was provided (*inter alia*) that the amount of stock to be issued was limited in the first instance to £300,000, the co. acknowledging in the deed that they were indebted to the trustees in that sum carrying interest at 3½ per cent. *per annum*; that the co. should be at liberty to issue further irredeemable 3½ per cent. debenture stock not exceeding £540,000, making a total of £840,000 but only for the purpose of redeeming or paying off the £500,000 4 per cent. stock at the rate of not more than £108 of the new stock for every £100 of the stock redeemed or paid off:—*Held*: in respect of the £540,000 as well as the £300,000, the deed of 1897 was chargeable with the *ad valorem* duty specified in sched. I. to Stamp Act, 1891, under the heading "Mortgage, Bond, Debenture, Covenant," & not being an "additional" or "substituted" security within the meaning of those words in the sched., it was chargeable with the full duty of 2s. 6d. per cent.

I am of opinion that the deed of 1897 is not a "transfer" of the deed of 1892, nor is it a security by way of further charge, & it does not therefore come within the meaning of sect. 87 (3) of the Stamp Act (A. L. SMITH, L.J.). —*CITY OF LONDON BREWERY CO. v. INLAND REVENUE COMRS.*, [1899] 1 Q. B. 121; 68 L. J. Q. B. 62; 79 L. T. 648; 47 W. R. 216; 15 T. L. R. 49; 43 Sol. Jo. 61, C. A. *Annotations*:—*Reid. Mount Lyell Mining & Ry. v. I. R. Comrs.*, [1904] 1 K. B. 757; *Underground Elec. Rys. of London & Glyn, Mills, Currie v. I. R. Comrs.*, [1916] 1 K. B. 306.

**720. — — — — —**—By a trust deed made between a joint-stock company & trustees for the debenture holders, the former stipulating that they might redeem the debenture stock after having given certain notice covenanted that after giving such notice they would redeem at nominal value, plus 10 per cent. By further clauses of the deed certain freeholds & leaseholds were assured to the trustees to secure payment of all principal moneys, bonuses, & interest which might become payable in respect of the debenture stock, & a floating charge on all the co.'s property was created for the same purpose. There was a clause giving the co. power to withdraw any of the freeholds or leaseholds assured to the trustees & substitute other property of equal value. By a subsequent indenture a small part of the leaseholds so assured was withdrawn & other leaseholds belonging to the co. assured to the trustees to be held on the trusts of the earlier indenture. This second indenture contained no covenant for payment of the

## PART IX. SECT. 6, SUB-SECT. 30.

*p. Letter of hypothecation.*—*SRORE-TARY TO THE COMR. OF SALT, ABKARI & SEPARATE REVENUE, REVENUE*

*q. Certificate in form of debenture.*—*Re RANGOON GYMKHANA CLUB* (1926), 1 L. R. 4 Rad. 456.—*IND.*

*r. Security for future advances—Unlimited amounts.*—*O'SULLIVAN v. LOUGHAN*, [1927] 1 R. 493.—*IR.*

*t. Avoidance of ad valorem*



**Sect. 6.—Duties upon particular instruments: Sub-sects. 30, 31, 32, 33 & 34.]**

debenture principal money or interest, & no express declaration of the trusts on which the property assured was to be held:—*Held*: the second indenture was a "mortgage" within Stamp Act, 1891 (c. 39), s. 86 (1), & a "substituted security" within sched. I. & heading "Mortgage, Bond, Debenture, Covenant" of that Act, & therefore the Comrs. of Inland Revenue were right in holding that the stamp duty was to be calculated at the rate of 6d. per £100, on the whole principal money of the debenture stock.—*GARTSIDES (BROOKSIDE BREWERY), LTD. v. INLAND REVENUE COMRS. (1900)*, 82 L. T. 686; 16 T. L. R. 378, D. C.

**721. — Agreement to execute mortgage when required.]**—A limited co., by deed, in consideration of £373,000 then advanced to them by a building society, agreed to execute, whenever called upon by the society, a mtge. or charge, in such form as the society should request, of all the co.'s interest in certain hereditaments to secure the repayment of the sum advanced with interest. A receiver was appointed by the deed to receive the rents & profits so long as any money remained due to the society; but there was a provision that he was not to enter into possession of such rents & profits until default should be made in payment of the principal & interest:—*Held*: this instrument was chargeable with *ad valorem* stamp duty under the head "Mortgage, Bond, Debenture, Covenant," in sched. I. to Stamp Act, 1891 (c. 39).—*UNITED REALIZATION CO. v. INLAND REVENUE COMRS.*, [1899] 1 Q. B. 361; 68 L. J. Q. B. 218; 79 L. T. 556; 47 W. R. 381; 43 Sol. Jo. 153, D. C.

**722. — No money advanced at time of execution.]**—*SUFFIELD (LORD) v. INLAND REVENUE COMRS.*, No. 432, *ante*.

**723. — Second mortgage containing covenant to pay amount secured by first mortgage.]**—A second mtge. of freehold property subject to an existing first mtge. contained a covenant by the borrower to pay by instalments (a) a sum equivalent to the amount of the loan, the subject of the first mtge., (b) a sum equivalent to the amount of the loan the subject of the second mtge., & (c) a sum equivalent to the interest on the amounts remaining unpaid under both mtges. There was a proviso for redemption on payment of the amount of the second mtge. & interest thereon. The first mtge. had been duly stamped with the appropriate duty on the amount thereby secured:—*Held*: the second mtge. was liable to stamp duty in the aggregate of the two sums secured by the two mtges., the covenant contained in the second mtge. to pay the amount secured by the first mtge. being an additional covenant made with a different covenantor.—*MUTUAL PROPERTY INSURANCE CO., LTD. v. INLAND REVENUE COMRS. (1926)*, 136 L. T. 354.

**724. Security for further advances—Trust deed to secure debentures.]**—*CITY OF LONDON BREWERY CO. v. INLAND REVENUE COMRS.*, No. 719, *ante*.

**725. "Declaration or deed for defeating or making redeemable or qualifying any covenant intended as security for money"—Surrender of copyholds to mortgagee—Collateral deed of covenant.]**—An indenture recited, that, in consideration of £400, part of £500 agreed to be advanced by pltf. to deft., paid to S., R., & P., by pltf., in discharge of all principal & interest owing to

them as mtgees., by virtue of a certain other surrender, they, S., R., & P., surrendered into the hands of the lord certain lands, to the intent that the lord might regrant the same to pltf., in trust to sell the same, & retain the sum of £500. The indenture then stated, that deft. covenanted with pltf. to pay him the sum of £500, with interest, on a certain day, & that, in default of payment, pltf. might enter upon & enjoy the land. The indenture was stamped with two stamps, of £1 15s. & £1 5s.:—*Held*: this was not "a declaration or deed for defeating or making redeemable or qualifying any covenant, etc., intended as a security for money," within the meaning of that clause in Stamp Act, 1815 (c. 184), sched., Part. I., "Mortgage," but a mere declaration of trust of the second surrender; & it did not require an *ad valorem* stamp.—*HAYWOOD v. BIBBY (1843)*, 1 Dow. & L. 290; 11 M. & W. 812; 12 L. J. Ex. 404; 1 L. T. O. S. 316; 152 E. R. 1032.

*See, now, Stamp Act, 1891 (c. 39), s. 86 (1) (d).*

**726. Equitable mortgage—Memorandum of authority to distrain.]**—The following document was given in evidence by deft. in replevin, in support of his right to distrain as bailiff of J.: "I, J., of, etc., having, on Oct. 7, 1843, borrowed from P. (def't.) £300, did then pledge with him certain title deeds of houses in T., in order to secure to him £300 with interest. I did then authorise P. to receive the rents of the houses during my right & interest therein; & I hereby confirm & make valid all acts, distresses, etc., particularly a distress on W. (pltf.), tenant of one of the houses, by P., & other proceedings made or taken, or to be made or taken, by P., to the end that the rents & profits of the houses may be received & taken by P. during all my estate & interest. (Signed) J.":—*Held*: this document did not require a stamp, either as an agreement accompanied with a deposit of title deeds for making a mtge. or as an authority to distrain, or as an agreement.—*PYLE v. PARTRIDGE (1846)*, 15 M. & W. 20; 15 L. J. Ex. 129; 153 E. R. 744.

**727. Grant of perpetual annuity—In consideration of sum paid by way of purchase.]**—*MERSEY DOCKS & HARBOUR BOARD v. INLAND REVENUE COMRS.*, No. 665, *ante*.

**728. "Collateral or auxiliary or additional or substituted security"—Trust deed for securing debentures.]**—*CITY OF LONDON BREWERY CO. v. INLAND REVENUE COMRS.*, No. 719, *ante*.

**729. — — —.]**—*GARTSIDES (BROOKSIDE BREWERY), LTD. v. INLAND REVENUE COMRS.*, No. 720, *ante*.

**730. — — —.]**—A limited co., upon the issue of debenture stock, by deed entered into with trustees for the holders of the stock, acknowledged that the co. was indebted to the trustees to the amount of the stock, & agreed to convey to the trustees certain freehold property, not at the time in the possession of the co., & power was given to the trustees to enforce payment by foreclosure. The co. subsequently acquired the property & conveyed it to the trustees upon the trusts & purposes & subject to the provisions of the trust deed. Stamp duty was paid on the trust deed under sched. I. to Stamp Act, 1891 (c. 39), title "Mortgage," etc., clause 2, on the amount of the debenture stock. The comrs. assessed the duty on the second deed under the same schedule, clause 2, at 6d. per cent. on the amount of the debenture stock:—*Held*: the deed of conveyance was liable, to the

A mtge. does not escape *ad valorem* duty as a collateral mtge. under Finance Act, 1916, Sched. 3, unless

there is a primary or principal mtge. duly stamped with *ad valorem* duty under Finance Act, 1916.—*HALL v.*

MINISTER OF STAMP DUTIES, [1925] N. Z. L. R. 360.—N.Z.

duty assessed by the comrs. as a mtge., "being an auxiliary security or by way of further assurance" for the repayment of money "where the principal or primary security is duly stamped."—*BRITISH OIL & CAKE MILLS, LTD. v. INLAND REVENUE COMRS.*, [1903] 1 K. B. 689; 72 L. J. K. B. 312; 88 L. T. 526; 67 J. P. 145; 51 W. R. 388; 19 T. L. R. 262, C. A.

**731. Transfer of security—Stamp Act, 1891 (c. 39), s. 87 (3), & Sched.]—***CITY OF LONDON BREWERY CO. v. INLAND REVENUE COMRS.*, No. 719, *ante*.

**732. Reconveyance, release, discharge, surrender—Acknowledgment by trustees indorsed on debenture—Stamp Act, 1891 (c. 39), Sched., Mortgage sub-head (5).]**—*FIRTH & SONS, LTD. v. INLAND REVENUE COMRS.*, No. 740, *post*.

**733. — Conveyance of equity of redemption.]—***WAGNER v. WASHBOURNE* (1847), 9 L. T. O. S. 270.

**Security for uncertain & indefinite amount.]—***See* MORTGAGE, Vol. XXXV., pp. 316, 317, Nos. 620–625.

**Stamps on discharge of mortgage.]—***See* MORTGAGE, Vol. XXXV., p. 615.

**Stamps on assignment of mortgage.]—***See* MORTGAGE, Vol. XXXV., p. 385, Nos. 1277, 1278.

**Stamps on foreclosure.]—***See* MORTGAGE, Vol. XXXV., p. 585, Nos. 3225–3228.

**As to stamps on building societies' mortgages.]—***See* BUILDING SOCIETIES, Vol. VII., pp. 483–485.

#### SUB-SECT. 31.—NOTARIAL ACTS.

*See* Stamp Act, 1891 (c. 39), s. 90, Sched.; NOTARIES, Vol. XXXVI., p. 151, No. 82.

#### SUB-SECT. 32.—PARTITION.

*See* Stamp Act, 1891 (c. 39), s. 73, & sched. I.; PARTITION, Vol. XXXVI., p. 306, No. 43.

#### SUB-SECT. 33.—PROXIES.

*See* Stamp Act, 1891 (c. 39), s. 80, sched. I.

**Proxies under local Acts.]—***See* AGENCY, Vol. I., pp. 294, 295, Nos. 229, 230.

**Proxies under Companies Act.]—***See* COMPANIES, Vol. IX., pp. 576, 577, Nos. 3838, 3839, 3848, 3849.

#### SUB-SECT. 34.—RECEIPTS.

*See* Stamp Act, 1891 (c. 39), ss. 101–103, & sched.; Finance Act, 1895 (c. 16), s. 9; Finance Act, 1920 (c. 18), s. 34; Finance Act, 1924 (c. 21), s. 36.

**734. What must be stamped—Any document**

#### PART IX. SECT. 6, SUB-SECT. 34.

**734 i. What must be stamped—Any document operating as receipt.]—**A document renewing a policy of insurance is not a fresh policy, but merely a receipt, & as such requires a penny stamp.—*KENNEDY v. MACMAHON* (1889), 3 Q. L. J. 119.—**AUS.**

**734 ii. —**—An acknowledgment that promissory notes have been given for a debt must be stamped as a receipt.—*LOMAX v. CROTHERS* (1894), 20 V. L. R. 292.—**AUS.**

**734 iii. —**—*A-G. v. AUSTRALIAN JOINT STOCK BANK, LTD.* (1894), 15 N. S. W. L. R. 240; 11

N. S. W. W. N. 46.—**AUS.**

**734 iv. —**—Stamp duty is payable on a duplicate receipt.—*McMANAMNY v. GOODWIN* (1901), 27 V. L. R. 566.—**AUS.**

**734 v. —**—*D'EMDEN v. PEDDER* (1904), 1 C. L. R. 91.—**AUS.**

**734 vi. —**—On receipt of a cheque for £2 12s. 6d. on account of a debt of £5 5s. deft. wrote on the butt of the cheque book "balance due £2 12s. 6d." & signed his name. The next day he gave a duly stamped receipt.—*Held*: the writing on the butt of the cheque was a receipt within Stamp Duties Act, 1898, & should be

operating as receipt.]—*SPAWFORTH v. ALEXANDER*, No. 764, *post*.

**735. — Bill marked settled.]—***SPAWFORTH v. ALEXANDER*, No. 764, *post*.

**736. —**—A bill of parcels, on which was written, "Settled by one bill at three & another at nine months," is not admissible in evidence, unless it is stamped.—*SMITH v. KELBY* (1803), 4 Esp. 249; 170 E. R. 708, N. P.

*Annotation*:—*Expld.* *Millen v. Dent* (1847), 10 Q. B. 846.

**737. — Receipt on instrument liable to stamp duty—Receipt annexed to bond.]—**Where indorsements of receipts on a bond have left no blank space for receipts of subsequent payments to be written upon, such receipts written on an unstamped piece of paper, annexed to the bond, may be read in evidence.—*ORME v. YOUNG* (1815), as reported in 4 Camp. 336; 171 E. R. 107, N. P.

*Annotations*:—*Mentd.* *Goring v. Edwards* (1829), 6 Bing. 94; *Combe v. Woolf* (1832), 8 Bing. 156; *Howell v. Jones* (1834), 4 Tyr. 548; *Bailey v. Edwards* (1864), 4 B. & S. 761.

**738. — Receipt on agreement.]—**The following document, stamped as an agreement, was held admissible in evidence, without a receipt stamp: "I have received your cheque for £391 10s. 3d., being the payment for an overdue bill & interest, in the hands of D.: & I hereby undertake to procure & hand the said bill over to you."—*VON DADELSZEN v. SWANN* (1850), 5 Exch. 825; 20 L. J. Ex. 50; 155 E. R. 361.

**739. — Receipt for future payment indorsed on scrip certificate.]—**A scrip certificate duly stamped stated that the bearer was entitled to £100 stock of the Cape of Good Hope after payment of two several sums of £40 at specified dates. Receipts were indorsed on the certificate applicable to the payment of the two instalments at the specified dates:—*Held*: the receipts acknowledged the receipt of the consideration money expressed in the certificate on which they were indorsed, & were exempt from duty under title "Receipts," exemption 11, in the sched. to Stamp Act, 1891 (c. 39).—*LONDON & WESTMINSTER BANK v. INLAND REVENUE COMRS.*, [1900] 1 Q. B. 166; 69 L. J. Q. B. 102; 81 L. T. 630; 48 W. R. 195; 16 T. L. R. 106; 44 Sol. Jo. 117, C. A.

**740. — Acknowledgment of redemption indorsed on trust deed.]—**On an indenture securing redeemable debenture stock an instrument was indorsed, which was signed by the trustees for the debenture-holders, acknowledging that all the debenture stock secured by the within written indenture & all interest thereon had been redeemed, paid off, & satisfied:—*Held*: this was not a "discharge" within the meaning of that term in sub-heading 5 of the heading "Mortgage" in the schedule to the Stamp Act, 1891 (c. 39), & it was therefore not chargeable with *ad valorem* duty, but it was merely a receipt, & being indorsed on a duly stamped instrument it was exempt from duty under the eleventh exemption to the heading "Receipt" in the same schedule.—*FIRTH & SONS*,

stamped.—*CLOUGH v. COX* (1907), 7 S. R. N. S. W. 210; 24 N. S. W. W. N. 42.—**AUS.**

**734 vii. —**—*WILLIS v. ONGLEY* (1915), 34 N. Z. L. R. 967.—**N.Z.**

**734 viii. —**—*ALLAN v. MURRAY* (1837), 15 Sh. (Ct. of Sess.) 1130; 12 Fac. Coll. 1054.—**SCOT.**

**734 ix. —**—*TODD v. WOOD* (1897), 24 R. (Ct. of Sess.) 1104; 34 Sc. L. R. 815; 5 S. L. T. 98.—**SCOT.**

**734 x. —**—*DAY v. GLAISTER* (1900), 2 F. (Ct. of Sess.) 963; 37 Sc. L. R. 736; 8 S. L. T. 55.—**SCOT.**

**Sect. 6.—Duties upon particular instruments: Subsects. 34 & 35.]**

**LTD. v. INLAND REVENUE COMRS.**, [1904] 2 K. B. 205; 73 L. J. K. B. 632; 91 L. T. 138; 52 W. R. 622; 20 T. L. R. 447; 48 Sol. Jo. 460.

**741. — Acknowledgment of receipt of bill of exchange—From father of bastard—Stating freedom from liability when paid.]—WATKINS v. HEWLETT**, No. 522, *ante*.

**742. — Accounts—Successive acknowledgments of payments—Entered when payments made.]—The evidence was properly rejected. It appears from the paper that the acknowledgments were made at successive times upon the payment of the money; & therefore, under the general words used in the Act of Parliament they require to have been stamped. The case of an account current is different. There the sums stated to be received are not written in to the account at & upon the receipt of the money, but long after, & only amount to admissions of money received at an antecedent time (*per* CUR.).—WRIGHT v. SHAWCROSS** (1819), 2 B. & Ald. 501, n.; 106 E. R. 449.

**Annotations:—***Refd.* R. v. Overton (1854), 18 Jur. 134. *Mentd.* Hawkes v. Salter (1828), 4 Bing. 715.

**743. — Acknowledgment of correctness.]—An acknowledgment of the correctness of an account does not require a receipt stamp.—WELLARD v. MOSS** (1823), 1 Bing. 134; 7 Moore, C. P. 503; 1 L. J. O. S. O. P. 18; 130 E. R. 55.

**744. — Memorandum of accounts delivered.]—Where the evidence of payments consisted of memoranda of accounts delivered to the tenant, in which the items in question were set down, & to each of which was written by the landlord the word "paid":—*Held*: such memoranda, were admissible, without a stamp, when coupled with entries in the steward's books to the same effect.—CLARK v. HOUGHAM** (1823), as reported in 3 Dow. & Ry. K. B. 322.

**Annotations:—***Mentd.* A'Court v. Cross (1825), 11 Moore, C. P. 198; Gibbs v. Guild (1882), 46 L. T. 248.

**745. — Memorandum of having settled accounts—Statement of intention to give receipt.]—A paper in the following form, signed by the party, "Memorandum, Apr. 30, 1836, Settled all accounts of law business up to this day, & will give a receipt in full of all demands when called for, (signed) T."; stamped with an agreement stamp, is receivable in evidence without a receipt stamp.—TEBBUTT v. AMBLER** (1839), 9 C. & P. 60, N. P.

**Annotations:—***Distd.* Livingston v. Whiting (1850), 19 L. J. Q. B. 528. *Refd.* Matheson v. Ross (1849), 2 H. L. Cas. 286.

**746. — Balance struck.]—PAGE v. CURLEWIS** (1845), 4 L. T. O. S. 339.

**747. — ]—In an action by S., a coal merchant, against his clerk, to recover the amount of money received & not accounted for, pltf. having proved an admission by deft. on Aug. 15, that a sum of £12 was due, the latter offered in evidence an unstamped receipt, of a subsequent date, for a larger amount. This being rejected, deft. gave in evidence a memorandum on the back of the same paper, written and signed by pltf. as follows:—"Balanced up to this day, as per cash-book. S., Nov. 19":—*Held*: this memorandum did not require a receipt stamp, & was properly admitted, without producing, & without notice to produce, the cash book to which it referred, which was in pltf.'s possession.—FINNEY v. TOOTELL** (1848), 5 C. B. 504; 3 New Pract. Cas. 40; 17 L. J. O. P. 158; 10 L. T. O. S. 393; 12 Jur. 291; 136 E. R. 975.

**748. — Entries in account book initialled**

**as paid—Marked as "received."—A solr. was employed by a bank under an agreement whereby he was appointed an officer of the bank upon the terms that he was to be paid a salary, & to be provided with an office, stationery, & staff of clerks, & was to devote his whole time to the conduct of the legal business of the bank. The solr. from time to time sued for & recovered sums of money due to the bank. As each sum was recovered he entered the amount in an account book, & then in accordance with his duty handed over the money to the secretary or cashier of the bank, who wrote against the entry in the account book his initials & the date on which the money was handed over to him, in some instances adding the word "received." The account book was the property of the solr. & remained in his possession:—*Held*: as the initialling of the entries in the account book, whether with the addition of the word "received" or not, was intended as an acquittance of the solr. in respect of the money handed over by him, the entries so initialled constituted "receipts" within Stamp Act, 1891 (c. 39), s. 101, & required to be stamped, none the less because the solr. was a servant of the bank on whose behalf he had received the money, & the acknowledgment of the receipt of the money from him was given by a fellow servant.—A-G. v. CARLTON BANK**, [1899] 2 Q. B. 158; 68 L. J. Q. B. 788; 81 L. T. 115; 63 J. P. 629; 47 W. R. 650; 15 T. L. R. 380.

**Annotations:—***Refd.* General Council of the Bar, England v. I. R. Comrs., [1907] 1 K. B. 462. *Mentd.* City of London Electric Lighting Co. v. London Corpn. (1901), 65 J. P. 563.

**749. — Written acknowledgment used to refresh memory as to payment.]—A witness called to prove the receipt of a sum of money, was shown an acknowledgment of the receipt of such money signed by himself; & on seeing it said that he had no doubt he had received it, although he had no recollection of the fact:—*Held*: this was sufficient parol evidence of the payment of the money, & the written acknowledgment having been used to refresh the memory of the witness, & not as evidence of the payment, did not require any stamp.—MAUGHAM v. HUBBARD** (1828), 8 B. & C. 14; 2 Man. & Ry. K. B. 5; 6 L. J. O. S. K. B. 229; 108 E. R. 948.

**Annotation:—***Mentd.* Hill v. Barry (1842), 7 Jur. 10.

**750. — Settlement & discharge.]—LUCAS v. JONES**, No. 525, *ante*.

**751. — ]—Debt for ironwork sold & delivered. Plea: payment. Deft., in support of the plea, offered in evidence an unstamped document signed by pltf.s, in these words: "Memorandum. That any demand we may have against W." (deft.) "for ironwork, etc., is this day settled & discharged in consideration of services rendered by him to us. N.B. Particulars of our account shall be delivered with a stamp receipt":—*Held*: the document was not admissible for this purpose without a receipt stamp.—LIVINGSTONE v. WHITING** (1850), 15 Q. B. 722; 19 L. J. Q. B. 528; 15 L. T. O. S. 279; 15 Jur. 147; 117 E. R. 632.

**Annotations:—***Refd.* Laycock v. Pickles (1863), 4 B. & S. 497. *Mentd.* Holland v. Russell (1861), 1 B. & S. 424.

**752. — Banker's receipt for money to be accounted for.]—An acknowledgment by a banker of the receipt of money paid as deposit by an allottee of shares in a joint stock co., does not require a stamp.—CLARKE v. CHAPLIN** (1847), 1 Exch. 26; 5 Ry. & Can. Cas. 294; 16 L. J. Ex. 246; 9 L. T. O. S. 512; 154 E. R. 11; *subsequent proceedings, sub nom.* CHAPLIN v. CLARKE (1849), 4 Exch. 403, Ex. Ch.

**Annotation:—***Mentd.* Chaplin v. Clarke (1849), 4 Exch. 403.

753. —.]—CHAPLIN *v.* CLARKE, No. 596, *ante*.

**Counsel's briefs.**—See BARRISTERS, Vol. III., pp. 333, 334, Nos. 231, 232.

754. **Admissibility of unstamped receipt—Receipt containing collateral matter.**—A receipt for the price of a horse containing a warranty of soundness may be read in evidence to prove the warranty, without an agreement stamp.—SKRINE *v.* ELMORE (1810), 2 Camp. 407; 170 E. R. 1199, N. P.

—.]—See, also, EVIDENCE, Vol. XXII., pp. 262 *et seq.*

#### SUB-SECT. 35.—SETTLEMENTS.

See Stamp Act, 1891 (c. 39), ss. 107–109, sched.

755. **Definite & certain sum of money—13 & 14 Vict. c. 97, sched.—Settlement of policy of insurance.**—The assignment to trustees of a marriage settlement of a policy of insurance effected on the settlor's life for a sum named, & all moneys assured or to become payable by or under the policy, is not liable to the payment of *ad valorem* duty under above Act, sched. "Settlement," as being a deed whereby any definite & certain principal sum of money is settled.—SANVILLE *v.* INLAND REVENUE COMRS. (1854), 10 Exch. 159; 2 C. L. R. 1242; 23 L. J. Ex. 270; 156 E. R. 397; *sub nom.* *Re* STAMP DUTY PAYABLE UPON A DEED OF SETTLEMENT, SANVILLE *v.* INLAND REVENUE COMRS., 23 L. T. O. S. 223; *sub nom.* SAINVILLE *v.* INLAND REVENUE COMRS., 2 W. R. 529.

**Annotations.**—*Expld.* *Re* Alsager's Settmt. & I. R. Comrs. (1864), 2 H. & C. 969. *Re* Mortimore *v.* I. R. Comrs. (1864), 2 H. & C. 838.

756. — Foreign bonds & stock.]—(1) Brazilian & other foreign bonds are "definite & certain sums of money" within above Act.

(2) Indian stock is Govt. or Parliamentary stock within above Act, although created subsequently to its passing.

(3) A deed of settlement comprising such foreign bonds & Indian stock was assessed & charged with *ad valorem* duty in respect thereof:—*Held*: it was rightly so charged.—*Re* ALSAGER'S SETTLEMENT & INLAND REVENUE COMRS. (1864), 2 H. & C. 969; 3 New Rep. 651; 10 L. T. 238; 10 Jur. N. S. 828; 12 W. R. 477; 159 E. R. 401; *sub nom.* ALSAGER & GUIDICI *v.* INLAND REVENUE COMRS., 33 L. J. Ex. 161.

757. — Money to be laid out in land—Land purchased with trust funds—Trust for conversion.]—By arts. of settlement it was recited that part of the property to be settled consisted of lands purchased, under a power, to the amount of £52,000, out of trust moneys subject to an earlier settlement, & held by trustees on trust for sale, & in the meantime to be considered in equity as

money, & as well as the proceeds of sale to be subject to the trusts of the settlement; & it was agreed that the property should be settled, & as to the lands, without prejudice to the trust for sale, upon certain trusts, with a proviso that if, when the property, which was subject to a life estate, should become subject in possession to the trusts of the settlement to be executed, the lands should not have been sold, the trustees might with the consent of the husband & wife, or the survivor, & afterwards at their own discretion, accept a conveyance of them in lieu of the trust moneys, upon the like trusts for sale, such power of sale not to be exercised during the lives of the husband & wife & the survivor, without their, his, or her consent:—*Held*: the arts. were not, under above Act, sched. "Settlement," subject to an *ad valorem* stamp duty on the £52,000, as a definite & certain principal sum to be laid out in the purchase of lands.—*Re* STUCLEY'S SETTLEMENT (1870), L. R. 5 Exch. 85; 39 L. J. Ex. 86; *sub nom.* STUCLEY *v.* INLAND REVENUE COMRS., 21 L. T. 718; 18 W. R. 462.

See, now, Stamp Act, 1891 (c. 39), ss. 107, 109, sched.

758. **Settlement under order of court.**—An order of the ct. making a settlement should bear the usual settlement stamp.—*Re* GOWAN, GOWAN *v.* GOWAN (1880), as reported in 17 Ch. D. 778.

**Annotations.**—*Mentd.* *Re* Parrott, Walter *v.* Parrott (1886), 55 L. T. 132; *Re* Galsworthy, Galsworthy *v.* Galsworthy, [1922] 2 Ch. 558.

759. **Contingent reversionary interest—Trustees with power to vary investments.**—A settlement of contingent reversionary interests in certain specified amounts of stock which were vested in trustees with power to vary the securities, is liable to an *ad valorem* duty under Stamp Act, 1870 (c. 97), sched. (now Stamp Act, 1891 (c. 39), sched.).—ONSLOW *v.* INLAND REVENUE COMRS., [1891] 1 Q. B. 239; 60 L. J. Q. B. 138; 64 L. T. 211; 39 W. R. 373; 7 T. L. R. 149, C. A.

**Annotations.**—*Consd.* Underground Elec. Rys. of London & Glyn, Mills, Currie *v.* I. R. Comrs., [1914] 3 K. B. 210. *Re* Underground Elec. Rys. of London *v.* I. R. Comrs. (1904), 91 L. T. 141.

760. **Several instruments for settling same property—Containing power of revocation & re-settlement—Stamp Act, 1891 (c. 39), s. 106 (1)—Whether "instrument of appointment relating to property of persons named."**—By a settlement funds were to be held by trustees on certain specified trusts for the benefit of the settlor's children. The settlement contained a provision that the trustees might at the request of any of the children revoke the trusts concerning that child's settled share & resettle that share for the benefit of a certain specified class of persons. *Ad valorem* duty was paid on that settlement under Stamp Act, 1891 (c. 39), sched. I., head "Settlement." Subsequently, at the request of

#### PART IX. SECT. 6, SUB-SECT. 35.

a. **Dutiable transfers of land—To carry out agreements between tenants in common.**—WISSEMAN *v.* COLLECTOR OF IMPOSTS (1896), 21 V. L. R. 743.—AUS.

b. — Whether actual value or face value of property considered.]—*Re* TWO-PENNY, *Ex p.* COLLECTOR OF IMPOSTS (1899), 24 V. L. R. 596.—AUS.

c. — —.]—Actual value not face value of property should be taken as basis of duty.]—*Re* LANG, *Ex p.* COLLECTOR OF IMPOSTS (1899), 24 V. L. R. 807.—AUS.

d. — —.]—A deed exercising a special power of appointment created by a settlement which was

executed at a time when no *ad valorem* duty was payable thereon is a "deed of settlement" within the meaning of Part VIII. of the Schedule to the Stamps Act, 1892.

The value of the actual interest dealt with in such deed is the basis on which the duty is to be assessed.—DAVIDSON *v.* ARMYTAGE (1906), 4 C. L. R. 205.—AUS.

e. — Settlement by deed directed by will—New interests created.]—NEWMAN *v.* COLLECTOR OF IMPOSTS (1903), 29 V. L. R. 161.—AUS.

f. — Trust for wife—During joint lives of settlor & for survivor for life.]—NEW SOUTH WALES STAMP DUTIES COMRS. *v.* PERPETUAL TRUSTEE CO., LTD. (1915), 21 C. L. R. 69.—AUS.

g. — Declaration of trust.]—WILLIAMS *v.* STAMPS COMR. (1905), 25 N. Z. L. R. 481.—N.Z.

h. **Not dutiable—Settlement merely carrying out trusts of will—As to one part of the property.**—*Re* STRACHAN (1902), 28 V. L. R. 118.—AUS.

k. — Settlement subject to "a mortgage debt & certain charge."—*Re* TIMMS' SETTLEMENT, *Ex p.* COLLECTOR OF IMPOSTS (1902), 28 V. L. R. 65.—AUS.

l. — Settlement of sum of money—"In consideration of marriage."—*Re* SMITH, [1905] V. L. R. 203.—AUS.

m. **Whether subject-matter of instrument considered.**—The determining whether an instrument is taxable as a

**Sect. 6.—Duties upon particular instruments: Sub-sects. 35, 36 & 37. Sect. 7. Part X. Sect. 1.]**

applt., who was one of the children, & in contemplation of his marriage, the trustees by deed revoked the trusts of the original settlement concerning his share, & declared that during his life it should be held on trust to pay the income to him, & on his death should be transferred to the trustees of his marriage settlement, which was of even date, upon the trusts declared concerning the same in that settlement. By the marriage settlement, to which the trustees of the original settlement were not parties, applt.'s share was settled on trusts which were within the power of resettlement given to the trustees under the original settlement:—*Held*: the case was not one in which several instruments were executed for effecting a settlement of the same property within above sect.; & the marriage settlement was within Stamp Act, 1891 (c. 39), sched. I., head "Settlement," & not within the exemption therein of an "instrument of appointment relating to any property in favour of persons specially named or described as the objects of a power of appointment," & it was therefore liable to *ad valorem* stamp duty.—*RUSSELL v. INLAND REVENUE COMRS.*, [1902] 1 K. B. 142; 66 J. P. 228; 18 T. L. R. 126; *sub nom.* *HAMILTON-RUSSELL v. INLAND REVENUE COMRS.*, 71 L. J. K. B. 201; 85 L. T. 738; 50 W. R. 193; 46 Sol. Jo. 103, C. A.

**761. Ante-nuptial contract—Sale & substitution of securities.]—INLAND REVENUE v. OLIVER**, No. 397, *ante*.

**762. Settlement of policy of life insurance—Provision for keeping up policy—Covenant for payment of premiums—Stamp Act, 1891 (c. 39), s. 104.]—Where money to become due or payable under a policy of life insurance was "settled" by an instrument dated in 1894, which contained no provision for keeping up the policy, but the policy was in fact protected by a covenant still applicable, for the payment of the premiums, such covenant being contained in a previous instrument executed when the policy was effected in 1892:—*Held*: provision was "made for keeping up the policy" within the meaning of proviso 2 (a) to above sect. & for the purpose of stamping the instrument of 1894, the *ad valorem* duty was chargeable in respect of the full amount of the policy moneys, & not only on the value of the policy at the date of the instrument.**

It is not necessary for the purpose of the sub-sect. that the provision should be contained in the particular instrument which is sought to be charged with duty.—*NORTHUMBERLAND (DUKE) v. INLAND REVENUE COMRS.*, [1911] 2 K. B. 1011; 81 L. J. K. B. 240; 105 L. T. 485, C. A.

**SUB-SECT. 36.—SURRENDERS OF LEASES.**

*See LANDLORD & TENANT*, Vol. XXXI., pp. 509, 510, 521, Nos. 6571–6574, 6883.

settlement under Act, 1274, Sch. Div. 8, the subject-matter of the instrument will not be considered, but only the instrument itself. The value of the property settled is merely looked at in order to fix the amount payable in respect of the tax.—*SPENSLEY v. COLLECTOR OF IMPOSTS* (1898), 24 V. L. R. 53.—*AUS.*

*n.* —.]—An indenture of settlement made in pursuance of directions given in testator's will for the settlement of certain funds created new interests not contained in the will:—*Held*: the subject-matter of the instrument was taxable under Stamps

Act.—*Re AUSTIN* (1901), 27 V. L. R. 408.—*AUS.*

*o.* *Meaning of "settlement" in Stamp Act, 1891—Whether deed appointing new trustee & vesting property in him included in meaning.]—MASSERENE (VISCOUNT) v. INLAND REVENUE COMRS.*, [1900] 2 L. R. 138.—*IR.*

**PART IX. SECT. 7.**

**764. Failure to stamp receipt.]—*Ex p. MACFARLANE* (1926), 26 S. R. N. S. W. 473; 43 N. S. W. W. N. 151.—*AUS.***

**SUB-SECT. 37.—WARRANTS OF ATTORNEY.**

*See Stamp Act, 1891 (c. 39), s. 120, sched.*

**763. Warrant given to secure principal sum with accrued interest—Duty calculated on principal sum.]—By Stamp Act, 1815 (c. 184), sched. Title Bond, referred to from Title Warrant of Attorney, an *ad valorem* duty is payable where the instrument is "given as a security for the payment of any definite & certain sum of money":—*Held*: a warrant of attorney given to secure a principal sum, with interest commencing from a previous day, was only liable to the *ad valorem* duty on the principal sum.—*PIERPOINT v. GOWER* (1842), 4 Man. & G. 795; 2 Dowl. N. S. 652; 5 Scott, N. R. 605; 12 L. J. C. P. 55; 6 Jur. 952; 134 E. R. 327.**

**SECT. 7.—OFFENCES IN RELATION TO STAMPS.**

*See Stamp Act, 1891 (c. 39); Stamp Duties Management Act, 1891 (c. 38); Revenue Act, 1898 (c. 46), s. 7; Post Office Act, 1908 (c. 48), ss. 89, 91.*

**764. Failure to stamp receipt.]—A party, who on payment of a bill writes the word "Settled," by way of receipt, is liable to the penalty under the Act imposing a duty on receipts, if it is not stamped.**

Any form of words which, if duly stamped, would operate as a receipt is to be considered liable to the stamp duty (LORD KENYON).—*SPAWFORTH v. ALEXANDER* (1798), 2 Esp. 621; 170 E. R. 475, N. P.

**765. — Liability of master for penalty incurred by servant.]—A.-G. v. CARLTON BANK**, No. 748, *ante*.

**766. Failure to stamp conveyance—Purchase-money not set forth.]—H. being seised in fee of certain land, contracted with B. to execute to him a lease of the land & a house to be built thereon by B., for ninety-nine years, at a rent of £9 5s. The house having been built, B. contracted with O. to sell him his (B.'s) interest in the land & house for £850, which was accordingly paid. In order to effect this contract, B. procured an indenture to be made between himself, H. & O. whereby H. demised to O. the house & land for ninety-nine years, at the same rent. No mention was made in this instrument of the purchase-money:—*Held*: the lease was a conveyance within Stamp Act, 1815 (c. 184), & B. was liable to the penalties imposed by 48 Geo. 3, c. 149, s. 2, for omitting to set forth the purchase-money.—*A.-G. v. BROWN* (1849), 3 Exch. 662; 18 L. J. Ex. 336; 13 L. T. O. S. 121; 154 E. R. 1011.**

**767. — Not criminal offence.]—I think it is clear that there is nothing criminal in a purchaser omitting to stamp his conveyance. By such an omission he commits no breach of duty. He does nothing wrong. The instrument, if not duly stamped, cannot be put in evidence or made available for any purpose. That is all. The**

*p.* *Failure to stamp promissory note.]—No penalty can be recovered under 27 & 28 Vict. c. 4, s. 9, for not affixing stamps to a promissory note for money lost at play, for such note under 9 Anne, c. 14, is utterly void.—TAYLOR v. GOLDING* (1868), 28 U. C. R. 198.—*CAN.*

*q.* —.]—*EDMONDS v. HOEY* (1874), 35 U. C. R. 495.—*CAN.*

*r.* —.]—*BANK OF OTTAWA v. MC-MORROW* (1883), 4 O. R. 345.—*CAN.*

*t.* *Failure to stamp packages of playing cards.]—CONKLIN v. BRUSER* (Sask.), [1919] 2 W. R. 644.—*CAN.*



purchaser need not go about in fear of the A.-G. pouncing upon him & getting him fined. The fines spoken of in sect. 15 are not, as one of the Lords Justices seems to think, fines to which a purchaser becomes liable by not stamping his conveyance, but fines which he has to pay for the privilege of stamping his conveyance after the prescribed period if he wants to get it stamped (LORD MACNAGHTEN).—INLAND REVENUE COMRS. *v.* MAPLE & CO. (PARIS), LTD. (1907), as reported in

77 L. J. K. B. 55; 97 L. T. 814; 24 T. L. R. 140; 52 Sol. Jo. 92; 14 Mans. 302, H. L.; *revg.* S. C. *sub nom.* MAPLE & CO. (PARIS), LTD. *v.* INLAND REVENUE COMRS., [1906] 2 K. B. 834, C. A.

**768. Powers of Commissioners of Inland Revenue—Enforcement of writ by attachment.]—***Re COULSON* (1894), *Highmore's Stamp Laws*, 3rd ed. 18, D. C.

**Forgery of stamps.]—***See CRIMINAL LAW*, Vol. XV., p. 1065, Nos. 12,051–12,056.

## Part X.—Corporation Duty.

### SECT. 1.—RATE OF DUTY AND PROPERTY CHARGED.

*See Customs & Inland Revenue Act, 1885 (c. 51), s. 11.*

**769. Incidence of duty—“All real & personal property”—Not restricted to property escaping legacy or succession duty.]—**The language in the recital to Customs & Inland Revenue Act, 1885 (c. 51), s. 11, must be read in contradistinction to the language in the enacting part of the sect., which did not refer, as the recital did, to “certain property which escapes liability to probate, legacy, or succession duties,” but included “all real & personal property belonging to or vested in the corpn. during any of the yearly periods.”—*A.-G. v. CITY OF LONDON CORPN.*, [1913] 1 K. B. 201; 82 L. J. K. B. 144; 108 L. T. 250; 29 T. L. R. 126; *on appeal*, [1913] 2 K. B. 497.

**770. —“Property vested in body corporate or unincorporate”—Debenture stock issued by corporation—Income from sinking fund invested in name of trustees—Permanent trust.]—**A corpn. issued debenture stock redeemable at their option at the end of thirty years or in any event at the end of sixty years. The corpn. covenanted with trustees for the debenture stockholders to set aside every half year a sum of £7,500, so long as the stock remained unredeemed, & to invest these half-yearly sums in such investments as the corpn. should think fit, the income thereof to be accumulated by similarly investing the same & the income thereof from time to time. The fund so created was to be applied by the corpn. in or towards the redemption of the debenture stock as & when it became redeemable. Accordingly the corpn. set aside these half-yearly sums, which were regularly invested in the purchase of stock in the names of the trustees; & the interest on these funds was similarly invested from time to time in the names of the trustees:—*Held*: the equity of redemption in the sinking fund subject to the charge in favour of the debenture stockholders belonged to the corpn., & the income thereof ought to be brought into account for the purpose of assessing corpn. duty under Customs & Inland Revenue Act, 1885 (c. 51), s. 11, the amount expended by the corpn. in paying the interest on the debenture stock being brought in by way of deduction on the other side of the account.—*A.-G. v. LONDON CORPN.*, [1913] 2 K. B. 497; 82 L. J. K. B. 698;

108 L. T. 661; 29 T. L. R. 494; 6 Tax Cas. 313, C. A.

**771. Assessment of duty—On “annual value income & profits”—Gate money & receipts of cricket club.]—**The Surrey County Cricket Club, an unincorporated body of persons, were possessed of real & personal property, the real property consisting of a building & land in the metropolis held under a lease for years & used by them for the purposes of a cricket club. Their receipts included large sums in respect of gate money & other payments received from persons admitted to view the cricket matches played on the ground. The club was carried on at a profit:—*Held*: the gate money & other payments received from the public were not “annual value, income, or profits of the property” within Customs & Inland Revenue Act, 1885 (c. 51), s. 11; the annual value of the real property should be arrived at in the same way as upon an assessment of annual value made for the purposes of the property tax under Income Tax Act, 1853 (c. 34), Sched. A., & the club were entitled to include the estimated cost of repairs as a permissible deduction from that annual value.—*Re SURREY COUNTY CRICKET CLUB*, [1901] 2 K. B. 400; 70 L. J. K. B. 823; 85 L. T. 213; 65 J. P. 488; 50 W. R. 173; 17 T. L. R. 494, D. C.

*Annotation*:—*Refd. Carlisle & Silloth Golf Club v. Smith*, [1913] 3 K. B. 75.

**772. Deduction from duty—“Necessary outgoings incurred for management”—Deduction for capital expenditure—Rebuilding & improvement of site.]—**The corpn. of the City of London were rightly assessed to corpn. duty in respect of income derived from the shops round the Royal Exchange.

There remains the question whether the corpn. are entitled under the operative part of Customs & Inland Revenue Act, 1885 (c. 51), s. 11, to deduct from the surplus rents their expenditure in rebuilding & improving the site. The tax is imposed upon the annual value, income, or profits of the property accrued to the body corporate within the year, “after deducting therefrom all necessary outgoings, including the receiver’s remuneration, & costs, charges, & expenses properly incurred in the management of such property.” The outgoings here mentioned are plainly yearly outgoings. Past capital expenditure could not be deducted. The deductions claimed here were deductions on past capital account (CHITTY, J.).—*Re DUTY ON*

a. *Several lettings in one instrument—Whether violation of Stamp Act.]—*It is not in violation of Stamp Act to comprise several lettings in ct. in one instrument.—ANON. (1828), 1 Mol. 438.—IR.

b. *What amounts to evasion of Stamp Act—Unstamped agreement.]—*A clause in an agreement providing that, if it

should become necessary to stamp it, & to pay any penalty for that purpose, the creditor may charge it against the debtor, is an evasion of Stamp Act, & the ct. will not enforce it.—ABBOTT *v.* STRATTON (1846), 9 L. Eq. R. 233; 3 Jo. & Lat. 603.—IR.

c. *Failure to stamp instrument—*

*Within limited period.]—*WALL *v.* STAMPS COMR. (1899), 18 N. Z. L. R. 74.—N.Z.

d. *Failure to stamp contract notes.]—*LORD ADVOCATE *v.* THOMSON (1897), 24 R. (Ct. of Sess.) 543; 34 Sc. L. R. 412; 4 S. L. T. 315.—SCOT.



**Sect. 1.—Rate of duty and property charged. Sects. 2 & 3.]**

**ESTATE OF GRESHAM** (1897), 13 T. L. R. 362; *sub nom.* **GRESHAM TRUSTEES v. INLAND REVENUE COMRS.**, 4 Tax Cas. 304, C. A.

**SECT. 2.—EXEMPTION.**

*See Customs & Inland Revenue Act, 1885 (c. 51), s. 11.*

**773. Property appropriated for charitable purposes—Trade institution for distressed members—Mutual benefit society.]—**The Linen & Woollen Drapers, etc. Institution was founded in 1832, by leading members of the several trades concerned, with the object & purpose of making provision for sick, infirm, & decayed members of the trades & their widows & children. A body of rules for the government of the institution was then framed, under which it has ever since been carried on, by which rules any person of three years' standing in any of the trades, residing within 12 miles of the General Post Office, may, on payment of the life or annual subscription therein-mentioned, be elected a member. The rules also prescribe the terms & conditions under which relief & other pecuniary benefits are afforded to members or their families, either by payment of a lump sum, a weekly allowance during sickness or other necessity, or the grant of a life annuity. Medical advice & medicine are also provided free of charge to members or their families requiring same; all relief being confined to members, & no member being entitled as of right to assistance, the board of directors having absolute discretion in every case to grant or refuse same, & in no case can a member receive assistance unless in necessitous circumstances. The property of the institution consists of the accumulated subscriptions of members, & of considerable sums from time to time contributed as donations by benevolent persons other than members, but chiefly belonging to the trades concerned, & the cash value of the institution's invested funds amounted on Dec. 31, 1885, to £50,511 1s. 9d., the annual income whereof, amounting to £1,670 after necessary outgoings, costs, & expenses in the management of the property, is "legally appropriated & applied for charitable purposes" connected with the institution; but no precise or accurate calculations had been made, showing how much of such invested funds was derived from members' subscriptions, & how much from voluntary contributions & bequests within the thirty years immediately preceding. The Comrs. of Inland Revenue assessed the institution in £1,482 12s. 4d. & charged same with £74 3s. 7d. duty, under Customs & Inland Revenue Act, 1885 (c. 51), s. 11:—*Held*: (1) the institution was not a charitable institution, but was in the nature of a mutual benefit society, the benefits afforded by which to the members could not be looked upon as charity, but were what the members were entitled to as of right, in return for their subscriptions, & the portion of the funds derived from such subscriptions was not exempt from duty under Customs & Inland Revenue Act, 1885 (c. 51), s. 11 (3); & (2) the other portions of the funds, derived from voluntary contributions within the specified period of thirty years, & from property acquired within the same period on which legacy duty had been paid were, if the amounts thereof could be ascertained, exempt from duty under Customs & Inland Revenue Act, 1885 (c. 51), s. 11 (6), (7).—*Re LINEN & WOOLLEN*

**DRAPERS, ETC. INSTITUTION, Re CUSTOMS & INLAND REVENUE ACT, 1885** (1887), 58 L. T. 949; *sub nom.* **LINEN & WOOLLEN DRAPERS' INSTITUTION v. INLAND REVENUE COMRS.**, 4 T. L. R. 345; 2 Tax Cas. 651, D. C.

*Annotations*.—*Reid*. *Masons of Scotland Grand Lodge, etc. v. I. R. Comrs.* (1912), 6 Tax Cas. 116; *I. R. Comrs. v. Soc. for Relief of Widows & Orphans of Medical Men, I. R. Comrs. v. Medical Charitable Soc. for West Riding of Yorkshire* (1926), 136 L. T. 60.

**774. — Trust for freemen inhabitants of city.]—**By a private inclosure Act in 1763, certain spaces of C. Common were allotted to the corpns. of York, in trust for the freemen inhabitants of B. ward in that city, as compensation for previous rights of common. In 1832, by agreement with the lord of the manor, the fourth part of the adjoining common of H., afterwards called the "Intack," was conveyed in fee to the mayor of York, in satisfaction of the common rights of the freemen inhabitants of B. ward. The allotments of C. Common & the "Intack" had ever since been enjoyed by the freemen inhabitants of B. ward, & were under the control of pasture masters, who, after paying the expenses of management, applied the profits of the whole to the benefit of poor freemen, & also for some years past for the benefit of their widows:—*Held*: (1) the profits of the allotments which were applied under the Act of 1763 were exempt from corporation duty under Customs & Inland Revenue Act, 1885 (c. 51), s. 11 (2); but the profits of the "Intack," not being appropriated & applied under any Act of Parliament, were not exempt under Customs & Inland Revenue Act, 1885 (c. 51), s. 11 (2), (2) the profits of the "Intack" were not within the exemption in Customs & Inland Revenue Act, 1885 (c. 51), s. 11 (2), as profits appropriated & applied "for any charitable purpose."—**INLAND REVENUE COMRS. v. SCOTT, Re BOOTHAM WARD STRAYS, YORK**, [1892] 2 Q. B. 152; 61 L. J. Q. B. 432; 67 L. T. 173; 56 J. P. 580, 632; 40 W. R. 632; 8 T. L. R. 347, 458; 36 Sol. Jo. 395; 3 Tax Cas. 134, C. A.

*Annotations*.—*Generally*. *Reid*. *R. v. Income Tax Special Comrs.* (1909), 25 T. L. R. 363; *R. v. Income Tax Special Comrs., Ex p. University College of North Wales* (1909), 78 L. J. K. B. 576; *Chesterman v. Taxation Federal Comr.*, [1926] A. C. 128.

**775. — Royal Exchange & shops around.]—***Re DUTY ON ESTATE OF GRESHAM*, No. 772, *ante*.

**776. Funds voluntarily contributed—Property of members' club—Entrance fees & subscriptions.]—**Exemption was claimed by a members' club, the property of which was vested in trustees, & which had been established less than thirty years, from the duty imposed on the annual value, income, or profits of bodies corporate & unincorporate by Customs & Inland Revenue Act, 1885 (c. 51), s. 11, on the ground that the property of the club was "property acquired by or with funds voluntarily contributed" within thirty years preceding, within exemption 6 in that sect. By the rules of the club every member on admission paid an entrance fee & the annual subscriptions for the current year, & until payment was not admitted to any of the benefits or privileges of the club, & payment was considered as a declaration of submission to the rules; an annual subscription was payable on Jan. 1 in each year, & if it was not paid on or before Mar. 1, the member's name was erased from the list of members, & a member intending to withdraw from the club had to give notice on or before Jan. 1, or otherwise was liable to pay his subscription for the current year:—*Held*: as the entrance fees & subscriptions were paid by members in consideration of the right to enjoy the benefits & privileges of the club, they were not "funds

voluntarily contributed" to the club, & duty was payable on property acquired with money so paid.—*Re DUTY ON ESTATE OF NEW UNIVERSITY CLUB* (1887), 18 Q. B. D. 720; 56 L. J. Q. B. 462; 56 L. T. 909; 35 W. R. 774; 3 T. L. R. 570; *sub nom.* INLAND REVENUE COMRS. v. NEW UNIVERSITY CLUB, 2 Tax Cas. 279, D. C.

*Annotations* :—*Distd. Re Incorporated Council of Law*

296 A.-G. v. Swan, [1922] 1 K. B. 682.

**777. — Trade institution for distressed members.]—*Re LINEN & WOOLLEN DRAPERS, ETC. INSTITUTION, Re CUSTOMS & INLAND REVENUE ACT, 1885, No. 773, ante.***

**778. Property acquired within thirty years when legacy duty paid on its acquisition—Trade institution.]—*Re LINEN & WOOLLEN DRAPERS, ETC. INSTITUTION, Re CUSTOMS & INLAND REVENUE ACT, 1885, No. 773, ante.***

**779. Property of body established for any trade or business—Company not trading for profit.]—**In 1870 the Council of "The Law Reports" were incorporated under the provisions of Cos. Act, 1867 (c. 131), obtaining a licence under sect. 23 to be registered as a limited co. without the addition of the word "limited." The assocn. was established for the objects of preparing & publishing, under gratuitous professional control, reports of judicial decisions; of issuing digests & other publications relating to legal subjects, including the statutes; of continuing the series of reports then called "The Law Reports"; of acquiring the copyright of any other reports, & of doing any other things incidental or conducive to those objects. In carrying them out the assocn. employed editors, reporters, printers, & publishers, & prepared, printed, & published reports & other legal publications, & supplied them to subscribers & others for payment. By the memorandum of assocn. all the property & income of the assocn. were applicable solely to the promotion of the above objects, & no part thereof could be paid as dividend, bonus, or otherwise, to any member :—*Held* : the assocn. was established for a trade or business within Customs & Inland Revenue Act, 1885 (c. 51), s. 11 (5), & was entitled to exemption from the duty imposed by that sect.—*Re DUTY ON ESTATE OF INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND & WALES* (1888), 22 Q. B. D. 279; 58 L. J. Q. B. 90; 60 L. T. 505; 53 J. P. 119; 37 W. R. 382; 5 T. L. R. 128; 3 Tax Cas. 105, D. C.

*Annotations* :—*Consd. Brighton College v. Marriott*, [1926] A. C. 192. *Reid. British Institute of Preventive Medicine v. Styles* (1895), 11 T. L. R. 432. *Mentd. Skinner v. Jack Breach*, [1927] 2 K. B. 220.

**780. Property applied for promotion of science—Institution of Civil Engineers.]—**In Customs & Inland Revenue Act, 1885 (c. 51), s. 11 (3), "science" is not confined to pure or speculative

science, or science generally, but includes various branches of science :—*Held* : the property of the Institution of Civil Engineers was entitled to the exemption, because it was in fact legally appropriated & applied substantially for the promotion of mechanical or engineering science, & not for the promotion of the professional interest or advantage of the members.—*INLAND REVENUE COMRS. v. FORREST* (1890), 15 App. Cas. 334; 60 L. J. Q. B. 281; 63 L. T. 36; 54 J. P. 772; 39 W. R. 33; 6 T. L. R. 456; 3 Tax Cas. 117, H. L.

*Annotations* :—*Distd. Re Royal College of Surgeons of England*, [1899] 1 Q. B. 871. *Consd. Farmer v. Juridical Soc. of Edinburgh* (1914), 6 Tax Cas. 467. *Reid. Sulley v. Royal College of Surgeons, Edinburgh* (1892), 3 Tax Cas. 173; *Manchester Corp'n. v. McAdam*, [1896] A. C. 500; *Savoy Overseers v. Art Union of London*, [1898] A. C. 296; *Royal College of Music v. St. Margaret & St. John, Westminster, Vostry* (1897), 67 L. J. Q. B. 80; *Chesterman v. Federal Taxation Comr.*, [1926] A. C. 128.

**781. — Royal College of Surgeons.]—**The Royal College of Surgeons of England, incorporated by charter, had two main objects : the promotion of the science of surgery, & the promotion & encouragement of the practice of surgery, including the promotion of the interests of those practising surgery as a profession, & the examination of students & others, to qualify for practice or honours in surgery & kindred subjects. On an appeal against an assessment to duty under Customs & Inland Revenue Act, 1885 (c. 51) :—*Held* : as the promotion of the interests of those practising surgery as a profession was in itself a main object, & one in respect of which no exemption could be claimed, the only exemption that could be claimed under Customs Inland Revenue Act, 1885 (c. 51), s. 11, was in respect of property or income so appropriated as to create a legal obligation to apply it to the promotion of the science of surgery.—*Re ROYAL COLLEGE OF SURGEONS OF ENGLAND*, [1899] 1 Q. B. 871; 68 L. J. Q. B. 613; 80 L. T. 611; 47 W. R. 452; 15 T. L. R. 317; 43 Sol. Jo. 416; *sub nom.* ROYAL COLLEGE OF SURGEONS OF ENGLAND v. INLAND REVENUE COMRS., 4 Tax Cas. 344, C. A.

**782. Property applied for benefit of public or in manner expressly prescribed by Act of Parliament—Land allotted under Act of Parliament in lieu of common rights—Trust for freeman inhabitants of city.]—***INLAND REVENUE COMRS. v. SCOTT, Re BOOTHAM WARD STRAYS, YORK, No. 774, ante.*

**783. — Royal Exchange & shops around—Gresham Trust.]—*Re DUTY ON ESTATE OF GRESHAM, No. 772, ante.***

### SECT. 3.—ASSESSMENT AND RECOVERY.

*See Customs & Inland Revenue Act, 1885 (c. 51), ss. 13–20.*

### PART X. SECT. 2.

**777 i. Funds voluntarily contributed—Trade institution for distressed members.]—*Held* : funds belonging to an incorporated body, which were derived from the entry-moneys of members & were solely applicable as pensions to decayed members & widows of members at the absolute discretion of certain officer-bearers, were not to be regarded**

as funds appropriated to a charitable purpose.—*TAILORS IN GLASGOW INCORPORATION v. INLAND REVENUE* (1887), 14 R. (Ct. of Sess.) 729.—*SCOT.*

*s.* — *Grand Lodge of Masons.]—GRAND LODGE OF MASONRY OF SCOTLAND v. INLAND REVENUE COMRS.* (1912), 6 Tax Cas. 116.—*SCOT.*

*1. Property applied for promotion of*

*science—Endowment of chair of conveyancing.]—*Held* : the income of the Society of Writers to the Signet was exempt from duty to the extent of £105 per annum, appropriated by contract to the perpetual endowment of a chair of conveyancing in a university.—SOCIETY OF WRITERS TO THE SIGNET v. INLAND REVENUE COMRS.* (1886), 14 R. (Ct. of Sess.) 34.—*SCOT.*

## Part XI.—Excess Profits Duty and Corporation Profits Tax.

*NOTE.—Excess Profits Duty was terminated by Finance Act, 1921 (c. 32), s. 35, & Corporation Profits Tax by Finance Act, 1924 (c. 21), s. 34, & therefore the cases thereon are not included in this work.*

## Part XII.—Entertainments Duty.

*See Finance (New Duties) Act, 1916 (c. 11); Finance Act, 1924 (c. 21), s. 6, sched. II.*

**784. Admission by means of subscription—Dinner & concert at anniversary festival.]—**A charity consisted of a school where sons of Freemasons could be educated at the charge of funds contributed or collected by stewards who were Freemasons, & to assist in the raising of the funds there was held annually a festival consisting of a dinner followed by a concert. At the festival the amount of donations & subscriptions which had been procured was announced by the stewards. The sum so collected was devoted exclusively to the funds of the charity & for that reason the expenses of the festival were borne by the stewards & persons participating in it. Stewards not attending the festival contributed the sum of one guinea & no question arose with regard to that contribution. But stewards & other persons attending the festival, 962 in number, contributed a further guinea each, & in respect of the guineas so paid the Crown claimed entertainments duty under Finance (New Duties) Act, 1916 (c. 11), s. 1 (1). It was conceded by the Crown that the dinner apart from the concert was not an entertainment within Finance (New Duties) Act, 1916 (c. 11). The cost of the dinner including establishment charges attributable in some degree to the concert as well as the dinner, was upwards of £1,000. Certain considerable items for printing & expenses generally also had to be apportioned between various parts of the festival, including the dinner & concert. The cost of the music at the concert was approximately £30. After a point in the after dinner proceedings the concert was held in a room or hall different from the dining hall where the speeches were continued concurrently with the progress of the concert. All attending the dinner had the right of admission to the concert, but might please themselves whether they preferred the music or speeches or a selection of each. The dinner was the main part of the proceedings the concert being a subsidiary & separate, but at the same time important part:—*Held*: the concert must be regarded as an essential part of the festival & as a part separate & distinct from the dinner, & the expenditure upon the concert could not be looked upon as negligible, as the guinea was a lump sum paid in the expectation that it would secure admission to a concert & it did in fact secure such admission, entertainments duty was payable, it being for the comrs. to determine under Finance (New Duties) Act, 1916 (c. 11), s. 1 (4), what portion of the lump sum represented the right of admission to the concert.—*A.-G. v. McLEOD*, [1918] 1 K. B. 13; 87 L. J. K. B. 89;

117 L. T. 631; 34 T. L. R. 29; 62 Sol. Jo. 105; 15 L. G. R. 881.

*Annotation*:—*Reid A.-G. v Swan*, [1922] 1 K. B. 682.

**785. — Sports—Admission to matches.]—**A cricket club had a playing ground, vested in trustees for the club, on which matches were played. The public was admitted on payment. Members paid an annual subscription which gave them, among other privileges, that of admission as spectators. The matches were admitted to be "entertainment":—*Held*: although the members might be joint owners of the club property, it was still a question of fact whether the payments of subscriptions or any part thereof were made for the purpose of securing "admission to any entertainment" within Finance (New Duties) Act, 1916 (c. 11), s. 1 (1).

Where the comrs. found that a portion of the subscriptions was paid for admission to the matches, that portion was held liable to the entertainments duty imposed by Finance (New Duties) Act, 1916 (c. 11), s. 1 (1).—*A.-G. v. SWAN*, [1922] 1 K. B. 682; 91 L. J. K. B. 367; 127 L. T. 61; 38 T. L. R. 315; 66 Sol. Jo. 317; 20 L. G. R. 287. *Annotation*:—*Fold. A.-G. v. Valentia* (1924), 41 T. L. R. 78.

**786. — — — & tournaments.]—**Entertainments duty is chargeable on a proportion of the subscriptions & entrance fees of the members of the Hurlingham Club, who in addition to certain club privileges have the right to attend polo matches & tennis & other tournaments provided by the club.—*A.-G. v. VALENTIA* (1924), 41 T. L. R. 78; 69 Sol. Jo. 140, C. A.

**787. Music during meals at restaurants.]—**Applts. were the proprietors of the T. Restaurant. On certain dates in 1917 they inserted advertisements in newspapers of music played in the various rooms of the restaurant during meals. The rooms in which meals were served were open about twelve hours on weekdays & seven hours on Sundays. The time during which music was provided was about six hours on weekdays & four & a half hours on Sundays. Varying charges were made for the meals, but no difference was made between the times, when music was being played & when it was not. There was also a tea room open daily in which music was performed during a part of the time. A fixed price was charged for the tea whether it was served during the performance of the music or not. No person was admitted to the rooms unless he or she intended to partake of a meal or of tea, as the case might be. Two summonses were taken out against applts., charging them with admitting persons to a place of entertainment without payment of the enter-

### PART XII.

*g. What amounts to one entertainment—Admission to part of place of entertainment—Several amusements provided with separate charges for*

*admission.]—THE COMMONWEALTH v. LUNA PARK, LTD.* (1925), 36 C. L. R. 31; 31 Argus L. R. 245.—*AUS.*

*h. — Ball & supper—Composite ticket of admission.]—FEDERAL TAXA-*

*TION COMR. v. ROONEY* (1925), 36 C. L. R. 305; [1926] Argus L. R. 125.—*AUS.*

*k. Liability of billiard-room owner.]—R. v. VAN PRAEGH* (Man.), [1920] 3 W. W. R. 870.—*CAN.*

tainment duty. Evidence was given upon the hearing of the summonses that in fixing the prices of the meals & the teas applts. did not take into account the cost of the music. The magistrate who heard the cases was of opinion that the customers who visited the T. Restaurant paid for the music as well as the meals, & fined applt. :—*Held* : the magistrate was wrong.—*LYONS & Co. v. FOX*, [1919] 1 K. B. 11 ; 88 L. J. K. B. 241 ; 119 L. T. 763 ; 83 J. P. 101 ; 35 T. L. R. 6 ; 16 L. G. R. 880, D. C.

*Annotation* :—*Reid. A.-G. v. Swan*, [1922] 1 K. B. 682.

**788. Music on pier—Chairs in band hall.**—An inspector of the Brighton police force who was also appointed to look after entertainments duty visited the Palace Pier Band Hall, a structure on the pier. He went into the building & took a seat, for which he paid 2d. & received a ticket. The bandstand is in the centre & the seats are in series fixed together & screwed to the floor & they are so arranged that all the persons occupying them face the band. The sides are glass folding panels which are all connected & fold up concertina-like. The central eastern side was open when he entered & shortly afterwards the folding glass panels of the side were drawn & curtains were drawn all around the building so that it would be in utter darkness from the outside. When the building is closed in this way it becomes a closed building & is for all practical purposes a closed building with a sitting audience. There was no convenience whatever for persons to stand within the band hall, & if they did so they would cause obstruction to the gangways. If the public stand in the gangways they are required to leave. A programme of music was gone through by the band. The structure has a zinc roof & the chairs under it are fixed tip-up chairs. There are hundreds of unfixed chairs on other parts of the pier, the majority being in the vicinity of the bandstand. The unfixed chairs are marked "This chair must not be moved to any other part of the pier." A person occupying a chair on any part of the pier can move to another part of the pier & sit in a chair where he can hear the band & no further payment is required. There are no free seats under the structure nor outside in the immediate vicinity of the bandstand. At all times the seats under the structure can be used by the public on payment of 2d.

Upon an information before justices against applt., the proprietor of the entertainment, charging that the inspector was admitted to the entertainment contrary to Finance (New Duties) Act, 1916 (c. 11), s. 1, applt. did not dispute that if, in the circumstances, there had been payment for admission to a place of entertainment where the payment was subject to entertainments duty, he had committed an offence. The justices convicted applt., finding that on the facts there had been admission to an entertainment within Finance (New Duties) Act, 1916 (c. 11):—*Held* : there was evidence upon which the justices could so find.—*CORDINER v. STOCKHAM*, [1920] 1 K. B. 104 ; 89 L. J. K. B. 21 ; 121 L. T. 664 ; 83 J. P. 246 ; 35 T. L. R. 689 ; 17 L. G. R. 654 ; 26 Cox, C. C. 517, D. C.

*Annotation* :—*Reid. A.-G. v. Swan*, [1922] 1 K. B. 682.

**789. "Admission"**—Admission to one part & subsequent transfer to another—Liability of em-

ployer for act of attendant—Acting beyond scope of authority.]—Appls. were the proprietors of an entertainment which was subject to entertainments duty. An officer of customs & excise visited the premises, paid for admission, & received a ticket properly stamped, & was duly admitted. He then asked an attendant for a transfer to a dearer seat & handed her the difference, & she handed to him a portion of a dearer ticket which had been previously used, no entertainments duty being paid on the transfer, but there was no proof that applts. or their manager had any knowledge of these matters or that the attendant had any duty or authority to take money or hand out tickets, or that she was anything more than a mere attendant employed to show people to their seats. Appls. were convicted of an offence against Finance (New Duties) Act, 1916 (c. 11), s. 1.

On appeal, quarter sessions found that the attendant was employed generally in that capacity & to show persons to their seats, but that there was no proof that she was acting within the scope of her employment in transferring persons from one part of the entertainment to another or that she handed the extra money to applts. or obtained a transfer ticket from them. Quarter sessions held that applts. were not guilty, but stated a case:—*Held* : as the attendant was not acting within the scope of her authority the decision of quarter sessions was right.—*STAR CINEMA (SHEPHERD'S BUSH), LTD. v. BAKER* (1921), 126 L. T. 506 ; 86 J. P. 47 ; 20 L. G. R. 158, D. C.

**790. Procession—Window sub-let to view—"Place of entertainment."**—In 1922 there was held at Preston a celebration of the local guild merchant, & during a particular week several processions passed through certain streets of the town. Resp., who was the occupier of premises in one of these streets, sublet to a spectator for the week a window which commanded a view of that street along with the use of a room for a payment of £5 as rent. On that payment no entertainments duty was paid under Finance (New Duties) Act, 1916 (c. 11). The spectator was present in the room on one of the days of the week while a certain procession was passing the premises. It was admitted that the procession was an "entertainment" within Finance (New Duties) Act, 1916 (c. 11). An information was laid against resp. under Finance (New Duties) Act, 1916 (c. 11), s. 1 (2), charging that on the day above referred to the spectator was admitted for payment to a place of entertainment otherwise than in compliance with Finance (New Duties) Act, 1916 (c. 11), & that resp. was the proprietor of the entertainment:—*Held* : the window & room were a "place of entertainment" within Finance (New Duties) Act, 1916 (c. 11), s. 1 (2) ; resp. was the "proprietor" of the entertainment within Finance (New Duties) Act, 1916 (c. 11), s. 1 (2), as extended by Finance Act, 1922 (c. 17), s. 11, & entertainments duty was payable.—*GIBSON v. REACH*, [1924] 1 K. B. 294 ; 93 L. J. K. B. 154 ; 130 L. T. 411 ; 87 J. P. 206 ; 40 T. L. R. 73 ; 68 Sol. Jo. 210 ; 21 L. G. R. 802, D. C.

**791. ——— "Proprietor."**—*GIBSON v. REACH*, No. 790, ante.

## Part XIII.—Recovery of Revenue Duties and Penalties.

### SECT. 1.—LEGAL PROCEEDINGS.

#### SUB-SECT. 1.—IN HIGH COURT.

See Excise Management Act, 1834 (c. 51), s. 11 ; Customs & Inland Revenue Act, 1879 (c. 21), s. 11 ; Inland Revenue Regulation Act, 1890 (c. 21), s. 22 ; Excise Transfer Order, 1909, r. 25 ; & generally, CROWN PRACTICE, Vol. XVI., pp. 214–236, Nos. 1–316, Supp. III., No. 46 a.

**792. Jurisdiction of Court—Admiralty Court.]—**Jurisdiction of Vice-Admty. Cts. in revenue cases is of mere statutory institution ; & by 49 Geo. 3 (c. 107) questions of this sort must be tried either where the offence was committed or the seizure made.—THE HERCULES (1819), 2 Dods. 353 ; 165 E. R. 1511.

*Annotations:—*Mentd. R. v. McCleverty, The Telegraphs (or Restaucion) (1871), L. R. 3 P. C. 673 ; Mersey Docks & Harbour Board v. Turner, The Zeta, [1893] A. C. 468.

**793. — Equity jurisdiction.]—**The equity jurisdiction of the Ct. of Exch. as a Ct. of Revenue, is not taken away by 5 Vict. c. 5.—A.-G. v. HALLING (1846), 15 M. & W. 687 ; 16 L. J. Ex. 303 ; 163 E. R. 1027.

*Annotations:—*Consd. A.-G. v. Edmunds 1868, L. R. 6 Eq. 381. *Reid.* Dyson v. A.-G. (1910), 103 L. T. 707. *Mentd.* London Corpn. v. A.-G. (1848), 1 H. L. Cas. 440.

**794. — Action against revenue officer.]—**Where actions, brought against revenue officers for acts done by them in discharge of their duty, are removed into the Exch., they are like other causes on the plea side of the ct. & the proceedings are not conducted in the office of the Queen's remembrancer.—SMITH v. CAMERON (1845), 9 Jur. 405.

**795. — Intervention by Crown—Effect of Judicature Acts.]—**The prerogative of the Crown to intervene in actions affecting the rights or revenue of the sovereign has not been affected by the Jud. Acts ; & for the determination of such matters the Exch. Div. of the High Ct. of Justice has all the powers formerly possessed by the Ct. of Exch.—A.-G. v. CONSTABLE (1879), 4 Ex. D. 172 ; 48 L. J. Q. B. 455 ; 27 W. R. 661.

*Annotation:—*Reid. Dixon v. Farrer (1886), 17 Q. B. D. 658.

**796. Action for recovery of duties—Against whom maintainable—Assignees of bankrupt.]—**A.-G. v. SENIOR (1739), 2 Doug. K. B. 416, n. ; 99 E. R. 267.

*Annotations:—*Consd. R. v. Tregoning (1828), 2 Y. & J. 132. *Reid.* Stracy v. Hulse (1780), 2 Doug. K. B. 411.

**797. Right to amend information—Attorney-General.]—**The A.-G. may at any time amend a revenue information.—A.-G. v. HENDERSON (1796), 3 Anst. 714 ; 145 E. R. 1016.

#### PART XIII. SECT. 1, SUB-SECT. 1.

**792 i. Jurisdiction of Court—Admiralty Court.]—**THE NUESTRA SENORA DEL CARMEN (1806), Stewart, 83.—CAN.

**792 ii. — — —.]—**Offences against law relative to trade or revenue may be tried in any Ct. of Record, or Vice-Admiralty Ct.—THE PROVIDENCE (1810), Stewart, 186.—CAN.

**792 iii. — — —.]—**R. v. FLINT, Y. A. D. 280.—CAN.

**792 iv. — — —.]—**The A.-G. is entitled to sue in the ct. of chancery for the recovery of excise duties, even if it be a purely legal debt.—A.-G. v. WALKER (1878), 3 A. R. 195.—CAN.

**1. — — —.]—**Revenue statutes are not to be construed strictly against the

Crown & in favour of the subject, but are to be interpreted in the same way as other statutes ; & if on a proper construction of the statute deft., in a proceeding by the Crown is liable, the ct. has nothing to do with the hardship of the case.—R. v. ROBERTAILE (1909), 12 Exch. C. R. 264 ; 29 C. L. T. 264.—CAN.

*m. — — — Exchequer Court.]—*R. v. FINLAYSON (1897), 5 Exch. C. R. 387.—CAN.

*n. — — —.]—*Where a claim has been referred to the Exchequer Ct. under Customs Act, s. 82, the proceeding thereon is not in the nature of an appeal from the decision of the minister, & the ct. has power to hear, consider & determine the matter upon the evidence adduced before it, whether the same has been before the minister

**798. When motion may be made—Vacation sittings.]—**Motions on the revenue side of this ct. may be made in the Vacation Sittings.—R. v. MORSE (1848), 3 Exch. 223 ; 12 L. T. O. S. 223 ; 154 E. R. 825.

**799. Production of documents—When protection applies.]—**In revenue proceedings, to which, by R. S. C., Ord. 62, the rules under Jud. Acts do not apply, where a deft. distinctly & positively states that a document forms or supports his title, & does not contain anything impeaching his defence or forming or supporting the title or case of the other side, if the ct. is satisfied, on consideration of the whole case, that deft. erroneously represents or misconceives the nature of the document, such document is not protected from production.—A.-G. v. EMERSON (1882), 10 Q. B. D. 191 ; 52 L. J. Q. B. 67 ; 48 L. T. 18 ; 31 W. R. 191, C. A.

*Annotations:—*Consd. Bulman & Dixon v. Young, Ehlers & Commercial S.S. Co. (1883), 49 L. T. 736. *Distd.* Roberts v. Oppenheim (1884), 26 Ch. D. 724. *Apd.* A.-G. v. Newcastle-upon-Tyne Corpn., [1897] 2 Q. B. 384. *Reid.* Morris v. Edwards (1890), 15 App. Cas. 309 ; Budden v. Wilkinson, [1893] 2 Q. B. 452 ; Yorkshire Provident Life Assce. v. Gilbert & Rivington (1895), 14 R. 41 ; Frankenstein v. Gavin's Cycle Cleaning & Insee., [1897] 2 Q. B. 62 ; A.-G. v. Newcastle-upon-Tyne Corpn., [1899] 2 Q. B. 478 ; Milbank v. Milbank, [1900] 1 Ch. 376 ; British Asscn. of Glass Bottle Manufacturers v. Nettlefold, [1912] A. C. 709.

**Right to begin & reply.]—**See CONSTITUTIONAL LAW, Vol. XI., pp. 528, 529, Nos. 325–332 ; ESTATE & OTHER DEATH DUTIES, Vol. XXI., p. 115, No. 865.

**800. Sufficiency of evidence.]—**The master of a homeward bound vessel coming up the Thames, proved to have hired & sent off a boat & men accompanied by one of his own crew, to bring away certain boxes of foreign & British glass lying on the sands on the Essex coast, to be landed at Woolwich, which they find & bring as far as Gravesend where the whole is seized by the custom house officers ; held to be sufficient evidence for a jury of a being concerned in unshipping foreign glass without payment of duty & in unshipping British glass shipped for exportation, subjecting the master of the vessel to the penalties for both those offences, although the whole was one transaction.—A.-G. v. TOWNS (1818), 6 Price, 198 ; 146 E. R. 784.

**801. Effect of judgment—No bar to information against another—In respect of same goods.]—**One in execution upon a judgment on an information for being concerned in unshipping, etc., is no bar to an information against another for the

or not.—TYRRELL v. R. (1898), 6 Exch. C. R. 169.—CAN.

*o. — — —.]—*The penalty enforceable under Customs Act, s. 192, in the Exchequer Ct. is a pecuniary one only ; the other remedies open to the Crown thereunder cannot be prosecuted in this ct.—R. v. FITZGIBBON & Co., R. v. THOURET (1900), 6 Exch. C. R. 383 ; 20 C. L. T. 276.—CAN.

*p. Action for recovery of duties—Recovery as for debt—Sales tax.]—*R. v. SPIRIT RIVER LUMBER CO., LTD. (Alta.), [1925] 4 D. L. R. 794 ; [1925] 3 W. W. R. 574.—CAN.

**800 i. Sufficiency of evidence.]—**GREENSPAN v. R. (1909), 12 Exch. C. R. 254 ; 29 C. L. T. 712.—CAN.

**800 ii. — — —.]—**R. v. GOLD WATCHES & BALDWIN, Y. A. D. 179.—CAN.



very same thing.—*A.-G. v. POPPLESTONE* (1731), Bunb. 311; 145 E. R. 684.

**802. Costs—Follow event unless otherwise ordered.**—*A.-G. v. BLUCHER DE WAHLSTATT* (COUNTRESS) (1864), as reported in 3 H. & C. 374; 10 Jur. N. S. 1159; 59 E. R. 576.

*Annotations*:—*Mentd. Haldane v. Eckford* (1869), L. R. 8 Eq. 631; *Douglas v. Douglas*, *Douglas v. Webster* (1871), L. R. 12 Eq. 617.

**803. When certiorari granted.**—*ANON.* (1729), 1 Barn. K. B. 245; 94 E. R. 167.

—*See CROWN PRACTICE*, Vol. XVI., pp. 402, 403, 439, Nos. 2075, 2086, 3041.

**804. Statement of practice—Prevention of delay.**—*PRACTICE NOTE*, [1926] W. N. 250.

**Sciri facias.**—*See CROWN PRACTICE*, Vol. XVI., pp. 244, 245, Nos. 403–426.

**Appeal & new trial.**—*See CROWN PRACTICE*, Vol. XVI., p. 219, Nos. 69–71.

**Recovery of death duties.**—*See ESTATE & OTHER DEATH DUTIES*, Vol. XXI., pp. 44, 82, 115, 128, Nos. 281, 282, 582–587, 863–866, 945, 946.

**Recovery of income tax.**—*See INCOME TAX*, Vol. XXVIII., pp. 100–103, Nos. 604–633.

**Recovery of penalties from pilots.**—*See Pilotage Act*, 1913 (c. 31), s. 43 (3).

#### SUB-SECT. 2.—IN COURTS OF SUMMARY JURISDICTION.

##### *A. In General.*

*See Excise Management Act*, 1827 (c. 53), s. 65; *Summary Jurisdiction Acts*, 1848 (c. 43), 1879 (c. 49); *Customs Consolidation Act*, 1876 (c. 36), ss. 197, 199, 227, 229, 230, 273; *Customs & Inland Revenue Acts*, 1879 (c. 21), s. 11, 1888 (c. 8), s. 8; *Inland Revenue Regulation Act*, 1890 (c. 21), ss. 21, 27, 36; *Stamp Duties Management Act*, 1891 (c. 38), s. 26; *Finance (1909–1910) Act*, 1910 (c. 8), ss. 4 (2), 94; & generally, *MAGISTRATES*, Vol. XXXIII., pp. 283 *et seq.*

**805. Jurisdiction of magistrates—Excise offence.**—Where two persons were apprehended in a smuggling boat, under 57 Geo. 3, c. 87, s. 5, whilst afloat in the port of F. which had an exclusive local jurisdiction, & after being taken on shore & detained two days there, were carried on board again & conveyed into another port, where they were convicted by justices of another jurisdiction. *Semle*: such conviction was illegal.—*Ex p. KITE* (1822), 2 Dow. & Ry. K. B. 212; 1 Dow. & Ry. M. C. 222.

*Annotation*:—*Distd. R. v. Nunn* (1828), 3 Man. & Ry. K. B. 75.

**803 i. When certiorari granted.**—*Re BRUCE* (1899), 8 Nfld. L. R. 174.—*NFLD.*

**q. Recovery of alien tax—By quarter-master in office when tax incurred.**—The alien tax imposed by 6 Geo. 4, c. 18, must be recovered by the quarter-master in office when it is incurred.—*BRANNEN v. DUNN* (1848), 1 All. 218.—*CAN.*

**r. Admissibility of evidence—Of acquittal on information for improper entries—In action for recovery of duty.**—*A.-G. v. HALLIDAY* (1867), 26 U. C. R. 397.—*CAN.*

**t. Effect of delay in enforcement of licence fees.**—*CITY OF HALIFAX CORPN. v. JONES* (1896), 28 N. S. R. (16 R. & G.) 452.—*CAN.*

**a. Arrest & detention pending payment or forfeiture—Recognition not to leave province—Whether breach by temporary absence.**—*HARDING v. LEBLANC* (1921), 62 D. L. R. 655; 54 N. S. R. 546.—*CAN.*

**b. Qualification of prosecutor.**—*R. v. BROWN* (P. E. I.), [1924] 3 D. L. R. 93; 42 Can. Crim. Cas. 179.—*CAN.*

**c. —.**—*R. v. McNEILL* (P. E. I.), [1924] 3 D. L. R. 53; 42 Can. Crim. Cas. 158.—*CAN.*

**d. —.**—*R. v. ROE* (1829), 2 Hud. & B. 452; 2 Ir. L. Rec. 1st ser. 486.—*IR.*

#### PART XIII. SECT. 1, SUB-SECT. 2.—A.

**805 i. Jurisdiction of magistrate—Excise offence.**—*R. v. CARTER* (1884), 5 O. R. 651.—*CAN.*

**805 ii. —.**—*R. v. KENNEDY* (1902), 35 N. S. R. 266.—*CAN.*

**805 iii. —.**—*R. v. CARMITO* (B. C.), [1919] 2 W. W. R. 548.—*CAN.*

**805 iv. —.**—*R. v. OGLOFF*, [1920] 3 W. W. R. 511.—*CAN.*

**805 v. —.**—*M'INTOSH v. WAITE* (1891), 18 R. (Ct. of Sess.) 582.—*SCOT.*

**806 f. —.**—*R. v. SCHMOLKE* (Alta.), [1919] 2 W. W. R. 595.—*CAN.*

**806 ii. —.**—A magistrate has jurisdiction to try a person accused of an offence under Inland Revenue Act,

**806. —.**—(1) If a deft. be convicted by two resident justices of the peace upon 19 Geo. 3, c. 50, s. 2, for having in his custody & possession a private & concealed still for illicit distillation; & the evidence only show that his house was in the county, & that the still was found concealed in the garden of the said house; such garden not appearing to be in the same county; the conviction is bad; (2) the leaving with a woman at deft.'s house, whom the witness believed to be a menial servant of deft., a copy of the summons to appear & answer to the offence charged, to which woman the original was also shown, is a sufficient summons within 32 Geo. 2, c. 17.—*R. v. CHANDLER* (1811), 14 East, 267; 104 E. R. 603.

*Annotation*:—*As to* (1) *Reid. R. v. Nat Bell Liquors*, [1922] 2 A. C. 128.

#### 807.

##### **Metropolitan police magistrate.]**

*Held*: the provisions of 15 & 16 Vict. c. 61, s. 1, applied to informations for penalties imposed by statute in respect of excise offences created after the passing of the Act & therefore that a metropolitan police magistrate had jurisdiction to hear & determine an information for the recovery of the penalty imposed by Customs & Inland Revenue Act, 1887 (c. 15), s. 4, in respect of the new excise offence created by that sect.—*R. v. INGHAM* (1888), 21 Q. B. D. 47; 57 L. J. M. C. 87; 59 L. T. 62; 52 J. P. 550; 36 W. R. 811; 16 Cox, C. C. 505, D. C.

**808. — Customs offence—Committed on high seas.**—A vessel liable to forfeiture under 6 Geo. 4, c. 108, s. 3, was seized while entering the harbour of A. but within the jurisdiction of the justices of B. A person liable to apprehension under sect. 49, being found on board, was arrested there, & carried to A., & convicted by two justices of that place under sect. 74:—*Held*: (1) said person was, in the absence of evidence as to the time of his going on board, properly convicted as having been on board on the high seas; (2) the justices of A. had jurisdiction.—*Re NUNN* (1828), 8 B. & C. 644; 108 E. R. 1182; *sub nom. R. v. NUNN*, 3 Man. & Ry. K. B. 75; 2 Man. & Ry. M. C. 1; 7 L. J. O. S. M. C. 10.

**809. — — — —.**—Under 3 & 4 Will. 4, c. 53, & 4 & 5 Will. 4, c. 13, those justices alone have jurisdiction over offences committed on the high seas, who have jurisdiction over "the places on land," into which the person committing such offence, etc., "shall be taken, brought or carried, or in which such person shall be found." Notwithstanding the provisions, in these statutes, that proceedings shall be in the form or to the

1906, s. 185.—*R. v. KEEN* (Alta.), [1922] 3 W. W. R. 967; 70 D. L. R. 625; 38 Can. Crim. Cas. 168.—*CAN.*

**806 iii. —.**—Where two justices of the peace have once assumed jurisdiction over a case prosecuted under Inland Revenue Act, 1906, they have no power, even though they are unable to agree on a verdict, to adjourn the case for a rehearing before a District Ct. Judge, or to bring in other justices.—*R. v. KOLINCHUK* (Sask.), [1925] 2 W. W. R. 116.—*CAN.*

**e. — Customs offence.**—*CASHIN v. BARTLETT* (1909), 9 Nfld. L. R. 418.—*NFLD.*

**f. — Limitation by amount of accumulated penalties.**—*R. v. BEEKMAN* (1844), 2 U. C. R. 57.—*CAN.*

**g. Defence in action for penalty—Steps not taken to obtain exemption.**—Where the proper steps have not been taken to obtain exemption from the duty on lumber shipped for exportation, it cannot be set up as a defence to an



**Sect. 1.—Legal proceedings: Sub-sect. 2, A., B., C.,**

effect of the forms in the schedules, proceedings are defective which state an offence on the high seas, & do not show the fact which in such cases will give the justices jurisdiction, & if to a *habeas corpus* a warrant so defective be returned, & it does not appear there is a conviction supplying the defect, a prisoner committed under such warrant will be entitled to his discharge.—*Re PEERLESS* (1841), 1 Q. B. 143; 4 Per. & Dav. 528; 10 L. J. M. C. 67; 5 Jur. 748; 113 E. R. 1084; *sub nom.* *R. v. PEERLESS*, Arn. & H. 133; 5 J. P. 230.

*Annotation:—Mentd. Ex p. Wallingford Union Grdns.* (1841), 9 Dowl. 987.

**810. Service of summons—Delivery of copy to servant.]—***R. v. CHANDLER*, No. 806, *ante*.

**811. Conduct of proceedings—Right of district supervisor of Inland Revenue—Sufficiency of general authority from commissioners.]—***R. v. TURNER*, No. 8, *ante*.

**Mitigation of penalty.]—***See* MAGISTRATES, Vol. XXXIII., pp. 461, 462, Nos. 1733, 1734.

**Offences relating to Income tax.]—***See* INCOME TAX, Vol. XXVIII., p. 103, Nos. 639–642.

**B. Joint Offenders.**

*See* Excise Management Act, 1827 (c. 53), s. 70; Customs Consolidation Act, 1876 (c. 36), s. 222.

**812. Joint & several liability.]—**Upon an information & verdict against several persons for obstructing a custom house officer contrary to 8 Geo. 1, c. 18, s. 25, each deft. is separately liable to the penalty imposed by 8 Geo. 1, c. 18. Where an offence created, or made penal, by statute, is in its nature single, one single penalty only can be recovered, though several join in committing it. But if the offence is in its nature several, each offender is separately liable to the penalty.—*R. v. CLARK* (1777), 2 Cowp. 610; 98 E. R. 1267.

*Annotations:—Refd. R. v. Dean* (1843), 12 M. & W. 39. *Mentd. R. v. Mordecai Hymen* (1798), 7 Term Rep. 536; *Del Campo & Martinez v. R.* (1837), 2 Moo. P. C. C. 15; *R. v. Littlechild* (1871), L. R. 6 Q. B. 293; *Bradlaugh v. Clarke* (1883), 8 App. Cas. 354.

**813. — Partners.]—**An information for penalties under 3 & 4 Will. 4, c. 53, s. 44, charged deft. with being concerned in the unshipping of goods, the duties on which had not been paid; with knowingly harbouring goods imported & illegally unshipped without payment of duties; & with other offences under 3 & 4 Will. 4, c. 53, s. 44. It appeared at the trial, that a practice had prevailed at the custom house of allowing the owners of imported goods to take them away without payment of duty at the time, an entry of them having been previously made in a book kept by the officers; & that the fraud complained

of had been effected by a clerk of deft.'s removing some of the leaves from the custom house book, & substituting others containing false entries of the quantity of goods imported. There was no direct proof that this fact was known to deft., but he derived benefit from the fraudulent transaction:—*Held*: under these circumstances, the jury might infer that deft. was privy to the fraud.—*R. v. DEAN* (1843), 12 M. & W. 39; 13 L. J. Ex. 33; 152 E. R. 1102.

—*See* PARTNERSHIP, Vol. XXXVI., pp. 375, 376, Nos. 524, 525.

**814. Liability of master for act of servant—Implied authority—Master deriving benefit.]—***R. v. DEAN*, No. 813, *ante*.

—*See* MASTER & SERVANT, Vol. XXXIV., p. 150, Nos. 1184–1186.

**Offences against Game Act, 1831 (c. 32).]—***See* GAME, Vol. XXV., pp. 370, 371, Nos. 189, 190, 192, 193.

**Liability to costs.]—***See* CONSTITUTIONAL LAW, Vol. XI., p. 534, No. 375.

**C. Evidence.**

*See* Excise Management Act, 1827 (c. 53), s. 76; Customs Consolidation Act, 1876 (c. 36), s. 259; Revenue Act, 1884 (c. 62), s. 12 (5); Finance Act, 1897 (c. 24), s. 6; & generally, EVIDENCE, Vol. XXII., pp. 19 *et seq.*

**815. Onus of proof—Payment of duties—On claimer.]—***Onus probandi* of payment of duties lies on the claimer on prosecutions in the Exch., but in actions of trespass for taking the goods, the onus of proving the non-payment lies on deft.—*SALOMON v. GORDON* (1772), 2 Wm. Bl. 813; 96 E. R. 479.

*Annotation:—Apld. Henshaw v. Pleasance* (1777), 2 Wm. Bl. 1174.

**816. — Possession of licence—On party charged.]—**Upon a conviction under 5 Ann. c. 14, s. 2, against a carrier for having game in his possession, it is sufficient if in the information & adjudication, the qualifications mentioned in 22 & 23 Car. 2, c. 25, s. 3, be negated, without negating them in the evidence.—*R. v. TURNER* (1816), 5 M. & S. 206; 105 E. R. 1026.

*Annotations:—Fold. R. v. Hanson* (1821), Paley on Summary Convictions, 9th ed. 326. *Distd. James v. Nicholas* (1886), 50 J. P. 292. *Refd. Doe d. Bridger v. Whitehead* (1838), 3 Nev. & P. K. B. 557; *Elkin v. Jansen* (1845), 9 Jur. 353; *Tennant v. Cumberland* (1859), 1 E. & E. 401; *R. v. Harvey* (1871), 19 W. R. 446; *Abrath v. N. E. Ry.* (1883), 49 L. T. 618; *Ashton v. L. & N. W. Ry.*, [1918] 2 K. R. 488; *R. v. Scott* (1921), 86 J. P. 69.

**817. — — —.]—***R. v. HANSON* (1821), Paley on Summary Convictions, 9th ed. 326.

**818. Proof of possession—Of prohibited article.]—**If deft. be charged in an information, with knowingly receiving divers gallons of foreign spirits, which had been unshipped before the duties

action for the penalty imposed on shippers who omit to give the requisite bond for such duty, that the lumber would have been free from duty had the proper steps been taken to obtain exemption.—*WATSON v. MARKS* (1845), 4 N. B. R. (2 Kerr) 694.—CAN.

**h. Claim of informant—For money received by customs officer—Conclusiveness of findings of court.]—***CARROL v. CURLESS* (1890), 23 N. S. R. (11 L. & G.) 32.—CAN.

**k. Penalty for harbouring smuggled goods—To whom payable.]—***R. v. MCCARTHY* (1907), 38 N. B. R. 41; 2 E. L. R. 548.—CAN.

**l. Condition precedent to prosecution—Supply to accused of list of articles seized.]—***R. v. YARISH (Man.)*, [1926] 3 W. W. R. 586; 47 Can. Crim. Cas. 51.—CAN.

**PART XIII. SECT. 1, SUB-SECT. 2.—C.**

**815 i. Onus of proof—Payment of duties—On claimer.]—**In an information, under 7 & 8 Geo. IV. c. 53, s. 39, for fraudulently removing paper, it is not necessary to aver that the duties had not been paid on the goods in question by deft. The onus of proving payment of duties lies on deft.—*R. v. JENKINS* (1841), 2 Jebb & S. 627.—IR.

**815 ii. — — —.]—***R. v. RACICOT* (1913), 14 Exch. C. R. 214; 11 D. L. R. 149.—CAN.

**816 i. — Possession of licence—On party charged.]—**While it is quite right that the information should allege that the sale is made without a licence, it lies upon defts. to prove that they had a licence.—*R. v. GILROY* (1866), 4

Macph. (Ct. of Sess.) 656; 38 Sc. Jur. 275.—SCOT.

**m. — On party charged to prove his innocence.]—***Held*: the object of Excise Act, s. 144, is to relieve the Crown from the necessity of proving the case by oral evidence, & to make the information *prima facie* evidence of the charge, but does throw upon the accused the burden of proving his innocence.—*Ex p. HEALY* (1903), 13 S. R. N. S. W. 14; 20 N. S. W. N. 12.—AUS.

**n. — — —.]—***CARDINAL v. R.*, [1927] 4 D. L. R. 325; [1927] S. C. R. 541; 48 Can. Crim. Cas. 243.—CAN.

**o. — Liquor not intended for sale—On owner.]—**The onus of proving that liquor was not intended for sale, in order to save it from forfeiture is

imposed by 27 Geo. 3, c. 31, were paid. Evidence that several tubs containing it, were on different sides of a hedge in a field, that deft. was there with several other persons & that he had one tub in his hands, is sufficient to convict him of having the whole in his possession; within 27 Geo. 3, c. 31.—*R. v. CONSTABLE* (1793), *Nolan*, 232.

**819. What witness may be asked—Identity of informer.]**—(1) Deft.'s counsel have no right, nor shall they be permitted to inquire the name of the person who gave the information of the smuggled goods (*LORD KENYON*).

(2) Where the officers have an information of smuggled goods, which affords a probable ground to warrant the search, persons obstructing them in their search, or in the discharge of their duty, are liable to an information for the obstruction, whether smuggled goods are found or not. But the officers search at their peril (*LORD KENYON*).—*R. v. AKERS* (1790), 6 *Esp.* 125, n.; 170 *E. R.* 850.

**820. ———.]**—In an information by the A.-G. for a breach of the revenue laws, a witness for the Crown cannot be asked, in cross-examination, "Did you give the information?" For the rule of public policy, which protects a witness from being asked such questions as would disclose the informer, if he be a third person, equally applies to questions which would disclose whether the witness is himself the informer.—*A.-G. v. BRIANT* (1846), 15 *M. & W.* 169; 15 *L. J. Ex.* 265; 6 *L. T. O. S.* 394; 10 *J. P.* 518; 153 *E. R.* 808.

*Annotations:—*Consid. *Marks v. Beyfus* (1890), 25 *Q. B. D.* 494. *Mentd. R. v. Edwards* (1853), 9 *Exch.* 32.

**Admissibility of revenue books in evidence.]**—*See EVIDENCE*, Vol. XXII., p. 348, Nos. 3514–3521.

**Admissibility of evidence of witness disobeying order to leave court.]**—*See, generally, EVIDENCE*, Vol. XXII., pp. 456, 457, Nos. 4770–4782.

**Jurisdiction to order evidence on commission.]**—*See EVIDENCE*, Vol. XXII., p. 569, Nos. 6204–6207.

**Proof of authority to prosecute.]**—*See GAME*, Vol. XXV., pp. 388, 389, Nos. 390, 391.

#### D. Costs.

**Whether costs given for or against Crown.]**—*See CONSTITUTIONAL LAW*, Vol. XI., pp. 531, 533, Nos. 344, 345, 367.

**Liability of joint defendants.]**—*See CONSTITUTIONAL LAW*, Vol. XI., p. 534, No. 375.

**Right of Crown to excess costs paid to justices.]**—*See CONSTITUTIONAL LAW*, Vol. XI., p. 535, No. 377.

thrown on the owner.—*R. v. SALTER* (1856), 8 *N. B. R.* (3 *All.*) 321.—*CAN.*

**p. — Of illegality of seizure—Seizure for defective entry.]**—Where a seizure is made of goods imported into Canada, on the ground that, while the goods were stated in the entry papers to be imported in the original packages, they were not so imported in fact, if claimant declines to accept the Minister's decision confirming the seizure, & obtains a reference of his claim to the ct., the burden of proof is upon claimant to show the *bona fides* of the entry in dispute.—*CROSBY v. R.* (1907), 11 *Exch. C. R.* 74.—*CAN.*

**q. — Goods imported legally—On party charged.]**—*Re R. v. MCKENZIE* (1926), 45 *Can. Crim. Cas.* 144; 58 *N. S. R.* 313.—*CAN.*

**r. — ———.]**—*R. v. LE-BLANC* (N. B.), [1927] 2 *D. L. R.* 793; 47 *Can. Crim. Cas.* 302.—*CAN.*

**t. Possession of package—Prima facie evidence of knowledge of its contents.]**—The fact that a person has certain packets of goods in his possession,

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which he is in the act of importing, is evidence that he is aware of the contents of such packages.—*IRVING v. NISHIMURA* (1907), 5 *C. L. R.* 233.—*AUS.*

**a. Competent witness—Surveyor of customs.]**—The surveyor of customs, not being the party either "seizing or informing," is not entitled to a share of the penalty, & is a competent witness upon an information for a penalty for harbouring smuggled goods.—*A.-G. v. WARNER* (1849), 5 *U. C. R.* 485.—*CAN.*

**b. — Complainer.]**—*MACKINTOSH v. WOOSTER*, [1919] 3 *S. C. (J.)* 15; [1919] 2 *S. L. T.* 147.—*SCOT.*

#### PART XIII. SECT. 1, SUB-SECT. 2.—E.

**c. Notice of appeal—Time for—Extension of time—Where notice defective.]**—*R. v. MOYLE* (Ont.), [1927] 3 *D. L. R.* 639; 47 *Can. Crim. Cas.* 349.—*CAN.*

**d. Right of prosecutor to**  
*R. v. MCKENZIE*, [1924] 3

#### E. Appeals.

*See Excise Management Act*, 1827 (c. 53), s. 84; *Judicature (Procedure) Act*, 1894 (c. 16), s. 2; & generally, *MAGISTRATES*, Vol. XXXIII., pp. 390 *et seq.*

**821. Notice of appeal—By whom given—Appeal by Crown.]**—(1) A dealer in & retailer of tobacco is liable to the penalty of £200, imposed by Tobacco Act, 1842 (c. 93), s. 3, for having in his possession adulterated tobacco, although he had purchased it as genuine, & had no knowledge or cause to suspect that it was not so.

(2) Where an officer of excise, by whom an information for penalties is exhibited, is absent at the time of the hearing, & there is an appeal against the judgment, on the part of the Crown, to the quarter sessions, under Excise Management Act, 1827 (c. 53), s. 82, the notices of appeal required by sect. 83 may, by Excise Management Act, 1834 (c. 51), ss. 22 & 23, be given & signed by any officer of excise who is present conducting the proceedings.—*R. v. WOODROW* (1846), 15 *M. & W.* 404; 2 *New Mag. Cas.* 1; 2 *New Sess. Cas.* 346; 16 *L. J. M. C.* 122; 7 *L. T. O. S.* 115; 10 *J. P.* 791; 153 *E. R.* 907.

*Annotations:—*As to (1) *Reid. R. v. Sleep* (1861), *Le. & Ca.* 44; *Sherras v. De Rutzen*, [1895] 1 *Q. B.* 918; *Re Mahmoud & Ispahani*, [1921] 2 *K. B.* 716.

**822. On whom served—Convicting magistrates—Sufficiency of service on clerk in court.]**—(1) When an adjudication by justices on an information under Excise Management Act, 1827 (c. 53), is appealed against, notice of appeal must, by sect. 83, be served on the justices:—*Held*: service in ct. upon the clerk to the justices, in their presence was good service.

(2) Notice of hearing of the appeal is also Excise Management Act, 1841 (c. 20), s. 30 required to be served on resp. at his place of abode:—*Held*: such notice must be served on the person laying the information, & service at the office of excise was insufficient, although by Excise Management Act, 1827 (c. 53), s. 61, no information can be exhibited under the Act except by the order of the Comrs. of Excise.—*R. v. EAVES* (1870), *L. R.* 5 *Exch.* 75; 39 *L. J. M. C.* 70; 21 *L. T.* 829.

*Annotation:—*As to (1) *Reid. South Staffordshire Waterworks Co. v. Stone* (1887), 56 *L. J. M. C.* 122.

**823. — Time for—Summary Jurisdiction Act, 1879 (c. 49), s. 31.]**—A person convicted of an offence against the excise laws gave notice of appeal four days after the decision:—*Held*: making absolute a rule for a *mandamus* to justices

248; 43 *Can. Crim. Cas.* 247; 57 *N. S. R.* 341.—*CAN.*

**e. Whether appeal lies—Conviction for possessing distilling apparatus.]**—*Held*: an appeal would lie to the quarter sessions from a summary conviction for possessing distilling apparatus without having made a return thereof.—*Re LUCAS & MCGILVERAN* (1869), 29 *U. C. R.* 81.—*CAN.*

**f. ———.]**—*DARLING v. RYAN*, *Cass. Dig.* 2nd ed. 435.—*CAN.*

**g. — Conviction for brewing beer without license.]**—*R. v. ERNST* (B. C.), [1927] 1 *W. W. R.* 961; 43 *Can. Crim. Cas.* 190.—*CAN.*

**h. — Where amount of penalty or forfeiture, if judgment in civil cause, would give right to appeal.]**—*R. v. BAIG* (1926), 59 *N. S. R.* 86; [1927] 1 *D. L. R.* 896; 47 *Can. Crim. Cas.* 58.—*CAN.*

**k. — Order directing penalty to be enforced under Stamp Act.]**—A decision of a judge directing a penalty to be enforced under Stamp Act, the case being afterwards proceeded with,

V. for. 1

**831. — Property in hands of assignee in bankruptcy.]**—If a candle maker, being in arrear for the single duties, becomes a bkpt., & is convicted after the assignment of his effects; the double duties are a lien upon the candles, utensils, & materials, in the hands of his assignees; & they may be distrained.—*STRACY v. HULSE* (1780), 2 Doug. K. B. 411; 99 E. R. 264.

*Annotations:—Distd. Austin v. Whitehead* (1795), 6 Term Rep. 436. *Consd. R. v. Tregoning* (1828), 2 Y. & J. 132.

**832. —**—*R. v. DALE*, No. 829, *ante*.

**833. Divisibility of lien.]**—*R. v. DALE*, No. 829,

**834. Priority of Crown lien—Goods in hands of factor.]**—A writ of extent having issued against A., a malster, for a debt due to the Crown from him for duties on malt, a cargo of malt was seized under it, in the hands of deft. Deft. being allowed to plead to the extent, in order to state his interest in the goods, alleged by his plea that the malt in question, after being manufactured, had had the duty charged upon it, & that such duty was paid; that it was then deposited by A., the maker, with deft., upon a contract with him, that he was to accept certain bills of exchange drawn by A., & that the malt was to be held by him as a pledge for the payment of them, & in case the bills were not paid, he was then to be at liberty to sell the malt; that the bills first accepted were renewed, but before the renewed bills became due the malt was seized:—*Held*: the malt was seizable in the hands of deft., under 28 Geo. 3, c. 37, s. 21, as goods in the custody or possession of a person in trust for the maker, chargeable with duties of excise in arrear & owing from such maker, such goods having been, whilst in the hands of A., liable not only for the specific duties chargeable upon them, which had been paid, but for other duties for which A. was responsible at that time, & remaining so at the time of the seizure.

*Qu.*: whether goods chargeable with excise duties under Excise Management Act, 1826 (c. 53), s. 28, deposited with a person as a pledge for acceptances given by him to the maker, before the passing of Excise Management Act, 1841 (c. 20), by which the sect. of the former Act imposing the duties was

repealed, & similar duties imposed, were liable, since the passing of that Act, to be seized in the hands of the pledgee.—*A.-G. v. TRUEMAN* (1843), 11 M. & W. 694; 13 L. J. Ex. 70; 8 J. P. 443; 152 E. R. 983.

*Annotation:—Held. A.-G. v. Walmsley* (1843), 13 L. J. Ex. 66.

**835. — Sale by factor—Recovery of proceeds by Crown.]**—A., a maltster, had consigned large quantities of malt to W., a factor, for sale, on which W. made advances to him. While the malt was in W.'s hands, A. failed, being largely indebted to the Crown for malt duties, & an inquisition & extent issued against him, under which the malt in W.'s hands was seized by the sheriff. W. having petitioned the Board of Excise that his lien might be allowed, the solr. of Excise wrote to the collector for the district, stating, that the Board had ordered that W.'s claim as found on the inquisition, should be allowed; that he should communicate this to W. & the sheriff; that he was to satisfy himself as to the correctness of the amount of the lien by examination of the documents; & that, if all the parties interested consented to an immediate sale of the malt, the undersheriff might at once cause it to be sold, in the mode most likely to realise the best price, either by auction, or by allowing W. to dispose of it in the market. In pursuance of this letter, W., by consent of all parties, sold the malt & received the proceeds. While they were in his hands, the Board of Excise communicated to him, that, until the result of a case submitted to the law officers of the Crown, no steps must be taken respecting the sale of the malt, or the appropriation of the proceeds. W., however, on the following day, paid over to the sheriff, for the use of the Crown, the balance only of the proceeds, after retaining the amount of his own lien:—*Held*: W. had no authority from the Board of Excise to appropriate any part of the proceeds to the satisfaction of his own lien, until after the amount of it had been ascertained by the collector; & he was liable for the amount to the Crown in an information for money had & received.—*A.-G. v. WALMSLEY* (1843), 12 M. & W. 179; 13 L. J. Ex. 66; 2 L. T. O. S. 151; 152 E. R. 1100.

## Part XIV.—Expenditure of the Revenue.

### SECT. 1.—PENSIONS AND SUPERANNUATION ALLOWANCES.

*See Superannuation Acts, 1834 (c. 24), 1859 (c. 26), 1884 (c. 57), 1887 (c. 67), 1892 (c. 40), 1909 (c. 10), 1914 (c. 86); Police Magistrates (Superannuation) Act, 1915 (c. 74); Superannuation (Prison Officers) Act, 1919 (c. 67); Pensions (Increase) Acts, 1920 (c. 36), 1924 (c. 32).*

**836. Jurisdiction of Treasury Commissioners—To decide right to pension.]**—Under the provisions of Superannuation Act, 1859 (c. 26), the question whether or not a pension shall be granted to a public servant is to be decided by the Comrs. of the

Treasury; & until they have decided to grant a pension no public servant can maintain an action in respect thereof. *Pltf.*, a public servant, who had formerly held the office of clerk of the patents, but to whom no pension had ever been granted, brought an action against A.-G., claiming a pension in respect of such office, & to have an account taken of all moneys due to him in respect thereof. All matters of account between *pltf.* & the Crown had been finally settled, by the award of the arbitrators, in the year 1869:—*Held*: the action must be stayed, as being frivolous & vexatious, & an abuse of the process of the ct.—*EDMUNDS v. A.-G.* (1878), 47 L. J. Ch. 345; 38 L. T. 213; 26 W. R. 550.

*due.]—Re A. MOTHERWELL OF CAN., LTD. (Ont.), [1927] 1 D. L. R. 80; 8 C. B. R. 58.—CAN.*

*Crown lien—Bonds to bank.]—MONTREAL TRUST v. SOUTH SHORE LUMBER CO., LTD., [1924] 1 D. L. R. 667; 33 B. C. R. 280.—CAN.*

*h. Release of goods from bonded warehouse—For transfer to another province*

*Whether lien for duty still attaches.]—A.-G. OF CANADA v. MCCORMICK (1919), 52 N. S. R. 216; 45 D. L. R. 463.—CAN.*

### PART XIV. SECT. 1.

*k. Right to \_\_\_\_\_ sation allowance—Prosecutor for Queen.]—Held: applt. was entitled to superal \_\_\_\_\_ allowance by virtue of having held the office of "Prosecutor for the Queen."—SMITH*

*v. R., [1898] A. C. 782, P. C.—AUS.*

*l. — Whether service must be continuous.]—WALKER v. SIMPSON, [1903] A. C. 208, P. C.—AUS.*

*m. — Acceptance of compensation under special statute—Estoppel.]—WILLIAMS v. CURATOR OF INTTESTATE ESTATES, [1909] A. C. 353, P. C.—AUS.*

*of*

1.—*Pensions and superannuation allowances.*  
 Sect. 2: Sub-sects. 1 & 2.]

837. ———.]—Under Superannuation Acts, 1834 (c. 24), & 1859 (c. 26), the decision of the Comrs. of the Treasury, either as to whether a person is entitled to a superannuation allowance or as to the basis upon which an allowance shall be calculated, is final, & no ct. of law has jurisdiction in the matter.—*YORKE v. R.*, [1915] 1 K. B. 852; 84 L. J. K. B. 947; 112 L. T. 1135; 31 T. L. R.

*Annotation*.:—*Consd. Wigg v. A.-G. for Irish Free State*, [1927] A. C. 674.

838. ——— Whether special minute condition precedent.]—*MIDDLESEX JJ. v. R.*, No. 840, *post*.

839. ——— To decide amount of superannuation allowance.]—Under the Acts regulating the superannuation allowances of the Civil Service, the decision of the Comrs. of the Treasury as to the amount of an allowance is final, & no ct. of law has jurisdiction in the matter.—*COOPER v. R.* (1880), 14 Ch. D. 311; 49 L. J. Ch. 490; 42 L. T. 617; 28 W. R. 611.

*Annotations*.:—*Folld. Yorke v. R.*, [1915] 1 K. B. 852. *Consd. Wigg v. A.-G. for Irish Free State*, [1927] A. C. 674. *Reid. Hollinshead v. Hazleton*, [1916] 1 A. C. 428.

840. ——— To apportion allowance.]—At the time of the coming into operation of Prisons Act, 1877 (c. 21), C. was the governor of a prison which had been under the control of the justices of M. as the local authority, but by the Act it was transferred to the Secretary of State for the Home Department. Shortly afterwards O., who was not incapacitated in any way, resigned his appointment in order to facilitate some improvements in the organisation of the prison, & the Comrs. of the Treasury granted him an annuity pursuant to sect. 36, & apportioned it, in accordance with that sect., between the county rates of M. & moneys to be provided by Parliament. No special minute within Superannuation Act, 1859 (c. 26), s. 7, was made or laid before Parliament with reference to C. or his office:—*Held*: (1) the Comrs. had power to apportion the annuity as they had done; (2) the provisions of the Act of 1859 as to a special minute were directory only, & not a condition precedent to the granting of an annuity such as that in question.—*MIDDLESEX JJ. v. R.* (1884), 9 App. Cas. 757; 53 L. J. Q. B. 505; 51 L. T. 513; 48 J. P. 804; 33 W. R. 49; 15 Cox, O. C. 542, H. L.

841. ——— To decide basis of calculation.]—*YORKE v. R.*, No. 837, *ante*.

*Mandamus to Treasury Commissioners*.]—*See CROWN PRACTICE*, Vol. XVII., pp. 304, 305, Nos. 1164, 1167, 1171.

*Assignment of pensions, etc.*]—*See CHOSSES in ACTION*, Vol. VIII., pp. 436, 437–440, Nos. 135, 147–172.

*Commutation of pensions*.]—*See Pensions Commutation Acts*, 1871 (c. 36), 1882 (c. 44); *Admiralty Pensions Act*, 1921 (c. 39), s. 1.

*Compensation for abolition of office*.]—*See*

*Person employed temporarily*.—*Later*

*Civil Service in*  
 1868, as "temporary draftsman."  
 Jan. 1870, he was appointed  
 "assistant draftsman" & left the  
 office in Sept. 1896:—*Held* he was  
 entitled to reckon his service from Sept.  
 1869, to Jan. 1870, in computing his  
 length of service for a pension.—  
*WILLIAMS v. MACHARG* (1910), 102  
 L. T. 870, P. C.—*AUS.*

*s.* ——— *Jurisdiction of Public Service*

*Board*.]—*WILLIAMS v. GIDDY* (1911),  
 80 L. J. P. C. 102.—*AUS.*

*p.* ——— *Absolute right on attaining*  
*age of sixty*.]—*WILLIAMS v. DELOHERY*,  
 [1913] A. C. 172, P. C.—*AUS.*

*q.* ——— *Under Superannuation Act*,  
 1871 (W. A.).—*Discretion of Crown*—  
*Not affected by Public Service Appeal*  
*Board Act*, 1920 (W. A.).]—*WALSH v.*  
*R.*, [1927] A. C. 337, P. C.—*AUS.*

*r.* ——— *Jurisdiction of executive*  
*authority*.]—*Employees in the civil*

*PUBLIC AUTHORITIES*, Vol. XXXVIII., pp. 139–143,  
 Nos. 1031–1063.

*Officers of local authorities*.]—*See Local Govern-*  
*ment & Other Officers Superannuation Act*, 1922  
 (c. 59).

*Navy, Army & Air Force*.]—*See ROYAL FORCES*,  
 pp. 323, 326, 327, *post*.

*Receivership of pensions*.]—*See RECEIVERS*, p.  
 46, Nos. 568–570, *ante*.

## SECT. 2.—NATIONAL DEBT.

### SUB-SECT. 1.—IN GENERAL.

842. *Effect of conversion of stock*—*National Debt (Conversion) Act*, 1888 (c. 2), s. 25 (2).]—*Pltfs.*, by a deed executed in 1871, created a perpetual rentcharge of £10,000 a year, for the benefit of first debt. The deed provided that *pltfs.* should be entitled at any time to redeem the rentcharge by transferring to the trustees thereof a specified amount of "3 per cent Annuities." In 1888 above Act was passed:—*Held*: by sect. 25 (2) of that Act, *pltfs.* were entitled to redeem the rentcharge by transferring to the trustees the specified amount of 2½ per cent. stock created under the Act.

In the two instruments, the deeds of 1871 & 1880, which operate together, there is a reference to stocks, 3 per cent. Annuities & Bank Annuities, which were liable to be converted or exchanged in pursuance of the Act. That conversion or exchange has since taken place, & that being so, sect. 25 (2) says that the reference in those instruments to 3 per cent. Annuities or Bank Annuities is to be construed as a reference to the new stock created by the Act of 1888. I cannot see any reasonable ground for holding that that is not the effect of the words. It is contended that reference to a "stock liable to be converted or exchanged" means a reference to some particular sum of stock liable to be converted or exchanged. That would be giving a totally different meaning to the Act, & would, as it seems to me, be introducing something which is not to be found in the sect., & which would not be intelligible when it was inserted. I cannot understand why a different rule should be adopted when a particular sum is mentioned from that which is to prevail when a particular sum is not mentioned (*NORTH, J.*).—*NORTHUMBERLAND (DUKE) v. PERCY*, [1893] 1 Ch. 298; 62 L. J. Ch. 331; 68 L. T. 45; 41 W. R. 597; 9 T. L. R. 86; 37 Sol. Jo. 80; 3 R. 156.

*Annotation*.:—*Apld. Re Howell-Shepherd, Churchhill v. St. George's Hospital*, [1894] 3 Ch. 649.

843. ——— *Application to will*.]—In the first branch of above sub-sect. instrument includes a will.—*Re HOWELL-SHEPHERD, CHURCHILL v. ST. GEORGE'S HOSPITAL*, [1894] 3 Ch. 649; *sub nom. Re SHEPHERD, CHURCHILL v. ST. GEORGE'S HOSPITAL*, 64 L. J. Ch. 42; 71 L. T. 516; 43 W. R. 95; 8 R. 735.

——— *On rentcharge*.]—*See RENTCHARGES & ANNUITIES*, p. 191, Nos. 807, 808.

service who may be retired or removed from office under Civil Service Superannuation Act, s. 11, have no absolute right to any superannuation allowance, such allowance being entirely in the discretion of the executive authority.—*BALDERSON v. R.* (1898), 28 S. C. R. 261.—*CAN.*

*Labourer paid weekly*.—*Dismissal from employment*.]—*R. (DILLON) v. MINISTER FOR LOCAL GOVERNMENT & PUBLIC HEALTH*, [1927] 1 R. 474.—*IR.*



**Payment of dividends.]—***See* BANKERS, Vol. III., pp. 128, 129, Nos. 46–51.

**Maintenance of Infant.]—***See* INFANTS, Vol. XXVIII., p. 238, No. 938.

**Constitution of Bank of England.]—***See* BANKERS, Vol. III., p. 123, Nos. 1, 2.

**Bank books.]—***See* BANKERS, Vol. III., p. 133, Nos. 81–88.

#### SUB-SECT. 2.—TRANSFER OF STOCK.

*See, generally,* BANKERS, Vol. III., pp. 123–128, Nos. 3–45.

**844. Jurisdiction of court—To order bank to correct entries in books—Name of party misspelled.]—**Where, in consequence of erroneous spelling in the orders of the ct., the name of a party has been misspelled in the entries of transfers in the books of the Bank of England, the ct. will amend its own orders, but will not make an order upon the Bank to correct the entries in their books.—*NEWTON v. CLARK* (1823), 1 L. J. O. S. Ch. 168.

**845. — To order Bank to transfer—Stock invested in names of Infant & others.]—***Semble*: the ct. cannot, under any circumstances, direct the Bank of England to transfer stock which has been invested in the names of an infant & other persons.—*BANNISTER v. ROGERS* (1838), 2 Jur. 393.

**846. — — To sequestrator.]—***HOOD-BARRS v. CATHCART* (1895), 39 Sol. Jo. 639, D. C.

**847. Right to retransfer—Stock standing in joint names of transferor & transferee—Transfer not by way of advancement.]—**A. transferred a sum of stock into the joint names of himself & wife & child, without however declaring any trust thereof, & for nine years regularly received the dividends thereof, & applied them to his own use. He then filed his bill for a retransfer by the Bank to himself. Retransfer ordered upon motion for decree, founded upon pltf.'s own affidavit, stating that the transfer of the stock into the joint names had not been intended by him as an advancement.—*DEVOY v. DEVOY* (1857), 3 Sm. & G. 403; 26 L. J. Ch. 290; 28 L. T. O. S. 336; 3 Jur. N. S. 79; 5 W. R. 222; 65 E. R. 713.

*Annotations:—*Folld. Stone v. Stone (1857), 3 Jur. N. S. 708. *Re*ld. *Dumper v. Dumper* (1862), 3 Giff. 583; *Forrest v. Forrest* (1865), 5 New Rep. 299.

**848. — — —.]—**E. transferred a sum of stock into the names of her three infant children jointly with her own, but not as a gift or provision for them, nor with the intention in any way to deprive herself of the ownership thereof, or the benefit of the same, but solely to prevent another party obtaining the same. On bill filed by E., the ct. declared that the three infant children were trustees jointly with pltf., in trust for pltf., & that pltf. was absolutely entitled to the fund.—*STONE v. STONE* (1857), 3 Jur. N. S. 708.

**849. — No intention to make transferee trustee.]—**Pltf. a widow in the year 1880, caused £6,000 Consols to be transferred into the joint names of herself & deft. who was her godson. She did so with the express intention that deft. in the event of his surviving her, should have the Consols for his own benefit, but that she should have the dividends during her life; & she had previously been warned that if she made the transfer she could not revoke it. The first notice deft. had of the transaction was a letter from pltf.'s solrs. about

the end of 1882 claiming to have the fund retransferred to pltf.:—*Held*: (1) the legal title of deft. as a joint tenant of the stock was complete, although he had not assented to the transfer, until he was requested to join in retransferring the stock, for the legal title of a transferee of stock is complete without acceptance; (2) pltf. could not claim a retransfer on equitable grounds, the evidence clearly showing that she did not when she made the transfer, intend to make deft. a mere trustee for her as to the dividends, therefore pltf. was not entitled to have the stock retransferred to her.

(3) A transfer of property to a person without his knowledge, if made in proper form, vests the property in him at once, subject to his right to repudiate it when informed of the transfer.—*STANDING v. BOWRING* (1885), 31 Ch. D. 282; 55 L. J. Ch. 218; 54 L. T. 191; 34 W. R. 204; 2 T. L. R. 202, C. A.

*Annotations:—*As to (3) *Re*ld. *Re Blake, Blake v. Power* (1889), 60 L. T. 663; *Re Arbib & Class's Contract*, [1891] 1 Ch. 601. *Generally, Re*ld. *London & County Banking Co. v. London & River Plate Bank* (1888), 21 Q. B. D. 635; *Re Weston, Davies v. Tagart*, [1900] 2 Ch. 164; *Mallott v. Wilson*, [1903] 2 Ch. 494; *Re Howes, Howes v. Platt* (1905), 21 T. L. R. 501.

**850. Injunction to restrain transfer—Undertaking as to damages—Application by married woman.]—**An application was made on behalf of a married woman for an injunction restraining the Bank of England, until further order, from permitting the transfer of a sum of New 3 per cent. Annuities, standing in the names of the exors. of testator, & to which the married woman claimed to be beneficially entitled. An injunction was granted for a fortnight on the usual undertaking of the married woman to be answerable in damages. The registrar refused to draw up the order on the sole undertaking of the married woman as to damages:—*Held*: the sole undertaking of the married woman must be accepted.—*Re PRYNNE* (1885), 53 L. T. 465.

*Annotation:—**Apld. Pike v. Cave* (1893), 62 L. J. Ch. 937.

**851. Transfer by operation of statute—Stock vested in dissolved school board—Right of individual members to transfer.]—**Poor Law Amendment Act, 1844 (c. 101), which empowers parishes & poor law unions to combine into school districts, by sect. 45 incorporates the boards of management for such school districts, & not the school district itself. When a school district has been dissolved by the Local Government Board under Dissolved Boards of Management & Guardians Act, 1870 (c. 2), sect. 12 of that Act does not automatically vest in the members constituting the board of management the property of the school district which has been dissolved, but such property remains vested in the district board. Consols vested in the board of management of a dissolved school district are therefore not transferable by the individual members constituting the board until some further act has taken place vesting the right to transfer in them.—*MORTON v. BANK OF ENGLAND*, [1904] 1 Ch. 664; 73 L. J. Ch. 503; 90 L. T. 375; 68 J. P. 268; 52 W. R. 393; 20 T. L. R. 230; 2 L. G. R. 734.

**852. — — — Transfer to local education authority—**Education Act, 1902 (c. 42), sched. 2 (1).—This was an action brought by the corpn. of Oldham against the Bank of England to obtain possession of £780 Os. 2d. 2½ per cent. Annuities. Pltfs. by their council were, under above Act, the local education authority for the district of the

#### PART XIV. SECT. 2, SUB-SECT. 2.

**a. Transfer into court—Undertaking to institute administration**  
*BYRNE*, [1897] 1 L. R. 61.—*IR.*

NATIONAL DEBT ACT, 1870, *Ex*



**Sect. 2.—National debt: Sub-sects. 2 & 3, A., B.**

borough of Oldham. The Act came into operation in that district on Jan. 1, 1904, which was the "appointed day," & at that time these annuities stood in the books of the Bank of England in the name of the Oldham School Board. Pltfs. claimed that on the appointed day the school board had ceased to exist, that the £780 0s. 2d. had then become vested in them by virtue of the Act, & that no further transfer was necessary. The bank contended that the Annuities could only be transferred by an entry in their books, that the Oldham School Board had not been dissolved, that the Annuities must be transferred by them to pltfs., & that the Annuities had not been vested in pltfs. by virtue of the Act:—*Held*: by above Act, s. 2, the school board had for all purposes ceased to exist on the appointed day; by above sched. to the Act the Annuities had on that day vested in pltfs. by virtue of the Act; & no further transfer was necessary.—**OLDHAM CORPN. v. BANK OF ENGLAND**, [1904] 2 Ch. 716; 73 L. J. Ch. 785; 91 L. T. 582; 68 J. P. 584; 53 W. R. 243; 20 T. L. R. 787; 48 Sol. Jo. 724; 2 L. G. R. 1324, C. A.

*Annotations*:—*Reid*. *Re Wallend B. C. & Northumberland County Council*, [1906] 2 Ch. 506; *Re Leeds Institute of Science Art & Literature & Leeds City Council*, [1909] 1 Ch. 500.

**Transfer of stock vested in lunatic.**—*See, generally*, LUNATICS, Vol. XXXIII., pp. 217–221, Nos. 1243–1302.

**Bequest of stock for reduction of National Debt.**—*See* CHARITIES, Vol. VIII., pp. 259, 385, Nos. 209, 2001.

**Production & inspection of bank books & transfer list.**—*See* BANKERS, Vol. III., p. 133, Nos. 81–88.

**SUB-SECT. 3.—RETRANSFER OF UNCLAIMED DIVIDENDS AND STOCK.**

*A. In General.*

*See* National Debt Act, 1870 (c. 71), s. 55.

**853. Jurisdiction of court.**—The jurisdiction given to the ct. by National Debt Act, 1870 (c. 71), s. 55, to decide upon petition as to the validity of a claim for the retransfer of stock, which has been transferred to the National Debt Comrs. under the provisions of sect. 51, is to be exercised in the mode in which the ordinary jurisdiction of the ct. is exercised. Therefore, if a petition for the retransfer of stock is heard on its merits, & is dismissed on the ground that petitioner has failed to make out his title, he cannot, on the subsequent discovery of fresh evidence in support of his title, present a fresh petition for the same object, without leave of the ct. previously obtained.—*Re MAY* (1885), 28 Ch. D. 516; 54 L. J. Ch. 338; 52 L. T. 78; 33 W. R. 917; 1 T. L. R. 220, C. A.  
*Annotation*:—*Reid*. *Bruce v. Allesbury* (1892), 36 Sol. Jo. 865.

**854. Form of proceedings—Petition—In first instance.**—(1) To a suit by three out of four residuary legatees, to recover three-fourths of a sum of stock which the exors. had omitted to get in, & which had been transferred to the Comrs. for the Reduction of the National Debt, under 56 Geo. 3, c. 60, the legatee entitled to the other fourth part of the stock is a necessary party.

(2) The proper form of proceeding to recover stock & dividends, unclaimed for ten years, & carried over to the account of the Comrs. for the Reduction of the National Debt, under 56 Geo. 3, c. 60, is, by petition to be served upon the A.-G. & the Comrs., & not by bill in the first instance;

& if there be conflicting claims to the fund, the ct. will then give directions for the trial of the rights of the parties between themselves, either by suit or otherwise.—*HUNT v. PEACOCK* (1848), 6 Hare, 361; 17 L. J. Ch. 163; 12 L. T. O. S. 5; 12 Jur. 154; 67 E. R. 1205.

**855. —Where conflicting claims—Directions as to trial thereof.**—*HUNT v. PEACOCK*, No. 854, *ante*.

**856. Parties—Claim by legatees—Whether all legatees necessary parties.**—*HUNT v. PEACOCK*, No. 854, *ante*.

**857. —Claim by beneficial owner—Whether legal owner necessary party.**—Stock standing in the name of a deceased trustee having been transferred to the Comrs. for the Reduction of the National Debt, a person claiming to be the legal personal representative of the beneficial owner petitioned for a retransfer:—*Held*: (1) an inquiry, who was entitled, could not be directed in the absence of the personal representative of the trustee; (2) claimant who establishes his claim has no title to any accumulations arising from the investment of the dividends, his right being to have the stock retransferred & the amount of unpaid dividends paid to him in cash, without interest.—*Re ASHMEAD'S TRUSTS* (1872), 8 Ch. App. 113; 42 L. J. Ch. 314; 28 L. T. 1; 21 W. R. 65, L. J.

**858. —Claim by survivor of two executors—Necessity for concurrence of beneficiaries.**—A legacy to an infant was invested in stock in the names of two exors., & the dividends not having been claimed for ten years, the stock was transferred to the Comrs. for the Reduction of the National Debt. One of the exors. having died, the survivor presented a petition for retransfer of the stock. The ct., without requiring the concurrence of the beneficiaries, made an order directing the stock to be transferred to petitioner, & that he should thereout pay the costs of the A.-G. & the Comrs.—*Re ACKLAND'S TRUSTS* (1872), 26 L. T. 418.

**859. —Position of Attorney-General.**—Upon a petition for the retransfer of stock, under 56 Geo. 3, c. 60, service on the Comrs. & also on the A.-G. is required by the Act. The ct. will presume at the hearing of the petition, that the A.-G. represents not only the Comrs. & the Crown as *parens patriæ*, but also the Crown in its beneficial capacity.—*LAWRENCE v. MAULE* (1859), 4 Drew. 472; 28 L. J. Ch. 681; 34 L. T. O. S. 3; 7 W. R. 314; 62 E. R. 182.

*Annotation*:—*Mentd*. *Ellas v. Griffith* (1878), 38 L. T. 871.

**860. On whom petition must be served—Commissioner, & Attorney-General.**—*HUNT v. PEACOCK*, No. 854, *ante*.

**861. — — —**—*LAWRENCE v. MAULE*, No. 859, *ante*.

**862. To whom transfer ordered—Person making out legal title.**—When stock has been transferred to the Comrs. for the Reduction of the National Debt, in consequence of the dividends upon it not having been claimed for ten years, it is not a matter of course to order it to be retransferred to a person who subsequently makes out a legal title, upon which a transfer of the stock would have been made to him if the ten years had not elapsed.

Thus, where stock had stood in the joint names of two persons, of whom one had survived the other upwards of ten years, but had not, during that time, claimed any dividends, the ct. would not, upon the petition of the widow & personal representative of the survivor, order the stock to be transferred into her name, or into the names of the two deceased persons; but directed the master to inquire who was entitled to the stock, with liberty

to state special circumstances.—*Ex p. RAM* (1837), 3 My. & Cr. 25; 1 Jur. 668; 40 E. R. 833, L. C.

*Annotations*:—*Consd. Ex p. Bouts* (1859), 28 L. J. Ch. 648. *Appl. Re Molony* (1860), 1 John. & H. 249. *Distd. Re Ackland's Trusts* (1872), 28 L. T. 418. *Co--l. Re Ash-* (1872), 8 Cl. *Ex p.*

**863. Stock standing in name of trustee—Trustee not beneficiary.**—Where stock in the name of a trustee holding upon trust for a beneficiary has been transferred to the National Debt Comrs., the retransfer will be ordered to be made, not to the beneficiary, but to the trustee.—*Ex p. JAMESON* (1875), L. R. 19 Eq. 430; 44 L. J. Ch. 480; 23 W. R. 591.

**864. What amount retransferred—Not accumulations of dividends.**—*Ex p. LAFERTE* (1837), 8 Jur. 253, n.

**865. ———.**—(1) Where, under 56 Geo. 3, c. 60, a fund had been transferred to the Comrs. for the Reduction of the National Debt, upon a retransfer being directed by the ct., upon the application of the party entitled thereto, it is the uniform practice, without any exception, to direct the costs of the A.-G. & the Comrs., as between party & party, to be paid out of the fund.

(2) The party so obtaining the fund is not entitled to any accumulations which may have arisen from the investment of dividends by the Comrs.—*Re HOLLAND* (1844), 1 Ph. 379; 41 E. R. 676; *sub nom. Ex p. HOLLAND*, 13 L. J. Ch. 167; 3 L. T. O. S. 17; 8 Jur. 253, L. C.

**866. ———.**—*Re ASHMEAD'S TRUSTS*, No. 857, *ante*.

**867. Proof of identity of owner—Petition by executors.**—*HOWARD v. KAY* (1857), 4 Drew. 151; 62 E. R. 59.

**868. Effect of dismissal of petition—Right to present fresh petition—Discovery of fresh evidence—Necessity for leave of court.**—*Re MAY*, No. 853, *ante*.

#### B. When Order Made.

**869. Title in dispute.**—Certain stock standing in the name of bkpt., the dividends of which had not been claimed, was, under 56 Geo. 3, c. 60, transferred to the Comrs. for the reduction of the National Debt. The assignee of the bankrupt, by petition under the Act, claimed the stock as part of bkpt.'s effects. Another person, by petition, claimed the stock, insisting that bkpt. was a trustee for him. A reference was directed to the master to ascertain whose stock it was, & in the meantime, the stock was directed to be transferred into the name of the Accountant-General.—*Ex p. GILLETT*, *Ex p. BACON* (1818), 3 Madd. 28; 56 E. R. 420.

*Annotation*:—*Consd. Hunt v. Peacock* (1848), 6 Hare, 361.

**870. ———.**—The ct. will not, under 56 Geo. 3, c. 60, order, on petition, a retransfer of unclaimed stock that has been transferred to the sinking fund, when the title is disputed.—*Ex p. LAVELL* (1820), 2 Jac. & W. 397; 37 E. R. 680.

*Annotation*:—*Expld. Hunt v. Peacock* (1848), 6 Hare, 361.

**871. Claim by personal representative—Stock in joint names.**—Unclaimed stock standing in the joint names of A. & B., was transferred to the Comrs. for the Reduction of the National Debt; B. survived A., & a petition was presented by the personal representative of B. for the retransfer. The application was refused, on the ground that no account was given of the beneficial interest.—*Ex p. BATEMAN* (1835), 4 L. J. Ch. 112.

**872. ———.**—*Ex p. RAM*, No. 862, *ante*.

—*Sec EXECUTORS*, Vol. XXIII., p. 293, Nos. 3585, 3586.

**873. Transfer previously made to unauthorised person—Personation under forged will.**—*Ex p. JOLLIFFE*, No. 884, *post*.

**874. When inquiry directed as to beneficiaries—Petitioner's title clear.**—The ct. upon petition under 56 Geo. 3, c. 60, will direct stock, which has been transferred to the sinking fund, to be retransferred to petitioners, where their title is clear, without any reference to the master to ascertain who is beneficially entitled to the stock.—*Ex p. NICHOLL* (1823), Turn. & R. 119; 37 E. R. 1041, L. C.

*Annotations*:—*Folld. Re Avery* (1830), 1 Russ. & M. 356. *Distd. Ex p. Ram* (1837), 3 My. & Cr. 25.

**875. ———.**—*Re AVERY* (1830), 1 Russ. & M. 356; 39 E. R. 138, L. C.

**876. ———.**—In 1806, S., in the names of herself, C. & H., purchased a sum of 4 per cent. annuities, subsequently reduced to 3 per cent., the dividends of which were received by S. till her death in 1821, & by C. till his death in 1838. In consequence of no dividends having been received since 1838, the stock had been transferred into the names of the Comrs. for reducing the National Debt. On a petition presented by H., showing that he was the survivor of the three persons, the ct. ordered the stock to be retransferred, & the dividends paid to him, but subject to the payment of the costs of the petition.—*Ex p. BOUTS* (1859), 28 L. J. Ch. 648; 34 L. T. O. S. 27; 5 Jur. N. S. 951; 7 W. R. 512.

**877. ——— Title in dispute.**—*Ex p. GILLETT*, *Ex p. BACON*, No. 869, *ante*.

**878. ——— Claim by personal representative—Stock in joint names.**—*Ex p. RAM*, No. 862, *ante*.

**879. ———.**—Where stock, which had been standing in the names of two persons, had been transferred to the Comrs. for the Reduction of the National Debt, in consequence of the dividends not having been claimed for ten years, the ct., upon the petition of the administrator of the survivor of the two persons to have the stock transferred to him, directed a reference to inquire who was entitled to the stock.—*Re BISHTON & CROCKETT* (1858), 27 L. J. Ch. 168; 31 L. T. O. S. 64; 6 W. R. 289, L. C.

**880. ——— Stock in sole name.**—Where stock standing in the sole name of a person, who died in 1843, had been transferred to the Comrs. for the Reduction of the National Debt:—*Held*: one of the next of kin, who took out administration in 1860, was not entitled to an order for retransfer, without an inquiry who were the persons interested.—*Re MOLONY* (1860), 1 John. & H. 249; 3 L. T. 465; 9 W. R. 68; 70 E. R. 740; *sub nom. Re MALONY*, 7 Jur. N. S. 42.

#### C. Costs.

**881. General rule—Payment out of stock retransferred.**—On petition under 56 Geo. 3, c. 60, for a retransfer of unclaimed stock that has been transferred to the sinking fund, the costs are in general to be paid out of the stock in question.—*Ex p. MARTIN* (1821), Jac. 55; 37 E. R. 770.

**882. ———.**—*Ex p. LAFERTE* (1837), 8 Jur. 253, n.

**883. ———.**—*Re HOLLAND*, No. 865, *ante*.

**884. ———.**—A sum of stock, belonging to one H., was transferred by the Bank, under 56 Geo. 3, c. 60, into the names of the Comrs. for the Reduction of the National Debt, no claim having been made to the dividends for ten years. Afterwards, the Bank retransferred the Stock to one S., who had by fraud obtained probate to a forged will of H., in which she was made to appoint T. exor., S. representing himself to be such T.:—

*Sect. 2.—National debt: Sub-sect. 3, C. Sect. 3.]*

*Held*: the retransfer having been actually made to a person not authorised by the Ecclesiastical Ct. to receive it, the real exors. of H. were entitled, on petition presented under the Act, to have such amount of stock transferred to them out of the funds standing in the names of the Comrs. as would be sufficient to answer the amount of stock & dividends paid to S., they having no remedy against S., who had been transported for the felony; but the costs were ordered to be paid out of the fund.—*Ex p. JOLLIFFE* (1845), 8 Beav. 168; 4 L. T. O. S. 309; 10 Jur. 813; 50 E. R. 66; *sub nom. Ex p. JOLIFFE*, 14 L. J. Ch. 134.

885. ———.]—*Ex p. BOUTS*, No. 876, *ante*.

886. ———.]—*Re ACKLAND'S TRUSTS*, No. 858, *ante*.

**SECT. 3.—PAYMASTER-GENERAL AND ACCOUNTING OFFICERS.**

*See* Paymaster-General Acts, 1835 (c. 35), 1845 (c. 55), 1889 (c. 53); Exchequer & Audit Department Act, 1866 (c. 39).

**887. Paymaster of exchequer bills—Revocation of appointment.]**—The office of paymaster of exchequer bills is an office during pleasure only, & not during good behaviour, under the provisions of 48 Geo. 3, c. 1. The appointment of a paymaster in the room of another is, of itself, a revocation of the first appointment. Such former appointment may be so revoked, although the writing conferring that appointment contain no power of revocation.—*SMYTH v. LATHAM* (1833), 9 Bing. 692; 1 Cr. & M. 547; 3 Moo. & S. 251; 3 Tyr. 509; 2 L. J. Ex. 241; 131 E. R. 773, Ex. Ch.  
*Annotation*:—*Reid. Hill v. R.* (1854), 8 Moo. P. C. C. 138.

**REVENUES OF THE CROWN.**

*See* CONSTITUTIONAL LAW.

**REVERSIONS AND REMAINDERS.**

*See* REAL PROPERTY AND CHATELS REAL; SETTLEMENTS.

**REVOCATION OF WILLS.**

*See* WILLS.

**REWARD.**

*See* CONTRACT; CRIMINAL LAW AND PROCEDURE; POLICE.

**RIGHT OF AUDIENCE.**

*See* BARRISTERS; PARLIAMENT; SOLICITORS.

**RIGHT OF WAY.**

*See* EASEMENTS AND PROFITS À PRENDRE.

## RIGHTS IN RELATION TO LAND.

*See* COMMONS AND RIGHTS OF COMMON; EASEMENTS AND PROFITS À PRENDRE; FERRIES; FISHERIES; GAME; HIGHWAYS, STREETS, AND BRIDGES; LANDLORD AND TENANT; MINES, MINERALS, AND QUARRIES; MORTGAGE; OPEN SPACES AND RECREATION GROUNDS; PARTITION; REAL PROPERTY AND CHATTELS REAL; SALE OF LAND; WATERS AND WATERCOURSES.

## RIOTS.

*See* CRIMINAL LAW AND PROCEDURE; POLICE.

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## RIPARIAN RIGHTS.

*See* FISHERIES; WATERS AND WATERCOURSES.

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## RITUAL.

*See* ECCLESIASTICAL LAW.

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## RIVERS.

*See* WATERS AND WATERCOURSES.

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## ROADS.

*See* HIGHWAYS, STREETS, AND BRIDGES.

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## ROBBERY.

*See* CRIMINAL LAW AND PROCEDURE.

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## ROMAN CATHOLICS.

*See* CHARITIES; ECCLESIASTICAL LAW; HUSBAND AND WIFE.

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## ROYAL FAMILY.

*See* CONSTITUTIONAL LAW.

# ROYAL FORCES.

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## Part I.—The Royal Navy.

### SECT. 1.—THE KING'S SHIPS.

See Merchant Shipping Act, 1906 (c. 48), s. 80; Statutory Rules & Orders, 1911, p. 238; 1917, No. 1074.

1. **What are King's ships—Whether Crown can declare by Order in Council.**—A German steamship, seized as prize in a British port on the outbreak of war, was ordered, under a decree of the Prize Ct., to be detained until the conclusion of peace or further order. She was subsequently requisitioned by the Admty. & delivered to the Lords Comrs. of the Admty. in accordance with the Prize Ct. Rules. While in the service of the Admty. she rendered salvage services:—*Held*: she was a ship belonging to His Majesty within Merchant Shipping Act, 1894 (c. 60), s. 557, & the Admty. were therefore precluded from claiming salvage.

Orders in Council of Mar. 22, 1911, Sept. 29, 1917, & June 4, 1918, promulgated under Merchant Shipping Act, 1906 (c. 48), s. 80, provided respectively that Govt. ships in the service of the Admty. should be included, & that Govt. ships in the service of the Shipping Controller & of the War Office should be excluded, from the category of "ships belonging to His Majesty" within Merchant Shipping Act, 1906 (c. 48), s. 557:—*Held*: Merchant Shipping Act, 1906 (c. 48), s. 80, does not give any authority to the Crown by Order in Council to declare what class of ship is or is not within the category of the ships dealt with in Merchant Shipping Act, 1906 (c. 48), s. 557.—*THE MATTI*, [1918] P. 314; 87 L. J. P. 179; 34 T. L. R. 582; 62 Sol. Jo. 730.

2. — **Revenue cutters.**—Revenue cutters entitled to salvage on recapture, as private ships of war.—*THE HELEN* (1801), 3 Ch. Rob. 224; 1 Eng. Pr. Cas. 299; 165 E. R. 444.

3. — **Store ships.**—A store ship recapturing British property from the enemy, is entitled to an eighth only for salvage.

These store ships . . . are armed at the public expense, are commanded by commissioned officers, are rated as ships of war, & bearing that character, are entitled to make captures on their own account, their primary business is the conveyance of stores, but they are not prohibited from taking prizes. I must consider them as forming part of the military establishment of the country (*SIR WILLIAM SCOTT*).—*THE SEDULOUS* (1813), 1 Dodds. 253; 165 E. R. 1302.

4. — **Transport under charter to the Admiralty.**—The captain of a Queen's ship lying at anchor in a foreign port received intelligence that an English steamer was outside the port disabled, & in a position of great danger, & communicated with the master of a screw steamer which was under charter to the Lords of the Admty. as a transport, & was then coaling in the port. In consequence of this communication the transport, after taking on board one officer & a party of petty officers & seamen from the Queen's ship, proceeded to the disabled vessel & succeeded in placing her in safety. As salvage remuneration for the services so rendered a sum of £1,000 was tendered & accepted in a cause of salvage instituted on behalf of the owners, master, & crew of the transport, & the captain, officers, & crew of the Queen's ship. On an application to apportion this sum:—*Held*: The ct. awarded £400 to the

owners, master, & crew of the transport, £400 to the captain of the Queen's ship & the party of petty officers & seamen who went on board the transport, & £200 to the officer who accompanied them.—*THE NILE* (1875), L. R. 4 A. & E. 449; 44 L. J. Adm. 38; 33 L. T. 66; 3 Asp. M. L. C. 11.

*Annotations*:—*Föld. The Bertie* (1886), 55 L. T. 520. *Consd. The Sarpen*, [1916] P. 306.

5. — — — **Ship belonging to Bombay Government—Hired commander & crew.**—(1) The commander & crew of a Queen's ship have the same rights to remuneration for salvage as the master & crew of a merchant ship. (2) *Qu.*: whether they can make with the captain of the wrecked ship an agreement as to the amount. (3) The commander of a Queen's ship, sent to render help to a wrecked ship, cannot impose terms & refuse to give salvage services unless those terms are accepted. (4) A ship belonging to the Bombay Govt. with a hired commander & crew is, with respect to 17 & 18 Vict. c. 104, s. 484, in the same position as a Queen's ship with commissioned officers.—*THE WOOSUNG (CARGO EX)* (1876), 1 P. D. 260; 35 L. T. 8; 25 W. R. 1; 3 Asp. M. L. C. 239, C. A.

*Annotations*:—*As to (1) Refd. The Sarpen*, [1916] P. 306.

*As to (3) Refd. The Cybele* (1877), 37 L. T. 773. *Generally, Mentd. The Medina* (1876), 1 P. D. 272; *The Mark Lane* (1890), 39 W. R. 47; *The Mariposa*, [1896] P. 273.

7. — **Vessel owned by Government—Harbour tug.**—Under Harbours & Passing Tolls Act, 1861 (c. 47), the Harbour of Ramsgate & the property & powers of its trustees were transferred to the Board of Trade. In a suit for salvage remuneration for services rendered by a vessel belonging to the harbour & vested in the Board of Trade under Harbours & Passing Tolls Act, 1861 (c. 47):—*Held*: the vessel was not a ship belonging to her Majesty within 17 & 18 Vict. c. 104, ss. 484, 485; & the Board of Trade were not precluded from recovering salvage in respect of its services, & the claims of the commander & crew might be adjudicated upon without the consent of the Admty.—*THE CYBELE* (1878), 3 P. D. 8; 47 L. J. P. 86; 37 L. T. 773; 26 W. R. 345; 3 Asp. M. L. C. 532, C. A.

*Annotation*:—*Consd. Young v. S.S. Scotia*, [1903] A. C. 501.

8. — — — **Entered on Navy list—Employed in carrying coal for the Navy.**—A vessel owned by the Government and entered in the Navy List as employed on harbour service was exclusively employed under the Admty. by the Devonport Dockyard authorities in carrying coal to ships of the Royal Navy. Her master held a Board of Trade certificate, & neither he nor the crew, who were engaged under arts. of agreement, were in the Navy. The master employed pilots, &

proceedings were taken against him in a ct. of summary jurisdiction under Merchant Shipping Act, 1894 (c. 60), s. 591, for the recovery of pilotage dues according to a scale imposed by bye-laws made in pursuance of Merchant Shipping Act, 1894 (c. 60), & a local Act, in which the Crown was not mentioned, under which the pilots were licenced:—*Held*: the vessel was a King's ship, & the master was therefore not liable either under Merchant Shipping Act, 1894 (c. 60), or the local Act to pay pilotage dues on the scale imposed by the bye-laws.—*SYMONS v. BAKER*, [1905] 2 K. B. 723; 74 L. J. K. B. 965; 93 L. T. 548; 54 W. R. 159; 21 T. L. R. 734; 49 Sol. Jo. 714; 10 Asp. M. L. C. 129, D. C.

9. — **Vessel requisitioned by Admiralty—No terms arranged at time of services.**—The Admty., acting under the powers conferred by a Proclamation of Aug. 3, 1914, requisitioned pltf's. tug *Simla*, & sent her to Kirkwall Bay in the Orkneys. While stationed there the *Simla*, with the consent of the commander of the Northern Patrol, rendered valuable salvage services to the *Sarpen*, which had run upon the rocks in the vicinity. At this time no terms & conditions of employment of the *Simla* had been agreed to by pltf's. & the Admty., but terms were afterwards arranged:—*Held*: the effect of the requisitioning by the Admty. under the Proclamation was not to make the *Simla* a ship "belonging to His Majesty" within Merchant Shipping Act, 1894 (c. 60), s. 557, nor did the terms & conditions of the hiring have that effect, & therefore the owners, master, & crew were entitled to prosecute a claim for salvage.—*THE SARPEN*, [1916] P. 306; 85 L. J. P. 209; 114 L. T. 1011; 32 T. L. R. 575; 60 Sol. Jo. 538; 13 Asp. M. L. C. 370, C. A.

*Annotations*:—*Consd.* The Matti, [1918] P. 314. *Apld.* Admiralty Comrs. v. Page, [1919] 1 K. B. 299. *Refd.* The Carrie, [1917] P. 224; France Fenwick v. R., [1927] 1 K. B. 458.

10. — **Subsequent terms not amounting to demise.**—*THE SARPEN*, No. 9, *ante*.

11. — **On terms amounting to demise.**—

A tug belonging to defts. was requisitioned by the Admty. upon terms which amounted to a demise of the tug to the Admty. The tug rendered salvage services to another vessel in respect of which a salvage award was made:—*Held*: the tug having been demised to the Admty. was a "ship belonging to His Majesty" within Merchant Shipping (Salvage) Act, 1916 (c. 41), s. 1, & the Admty., & not the owners of the tug, were entitled to the salvage award.—*ADMIRALTY COMRS. v. PAGE*, [1919] 1 K. B. 299; 88 L. J. K. B. 325; 120 L. T. 137; 35 T. L. R. 125; 63 Sol. Jo. 165; 14 Asp. M. L. C. 394, C. A.; *affd. sub nom.* ELLIOTT STEAM TUG CO. v. ADMIRALTY COMRS., *PAGE v. ADMIRALTY COMRS.*, [1921] 1 A. C. 137, H. L.

*Annotation*:—*Refd.* The Matti, [1918] P. 314.

12. — **Enemy ship seized as prize.**—*THE MATTI*, No. 1, *ante*.

13. **Whether within jurisdiction of High Court—Service of writs.**—Upon an application for leave to serve a writ out of the jurisdiction it appeared that deft. was a British naval officer on board a man of war at the Mediterranean station, which at the time of application was on the high seas, but would touch at one or other of the coaling ports in the Mediterranean, & would ultimately put into Malta, the chief port on the station:—*Held*: it was not sufficiently shown in what place or country deft. "was or might probably be found"

within the meaning of R. S. C., Ord. 11, r. 4, & leave to serve the writ out of the jurisdiction must be refused.—*SEAGROVE v. PARKS*, [1891] 1 Q. B. 551; 60 L. J. Q. B. 355, D. C.

14. — **Exemption from pilotage dues.**—*FRASER v. AKERS* (1891), cited n 35 Sol. Jo. at p. 477.

15. **Exemption from pilotage dues.**—*SYMONS v. BAKER*, No. 8, *ante*.

## SECT. 2.—ENLISTMENT AND SERVICE.

*See* Naval Enlistment Acts, 1835 (c. 24); 1853 (c. 69); 1884 (c. 46); Naval Discipline Acts, 1853 (c. 69); 1866 (c. 109), s. 86; 1922 (c. 37), s. 5 (1); Merchant Shipping Act, 1894 (c. 60), ss. 195–197.

16. **What is "naval service"—Service in Royal Naval Reserve.**—The words "naval service," Naval Enlistment Act, 1853 (c. 69), s. 16, do not include service in the Royal Naval Reserve. A person, therefore, is not liable to be proceeded against under that sect. for making a false statement on joining the Royal Naval Reserve.—*WESTHORPE v. POWLEY*, [1905] 1 K. B. 286; 74 L. J. K. B. 150; 92 L. T. 57; 69 J. P. 77; 53 W. R. 366; 21 T. L. R. 152; 20 Cox, C. C. 747, D. C.

17. **Duration of seaman's service—While on ship's books.**—*STUDWELL v. BUNTON* (1745), Barnes, 95; 94 E. R. 823.

18. **Right of officer to resign—After acceptance of commission.**—H., a lieutenant in the Royal Navy, being offered a situation, applied to the Admty. for leave to retire from the service, but this was refused. H. then obtained leave to go ashore from the ship in which he served, & did not return after such leave had expired. He was afterwards arrested by order of the Admty., & detained to be tried by court martial as a deserter. On a rule for *habeas corpus*:—*Held*: after accepting his commission, & entering on his duties (1) he cannot at his own pleasure resign, & if he does so he commits an offence against Naval Discipline Act, 1866 (c. 109); (2) he may be arrested without warrant by any person subject to the same Act.—*R. v. CUMING, Ex p. HALL* (1887), 19 Q. B. D. 13; 56 L. J. Q. B. 287; 57 L. T. 477; 51 J. P. 326; 36 W. R. 9; 3 T. L. R. 531; 6 Asp. M. L. C. 189; 16 Cox, C. C. 315, D. C.

*Annotation*:—*As to* (1) *Apld.* *Hearson v. Churchill*, [1892] 2 Q. B. 144.

19. — **Engineer officer in the Royal Navy, who has accepted a commission, & is borne on the books of a ship in commission, cannot resign without the consent of the Lords Comrs. of the Admiralty.** *Semble*: under no circumstances is a naval officer entitled to resign his commission except by permission of Her Majesty.—*HEARSON v. CHURCHILL*, [1892] 2 Q. B. 144; 61 L. J. Q. B. 569; 66 L. T. 843; 56 J. P. 820; 40 W. R. 615; 8 T. L. R. 579; 36 Sol. Jo. 521, C. A.

20. **Spreading reports prejudicial to recruiting—Time for commencement of proceedings.**—By regulation 27 of the Defence of the Realm Regulations Consolidated it is an offence for any person to spread reports intended or likely to prejudice the recruiting of His Majesty's Forces, & by regulation 56 a person charged with an offence against the Regulations may be tried either by a court martial, or by a civil ct. with a jury, or by a

## PART I. SECT. 2.

a. **Naval officer in plantations—By whom appointed.**—A naval officer

in the plantations must be appointed by the Governor & approved by the Comrs. of the Customs, & must also

give security for the faithful perform-

**Sect. 2.—Enlistment and service. Sects. 3 & 4: Sub-sects. 1, 2 & 3, A.]**

ct. of summary jurisdiction. Where a person was charged before a ct. of summary jurisdiction with an offence under regulation 27 of the Regulations:—*Held*: the limitation imposed by Summary Jurisdiction Act, 1848 (c. 43), s. 11, had no application, & the ct. had jurisdiction to deal with the case, although there was no evidence that the offence had been committed within six months of the date of the hearing.—*KAYE v. COLE* (1916), 86 L. J. K. B. 1084; 115 L. T. 783; 81 J. P. 3; 33 T. L. R. 30; 15 L. G. R. 45; 25 Cox, C. C. 573, D. C.

**Enlistment of apprentices.]—See MASTER & SERVANT, Vol. XXXIV., p. 621, Nos. 4388-4391.**

**SECT. 3.—DISCIPLINE.**

*See Naval Discipline Acts, 1866 (c. 109); 1884 (c. 39); 1909 (c. 41); 1915 (c. 30); No. 2, 1915 (c. 73); 1917 (c. 34); 1922 (c. 37); Statutory Rules & Orders, 1918, No. 969; 1921, No. 222; 1923, No. 1290.*

**21. Naval offences—Taking false oath before court martial—Whether perjury at common law.]—**An indictment under Naval Discipline Act, 1861 (c. 115), s. 57, charged that deft., on his oath before a court martial, held on board of Her Majesty's ship "H," then being on the high seas & within the jurisdiction of the Admty. of England, wilfully & corruptly did give false evidence, contrary to the form of the statute, etc., & against the peace, etc. *Qu.*: (1) whether this was an indictment for perjury within Vexatious Indictments Act, 1859 (c. 17), s. 1, which enacts that no indictment for that offence (*inter alia*) be preferred without previous authorisation, etc.; (2) whether that enactment extends to offences committed on the high seas; (3) *Seem*, taking a false oath before a court martial is perjury at common law.—*R. v. HEANE* (1864), 4 B. & S. 947; 3 New Rep. 466; 33 L. J. M. C. 115; 9 L. T. 719; 28 J. P. 500; 10 Jur. N. S. 724; 12 W. R. 417; 9 Cox, C. C. 433; 122 E. R. 714.

*Annotations:—As to (3) Refd. R. v. Tomlinson* (1866), 12 Jur. N. S. 944. *Generally, Mentd. Re Ryland* (1861), 16 W. R. 280; *Knowlden v. R.* (1864), 5 B. & S. 532; *R. v. Yates* (1883), 48 J. P. 102; *R. v. Boaler* (1890), 7 T. L. R. 3; *R. v. Thompson* (1913), 78 J. P. 212.

*See, now, Naval Discipline Act, 1866 (c. 109), s. 67, & Perjury Act, 1911 (c. 6).*

**22. ——— Application of Vexatious Indictments Act, 1859 (c. 17)—Offence committed on the high seas.]—R. v. HEANE, No. 21, ante.**

**23. ——— Resignation of officer without consent of Crown.]—R. v. CUMING, Ex p. HALL, No. 18, ante.**

**24. ———.]—HEARSON v. CHURCHILL, No. 19, ante.**

**25. Liability to arrest without warrant—By person subject to Naval Discipline Acts.]—R. v. CUMING, Ex p. HALL, No. 18, ante.**

**26. Jurisdiction of civil courts.]—Pltf., a retired naval officer, brought an action against the former First Lord of the Admty. for alleged false imprisonment & for the alleged malicious & wrongful retirement of pltf. from the Navy. The claim against deft. for false imprisonment was in respect of acts done by his subordinates, & was not based on any allegation that deft. knew of it at the time. The other claim was framed as follows in the statement of claim: "Further, deft. by an order made on Nov. 6, 1915, wrongfully & maliciously caused pltf. to be placed on retired pay, &**

**also caused the retirement to be published in the London Gazette & other newspapers, whereby pltf. has suffered damage":—Held: as regards the alleged false imprisonment, no action lay against the head of a Govt. department for any wrong committed by a subordinate officer, & as regards the other claim, the wording of it was meagre & ambiguous & tended to embarrass & prejudice the fair trial of the action, & therefore the statement of claim should be struck out, but pltf. should have leave to amend it, as the question whether a case involving matters of military or naval discipline was cognisable in a civil ct. was still an open question, at all events in the House of Lords.—FRASER v. BALFOUR (1918), 87 L. J. K. B. 1116; 34 T. L. R. 502; 62 Sol. Jo. 680, H. L. *Annotations:—Consd. Heddon v. Evans* (1919), 35 T. L. R. 642. *Mentd. Everett v. Griffiths*, [1920] 3 K. B. 163.**

—.]—*See Part X., Sect. 4, post.*

**Action for damages against naval authorities.]—See Part IX., Sect. 1, sub-sect. 2, post.**

**Courts martial.]—See Part X., Sect. 2, post.**

**SECT. 4.—SALVAGE BY KING'S SHIPS.**

**SUB-SECT. 1.—IN GENERAL.**

Salvage generally, *see SHIPPING.*

**Prize salvage.]—See PRIZE LAW, Vol. XXXVII., pp. 673 et seq.**

**Jurisdiction of Admiralty in salvage.]—See ADMIRALTY, Vol. I., pp. 151 et seq.**

**27. Duty to render service—Protection of merchant vessels.]—**By the law of England, King's ships are entitled to a salvage remuneration for services rendered to merchant vessels in distress.

The parties may fairly claim a remuneration, although the ship belongs to the state, & although there is an obligation upon King's ships to assist the merchant vessels of this country; yet, when services have been rendered, those who confer them are entitled to an adequate reward (LORD STOWELL).

In regard to the proportion of remuneration, there are many cases in which there is much labour & little to pay for it; so that the ct. acts upon the principle of giving a larger proportion in cases of small value, than in cases where the property is considerable, as a due encouragement to the interests of the commerce & navigation of the country (LORD STOWELL).—*THE MARY ANN* (1823), 1 Hag. Adm. 158; 166 E. R. 57.

*Annotation:—Refd. The Lustre* (1834), 3 Hag. Adm. 154.

**28. ———.]—THE RAPID, No. 65, post.**

**29. ——— No salvage service in absence of sea peril.]—**A British steamship was at anchor off Lowestoft when a portion of the German fleet attacked that town. Shells fell in the vicinity of the steamship, one of them struck her & caused a fire to break out on board her. The master & crew of the steamship put off from their vessel in boats with the intention of seeking refuge on board a lightship stationed near at hand. Before the lightship was reached a British torpedo gunboat came up and the crew of the steamship left their boats & went on board the gunboat. Some of the crew of the gunboat then boarded the steamship, put out the fire, lifted the anchors, raised steam, & took her into Yarmouth Roads; the gunboat meanwhile acted as escort to protect her from attacks by submarine. In an action for salvage by the commander, officers, & crew of the gunboat it was alleged that the steamship was badly on fire & in imminent danger of destruction by enemy submarines:—*Held*: though the services rendered

by the commander, officers, & crew of the gunboat were salvage & they were entitled to an award, it was part of the duty of patrol vessels to protect the mercantile marine from submarine attack, & in the absence of sea peril, such protection was not to be regarded as a salvage service.—*THE F. D. LAMBERT* (1917), 119 L. T. 119; 14 Asp. M. L. C. 278.

*Annotation* :—*Apld.* *The Carrie* (1917), 86 L. J. P. 178.

30. ——— **Neutral vessels.**]—A Swedish steamship, while on a voyage from Glasgow to Nantes with a cargo of munitions consigned to the French Govt., was attacked by a German submarine, & the crew were ordered to abandon the vessel. When His Majesty's armed trawlers *Fusilier* & *Kinaldie* arrived later the ship was still afloat, the enemy submarine having disappeared without sinking her; & as the Swedish crew refused to return to the ship, it was towed into port by the armed trawlers. The commanders, officers, & crews of the *Fusilier* & *Kinaldie* claimed salvage against the owners of the *Carrie* :—*Held* : (1) even assuming pl'tfs. owed a duty to save the cargo of an Allied Government, they were under no duty to save the neutral steamship, & were entitled to a salvage award based on the war risks, as well as the maritime risks from which the steamship was saved; (2) salvage by a King's ship cannot be treated on the same footing as a salvage by a private ship, & the ct., in determining its award, must take into consideration the facts that the officers & crews lose no time & run no risk to property; (3) the work done in connection with the salvage services may be no harder & no more risky than the work in which pl'tfs. would ordinarily be engaged; & (4) the officers & crews of a King's ship can claim only with the sanction of the Admty., a sanction which is intended to enforce the rule that to entitle His Majesty's ships to claim salvage the services must be of an important character.—*THE CARRIE*, [1917] P. 224; 86 L. J. P. 178; 119 L. T. 128; 33 T. L. R. 573; 14 Asp. M. L. C. 321.

31. ———.]—Salvage by a govt. steamer, & 200 men, to a vessel in extreme danger on a shoal off Jamaica; she had been there from July 21 to July 24, when a signal of distress brought to her assistance a steamer, carrying dispatches, & in about eight hours she was moored in safety; & on the next morning towed into Carlisle Bay. The magistrates there, upon a value of about £6,000, gave to the salvors one-third of the ship, cargo & freight; but the owners, refusing to abide by that decree, the ct. here, in an action by the salvors, gave £1,200, & costs.

King's ships are fitted out for war; to protect the commerce of the country; they are bound to recapture; it is part of their duty; & yet though armed & manned at the public expense, they are rewarded for the benefit rendered to the individual owners, something less certainly, than if the recapture be by a privateer; for a privateer has one-sixth, while a King's ship one-eighth, in the proportion of a third & a fourth. On parity of reason & fair analogy, a similar principle may apply to civil salvage effected by vessels in the public service (*SIR JOHN NICHOLL*).

In effecting this service there was no great personal risk, but there was some; boats passing & repassing in a heavy swell on a lee shore, men carrying out & taking up anchors, hawsers breaking, are circumstances of some risk, & denote much personal labour. But there was considerable risk of another sort, the risk of responsibility. The steam vessel was on a service requiring despatch; she was under positive orders to return

by a certain time, & it was not till after much consideration & doubt that captain E. takes upon himself the responsibility, & sends an excuse to the commodore. But if any untoward accident had happened, this conduct might have deeply involved the captain, & perhaps also his officers; & I think, therefore, that the incurring such a responsibility was equal to a personal risk of life (*SIR JOHN NICHOLL*).—*THE EWELL GROVE* (1835), 3 Hag. Adm. 209; 166 E. R. 384.

32. ———.]—Commanders, officers, & crews of Her Majesty's ships are entitled to the same remuneration for salvage service as other salvors: the risk of the ship & property effecting the salvage, subject to a different consideration.—*THE IODINE* (1844), 3 Notes of Cases, 140; 8 L. T. 30.

*Annotations* :—*Refd.* *The Sarpen*, [1916] P. 306; *The Carrie*, [1917] P. 224.

33. ———.]—A commander of one of Her Majesty's ships on the coast of Africa, who, meeting with a merchant vessel, the master of which & one of the crew were sick, & the mate was incompetent to navigate her, put his sailing master & two of his men on board, to navigate her to England :—*Held* : entitled to claim salvage on behalf of himself, his officers & crew.

It is the duty of Her Majesty's officers to render assistance, & they do not risk any property belonging to themselves when they perform a service of this kind, though they incur a responsibility; & they do not suffer a loss of their own time, because if the service be properly undertaken, they receive their ordinary pay. But that they are entitled to salvage, & subject to these considerations, is a point fully admitted in this ct. (*DR. LUSHINGTON*).—*THE CHARLOTTE WYLIE* (1846), 2 Wm. Rob. 495; 5 Notes of Cases, 4; 8 L. T. 153; 166 E. R. 842.

**What are King's ships.**]—*See Sect. 1, ante.*

#### SUB-SECT. 2.—NATURE OF SERVICES.

34. **General rule — Services must be substantial.**]—A King's ship is not entitled to salvage for rescuing a convict vessel from the possession of the convicts & of the mutinous crew & soldiers on board her.

I do not mean to say that the King's officers would universally & in all cases be excluded from salvage for services rendered by them in rescuing vessels from other than maritime dangers, but still it is their duty to render such assistance without having any such object in view; & unless they incur great personal danger & use very great exertions in the performance of the service, I must hold that they are not entitled to a pecuniary reward (*SIR W. SCOTT*).—*THE FRANCIS & ELIZA* (1816), 2 Dods. 115; 165 E. R. 1433.

35. ———.]—*THE ATHAMAS*, No. 61, *post*.

36. ———.]—*THE CARRIE*, No. 30, *ante*.

37. **Whether unloading cargo is salvage service.**]—*THE ROSALIE*, No. 44, *post*.

#### SUB-SECT. 3.—REMUNERATION.

##### A. In General.

*See Merchant Shipping Acts*, 1894 (c. 60), ss. 557–563, & 1916 (c. 41), s. 1.

38. **Right to civil salvage.—In addition to prize salvage.**]—Civil salvage is due to a King's ship for services rendered to a vessel in distress, in addition to military salvage for recapture from the enemy.—*THE LOUISA* (1813), 1 Dods 317; 165 E. R. 1324.

**Sect. 4.—Salvage by King's ships: Sub-sect. 3, B., C. & D.]**

**B. Right to Remuneration.**

**39. Officers & men of King's ships.]—THE MARY ANN, No. 27, ante.**

**40. —.]—THE ALEXANDER ROBERTSON (1842), 8 L. T. 30.**

**41. —.]—THE WILSONS, No. 68, post.**

**42. —.]—THE IODINE, No. 32, ante.**

**43. —.]—THE CHARLOTTE WYLIE, No. 33, ante.**

**44. —.]—**A vessel having taken fire from spontaneous combustion of the cargo, came to anchor, in a calm, about eight miles off Monte Video; at the request of her master, the commander of a govt. steam tug went to her assistance, & towed her to the harbour, at the entrance of which, however, both vessels grounded on a rock. She was got off by other assistance, & was then unladen by the crew of the steam tug. The service continued about twenty days. Defence set up that, by the heedlessness of the salvors, the vessel grounded & suffered more harm than their services did good, not sustained. On the value of £8,800 the ct. awarded £750.

It is advantageous to the mercantile marine that her Majesty's officers should be allowed to obtain reward for salvage services.

No claim can be made for the services of a vessel belonging to the Govt.

The objection that the unloading of the cargo was not a salvage service, but a service on shore, over which the ct. of Admty. has no jurisdiction, cannot, for various reasons, be allowed.—**THE ROSALIE (1853), 1 Ecc. & Ad. 188; 18 Jur. 337; 164 E. R. 109; sub nom. H.M.S. LOCUST v. THE ROSALIE, 7 L. T. 340.**

**45. —.]—**Officers & crews of Queen's ships are entitled to salvage reward; though the fact that their own property is not risked in such services will be taken into consideration. A larger proportion will be given where the property salvaged is of great value.—**THE EARL OF EGLINTON (1855), Sw. 7; 166 E. R. 989.**

**Annotation:—**Refd. *The Alicia Annie & The Aminta v. The Scindia (1865), 2 Mar. L. C. 232.*

**46. —.]—H.M.S. STAR v. THE WASHINGTON (1855), 7 L. T. 340.**

**47. — With consent of Admiralty.]—**Officers & crew of Her Majesty's Ships, on receiving, in the usual form, the consent of the Admty., as required by Merchant Shipping Act, 1854 (c. 104), s. 485, may recover salvage from the owners of ship & cargo for services rendered thereto, & for salvage services rendered to passengers belonging to the ship.—**THE ALMA (1861), 1 Lush. 378; 7 L. T. 223; 1 Mar. L. C. 249; 167 E. R. 162.**

**48. —.]—THE DALHOUSIE (1875), 1 P. D. 271, n; sub nom. THE AZALEA, 35 L. T. 9, n; 3 Asp. M. L. C. 240, n., C. A.**

**Annotations:—**Apld. *The Woosung (Cargo Ex) (1876), 1 P. D. 260.* Consd. *The Sarpen, [1916] 306.*

**49. —.]—THE CARRIE, No. 30, ante.**

**50. —.]—THE WOOSUNG (CARGO EX), No. 6, ante.**

**51. —.]—**A vessel with a valuable cargo on board struck on a reef on an uninhabited island in the Red Sea near the mainland; & the crew began to jettison part of the cargo, which they threw into shallow water. Armed Arabs then

crossed over from the mainland & began to plunder the jettisoned cargo. A Queen's ship having come up, her commander anchored near the wrecked vessel, & sent a number of his crew to act as sentinels on the beach of the mainland, who were posted for about a mile along the beach, & were exposed to severe heat. Others of the crew were employed in discharging the cargo, working up to their waists in water in the hold, which was greatly fouled. They threw out the cargo & hauled it across the reef to the mainland, where it was collected by the sentinels & labourers. In an action of salvage by the commander & crew of the Queen's ship:—**Held:** the services rendered by them being beyond the scope of their public duty were salvage services, & they were entitled to remuneration accordingly.—**THE ULYSSES (CARGO EX) (1888), 13 P. D. 205; 58 L. J. P. 11; 60 L. T. 111; 37 W. R. 270; 6 Asp. M. L. C. 354.**

**Annotation:—**Refd. *The Domira (1913), 29 T. L. R. 557.*

**52. —.]—**Salvage remuneration awarded to the commander, officers, & crew of a King's ship in respect of services rendered by them to deft.'s steamship.—**THE DOMIRA (1914), 30 T. L. R. 521, C. A.**

**Coastguards.]—**See Part II., Sect. 3, post.

**53. Whether claim can be made for services of King's ship.]—THE ROSALIE, No. 44, ante.**

**54. —.]—THE DALHOUSIE (1875), 1 P. D. 271, n; sub nom. THE AZALEA, 35 L. T. 9, n; 3 Asp. M. L. C. 240, n., C. A.**

**Annotations:—**Refd. *The Woosung (Cargo Ex) (1876), 1 P. D. 260; The Sarpen, [1916] P. 306.*

**55. —.]—THE ATHAMAS, No. 61, post.**

**56. — Tug on time charter to Admiralty by way of demise—Merchant Shipping Act, 1916 (c. 41), s. 1.]—ADMIRALTY COMRS. v. PAGE, No. 11, ante.**

—.]—See, further, Sub-sect. 4, D., post.

**C. Amount of Remuneration.**

**57. Whether amount proportionate to value of salvage.]—THE MARY ANN, No. 27, ante.**

**58. —.]—THE EARL OF EGLINTON, No. 45, ante.**

**59. Right to make terms with master of distressed vessel.]—THE WOOSUNG (CARGO EX), No. 6, ante.**

**60. Imposition of terms by commander.]—THE WOOSUNG (CARGO EX), No. 6, ante.**

**61. Salvage by several ships—Services to be regarded as a whole.]—**A Greek steamship, after striking a German mine, was salvaged by services rendered by nine vessels in the Royal Navy. The officers & crews of these vessels having obtained leave from the Admty. to put forward claims for salvage, instituted proceedings to recover salvage. The claim of one of the vessels was settled, but the claims of the other eight were tried. It was proved that the crews of all the vessels rendered services which contributed to the successful salvaging of the vessel:—**Held:** as all the claimants had performed substantial services they were all entitled to share in the award; the total sum awarded was not to be increased by the fact that the numbers of the salvors were increased by their working in relays. Though consideration was to be taken of special work done or risk incurred by individuals, too minute a view of the services

**PART I. SECT. 4, SUB-SECT. 3.—B.**

**39 i. Officers & men of King's ships.]—THE WALKER (1807), Stewart, 105.—CAN.**

**39 ii. —.]—**One of Her Majesty's

men-of-war rendered salvage services to a derelict ship, but was not allowed by the govt. authorities to make any claim therefor.—**THE HERMAN (1872), Y. A. D. 111.—CAN.**

**39 iii. —.]—**One of Her Majesty's

troopships having picked up a derelict barque with a valuable cargo & brought her into port, was not allowed by the Admiralty authorities to receive any allowance by way of salvage.—**THE JOHN (1872), Y. A. D. 129.—CAN.**



of each set of salvors was not to be taken, & the services were to be regarded as a whole.

In making an award the ct. can allow nothing for the use of His Majesty's ships as instruments of salvage (HILL, J.).—THE ATHAMAS (1917), 119 L. T. 117; 14 Asp. M. L. C. 276.

*Annotation* :—*Consd.* The Carrie (1917), 119 L. T. 128.

#### *D. Matters Considered in Making Award.*

**62. Number of salvors—On board each of two salving ships.**—The only question then is respecting the apportionment between the salvors so allotted. . . . In order to make an equitable division between the parties entitled, it appears to me, that some reference should be had to the number of persons on board each of the ships (SIR W. SCOTT).—L'ESPERANCE (1811), 1 Dods. 46; 165 E. R. 1227.

*Annotations* :—*Refd.* The Cosmopolitan (1848), 6 Notes of Cases, Supp. xvii; Gore v. Bethel, The Inca (1858), 12 Moo. P. C. C. 189.

**63. — Increased by working in relays.**—THE ATHAMAS, No. 61, *ante*.

**64. Personal risk.**—In an action entered in Nov., for salvage rendered in Apr. by a lieutenant of a coastguard station, & four of his boatmen, a tender of £50 pronounced for.

The ingredients of a salvage service are, first, enterprise on the salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow creatures, & to rescue the property of their fellow subjects; secondly, the degree of danger & distress from which the property is rescued, whether it were in imminent peril & almost certainly lost if not at the time rescued & preserved; thirdly, the degree of labour & skill which the salvors incur & display & the time occupied; lastly, the value. Where all these circumstances concur a large & liberal reward ought to be given; but where none or scarcely any take place the compensation can hardly be denominated a salvage compensation; it is little more than a remuneration *pro opere et labore* (SIR J. NICHOLL).—THE CLIFTON (1834), 3 Hag. Adm. 117; 166 E. R. 349.

*Annotations* :—*Apld.* Arnold v. Cowie, The Glenduror (1871), L. R. 3 P. C. 589. *Refd.* The Ardincaple (1834), 3 Hag. Adm. 151; The Lord Dufferin (1849), 7 Notes of Cases, Supp. xxxiii; The Samuel (1851), 17 L. T. O. S. 204; *Re* The Cleopatra (1878), 3 P. D. 145.

**65. —**Ships of war assisting British merchantmen are entitled to salvage for important services; but *aliter* if slight, & not promptly demanded.

To entitle His Majesty's ships to a salvage remuneration for services to a private ship, the services must be important, & even then the remuneration would be less than to a merchant ship; & the same principle applies in war salvage; & for many reasons: they lose no time; & they run no risk of property, both are at the expense of the public. In this case, also, there was no special assistance; no bad weather, no personal danger; no peculiar skill; no great labour. . . . I cannot easily describe a case of less salvage merit in a ship in the public service (SIR JOHN NICHOLL).—THE RAPID (1838), 3 Hag. Adm. 419; 8 L. T. 30; 165 E. R. 460.

*Annotations* :—*Refd.* The Iodine (1844), 3 Notes of Cases, 140; The Samuel (1851), 17 L. T. O. S. 204; The Carrie, [1917] P. 224.

**66. —**The officers & crews of King's ships not debarred from suing as salvors. For risk & labour encountered in a salvage service, they are entitled to remuneration upon the same footing as other salvors.—THE WILSONS (1841), 1 Wm.

Rob. 172; 1 Notes of Cases, 115; 8 L. T. 582; 166 E. R. 537.

*Annotation* :—*Fold.* The Iodine (1844), 3 Notes of Cases, 140.

**67. —**—THE DALHOUSIE (1875), 1 P. D. 271, n.; *sub nom.* THE AZALEA, 35 L. T. 9, n.; 3 Asp. M. L. C. 240, n., C. A.

*Annotations* :—*Refd.* The Woosung (Cargo Ex) (1876), 1 P. D. 260; The Sarpen, [1916] P. 306.

**68. —**—THE ATHAMAS, No. 61, *ante*.

**69. —**—A Spanish steamship ran ashore in the Thames Estuary. Several vessels in His Majesty's navy came up & towed at the vessel, & she was ultimately got off. In an action for salvage brought by the commanders, officers, & crews of the salving vessels to recover salvage, it was admitted by defts. that the services were salvage services:—*Held*: in awarding salvage to the commanders, officers, & crews of vessels in His Majesty's navy, the responsibility taken by the officers in employing the property of His Majesty on such a service, the personal risks run by the salvors, & the work & skill necessary to perform the service, were the matters to be considered; though the services in the case were admitted to be salvage, yet, as the work done was no harder & no more dangerous than the work the salvors would be ordinarily engaged on, the award should not be a large one.—THE GORLIZ (1917), 119 L. T. 123; 14 Asp. M. L. C. 282.

*Annotation* :—*Refd.* The Carrie (1917), 86 L. J. P. 178.

**70. —**—THE CARRIE, No. 30, *ante*.

**71. Special labour.**—THE CLIFTON, No. 64, *ante*.

**72. —**THE RAPID, No. 65, *ante*.

**73. —**THE WILSONS, No. 66, *ante*.

**74. —**THE ATHAMAS, No. 61, *ante*.

**75. —**THE GORLIZ, No. 69, *ante*.

**76. —**THE CARRIE, No. 30, *ante*.

**77. Peculiar skill.**—THE CLIFTON, No. 64, *ante*.

**78. —**THE RAPID, No. 65, *ante*.

**79. —**THE GORLIZ, No. 69, *ante*.

**80. Value of property.**—THE CLIFTON, No. 64, *ante*.

**81. Time occupied.**—THE CLIFTON, No. 64, *ante*.

**82. —**—THE CARRIE, No. 30, *ante*.

**83. Degree of danger.**—THE CLIFTON, No. 64, *ante*.

**84. Responsibility of officers.**—THE EWELL GROVE, No. 31, *ante*.

**85. —**—THE GORLIZ, No. 69, *ante*.

**86. Bad weather.**—THE RAPID, No. 65, *ante*.

**87. Damage to vessel.**—The Admty. held entitled to repayment for the pay, victualling & wear & tear of the King's ships for the time that they were employed upon a service of salvage of private treasure lost on board of a King's ship, & that repayment deducted from the amount of the money decreed for salvage.—THE THETIS (1834), 2 Knapp, 390; 8 L. T. 154; 12 E. R. 533, P. C.

*Annotations* :—*Refd.* The Ewell Grove (1835), 3 Hag. Adm. 209; Gore v. Bethel, The Inca (1858), 12 Moo. P. C. C. 189; The Amérique (1874), L. R. 6 P. C. 468; The Schiller (Cargo Ex) (1877), 2 P. D. 145; The Glengyle, [1898] P. 97; The Tubantia, [1924] P. 78.

**88. —**—THE ALEXANDER ROBERTSON (1842), 8 L. T. 30.

**89. —**—THE ROSALIE, No. 44, *ante*.

**90. Wear & tear of vessel.**—THE ALEXANDER ROBERTSON (1842), 8 L. T. 30.

**91. Risk to vessel.**—THE ALEXANDER ROBERTSON (1842), 8 L. T. 30.

**92. —**—THE EARL OF EGLINTON, No. 45, *ante*.

**93. Hindrance of voyage.**—THE ALEXANDER ROBERTSON (1842), 8 L. T. 30.

**94. Expenditure of stores.**—THE ALEXANDER ROBERTSON (1842), 8 L. T. 30.



*Sect. 4.—Salvage by King's ships: Sub-sect. 3, B.; sub-sect. 4. Sects. 5 & 6. Part II. Sects. 1, 2 & 3. Parts III. & IV.]*

*E. Proceedings for Recovery.*

*See, generally, SHIPPING.*

**95. Services rendered by subordinate officer—Action brought in name of commander.]—THE ALEXANDER ROBERTSON (1842), 8 L. T. 30.**

**SUB-SECT. 4.—PRIZE SALVAGE.**

*See, generally, PRIZE LAW, Vol. XXXVII., pp. 673–678, Nos. 1387–1462.*

**Distribution of prize money generally.]—See PRIZE LAW, Vol. XXXVII., pp. 681–686, Nos. 1499–1545.**

**SECT. 5.—SALVAGE OF KING'S SHIPS.**

**96. Whether remuneration allowed.]—THE COMUS (1816), cited in 2 Dods. at p. 464; 165 E. R. 1548.**

*Annotations:—Consd. The Athol (1842), 6 Jur. 376. Refd. The Charkieh (1873), L. R. 4 A. & E. 59.*

**SECT. 6.—CONVEYANCE OF MERCHANDISE.**

*See, now, Naval Discipline Act, 1866 (c. 109), s. 32; Freight for Treasure Act, 1819 (c. 25).*

**97. Right to freightage—Carriage of public treasure.]—The flag officers of a fleet have no right to any share in the gratuity of one-half per cent., which is given to the captains of ships of war for carrying public treasure on board their ships. Nor in the freight received by captains for carrying the treasure of individuals.—MONTAGU v. JANVERIN (1811), 3 Taunt. 442; 128 E. R. 175.**

*Annotations:—Apld. Warren v. Shirreff (1816), 5 M. & S. 32. Consd. The Calypso (1828), 2 Hag. Adm. 209. Refd. Hatchwell v. Cooke (1816), 6 Taunt. 577.*

**98. ———.]—It is illegal for the commander of one of His Majesty's ships of war to carry on board her, on freight, the bullion of private merchants, without an order from an authority competent to command him to perform that service. The captain of a King's ship brought home in her public treasure upon the public service, & treasure of individuals for his own emolument; he received freight for both, & paid over one-third of it, according to an usage heretofore established in the Navy, to the admiral under whose command he sailed. Discovering that the law does not compel captains to pay to admirals one-third of the freight; the captain brought an action for money had & received, to recover it back from the admiral's extrix:—*Held*: he could not recover back the private freight, because the whole of that transaction was illegal, nor the public freight, because he had paid it with full knowledge of the facts, although in ignorance of the law, & because**

**it was not against conscience for the extrix. to retain it.—BRISBANE v. DACRES (1813), 5 Taunt. 143; 128 E. R. 641.**

*Annotations:—Expld. Hatchwell v. Cooke (1816), 6 Taunt. 577. Refd. King-Hall & Hencage v. Standard Bank of South Africa (1919), 88 L. J. K. B. 1058. Mentd. Andrew v. Hancock (1819), 1 Brod. & Bing. 37; Dew v. Parsons (1819), 2 B. & Ald. 562; Hales v. Freeman (1819), 1 Brod. & Bing. 391; Goodman v. Sayers (1820), 2 Jac. & W. 249; Morgan v. Palmer (1824), 2 B. & C. 729; Smith v. Alsop (1824), M'Cle. 622; Bramston v. Robins (1826), 4 Bing. 11; Wilson v. Way (1837), 1 Jur. 637; Parker v. G. W. Ry. (1844), 7 Man. & G. 253; Bayley v. Wilkins (1849), 7 C. B. 886; R. v. Treasury Lords Comrs., Re Queen Dowager's Annuity (1851), 15 Jur. 767; Miles v. Scotting (1885), Cab. & El. 491; Baylis v. London (Bp.), [1913] 1 Ch. 127; Maskell v. Horner, [1915] 3 K. B. 106.*

**99. ——— Carriage of private treasure.]—MONTAGU v. JANVERIN, No. 97, ante.**

**100. ———.]—BRISBANE v. DACRES, No. 98, ante.**

**101. ———.]—A flag officer commanding on a foreign station is not entitled to any share of the freight paid by private merchants to the captain of a ship of war for conveying private treasure on board the ship to this country, in pursuance of orders issued to the captain by the flag officer, under the authority of the Admlty.—WARREN v. SHIRREFF (1816), 5 M. & S. 32; 105 E. R. 963.**

**102. ——— Carriage of bullion.]—By Freight for Treasure Act, 1819 (c. 25), a custom which up to the passing of the Act had existed in the Navy of carrying gold, silver, jewels & other articles for private merchants & others on board the King's ships was declared to be illegal & prohibited, except so far as Orders in Council & Proclamations issued under the Act should order & regulate the practice & the freight to be paid. On Aug. 10, 1888, an Order in Council had been issued which revoked the Orders then in existence, & that Order was annulled by an Order in Council of Oct. 26, 1914, & no new Order was subsequently made under the Act:—*Held*: as there was no Order in Council in existence regulating the payment of the freight, as before stated, a claim for freight could not be enforced.—KING-HALL v. STANDARD BANK OF SOUTH AFRICA, LTD., [1919] 2 K. B. 52; 88 L. J. K. B. 1058; 120 L. T. 638; 35 T. L. R. 324; 14 Asp. M. L. C. 415.**

**103. Liability of commander for loss—Carriage of bullion.]—An action lies against the commander of a ship of war who takes the bullion of a private merchant on board, for not safely keeping & delivering it.—HODGSON v. FULLARTON (1813), 4 Taunt. 787; 128 E. R. 540.**

*Annotation:—Fold. Hatchwell v. Cooke (1816), 6 Taunt. 577.*

**104. ———.]—The master of a storeship in the King's service took in the bullion of a private merchant on freight from Gibraltar to Woolwich:—*Held*: an action lay against him for the loss of the bullion.—HATCHWELL v. COOKE (1816), 6 Taunt. 577; 2 Marsh. 293; 128 E. R. 1159.**

**105. Legality of carriage of private bullion—Without authority.]—BRISBANE v. DACRES, No. 98, ante.**

**PART I. SECT. 5.**

**96.1. Whether remuneration allowed.]—Where a ship is seized for salvage**

**services, & on the hearing of the action it is proved that the ship is the property of the Crown:—*Held*: the action cannot be maintained since it**

**is impossible to contend that the King can be impleaded in his own cts.—YOUNG v. THE SCOTIA (1903), 8 Nfld. L. R. App. 1.—NFLD.**

## Part II.—The Reserve Naval Forces.

## SECT. 1.—THE ROYAL NAVAL RESERVE.

See Royal Naval Reserve (Volunteer) Act, 1859 (c. 40); Merchant Shipping Act, 1894 (c. 69), s. 745; Naval Reserve Act, 1900 (c. 52); Naval Forces Act, 1903 (c. 6); Officers of the Royal Naval Reserve Act, 1863 (c. 69); Naval Reserve Officers Act, 1926 (c. 41).

**Reservist serving in mercantile marine—Whether entitled to compensation under Workmen's Compensation Acts.]—**See MASTER & SERVANT, Vol. XXXIV., p. 244, No. 2078.

## SECT. 2.—COLONIAL NAVAL FORCES

See Colonial Naval Defence Acts, 1865 (c. 14); 1909 (c. 19); Naval Discipline (Dominion Naval Forces) Act, 1911 (c. 47).

## SECT. 3.—COASTGUARDS.

See Naval Volunteers Act, 1853 (c. 73), ss. 13–17; Coastguard Act, 1925 (c. 88); Admiralty Pensions Act, 1921 (c. 39), s. 3.

**106. Right to salvage.]—**THE CLIFTON, No. 64, ante.

**107. —.]—**Under 9 & 10 Vict. c. 99, the ct. is empowered to award remuneration for salvage of life. Coastguardsmen are entitled to salvage reward; for although it is a part of their duty to save life & property, it is a duty for which they should be paid.—SILVER BULLION (1854), 2 Ecc. & Ad. 70; 164 E. R. 312; *sub nom.* THE SIR ROBERT PEEL, 8 L. T. 335.

*Annotation:—*Mentd. The Dictator, [1892] P. 304.

**Salvage by King's ships.]—**See Part I., Sect. 4, ante.

## Part III.—The Royal Marines.

See Royal Marines Act, 1847 (c. 63); Royal Marines Act, 1857 (c. 1); Naval Forces Act, 1903 (c. 6), ss. 2, 3; Army Act, 1881 (c. 58), ss. 179, 190; Royal Marines Act, 1918 (c. 23); Naval, Military & Air Force Service Act, 1919 (c. 15), s. 1 (1), (2);

Army (Annual) Act, 1914 (c. 2), s. 6; Army & Air Force (Annual) Act, 1925 (c. 25), s. 14; Army & Air Force (Annual) Act, 1926 (c. 6); Statutory Rules & Orders, 1919, No. 272.

## Part IV.—Naval and Marines Pay, Pensions and Prize Money.

See Pensions Act, 1839 (c. 51), s. 24; Naval & Marine Pay & Pension Act, 1865 (c. 73); Greenwich Hospital Acts, 1865 (c. 89); 1869 (c. 44); 1872 (c. 67); 1883 (c. 32); 1885 (c. 42); 1898 (c. 24); 1921 (c. 41); Naval Agency & Distribution Act, 1864 (c. 24), s. 15; Naval Prize Acts, 1864 (c. 25); 1918 (c. 30); Naval Knights of Windsor (Dissolution) Act, 1892 (c. 34); Naval Medical Compassionate Fund Act, 1915 (c. 28); Pensions (Increase) Acts, 1920 (c. 36); 1924 (c. 32); Lunacy Act, 1890 (c. 5), s. 335; Bankruptcy Act, 1914 (c. 59), s. 51 (1), (2); Soldiers & Sailors (Gifts for Land Settlement) Act, 1916 (c. 60); Disabled Men (Facilities for Employment) Act, 1919 (c. 22); Admiralty Pensions Act, 1921 (c. 39); Statutory Rules & Orders, 1915, No. 769; 1916, Nos. 170, 172, 744; 1919, No. 884.

**108. No vested right in half-pay—Deductions made in pursuance of general order—Mandamus to compel restoration of sums deducted.]—**Deductions having been made from a naval officer's half-pay in pursuance of a general order from the Admiralty, application was made on his behalf to have the amount of such deduction restored, & the Lords of the Admiralty, stated, in answer, that they had given directions for restoring it. Afterwards they retracted this consent, giving as a reason that it would subject them to many similar applications. After the officer's death,

his administratrix moved for a *mandamus* to the Lords of the Admiralty, to restore the deducted sums, on the ground that they had admitted the right to them & the possession of applicable funds:—*Held*: there was no vested right in the half-pay, entitling the administratrix to a *mandamus*.—*Ex p. RICKETTS* (1836), 4 Ad. & El. 999; 6 Nev. & M. K. B. 523; 111 E. R. 1059.

*Annotations:—*Mentd. *Re De Bode* (1838), 6 Dowl. 776; *R. v. Treasury Lords Comrs., Re Queen Dowager's Annuity* (1851), 15 Jur. 767; *Williams v. Admiralty Lords Comrs.* (1851), 17 L. T. O. S. 200.

**Availability for distribution among bankruptcy creditors generally.]—**See BANKRUPTCY, Vol. V., pp. 928, 929, Nos. 7602, 7604–7606.

**Assignability of prize money.]—**See CHOSSES IN ACTION, Vol. VIII., pp. 435, 436, Nos. 127–132.

**Assignability of pay, pensions, etc., generally.]—**See CHOSSES IN ACTION, Vol. VIII., pp. 436–439, Nos. 135–139, 142–149, 151, 158–163.

**Attachment for satisfaction of debts generally.]—**See EXECUTION, Vol. XXI., pp. 634, 635, Nos. 2153, 2157, 2158.

**Assessment of damages for negligence—Whether loss of pension included.]—**See NEGLIGENCE, Vol. XXXVI., p. 140, No. 943.

**Prize bounty.]—**See PRIZE LAW, Vol. XXXVII., pp. 678–681, Nos. 1463–1498.

**Distribution of prize money.]—**See PRIZE LAW, Vol. XXXVII., pp. 681–686, Nos. 1499–1545.

## Part V.—The Regular Army.

### SECT. 1.—ENLISTMENT AND SERVICE.

**109. Officer—Whether entitled to resign.]—**Military officers in East India co.'s service cannot resign when they please.—*PARKER v. CLIVE* (LORD) (1769), 4 Burr. 2419; 98 E. R. 267.

*Annotations:—***Appld.** *Vertue v. Clive* (1769), 4 Burr. 2472. **Consd.** *R. v. Cuming, Ex p. Hall* (1887), 19 Q. B. D. 13. **Distd.** *Hearson v. Churchill* (1892), 61 L. J. Q. B. 569.

**110.** —[The right to resign must depend upon the particular circumstances of each particular case. All arises from the nature of the service (LORD MANSFIELD, C.J.).—*VERTUE v. CLIVE* (LORD) (1769), 4 Burr. 2472; 98 E. R. 296.

*Annotations:—***Consd.** *R. v. Cuming, Ex p. Hall* (1887), 19 Q. B. D. 13. **Refd.** *Hearson v. Churchill* (1892), 61 L. J. Q. B. 569.

**111. — Liability to dismissal at will.]—**In 1846 T., an army surgeon, was appointed by the Secretary for War to the "permanent medical charge of the military prison at Dublin," & continued to discharge the duties of that office until 1874, when he was compulsorily retired on half pay, whereby he became ineligible to hold the office. T. presented a petition of right alleging that he was by the terms of his appointment entitled to hold it during his life, or until incapacitated by infirmity or misconduct:—*Held:* the appointment was made subject to the rules of the service in accordance with which every military officer is liable to dismissal at any moment, at the will & pleasure of the Crown.—*Re TUNNELL* (1876), 3 Ch. D. 164; 45 L. J. Ch. 731; 34 L. T. 838; 24 W. R. 915.

*Annotations:—***Consd.** *Grant v. Secretary of State for India* (1877), 2 C. P. D. 445. **Mentd.** *Cooper v. R.* (1880), 14 Ch. D. 311.

**112. — — — — —.]—**The statement of claim in an action against the members of the Army Council for wrongfully procuring pltf.'s dismissal from the army, or, alternatively, for having wrongfully coerced & intimidated him into resigning his commission, struck out on the ground that it disclosed no reasonable cause of action.—*WOODS v. LYTTELTON* (1909), 25 T. L. R. 665, C. A. *Annotation:—***Refd.** *Heddon v. Evans* (1919), 35 T. L. R. 642.

— **Whether Gazette evidence of appointment.]**

—*See EVIDENCE*, Vol. XXII., p. 324, Nos. 3189, 3190.

**113. Enlistment of soldier—What constitutes enlistment—Receipt of enlistment money.]—**In an action of trespass against a military officer having command of a military prison for imprisoning pltf., deft. pleaded not guilty by statute, & at the trial set up under the 20th Article of War, that it was his duty to receive & keep any prisoner committed to his charge by any officer or non-commissioned officer, who should at the same time deliver an account in writing, signed by himself, of the crime with which the prisoner is charged, & that pltf. has been so committed to his authority on a charge of desertion:—*Held:* (1) the 20th Article of War applies only to a person who, under 13 & 14 Vict. c. 5, either is, or is to be deemed to be a soldier; (2) the authority to make a valid enlistment may be presumed in case of a person employed in the recruiting service, without evidence that such person is an attested soldier; (3) if a person receives the enlistment money, knowing it to be such, from a person employed in the recruiting service he is a soldier for the purpose of punishment for desertion, even though

he have not been attested; (4) the legality of enlistment does not depend upon the putting to the recruit the questions prescribed by 13 & 14 Vict. c. 5, s. 55, but on the reception by him of enlistment money, knowing it to be such; (5) a soldier employed in the recruiting service who enlists a recruit on a Sunday, is not a person following his ordinary calling within Sunday Observance Act, 1877 (c. 7); (6) deft. was not deprived of the benefit of the 20th Article of War by reason of pltf. not having been carried before a justice of the peace, & committed by him, before being taken to deft. as commanding officer of the guard.—*WOLTON v. GAVIN* (1850), 16 Q. B. 48; 20 L. J. Q. B. 73; 15 Jur. 329; 117 E. R. 794; *sub nom.* *WALTON v. GAVIN*, 16 L. T. O. S. 300; 14 J. P. 722.

*Annotations:—***As to (1)** *Appld.* *Wolton v. Freeze* (1851), 18 L. T. O. S. 158. **Generally,** *Mentd.* *R. v. Roberts* (1878), 38 L. T. 690.

**114. — — — — —.]—**A person knowingly accepted the enlistment shilling from a soldier who was not attested, but was acting under the orders of the recruiting sergeant. He then absented himself but was found & taken before a magistrate. The magistrate heard the case, but refused to commit or discharge him, & he was then sent to the civil prison, & from thence removed to the military guard-room, & there detained. *Qu.*: whether an action would lie for false imprisonment against the officer in command.

The evidence shows that pltf. was fully enlisted, he was, therefore, liable to military law (LORD CAMPBELL, C.J.).—*WOLTON v. FREEZE* (1851), 18 L. T. O. S. 158, N. P.; *subsequent proceedings, sub nom.* *WALTON v. FRIES*, 18 L. T. O. S. 224.

**115. — Legality of enlistment on Sunday.]—***WOLTON v. GAVIN*, No. 113, *ante*.

**116. — Right to affirm.]—**A person presenting himself for military service is entitled to make an affirmation instead of taking the oath. If a recruiting officer refuses to accept a man for enlistment because the man declares himself to be an atheist & wishes to affirm & will not take the oath, such refusal constitutes a rejection within 5 & 6 Geo. 5, c. 104, sched. I., para. 6.—*TOWLER v. SUTTON* (1916), 86 L. J. K. B. 46; 115 L. T. 836; 80 J. P. 461; 33 T. L. R. 27; 14 L. G. R. 1154, D. C.

— **Apprentice.]—***See MASTER & SERVANT*, Vol. XXXIV., pp. 508, 516, 521, Nos. 4225, 4328, 4387.

**Infant.]—***See INFANTS*, Vol. XXVIII., pp. 257, 258, Nos. 1124, 1125.

**Infant ward of court.]—***See INFANTS*, Vol. XXVIII., p. 338, Nos. 2055, 2056.

**117. Discharge of soldier—Refusal to accept affirmation.]—***TOWLER v. SUTTON*, No. 116, *ante*.

**118. — Entry on medical history sheet.]—**On Dec. 10, 1915, B. attested as a recruit under the Derby Group Scheme, & took the oath of allegiance. He served for one day with the Colours & received a day's pay. On Dec. 11 he was transferred to the Army Reserve. He was not medically examined before his attestation or transfer to the Reserve. On Mar. 1, 1916, he was medically examined. As a result, his medical history sheet was stamped with the words, "Not accepted, medically unfit," & above the signature of the medical officer was written, "unfit, deafness." After the medical examination the recruiting officer

## PART V.—THE REGULAR ARMY.

gave him a document, in which there were spaces for his name, the class of service for which he had been found fit, the unit to which he had been posted, & the officer to whom he had been ordered to report. With the exception of applt.'s name, none of these spaces were filled up, but the words "Not accepted, medically unfit" were stamped across them. This document was signed by the recruiting officer. The words "medically unfit" were also written across B.'s attestation paper. B. was therefore sent home without having been posted to any unit. He was not given any certificate of discharge, nor did his name appear in the discharge book of his recruiting area. On Dec. 23, 1916, a notice was served on him requiring him to present himself for medical re-examination on Jan. 9, 1917. He ignored this notice, & also a further notice calling upon him to rejoin the Colours on Jan. 22:—*Held*: when B. signed the declaration in his attestation paper & took the oath of allegiance he was to be deemed to be enlisted in His Majesty's Regular Forces, & the proceedings on Mar. 1, 1916, did not constitute a discharge therefrom.—*Boots v. Elvy* (1917), 86 L. J. K. B. 659; 116 L. T. 307; 81 J. P. 129; 33 T. L. R. 272; 15 L. G. R. 484, D. C.

**119. — Rejection by recruiter without examination.**—On Nov. 25, 1915, applt. offered himself as a recruit at the same time informing the recruiter that he had been rejected on Sept. 4, 1914. The recruiter after referring to his records wrote on the appropriate form "not accepted," signed the form & handed it to applt.:—*Held*: as the recruiter made no kind of examination he had not exercised the authority vested in him under Regulations for Recruiting, 1912 (with amendments to Aug. 31, 1914), reg. 102; applt. was not validly rejected & was not within the exception from military service contained in 5 & 6 Geo. 5, c. 104, Sched. I., para. 6.—*WALDER v. TURNER*, [1917] 1 K. B. 39; 85 L. J. K. B. 1570; 115 L. T. 550; 80 J. P. 405; 33 T. L. R. 1; 14 L. G. R. 1094, D. C.

**Military service of aliens.**—*See* Army Act, 1881 (c. 58), s. 95.

**Declaration of alienage by person of dual nationality.**—*See* ALIENS, Vol. II., p. 192, Nos. 534–538.

**120. Spreading reports prejudicial to recruiting**  
—**Time for commencement of proceedings.**—*KAYE v. COLE*, No. 20, *ante*.

### SECT. 2.—DISCIPLINE.

*See* Army Act, 1881 (c. 58), ss. 175, 176; Territorial Army & Militia Act, 1921 (c. 37), s. 3, Sched. I., Army & Air Force (Annual) Act, 1924 (c. 5), s. 4.

**121. Persons subject to military law—Canteen steward appointed by commanding officer.**—A canteen steward appointed by the commanding officer of the district, acting under a committee consisting of three officers, & having no interest in the profits of the canteen, but receiving such pay or allowance as the committee may think fit to award him, & being liable to dismissal at the pleasure of the committee, though performing no military duty, wearing no uniform, bearing no arms, & having free ingress & egress at his pleasure to & from the barracks, is still a person subject to military law within Army Act, 1881 (c. 58), s. 176 (4).—*Re FLINT* (1885), 15 Q. B. D. 488; 50 J. P. 454; *sub nom. Ex p. FLINT*, 33 W. R. 936, D. C.

**122. — Volunteer being trained with regular forces.**—*Pltf.* was a member of a volunteer corps, which was trained & exercised with a portion of the regular forces at Shorncliffe Camp under an order of the War Office, forming a volunteer brigade for the purpose of such training & exercise during the period Aug. 1 to Aug. 8, 1896. Upon the latter day, while preparations were going on for the departure of the volunteers from the camp, he was charged with larceny from a comrade. The adjutant of the corps gave orders that he should be taken under arrest with the baggage guard to Shorncliffe Station, & thence to Boxmoor Station in the special military train which was on that day to convey the corps home, & that on arrival at the latter station he should be taken to Hemel Hempstead, where he lived, & handed over to the police authority there. *Pltf.* was accordingly taken under arrest to Shorncliffe Station, & three of his comrades were there told off to form his escort in the train & to take him from Boxmoor Station to Hemel Hempstead, & there hand him over to the police, which they did. In an action against them for assault & false imprisonment:—*Held*: by Army Act, 1881 (c. 58), s. 176, the members of the corps were subject to military law from the time when they fell in on Aug. 1 for the purpose of proceeding to the camp to be trained & exercised with the regulars until on their return home on Aug. 8 they were dismissed; & *pltf.* & *defts.* were therefore subject to military law at the time when *defts.* did the acts complained of, which were consequently justified under Army Act, 1881 (c. 58), ss. 41 & 45.—*MARKS v. FROGLEY*, [1898] 1 Q. B. 888; 67 L. J. Q. B. 605; 78 L. T. 607; 46 W. R. 548; 14 T. L. R. 393; 42 Sol. Jo. 507; 19 Cox, C. C. 91, C. A.

*Annotations*:—*Apld. R. v. Army Council, Ex p. Ravenscroft*, [1917] 2 K. B. 504. *Refd. Fraser v. Hamilton* (1917), 33 T. L. R. 431; *Heddon v. Evans* (1919), 35 T. L. R. 642.

—*See* Army (Amendment) Act, 1915 (c. 26), s. 4; Naval Forces (Service on Shore) Act, 1916 (c. 101); Volunteer Act, 1916 (c. 62), s. 1.

**123. Desertion—Duty of officer of guard to receive party charged.**—*WOLTON v. GAVIN*, No. 113, *ante*.

**124. — Expense of conveying deserter to gaol.**—A justice before whom a deserter is brought & committed to the county gaol, may, if the deserter is unable to bear the charges himself, direct the expenses of conveying him thither to be paid, by the treasurer of the county, to the constable of the parish who found & apprehended him in the parish, & conveyed him to the gaol.—*R. v. PIERCE* (1814), 3 M. & S. 62; 105 E. R. 534.

**125. — Proof of desertion.**—Upon a charge under Mutiny Act, 1867 (c. 13), s. 81, for aiding a deserter in concealing himself, it is sufficient evidence of the person being a deserter, that such person had in point of fact acted as a soldier, & had left his regiment with the intention of not returning to it.—*RAM v. TAFE* (1868), 33 J. P. 38.

**126. Jurisdiction of civil court.**—*DAWKINS v. ROKEBY* (LORD), No. 281, *post*.

**127. —**—*A civil ct. has no power to intervene in matters affecting the regulation of military conduct, or in matters of military law affecting the rules laid down for the guidance of officers or the military discipline prescribed for them.*—*R. v. ARMY COUNCIL, Ex p. RAVENSCROFT*, [1917] 2 K. B. 504; 86 L. J. K. B. 1087; 117 L. T. 306; 33 T. L. R. 387, D. C.  
*Annotation*:—*Consd. Heddon v. Evans* (1919), 35 T. L. R. 642.

**128. —**—*FRASER v. BALFOUR*, No. 26, *ante*.

—*See* Part X., Sect. 4,

## ROYAL FORCES.

*Sect. 2.—Discipline. Sect. 3: Sub-sects. 1 & 2. Sects. 4 & 5.]*

**Action for damages against military authorities.]—***See Part IX., Sect. 1, sub-sect. 2, post.*

**Arrest by constable under Army Act, 1881 (c. 58), s. 156 (2).]**—*See CRIMINAL LAW, Vol. XIV., p. 183, No. 1620.*

**Incitement to mutiny.]—***See CRIMINAL LAW, Vol. XV., p. 638, Nos. 6795-6798.*

**Detaining army stores.]—***See CRIMINAL LAW, Vol. XV., p. 717, No. 7758.*

**Martial law generally.]—***See CONSTITUTIONAL LAW, Vol. XI., pp. 535, 536, Nos. 379-386.*

**Courts martial.]—***See Part X., Sect. 2, post.*

### SECT. 3.—PAY AND PENSIONS.

#### SUB-SECT. 1.—IN GENERAL.

*See Army Act, 1881 (c. 58), ss. 136-142.*

**129. Service in colonial contingent—Service with Crown.]—**Service in the army or in colonial contingents incorporated with the army is service under the King, & the King is paymaster, whether the supplies are granted by the Imperial or a Colonial Legislature.—*WILLIAMS v. HOWARTH*, [1905] A. C. 551; 74 L. J. P. C. 115; 93 L. T. 115; 21 T. L. R. 670, P. C.

*Annotation:—Reid, Leaman v. R.*, [1920] 3 K. B. 663.

**130. Power of Crown to stop—Half-pay of officer.]—**The King may at any time stop the half-pay of an officer in the army by signifying his pleasure that it shall be no longer paid.

The Pay Office cannot stop for the debt due to agent (LORD KENYON).—*MACDONALD v. STEELE* (1793), Peake, 233; 170 E. R. 140, N. P.

**131. Right of Pay Office to stop—For debt due to agent.]—***MACDONALD v. STEELE*, No. 130, *ante*.

**132. Whether assignable—Wound pension—Injunction.]—**A retired officer of the army, entitled to a pension granted by the Crown, in consideration of wounds received by him while in the service, assigned it for valuable consideration, & pursuant to his covenant in the deed of assignment, executed to the assignee a power of attorney, in the form required by the War Office, to enable him to receive the same. The pension was expressed in the warrant granting it, to be payable "until further order," & at the foot of the form of declaration issued by the Paymaster-General, to be filled up & signed by the grantee on applying for payment of the quarterly instalments of the pension, were these words: "This allowance cannot be assigned as security for a loan of money." The assignor, after allowing the assignee of the pension, by means of the power of attorney executed to him, to receive two quarterly instalments of the annuity, revoked the power, & thenceforth received it himself. The ct. on motion by the assignee, granted an injunction to restrain the assignor from receiving the pension, & from executing any power of attorney authorising any person other than pltf. to receive it.—*KNIGHT v. BULKELEY* (1858), 27 L. J. Ch. 592; 31 L. T. O. S. 210; 4 Jur. N. S. 527; 6 W. R. 610; *subsequent proceedings*, (1859), 83 L. T. O. S. 7.

*Annotation:—Reid, Dent v. Dent* (1867), L. R. 1 P. & D. 366.

—*See CHOSSES IN ACTION*, Vol. VIII., pp. 486-489, Nos. 136-138, 142-146, 148, 149, 158-163.

**Whether appropriated for benefit of creditors—**

#### PART V. SECT. 3, SUB-SECT. 2.

**b. Whether action lies.]—**A member of the military forces in Victoria has no civil right in respect of "pay"

or "salary" which can be enforced against the Crown.—*GILLESPIE v. R.* (1895), 21 V. L. R. 584.—*AUS.*  
c. —.]—Pltf. was enrolled in New

**Retired pay.]—***See BANKRUPTCY*, Vol. V., pp. 928-930, Nos. 7602, 7604, 7606, 7607, 7614.

**133. Whether receiver appointed—In respect of pension.]—**The pension of an officer of Her Majesty's forces, being by Army Act, 1881 (c. 58), s. 141, made inalienable by the voluntary act, of the person entitled to it, cannot be taken in execution even though such pension be given solely in respect of past services, & the officer cannot again be called upon to serve:—*Held*: an order appointing a receiver of such pensions was bad.—*LUCAS v. HARRIS* (1886), 18 Q. B. D. 127; 56 L. J. Q. B. 15; 55 L. T. 658; 51 J. P. 261; 35 W. R. 112; 3 T. L. R. 106, C. A.

*Annotations:—Apld. Crowe v. Price* (1889), 22 Q. B. D. 429. *Distd. Holmes v. Mittag* (1893), 9 T. L. R. 217. *Consd. Re Saunders, Ex p. Saunders*, [1895] 2 Q. B. 424; *Re Goudie, Ex p. Official Receiver v. Strand* (1896), 3 Mans. 224. *Reid. Apthorpe v. Apthorpe* (1887), 57 L. T. 618; *Harris v. Beauchamp*, [1894] 1 Q. B. 801; *Jones v. Coventry*, [1909] 2 K. B. 1029. *Mentd. Minter v. Kent, Sussex & General Land Soc.* (1895), 72 L. T. 186; *Tilling v. Blythe*, [1899] 1 Q. B. 557; *Hollinshead v. Hazleton*, [1916] 1 A. C. 428.

**134. ———.]—**A sum standing in the Bkpcy. Estates Account at the Bank of England to the credit of the judgment debtor, a retired deputy-commissary in the army, on the annulment of his bkpncy., consisted partly of a sum paid to the trustee out of the retired pay of the judgment debtor, partly of a sum paid to the trustee out of money paid by the Paymaster-General in respect of the commutation of a part of his retired pay:—*Held*: the judgment creditor was entitled to an order for the appointment of a receiver in respect of the sum arising from commutation money, but not in respect of the sum arising from retired pay.—*Crowe v. PRICE* (1889), 22 Q. B. D. 429; 58 L. J. Q. B. 215; 60 L. T. 915; 53 J. P. 389; 37 W. R. 424; 5 T. L. R. 280, C. A.

*Annotation:—Consd. Jones v. Coventry*, [1909] 2 K. B. 1029.

**135. ——— In respect of commutation money.]—***Crowe v. PRICE*, No. 134, *ante*.

**136. False declaration on claim for separation allowance.]—**A woman made a declaration that her son allowed her £2 a week before his enlistment. The son's wages were 30s. a week, & a small annual commission on sales, the employer being a draper with whom the son "lived in." There was no other evidence of the son's means; he was abroad on military service, & could not be called; but his mother had requested the employer to over-state the amount of the wages:—*Held*: there was sufficient evidence to make a *prima facie* case for the decision of the justices.—*HIGGON v. EVANS* (1917), 61 Sol. Jo. 710.

**Liability to execution.]—***See EXECUTION*, Vol. XXI., pp. 634, 635, Nos. 2157, 2158.

**What constitutes pay for purpose of maintenance of wife.]—***See HUSBAND & WIFE*, Vol. XXVII., p. 511, Nos. 5496, 5497.

**Contract for civilian remuneration during war-time service.]—***See MASTER & SERVANT*, Vol. XXXIV., p. 85, Nos. 627, 630.

**Commutation of pensions.]—***See Pension Commutation Acts*, 1871 (c. 38), 1882 (c. 44).

**Military savings banks.]—***See Military Savings Bank Act*, 1859 (c. 20).

#### SUB-SECT. 2.—RECOVERY OF PAY AND PENSIONS.

**137. Action to recover arrears of pay—Right of paymaster to set off overpayments—Overpayments**

South Wales for service with the New South Wales Contingent in South Africa, at 10s. a day, the rate of pay fixed by a general order. He served



made for long period.]—The paymaster of a military corps had given credit in account to an officer in that corps from Jan. 1, 1817 to Nov. 5, 1820, for certain increased pay, erroneously supposed to be granted by a general order of Aug. 27, 1806, to an officer of his situation, & a statement of that account was delivered to the officer in 1821. In Dec. 1816, the paymasters were informed by the board of ordnance that the increased pay granted by the order of 1806 would not be allowed to persons in the situation of the officer in question. The paymasters did not communicate this information to the officer until 1821, & subsequently to that time they continued to receive his pay. In an action brought by his personal representative to recover such pay:—*Held*: it was not competent to the paymaster to retain any of such sums of money on account of the sums which they had credited him for by way of increased pay, & which they had allowed him to consider his own for so long a period of time.—*SKYRING v. GREENWOOD* (1825), 4 B. & C. 281; 6 Dow. & Ry. K. B. 401; 107 E. R. 1064.

*Annotations*:—*Refd.* Higgs v. Scott (1849), 7 C. B. 63; Deutsche Bank (London Agency) v. Betero (1895), 73 L. T. 669; Baker v. Courage (1909), 101 L. T. 854; Holt v. Markham, [1923] 1 K. B. 504. *Mentd.* Bate v. Lawrence (1844), 2 Dow. & L. 83; Parrott v. Anderson (1851), 7 Exch. 93; It. v. Treasury Lords, *Re* Queen Dowager's Annuity (1851), 20 L. J. Q. B. 305; Townsend v. Crowdy (1860), 8 C. B. N. S. 477; Cayo v. Mills (1862), 7 H. & N. 913; Swan v. North British Australasian Co. (1862), 7 H. & N. 603; Do Cordova v. Do Cordova (1879), 4 App. Cas. 692; Daniell v. Sinclair (1881), 6 App. Cas. 181; Miles v. Scotting (1885), Cab. & El. 491; It. v. Blenkinsop, [1892] 1 Q. B. 43; Jones v. Waring & Gillow, [1926] A. C. 670; British & North European Bank v. Zalstein, [1927] 2 K. B. 92.

**138. Whether mandamus lies—To discharge arrears.**—An officer commanding forces of Her Majesty & of the East India Co., in India, has no such legal right, by statute or otherwise, to his pay, as entitles him, in the absence of any specific undertaking or acknowledgment, to a *mandamus* calling upon the co. to discharge arrears; though he has always received his pay from the co., & their practice has been to discharge it monthly.—*Ex p. NAPIER* (1852), 18 Q. B. 692; 21 L. J. Q. B. 332; 17 Jur. 380; 118 E. R. 261; *sub nom.* R. v. EAST INDIA CO., *Ex p. NAPIER*, 19 L. T. O. S. 214.

*Annotations*:—*Consd.* Grant v. Secretary of State for India (1877), 2 C. P. D. 445. *Apld.* It. v. Secretary of State for War, [1891] 2 Q. B. 326.

— **To compel fulfilment of royal warrant.**—*See* CROWN PRACTICE, Vol. XVI., pp. 303, 304, No. 1162.

**139. Whether petition of right lies—For arrears of pension—Alleged miscalculation.**—Petitioner, a retired army officer, alleged that a pension to which he was entitled was being, & had been, calculated upon a wrong basis, & claimed a declaration that the pension be calculated in the manner submitted by petitioner, & that any arrears found to be due to him upon such revised calculation be paid to him. Demurrer by the Crown that the petition disclosed no right, legal or equitable, cognisable by the ct.:—*Held*: the demurrer was good, & the petition must be dismissed on that

with the Contingent in South Africa, & was paid 4s. 6d. per day by the Imperial Govt. He claimed in addition the full rate of 10s. a day from the New South Wales Govt.—*Held*: *plf.* was in the service of the King, & it was immaterial by whom he was paid the 10s. a day, & therefore he was not entitled to more than the balance after giving credit for the 4s. 6d. received from the Imperial Govt.—*WILLIAMS v. HOWARTH* (1905), 21 T. L. R. 670, P. C.—*AUS.*

d. —.]—No action will lie by an officer against the paymaster of his regiment for his pay, when the paymaster is directed not to pay it over by the commanding officer.—*ELLIOTT v. HALL* (1838), 1 Ont. Dig. 171.—*CAN.*

e. *Pension commuted—Death of pensioner before payment of commutation sum—Right of executor to it.*—*R. v. MCCORRISTON*, [1920] 4 D. L. R. 1086.—*CAN.*

ground.—*YORKE v. R.*, [1915] 1 K. B. 852; 84 L. J. K. B. 947; 112 L. T. 1135; 31 T. L. R. 220.

*Annotation*:—*Expld.* Wigg v. A.-G. for Irish Free State [1927] A. C. 674.

—.]—*See* CROWN PRACTICE, Vol. XVI., p. 240, Nos. 357, 358.

#### SECT. 4.—IMPRESSMENT OF CARRIAGES.

*See* Army Act, 1881 (c. 58), ss. 112–114; & Army Annual Acts, 1882–1927.

**Effect of taking control of railways.**—*See* CARRIERS, Vol. VIII., pp. 144, 145, No. 951.

#### SECT. 5.—BILLETING.

*See* Army Act, 1881 (c. 58), ss. 30, 103–111, 119–121, 181, 187, 190.

**140. On whom troops billeteable—Lodging house keeper.**—A house for the reception of boarders & lodgers, with stabling for their horses, is not an inn, or alehouse, or public-house, on which soldiers can be quartered.—*PARKER v. FLINT* (1698), 12 Mod. Rep. 254; 88 E. R. 1303; *sub nom.* PARKHOUSE v. FORSTER, 5 Mod. Rep. 427; *sub nom.* PARKHURST v. FOSTER, Carth. 417; 1 Ld. Raym. 479; 1 Salk. 387.

*Annotations*:—*Mentd.* Scot v. Shepherd (1773), 3 Wils. 403; Deane v. Clayton (1817), 1 Moore, C. P. 203; Holder v. Souby (1860), 8 C. B. N. S. 254; R. v. Hymer (1877), 25 W. R. 415.

**141. —Victualling house keeper—Billet list not conclusive as to numbers.**—There is a statutory obligation under Army Act, 1881 (c. 58), s. 103, on the constable in charge at any place mentioned in the route issued to the commanding officer of any portion of Her Majesty's regular forces to give billets for all the officers, soldiers, & horses mentioned in the route, & for whom quarters are required; & the billet list made out under Army Act, 1881 (c. 58), s. 107, by the police authority of any such place is not conclusive as to the number of officers, soldiers, or horses for whom the keeper of a victualling house shown in the list may be required to find accommodation on an emergency. Such list merely determines the proportion in which the billets are to be distributed among the keepers of victualling houses, & does not relieve them from their liability to take in, or otherwise find accommodation for, according to the proportions shown in the list, any number for whom quarters are required.—*SHARRATT v. SCOTNEY*, [1892] 2 Q. B. 479; 67 L. T. 472; 56 J. P. 680; 40 W. R. 645; 8 T. L. R. 560; 36 Sol. Jo. 504, D. C.

**142. Right to billet horses**—Though furnished by contract.]—Horses employed in drawing artillery are billeteable under 19 Geo. 3, c. 16, whether they belong to the Ordnance or are furnished for the service by contract.—*READ v. WILLAN* (1780), 2 Doug. K. B. 422; 99 E. R. 271.

**143. —Duty of innkeeper to receive.**—Where justices of the peace are required by a penal

1. *Right of Chelsea Hospital Commissioners—To forfeit pension—Misconduct of pensioner.*—*MAKIN v. LORD ADVOCATE* (1898), 25 R. (Ct. of Sess.) 769; 35 Sc. L. R. 574.—*SCOT.*

#### PART V. SECT. 5.

g. *On whom troops billeteable*—On unmarried woman.—*Billets required for large number of troops.*—*BOSWELL v. CUPAR MAGISTRATES* (1804), 13 Fac. Coll. 397; Mor. Dict. 13083.—*SCOT.*



*Sect. 5.—Billeting. Part VI. Sects. 1 & 2. Parts VII., VIII. & IX. Sect. 1: Sub-sects. 1 &*

statute to distribute the penalty on conviction among certain persons according to their discretion, an adjudication that the forfeiture be disposed as the law directs is bad, & the ct. will quash the conviction. The justices ought to have adjudged what the several proportions should be. *Qu.*: whether ale house keepers be bound to receive horses as well as soldiers quartered on them.—*R. v. DIMPSEY, R. v. PORTS* (1787), 2 Term Rep. 96; 100 E. R. 52.

*Annotation*:—*Mentd. R. v. Seale* (1807), 8 East, 568.

**144. Right of Foot Guards to be billeted.]**—The Foot Guards may be billeted all over the kingdom as well as the other troops.—*R. v. CALVART* (1798), 7 Term Rep. 724; 101 E. R. 1210.

**145. Liability for expenses—Troops summoned by justices of county—Suppression of riot.]**—Where troops are summoned by justices of a county to aid in the suppression of apprehended riots the county council cannot be called upon to pay out of the county fund the expenses of housing & feeding them.—*R. v. GLAMORGAN COUNTY COUNCIL*, [1899] 2 Q. B. 536; 68 L. J. Q. B. 1047; 81 L. T. 372; 64 J. P. 115; 48 W. R. 112; 15 T. L. R. 536, C. A.

## Part VI.—The Reserve Army Forces.

### SECT. 1.—THE ARMY RESERVE.

*See Army Act, 1881 (c. 58), ss. 89, 90; Reserve Forces Act, 1882 (c. 48); Reserve Forces & Militia Act, 1893 (c. 9); Territorial Reserve Forces Act, 1907 (c. 9); Territorial & Army Militia Act, 1921 (c. 37); Army (Amendment) No. 2 Act, 1915 (c. 58), s. 5; Army & Air Force Annual Act, 1923 (c. 3), s. 10.*

**146. Effect of attestation under "Derby Scheme."]**—*BOOTS v. ELVY*, No. 118, *ante*.

**147. Notice calling up for service—Omission to state place & time for report—Subsequent information to solicitor of recruit.]**—Appl., a British subject liable to military service under Military Service Act, received three calling-up notices, dated July 18, 1917, signed by a recruiting officer, requiring applt. to report himself for military service on July 24, 1917, but the notices stated no place or time at which he was to report himself. These notices were, on receipt thereof, handed by applt. to his solr., who communicated with the recruiting officer & was informed by him in a letter as to the place at which applt. should report himself on July 24. Applt. failed to attend & was charged with being an absentee without leave. At the hearing of the charge he did not deny that he had notice of the time & place at which to report, & the justices convicted him. On a case stated:—*Held*: it must be assumed that applt. was informed by his solr. as to the time & place for reporting himself, & therefore there was evidence before the justices on which they could properly convict applt.—*GERHOLD v. DAY* (1917), 87 L. J. K. B. 659; 117 L. T. 813; 82 J. P. 78;

34 T. L. R. 69; 15 L. G. R. 934; 26 Cox, C. C. 133, D. C.

### SECT. 2.—THE SPECIAL RESERVE.

*See Reserve Forces Act, 1882 (c. 48); Territorial Reserve Forces Act, 1907 (c. 9); Territorial & Army Militia Act, 1921 (c. 37).*

**148. Legacy to officer commanding militia battalion—Effect of transfer to Territorial force.]**—Testator, who died in 1902, directed his trustees at the end of seven years to divide an accumulated fund among (*inter alia*) the institutions to which he had given legacies, or such of them as should then be existing, in proportion to their legacies, & in the event of any institution ceasing to exist prior to the expiration of seven years, then over. He gave legacies to the officers commanding certain bodies of Volunteers & Yeomanry & Militia:—*Held*: the effect of Territorial & Reserve Forces Act, 1907 (c. 9), was to reorganise & not to destroy the military forces existing at the passing of Territorial & Reserve Forces Act, 1907 (c. 9), & accordingly, the respective shares of the fund attributable to the legacies were payable, in the case of the Volunteers & Yeomanry to the county assocns. representing the units of the Territorial Force, & in the case of the Militia to the officer commanding the unit of the Army Reserve, which respectively corresponded to the several bodies for the benefit of which the legacies were originally given.—*Re DONALD, MOORE v. SOMERSET*, [1909] 2 Ch. 410; 78 L. J. Ch. 761; 101 L. T. 377; 53 Sol. Jo. 673.

### PART VI. SECT. 1.

**h. Liability of colonel of militia—For troops' clothing.]**—A lieutenant-colonel of militia was held not to be liable for the price of clothing ordered by him for his men, he being merely a servant of the Govt.—*MCLDERRY v. BALDWIN* (1839), 6 O. S. 31.—*CAN.*

**k. Liability for exempt tax.]**—An alien resident in this Province is liable to the payment of an exempt tax of thirty shillings annually, under Militia Act, 6 Geo. 4, c. 18, & not merely to one payment of that sum.

—*WATSON v. HALEY* (1840), 3 N. B. R. (1 Kerr) 124.—*CAN.*

**l. —.]**—An alien cannot discharge himself from the tax imposed by 6 Geo. 4, c. 18, by showing that he had enrolled himself & served in the militia of the Province.—*BRANNEN v. WILLIAMS* (1848), 6 N. B. R. (1 All.) 222.—*CAN.*

### PART VI. SECT. 2.

**m. Who is a "volunteer or reservist."]**—A member of a regiment of Canadian militia organised under

Militia Act, R. S. C. (1906), (c. 41), is a "volunteer or reservist" within Volunteer & Reservists' Relief Act, s. 2 (3), & s. 3 (2).—*CALGARY BREWING & MALTING Co. v. MCMAHON* (1916), 34 W. L. R. 1027; 10 W. W. R. 969.—*CAN.*

**n. Right of officer to pension—Based on pay & allowances.]**—*HODGINS v. R.* (1921), 20 Exch. C. R. 454; 60 D. L. R. 626.—*CAN.*

**o. Right to assign gratuity.]**—*UNION BANK OF CANADA v. NEWCOMEN* (1924), 55 O. L. R. 17.—*CAN.*

## Part VII.—The Territorial Force.

*See* Army Act, 1881 (c. 58), ss. 143–147, 181 (5); Railway Regulation Act, 1844 (c. 85), s. 12; Cheap Trains Act, 1883 (c. 84), s. 6; National Defence Act, 1888 (c. 31), s. 4; Territorial & Reserve Forces Act, 1907 (c. 9).

**Exemption from tolls.**—*See* Nos. 254, 255, *post*.

**Buildings used by Territorial Forces—Under London Building Acts.**—*See* METROPOLIS, Vol. XXXIV., p. 584, Nos. 64, 65.

**Houses in occupation of instructors—Exemption from poor rate.**—*See* RATES & RATING, Vol. XXXVIII., pp. 486, 487, Nos. 438–448.

## Part VIII.—The Air Force.

**Establishment of Air Force.**—*See* Air Force (Consolidation) Act, 1917 (c. 51).

**Auxiliary Air Force & Air Force Reserve.**—*See* Auxiliary Air Force & Air Force Reserve Act, 1924 (c. 15), s. 1.

**Air navigation.**—*See* Air Navigation Act, 1920 (c. 80).

**Liability of Air Council to be sued.**—*See* PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 58, 63, Nos. 343, 387.

## Part IX.—Matters Common to Navy, Army and Air Force.

## SECT. 1.—CIVIL RIGHTS AND LIABILITIES.

## SUB-SECT. 1.—IN GENERAL.

**Actions for damages.**—*See* Sub-sect. 2, *post*.

**Criminal liability of sailors & soldiers.**—*See* Sub-sect. 3, *post*.

**Effect of military or naval service on domicile.**—*See* CONFLICT OF LAWS, Vol. XI., pp. 314, 315, 321, 322, 335, 336, Nos. 51, 65, 97–106, 238–243.

**Duty to suppress riots.**—*See* CRIMINAL LAW, Vol. XV., p. 649, Nos. 6929, 6930.

**Voting qualifications of soldiers & sailors.**—*See* ELECTIONS, Vol. XX., pp. 9, 13, 14, Nos. 23, 72–74.

**Sale of intoxicating liquors in canteens.**—*See* INTOXICATING LIQUORS, Vol. XXX., p. 74, Nos. 589, 590.

**Reports & complaints to authorities—Privilege.**—*See* LIBEL & SLANDER, Vol. XXXII., pp. 111, 112, 133, Nos. 1430–1436, 1639.

**Settlement of sailors & soldiers & their dependents.**—*See* POOR LAW, Vol. XXXVII., pp. 253, 318, 334, Nos. 486, 1156, 1157, 1372–1374.

**Protection of naval & military authorities.**—*See* PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 65, 66, 79, 80, Nos. 404–412, 564–566; Public Authorities Protection Act, 1893 (c. 61); Army Act, s. 170; Militia Act, 1882 (c. 49), s. 16; Territorial Army & Militia Act, 1921 (c. 37), s. 4, sched. II.

## SUB-SECT. 2.—ACTIONS FOR DAMAGES AGAINST NAVAL AND MILITARY AUTHORITIES.

*A. By Persons in Naval and Military Service.*

**149. Acts done or words spoken in course of duty.**—*SUTTON v. JOHNSTONE*, *JOHNSTONE v. SUTTON* (1786), 1 Term Rep. 510; 99 E. R. 1225, Ex. Ch.; *affd.* (1787), 1 Bro. Parl. Cas. 76; 1

Term Rep. 784, H. L.; *revsg.* (1785), 1 Term Rep. 493.

*Annotations*:—*Distd.* Warden v. Bailey (1811), 4 Taunt. 67. *Apld.* Dawkins v. Rokeby (1866), 4 F. & F. 806; Dawkins v. Paulet (1869), L. R. 5 Q. B. 94. *Consd.* Dawkins v. Rokeby (1873), L. R. 8 Q. B. 255; Heddon v. Evans (1919), 35 T. L. R. 642. *Refd.* Ellis v. Abrahams (1846), 10 J. P. 820; Hodgkinson v. Fernie (1857), 3 C. B. N. S. 415; Grant v. Secretary of State for India (1877), 2 C. P. D. 445; *Ex p.* Marais, [1902] A. C. 109; R. v. Army Council, *Ex p.* Ravenscroft, [1917] 2 K. B. 504; Fraser v. Balfour (1918), 87 L. J. K. B. 1116. *Mentd.* Hill v. Yates (1818), 2 Moore, C. P. 80; Whitelegg v. Richards (1822), 6 Moore, C. P. 501; Taylor v. Williams (1831), 2 B. & Ad. 845; Mitchell v. Jenkins (1833), 5 B. & Ad. 588; Cane v. Chapman (1836), 6 L. J. K. B. 49; Musgrove v. Newell (1836), 1 M. & W. 582; Broad v. Ham (1839), 5 Bing. N. C. 722; Panton v. Williams (1841), 2 Q. B. 169; Ferguson v. Kinnoull (1842), 9 Cl. & Fin. 251; Michell v. Williams (1843), 11 M. & W. 205; Feather v. R. (1865), 6 B. & S. 257; Lister v. Perryman (1870), L. R. 4 H. L. 521; Abrath v. N. E. Ry. (1886), 55 L. T. 63; Brown v. Hawkes, [1891] 2 Q. B. 718.

**150.** —[In an action by an officer against his commander, for false imprisonment, malicious prosecution, & conspiracy to cause his removal from the Army, it appeared that more than four years before action, his commander, *deft.*, had decided against him on some dispute with brother officers, & that *pltf.* after this had been put under arrest by him for some supposed slight, for which he was kept in custody more than eight days, & not brought to a court martial, & that ultimately, in consequence of *pltf.*'s complaints against his commanding officers, including *deft.*, a *ct.* of inquiry sat, before which *deft.*, with others, gave evidence against him of want of temper, & proper respect, etc., for which the *ct.* reported him unfit for command, & upon this he was compelled by the Commander-in-Chief to retire:—*Held*: there was no cause of action on any of the counts, as the matters were purely military, & there was no evidence of malice.—*DAWKINS v. ROKEBY* (LORD) (1866), 4 F. & F. 806, N. P.

*Annotations*:—*Apld.* Dawkins v. Paulet (1869), L. R. 5 Q. B. 94. *Consd.* Dawkins v. Rokeby (1873), L. R. 8

## PART VII.

*p. Right of volunteer corps to make management rules—Officer failing to pay subscription to corps—Whether action lies.*—*MORRISON v. NEILSON* (1887), 14 R. (Ct. of Sess.) 452; 24 Sc. L. R. 318.—*SCOT*.

## Sect. 1.—Civil rights and liabilities: Sub-sect. 2, A.

Q. B. 255. **Apld.** *Grant v. Secretary of State for India* (1877), 2 C. P. D. 445; *R. v. Army Council, Ex p. Ravenscroft*, [1917] 2 K. B. 504. **Refd.** *Re Tufnell's Petn.* (1876), 45 L. J. Ch. 731; *Marks v. Frogley*, [1898] 1 Q. B. 888; *Fraser v. Balfour* (1918), 87 L. J. K. B. 1116.

151. —[—] **Pltf.** brought three actions, charging in each that **deft.** conspired with other persons to make a false & malicious representation to the Commander-in-Chief that he, **pltf.**, was unfit to command his regiment. **Defts.** did not plead, but took out a summons to stay proceedings on affidavits, stating that some years ago they were, respectively, members of a military ct. of inquiry, & that the actions were brought solely in respect of official & judicial acts done by them as members of the ct., & that until they were appointed members of the ct. they knew nothing of **pltf.** These statements being uncontradicted, the ct. ordered all proceedings to be stayed.—**DAWKINS v. SAXE WEIMAR** (PRINCE EDWARD), **DAWKINS v. WYN-YARD**, **DAWKINS v. STEPHENSON** (1876), 1 Q. B. D. 499; 45 L. J. Q. B. 567; 35 L. T. 323; 24 W. R. 670.

**Annotations** :—**Refd.** *Edmunds v. A.-G.* (1878), 47 L. J. Ch. 345. **Mentd.** *McHenry v. Lewis* (1882), 21 Ch. D. 202; *Bruce v. Ailesbury* (1892), 36 Sol. Jo. 865; *Salaman v. Secretary of State in Council of India* (1906), 94 L. T. 858.

152. — **Maliciously**.—Letters from the commanding officer of a regiment to his immediate superior, containing charges against the colonel in command; & a conversation with a Member of Parliament as to a question to be put in the House of Commons relative to the dismissal of the colonel on those charges held communications made on a privileged occasion. But circumstances showing that the letters were written not from a sense of duty, but from personal resentment on account of other matters, & that the object of the conversation was to prejudice **pltf.**, by reason of such personal resentment, held evidence of actual malice, taking away the privilege.—**DICKSON v. WILTON** (EARL) (1859), 1 F. & F. 419, N. P.

**Annotations** :—**Distd.** *Dawkins v. Paulet* (1869), L. R. 5 Q. B. 94; *Dawkins v. Rokeby* (1873), L. R. 8 Q. B. 255. **Refd.** *Beatson v. Sken* (1860), 5 H. & N. 838; *Hennessy v. Wright* (1888), 21 Q. B. D. 509; *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244. **Mentd.** *Cooper v. Blackmore* (1886), 2 T. L. R. 746.

153. —[—]—In an action against a late Secretary of State for War, a lord lieutenant, commandant of the militia of the district, & the colonel of a regiment of militia, for causing, by means of false charges, the removal of **pltf.** from the office of lieutenant-colonel of the regiment: the first count being for a conspiracy to cause his removal, & making such charges in pursuance of the conspiracy; & the second for making such charges, maliciously & without reasonable or probable cause; it appeared that charges, chiefly of neglect, based on a report of a regimental board, had been sent by the colonel to **pltf.** in writing, for the purpose of being answered by him, & that the charges, & his written answers, in effect admitting a certain amount of neglect of military duty, were, with all the papers he appended thereto, sent by the colonel-in-chief to the commandant, who first saw the colonel, & then **pltf.**, upon the subject, & heard their statements & counter-statements; & afterwards, & at the instance of the colonel, & after both of them had applied to, & had an interview with, the Secretary at War, with a view to **pltf.**'s removal, sent to the Secretary of War a formal list of charges drawn up by the colonel, & including some which were new & of a graver character, & as to which there had been no inquiry; but which, with the others, had been sent to **pltf.** for his answers, & were sent, with his answers in

writing; & the Secretary of State thereupon, after perusing the charges & written answers, without further inquiry declared that **pltf.** must be desired to resign; & afterwards, on remonstrance, appointed a military board of inquiry, before whom **pltf.** was fully heard, but against whose conduct of the inquiry certain complaints were made by **pltf.**; & ultimately, after their report, directed the dismissal of **pltf.** upon the charges of neglect, as admitted upon his own statements.—**Held**: (1) to sustain a verdict for **pltf.** upon the first count, both the other two **defts.** must be convicted, as it charged, in substance, a conspiracy; but, on the other count, either might be convicted; (2) assuming the charges, or those of them on which **pltf.** was really dismissed, were founded upon facts, as they appeared, or were represented, to the colonel, there was reasonable ground for preferring them; (3) if the commandant acted honestly on the representation made to him by the colonel, he was not liable, therefore, on either count, the question for the jury, in substance, was whether **defts.** acted honestly & *bond fide*; or without any belief in the truth of the charges, & from a bad & improper motive.—**DICKSON v. COMBERMERE** (VISCOUNT) (1863), 3 F. & F. 527, N. P.

**Annotations** :—**As to** (3) **Distd.** *Dawkins v. Paulet* (1869), L. R. 5 Q. B. 94. **Consd.** *Grant v. Secretary of State for India* (1877), 2 C. P. D. 445.

154. —[—]—In an action against a commanding officer of the Guards, for maliciously procuring the discharge of **pltf.**, a private soldier, it appearing that the commanding officer had absolute power to discharge private soldiers, & had so discharged **pltf.**, an amendment was directed, so stating the fact charging **deft.** with maliciously discharging **pltf.**; & held that, there being reasonable ground for suspecting **pltf.** of felony, which had been committed, & **deft.** having acted *bond fide*, he was entitled to the verdict.—**FREER v. MARSHALL** (1865), 4 F. & F. 485, N. P.

**Annotation** :—**Refd.** *Dawkins v. Rokeby* (1866), 4 F. & F. 806.

155. —[—]—An action will not lie against a superior official of the Army or Navy for maliciously causing **pltf.** to be retired from the service.—**FRASER v. HAMILTON** (1917), 33 T. L. R. 431, C. A.

**Annotations** :—**Consd.** *Fraser v. Balfour* (1918), 87 L. J. K. B. 1116. **Apld.** *Heddon v. Evans* (1919), 35 T. L. R. 642.

156. — **Without reasonable & probable cause**.—A military person cannot maintain an action against his officer for acts done by or under orders from his superiors, which they would have a right to give, & which he would be bound by military law to obey, unless, at all events, he has himself caused & procured such orders by means of reports or representations, malicious, or for some sinister & improper motive, & also without any reasonable or probable ground, & it is not enough, in order to show malice, that the report is in some respect untrue, in point of fact, unless it also appears to have been wilfully untrue, & without any reasonable ground.—**KEIGHLEY v. BELL** (1866), 4 F. & F. 763, N. P.

**Annotations** :—**Consd.** *Dawkins v. Rokeby* (1866), 4 F. & F. 806; *Marks v. Frogley*, [1898] 1 Q. B. 888. **Refd.** *Dawkins v. Rokeby* (1873), L. R. 8 Q. B. 255; *R. v. Army Council, Ex p. Ravenscroft*, [1917] 2 K. B. 504; *Fraser v. Balfour* (1918), 87 L. J. K. B. 1116; *Heddon v. Evans* (1919), 35 T. L. R. 642.

157. —[—]—No action would lie against a military officer for an act done in the ordinary course of his duty as such officer, even if done maliciously & without reasonable or probable cause.—**DAWKINS v. PAULET** (LORD) (1869), L. R. 5 Q. B. 94; 9 B. & S. 768; 39 L. J.

Q. B. 53; 21 L. T. 584; 34 J. P. 229; 18 W. R. 336.

*Annotations:—Apld.* Dawkins v. Rokeby (1873), L. R. 8 Q. B. 255. *Consd.* Grant v. Secretary of State for India (1877), 2 C. P. D. 445. *Apld.* Marks v. Frogley, [1898] 1 Q. B. 882; Edmondson v. Rundle (1903), 19 T. L. R. 356. *Refd.* Henwood v. Harrison (1872), L. R. 7 C. P. 608; Hart v. Gumpach (1873), L. R. 4 P. C. 439; Dawkins v. Saxe Weimar (Prince Edward), Dawkins v. Wynyard, Dawkins v. Stephenson (1876), 24 W. R. 670; R. v. Army Council, *Ex p.* Ravenscroft, [1917] 2 K. B. 504; Fraser v. Balfour (1918), 87 L. J. K. B. 1116.

158. ———.]—A military officer is liable to an action for damages if in excess of his jurisdiction he commits an act which amounts to false imprisonment or other common law wrong, even though he purports to act in the course of military discipline; but if his act is within his jurisdiction & is done in the course of military discipline no action will lie on the ground only that the act has been done maliciously & without reasonable & probable cause.—*HEDDON v. EVANS* (1919), 35 T. L. R. 642; *O'Sullivan's Military Law & Supremacy of Civil Courts*, 42.

*See, also, LIBEL*, Vol. XXXII., pp. 111, 112, Nos. 1430–1436.

159. ———.]—*In excess of jurisdiction.*—*FRYE'S CASE* (1746), 1 *McArthur on Naval & Military Courts Martial*, 4th ed., App. XXIV., 436.

*Annotation:—Consd.* Warden v. Bailey (1811), 4 Taunt. 67.

160. ———.]—*TONYN'S CASE* (prior to 1811), cited in 4 Taunt. at p. 71; 128 E. R. 254.

161. ———.]—*HEDDON v. EVANS*, No. 158, *ante*.

162. ———.]—*In abuse of authority.*—*WALL v. M'NAMARA* (1779), cited in 1 Term Rep. at p. 536; 99 E. R. 1239.

163. ———.]—*SWINTON v. MOLLOY* (1783), cited in 1 Term Rep. at p. 537; 99 E. R. 1239.

164. ———.]—*GRANT v. SHARD* (1784), cited in 4 Taunt. at p. 85; 128 E. R. 260.

165. ———.]—An action of trespass lies for an inferior military officer against his superior officer, both being under martial law, who imprisons him for disobedience to an order made under colour, but not within the scope of military authority, although the imprisonment be followed by a trial by a court martial.—*WARDEN v. BAILEY* (1811), 4 Taunt. 67; 128 E. R. 253; *subsequent proceedings, sub nom.* *BAILEY v. WARDEN* (1815), 4 M. & S. 400.

*Annotations:—Consd.* Dawkins v. Rokeby (1873), L. R. 8 Q. B. 255. *Refd.* Dawkins v. Paulet (1869), L. R. 5 Q. B. 94.

166. ———.]—*In trespass against the adjutant of a regiment of local militia for arresting & imprisoning a serjeant in the same regiment, upon a charge of unsoldier-like conduct in exciting disobedience & mutiny, it is a good defence upon the general issue that the action was not brought within six months after the fact committed; but if the imprisonment is continued by deft., in pursuance of orders from the commanding officer of the regiment, to a period within six months, the action lies; unless the continuance of it be justifiable on the part of the commanding officer; & such continuance was held to be justifiable where it was in order to bring pltf. to a general court martial for uttering words in the presence of several serjeants & others of the same regiment, amounting to disorderly conduct on the part of pltf., to the prejudice of good order & military discipline, within Articles of War, Art. 2, sect. 24, although the words uttered referred to an order made by the commanding officer, which he was not*

*strictly competent to make, & although pltf. was acquitted by the sentence of the court martial.*—*BAILEY v. WARDEN* (1815), 4 M. & S. 400; 105 E. R. 882.

*Annotation:—Refd.* Dawkins v. Paulet (1869), L. R. 5 Q. B. 94.

167. ———.]—*Within limits of jurisdiction.*—*Plea justifying a libel, which stated the grounds on which pltf. was dismissed the East India Co.'s service, on the ground that the co. ordered deft., as Governor in Council, to dismiss pltf. for the reasons assigned; the plea does not show a sufficient justification for publishing the causes of dismissal.*—*OLIVER v. BENTINCK* (1811), 3 Taunt. 456; 128 E. R. 181.

168. ———.]—*EDMONDSON v. RUNDLE* (1903), 19 T. L. R. 356.

169. ———.]—*Action for negligence.*—*WEAVER v. WARD* (1616), Hob. 134; Moore, K. B. 864; 80 E. R. 284.

*Annotations:—Refd.* Bessey v. Olliot & Lambert (1682), T. Raym. 467; Sharrod v. L. & N. W. Ry. (1849), 4 Exch. 580; Stanley v. Powell, [1891] 1 Q. B. 86. *Mentd.* Mitchell v. Alestree (1676), 1 Vent. 295; Dickenson v. Watson (1682), T. Jo. 205; Gibbon v. Pepper (1695), 2 Salk. 637; R. v. Keite (1696), 1 Ld. Raym. 138; R. v. Gill (1719), 1 Stra. 190; Scot v. Shepherd (1773), 3 Wils. 403; McManus v. Crickett (1800), 1 East, 106; Leame v. Bray (1803), 3 East, 593; Hall v. Fearnley (1842), 12 L. J. Q. R. 22.

170. ———.]—*Action for wrongful dismissal.*—*The statement of claim in an action against the members of the Army Council for wrongfully procuring pltf.'s dismissal from the Army, or alternatively, for having wrongfully coerced & intimidated him into resigning his commission, struck out on the ground that it disclosed no reasonable cause of action.*—*WOODS v. LYTTLETON* (1909), 25 T. L. R. 665, C. A.

*Annotation:—Refd.* Heddon v. Evans (1919), 35 T. L. R. 642.

171. ———.]—*FRASER v. BALFOUR*, No. 26, *ante*.

#### B. By Civilians.

*See, generally, PUBLIC AUTHORITIES*, Vol. XXXVIII., pp. 101 *et seq.*

172. *Acts done in course of duty—In excess of authority—Confirmation of illegal sentence of court martial—Sentence imposed on civilian.*—*COMYN v. SABINE* (1738), cited 1 Cowp. at p. 169; 98 E. R. 1026.

173. ———.]—*In an action against the Governor of Gibraltar, for assault & false imprisonment, it was proved that a party of soldiers, under the command of his military secretary surrounded pltf.'s house, & that while a search was making in the adjoining house for a Spaniard who was suspected to be concealed there, pltf., in attempting to leave his house, was prevented from so doing by a sentinel placed at the door, who compelled him to return. It was also proved, that deft. had repeatedly expressed a desire to apprehend the Spaniard; that his secretary, being unattached, could not employ the troops on such a service except by his directions, & that deft. had never called his secretary to account for what had occurred. It further appeared, on the evidence of pltf.'s brother, that pltf. had told him that deft. expressed to pltf. his regret at having been obliged to direct the search. No evidence was given on the part of deft. The jury having returned their verdict for pltf.:—*Held*: they were warranted in coming to the conclusion that deft. had ordered the search, & the act complained of was a necessary consequence of deft.'s orders.—*

#### PART IX. SECT. 1, SUB-SECT. 2.—B.

q. *Injury to civilian during rifle practice.*—*LAROSE v. R.* (1901), 21

C. L. T. 327; 31 S. C. R. 206.—*CAN. r. Action against gunner—Firing on vessel—How far order from Governor justification.*—*A gunner cannot justify*

*the act of firing upon a vessel by an order from the Governor requiring all vessels before they proceed to sea to be provided with passes from the*





a document disposing of his property. He remained in barracks at Chatham & did not go on board ship till he joined a transport on Aug. 17, 1914, & he was wrecked in her on Oct. 30, 1914:—*Held*: not within the exception in Wills Act, 1837 (c. 26), s. 11.—*In the Estate of ANDERSON, ANDERSON v. DOWNES*, [1916] 1 P. 49; 85 L. J. P. 21; 114 L. T. 519; 32 T. L. R. 248; 60 Sol. Jo. 254.

184. —[In order that a seaman's will may be valid under Wills Act, 1837 (c. 26), s. 11, it is necessary that the will should be made when the seaman is at sea.—*In the Estate of THOMAS, In the Estate of BOWLY* (1918), 34 T. L. R. 626; 62 Sol. Jo. 784.

185. — *Ship in river on naval expedition.*—A codicil signed, but not attested, on board a Queen's ship in a river, by the commander-in-chief actually engaged in a naval operation, held to be within Wills Act, 1837 (c. 26), s. 11, & to incorporate a prior codicil signed by him, but not attested, whilst living ashore.—*In the Goods of AUSTEN* (1853), 2 Rob. Eccl. 611; 21 L. T. O. S. 65; 17 Jur. 284; 163 E. R. 1431.

*Annotation*:—*Refd. In the Goods of M'Murdo* (1867), 37 L. J. P. & M. 14.

186. — *Ship lying in river before sailing.*—A letter containing testamentary dispositions written on a ship lying within a river, & before the ship has actually sailed, may be a valid will as made by a seaman at sea.—*In the Goods of PATTERSON* (1898), 79 L. T. 123.

187. — *Seaman returning from service.*—A surgeon in the Navy was invalided at a foreign station, & wrote a letter at sea on board a steamship, on which he was a passenger homewards, containing directions as to the manner in which he wished his property to be disposed of:—*Held*: (1) a surgeon in the Navy was a mariner or seaman within the provision contained in Stat. Frauds, s. 23, & Wills Act, 1837 (c. 26), s. 11, exempting mariners or seamen, being at sea, from making formal wills; (2) although deceased was not on duty at the date of the letter, yet, as he was returning from service, this will was entitled to probate, as made at sea.—*In the Goods of SAUNDERS* (1865), L. R. 1 P. & D. 16; 35 L. J. P. & M. 26; 13 L. T. 411; 11 Jur. N. S. 1027; 14 W. R. 148.

*Annotations*:—*As to* (1) *Consd. In the Estate of Thomas, In the Estate of Bowly* (1918), 34 T. L. R. 626. *Refd. In the Goods of M'Murdo* (1867), 17 L. T. 393.

188. — *Ship permanently stationed in harbour.*—A will made by a mariner serving on board H.M.S. *Excellent* whilst she was permanently stationed in Portsmouth harbour, was held to be the will of "a mariner or seaman being at sea," & within Wills Act, 1837 (c. 26), s. 11.—*In the Goods of M'MURDO* (1868), L. R. 1 P. & D. 540; 37 L. J. P. & M. 14; 17 L. T. 393; 32 J. P. 72; 3 Mar. L. C. 37; *sub nom. Re MacMURDO*, 16 W. R. 283.

*Annotations*:—*Refd. In the Goods of Patterson* (1898), 79 L. T. 123; *In the Estate of Anderson, Anderson v. Downes*, [1916] P. 49; *Re Wernher, Wernher v. Belt*, [1918] 1 Ch. 339.

*See, now*, Wills (Soldiers & Sailors) Act, 1918 (c. 58), ss. 1, 2.

189. *Necessity for death "at sea"—Accidental death on shore.*—The will of a seaman, who went on shore, & there died by an accident, allowed to pass as that of a seaman "at sea," under Wills Act, 1837 (c. 26), s. 11.—*In the Goods of LAY* (1840), 2 Curt. 375; 163 E. R. 444.

*Annotations*:—*Apld. In the Goods of Austen* (1853), 21 L. T. O. S. 65. *Distd. In the Goods of Corby* (1854), 1

*Ecc. & Ad. 292. Refd. In the Goods of Saunders* (1865), L. R. 1 P. & D. 16; *In the Goods of M'Murdo* (1867), L. R. 1 P. & D. 540; *In the Goods of Patterson* (1898), 79 L. T. 123; *In the Estate of Anderson, Anderson v. Downes*, [1916] P. 49; *In the Estate of Thomas, In the Estate of Bowly* (1918), 34 T. L. R. 626.

190. *Wills (Soldiers & Sailors) Act, 1918 (c. 58)*

—*Extent of application—Will made before but death after passing of Act.*—Above Act, which enlarges the power of sailors to make a privileged will under Wills Act, 1837 (c. 26), by putting them in the same position as soldiers, applies to the case of a sailor who made his will before, but died after, the passing of above Act of 1918.—*In the Estate of YATES*, [1919] P. 93; 88 L. J. P. 92; 120 L. T. 671; 35 T. L. R. 301; 63 Sol. Jo. 355.

#### ii. Who is a Sailor.

191. *Purser of man of war.*—Probate allowed of an unattested codicil made at sea by a purser of a man of war, as that of a seaman, under the exception contained in Wills Act, 1837 (c. 26), s. 11.—*In the Goods of HAYES* (1839), 2 Curt. 338; 163 E. R. 431.

*Annotations*:—*Apld. In the Goods of Saunders* (1865), L. R. 1 P. & D. 16. *Refd. In the Estate of Thomas, In the Estate of Bowly* (1918), 34 T. L. R. 626.

192. *Naval surgeon.*—*In the Goods of SAUNDERS*, No. 187, *ante*.

#### (b) Soldiers.

##### i. In General.

*See* Stat. Frauds, s. 23; Administration of Estates Act, 1925 (c. 23), s. 56; Wills Act, 1837 (c. 26), s. 11; Wills (Soldiers & Sailors) Act, 1918 (c. 58).

193. *What constitutes actual military service—Service in India.*—*In the Goods of JOHNSON* (1839), 2 Curt. 341; 163 E. R. 432.

*Annotation*:—*Mentd. In the Goods of Rees* (1865), 29 J. P. 296.

194. — *Service in Barbice.*—An unattested will, made by an officer on service at Barbice, allowed to pass as that of a "soldier in actual military service," under Wills Act, 1837 (c. 26), s. 11, at the prayer of the party whose interest was prejudiced by such will.—*In the Goods of PHIPPS* (1840), 2 Curt. 368; 163 E. R. 442.

195. — *Equivalent to "on an expedition."*—D. a major-general in the army, on full pay, & holding the appointment of Director-General of the Royal Artillery resident at Woolwich, held not to be "a soldier in actual military service."

I think it clear that the principle . . . is, that every soldier was not entitled to the exemption contained in the clause of the Statute of Charles II. [Stat. Frauds], but that it was confined to such as were on an expedition—in actual military service, that is, *in expeditione*. . . I do not consider that the words "in actual military service" apply to a person in D.'s situation, not living within the walls of a garrison, as far as appears, but *suvis aedibus*; & even if he were, I am of opinion he was not "in actual military service" (SIR JENNER FUST). —*DRUMMOND v. PARISH* (1843), 3 Curt. 522; 2 Notes of Cases, 318; 1 L. T. O. S. 207; 7 Jur. 538; 163 E. R. 812.

*Annotations*:—*Apld. Whyte v. Repton* (1844), 3 Notes of Cases, 97. *Fold. In the Goods of Hill* (1845), 1 Rob. Eccl. 276. *Distd. Herbert v. Herbert* (1855), Dea. & Sw. 10. *Apld. In the Goods of Thorne* (1865), 4 Sw. & Tr. 36. *Consd. In the Goods of Hiscock*, [1901] P. 78; *Re Wernher, Wernher v. Belt*, [1918] 1 Ch. 339. *Fold. In the Estate of Grey*, [1922] P. 140. *Consd. Re Booth, Booth v. Booth*, [1926] P. 118. *Refd. Bowles v. Jackson* (1854), 1 Ecc. & Ad. 294; *In the Estate of Donner* (1917), 34 T. L. R. 138; *In the Estate of Gossage, Wood v. Gossage*, [1921] P. 194.

#### PART IX. SECT. 2, SUB-SECT. 1.— A. (a) ii.

192 i. *Naval surgeon.*—A staff-sur-

geon in the navy wrote a letter, some sentences of which were testamentary, on board H.M.S. *S.* at Devonport. The ship was lost at sea a few days

later:—*Held*: the letter was entitled to probate as the will of a "seaman being at sea."—*In the Goods of RAE* (1891), 27 L. R. Ir. 116.—*IR.*



*Sect. 2.—Privileges and exemptions: Sub-sect. 1, A (b) i. & ii.]*

196. ———.] —The words "in actual military service" in Wills Act, 1837 (c. 26), s. 11 are now settled to be equivalent to "on an expedition." The service may continue after the fighting is over, but the man on such service must be either on a field of operations, or proceeding to or from the field, or in some place for the purpose of proceeding there. Duration of actual service is a matter of fact to which the date at which the war is declared to be terminated by proclamation under Termination of the Present War (Definition) Act, 1918 (c. 59), is irrelevant.—*In the Estate of GREY*, [1922] P. 140; 91 L. J. P. 111; 126 L. T. 799; 38 T. L. R. 401.

197. ——— Mobilisation.]—Mobilisation may be fairly taken as a commencement of that which, in Roman law, was understood by the words "*in expeditione*." If the order to mobilise has been received, although any particular member of the force may himself have taken no step under it, yet the order itself so affects his position, as a unit of the whole force, as to place him "*in expeditione*."

On Sept. 7, 1899, a battalion stationed in India was "warned" for service, & two days later was "ordered to mobilise" for active service in South Africa, & embarked on Sept. 19, 1899. Deceased, a private soldier in that battalion, wrote, between Sept. 8, & Sept. 19, an undated letter, which was received by pltf. in England on Oct. 2, 1899. The writer died of fever during the siege of Ladysmith on Feb. 9, 1900. The letter contained (*inter alia*) the expressions: "If you have a letter to say that I am killed, then the lot is for you." . . . "You will receive the lot if I am killed in action, for I shall make out my will in your favour." No other document in the nature of a will was ever received or discovered, & the father of deceased, the latter being unmarried, took out letters of administration. Pltf. having propounded the letter as the will of deceased soldier claimed revocation of the grant of administration:—*Held*: the document was testamentary, & it was a soldier's will within Wills Act, 1837 (c. 26), s. 11.—*GATTWARD v. KNEE*, [1902] P. 99; 71 L. J. P. 34; 18 T. L. R. 163; *sub nom.* *In the Goods of KNEE*, *GATTWARD v. KNEE*, 86 L. T. 119; 46 Sol. Jo. 123.

*Annotations*:—*Fold.* May v. May, [1902] P. 103, n. *Consd.* *Re Booth, Booth v. Booth*, [1926] P. 118. *Refd.* *In the Goods of Stanley* (1916), 114 L. T. 1182; *Godman v. Godman*, [1920] P. 261.

198. ——— Residence of officer suis aedibus.]—*DRUMMOND v. PARISH*, No. 195, *ante*.

199. ——— Being quartered in barracks with regiment.]—Will of a soldier made when quartered with his regiment in barracks at New Brunswick, & who died there, not admitted to probate, not being executed according to Wills Act, 1837 (c. 26), s. 9, & not being within the exception contained in Wills Act, 1837 (c. 26), s. 11.—*WHITE v. REPTON* (1844), 3 Curt. 818; 3 L. T. O. S. 322; 8 Jur. 562; 163 E. R. 912; *sub nom.* *WHYTE v. REPTON*, 3 Notes of Cases, 97.

*Annotations*:—*Fold.* *In the Goods of Norris* (1844), 3 Notes of Cases, 197. *Refd.* *Bowles v. Jackson* (1854), 1 Ecc. & Ad. 294.

200. ——— Receipt of order to proceed to seat of operations.]—A sergeant, with his regiment, at Malta, under orders for the West Indies:—*Held*:

not to be a soldier in actual military service.—*In the Goods of NORRIS* (1844), 3 Notes of Cases, 197.

*Annotation*:—*Refd.* *Bowles v. Jackson* (1854), 1 Ecc. & Ad. 294.

201. ———.] —A soldier under orders to proceed from his station in one Indian Presidency to take part in the war going on in another, & making his will only two days before he commenced the march, is not entitled to the privilege of a military testament.—*BOWLES v. JACKSON* (1854), 1 Ecc. & Ad. 294; 164 E. R. 170.

*Annotations*:—*Distd.* *Herbert v. Herbert* (1855), Dea. & Sw. 10. *Consd.* *In the Goods of Hiscock*, [1901] P. 78; *Re Booth, Booth v. Booth*, [1926] P. 118.

202. ———.] —A printer's apprentice, who was a private in a volunteer battalion & resided with his father in Chichester, sent in his name for active service in the war then being waged in South Africa, was certified as fit by the medical inspector, & pursuant to an order, went into barracks at Chichester, & while there made his will, being at that time under twenty-one years of age. An order was subsequently received from the military authorities pursuant to which he embarked with his regiment, & he died from a wound received in battle:—*Held*: by taking the step of going into barracks with a view to being drafted to the seat of war he had brought himself within Wills Act, 1837 (c. 26), s. 11, & he was, at the time he made his will, "a soldier in actual military service," & consequently his will, though made at a time when he was under age, was entitled to probate.—*In the Goods of HISCOCK*, [1901] P. 78; 70 L. J. P. 22; 84 L. T. 61; 17 T. L. R. 110.

*Annotations*:—*Apld.* *Gattward v. Knee*, [1902] P. 99. *Consd.* *Re Wernher, Wernher v. Beit*, [1918] 1 Ch. 339. *In the Estate of Grey*, [1922] P. 140; *Re Booth, Booth v. Booth*, [1926] P. 118. *Refd.* *In the Goods of Stanley* (1916), 114 L. T. 1182; *In the Estate of Gossage, Wood v. Gossage*, [1921] P. 194.

203. ———.] —*GATTWARD v. KNEE*, No. 197, *ante*.

204. ———.] —*STOPFORD v. STOPFORD* (1903), 19 T. L. R. 185.

205. ———.] —A sergeant in the Army Ordnance Corps, who was stationed at Woolwich, received, on Aug. 15, 1899, orders from the War Office to proceed in marching order, on Aug. 19, to Fermoy, where he was to report himself to the commanding officer of the Munster Fusiliers, & proceed with the regiment to South Africa, on Aug. 24, for special service. On Aug. 17, while still at Woolwich, the sergeant wrote a letter to a friend of his fiancée in which he stated that if anything happened to him, she would come in for everything he had. He died while serving in South Africa:—*Held*: the letter should be admitted to probate as a soldier's will.—*In the Goods of GORDON* (1905), 21 T. L. R. 653.

206. ———.] —When the country is at war a soldier who has been ordered to hold himself in readiness for service overseas can make a valid soldier's will under Wills Act, 1837 (c. 26), s. 11.—*Re KITCHEN, KITCHEN v. ALLMAN* (1919), 35 T. L. R. 612.

*Annotation*:—*Consd.* *Re Booth, Booth v. Booth*, [1926] P. 118.

207. ———.] —*In the Estate of GREY*, No. 196, *ante*.

208. ———.] —For the purposes of a

*Held*: when the document was signed deceased was "in actual military service" within Wills Act, 1915, s. 10, & the will was valid, sect. 6 of the Act not applying.—*Re VERNON*, [1915] V. L. R. 699.—*AUS.*

**PART IX. SECT. 2, SUB-SECT. 1.—A. (b) i.**

2001. *What constitutes actual military service—Receipt of order to proceed to seat of operations.*—A member of the Australian Imperial Expeditionary

force, under the age of 21 years, signed an informal document directing a certain disposition of his personal estate in the event of his death. He was at the time of signature under orders to embark for military service abroad, & he did in fact embark next day:—

soldier's will actual military service begins on receipt of orders to proceed abroad in order to serve in a campaign. The rule of Roman law that a will made in the manner allowed for a soldier's will is only good for a year after the soldier's discharge does not apply to English law.—*Re BOOTH, BOOTH v. BOOTH*, [1926] P. 118; 95 L. J. P. 64; 135 L. T. 229; 42 T. L. R. 454.

**209. — Residence at headquarters.**—Will of a soldier made at Bangalore, in the East Indies, whilst in command of the Mysore division of the army there stationed, & who died whilst on a tour of inspection of the troops under his command, not admitted to probate, not being executed according to Wills Act, 1837 (c. 26), s. 9, & not being held to be within the exception contained in Wills Act, 1837 (c. 26), s. 11.—*In the Goods of HILL* (1845), 1 Rob. Eccl. 276; 4 Notes of Cases, 174; 163 E. R. 1038.

*Annotations*.—*Distd.* *Herbert v. Herbert* (1855), Dea. & Sw. 10. *Reid.* *In the Goods of Fitzgerald* (1859), 23 J. P. 519.

**210. — Proceeding to or from field of operations.**—*HERBERT v. HERBERT* (1855), Dea. & Sw. 10; 26 L. T. O. S. 153; 2 Jur. N. S. 24; 4 W. R. 182; 164 E. R. 486.

*Annotation*.—*Reid.* *In the Goods of Saunders* (1865), L. R. 1 P. & D. 16.

**211. —**—*—*—*In the Estate of GREY*, No. 196, *ante*.

**212. — Officer acting as assistant commissioner—Controlling troops in civil capacity.**—Deceased was an officer in the army, & made an informal will when he was acting as assistant comr. in a district in the East Indies which was in open rebellion & subject to martial law. In his capacity of assistant comr. he had the direction & control of troops, but was not in military command.—*Held*: he was not in actual military service, & the testamentary paper was not within Wills Act, 1837 (c. 26), s. 11.—*In the Goods of FITZGERALD* (1859), 23 J. P. 519.

**213. — Continuance of service after fighting over.**—On the conclusion of the Waziristan operations on the frontier of India in 1895 a portion of the force remained in the Tochi Valley as an escort to the party engaged in the delimitation of the frontier. Testator was a lieutenant in an Indian regiment forming part of this escort. While so serving testator was mortally wounded by a fanatic & was carried into camp, where he dictated a will to his brother-in-law, whom he made his residuary legatee, & died on the next day. The will was signed by testator & attested by his brother-in-law & another officer as witnesses. His estate consisted of personal property only:—

**215 i. — Being in some place for purpose of proceeding to or from field of operations.**—Deceased signed a blank will form in the presence of two witnesses & declared his wishes with regard to the disposition of his property. These declarations were not written in the will. Deceased was an enlisted soldier in camp prior to dispatch overseas, for military service in the war then existing with Germany & her allies. Clear evidence was given as to the declarations made.—*Held*: deceased was on actual military service, & although the signed will form was invalid as a will the evidence as to the testamentary wishes expressed verbally was satisfactory & probate limited to personal estate should be granted.—*Re HAVEY*, [1918] S. A. L. R. 169.—AUS.

**215 ii. —**—*—*—A postcard written to his sister by a soldier who had enlisted for active service in an expeditionary force, & was afterwards killed in action, contained the words, "for case I don't come back O. is to get all my insurance,

etc." The father of deceased having applied, with O.'s consent, for letters of administration with the document annexed.—*Held*: the document was the will of a soldier in actual military service within Wills Act, s. 11, & the application should be granted.—*Re COGAN* (1915), 34 N. Z. L. R. 960.—N.Z.

**215 iii. —**—*—*—Deceased was a member of the New Zealand Expeditionary Forces. Two days before embarkation, being then on active service, he visited his family, & a discussion took place in the presence of his mother, two brothers, & a sister as to the amount of money he possessed. After inspecting his savings bank pass-book, which was in the custody of his mother, & inquiring of his brother what payments had been made on his behalf to the National Provident Fund, he then said, "Well, if anything happens to me there will be over £300 for 'mum,'" & handed the pass-book back to his mother. Deceased died at the New Zealand General Hospital,

*Held*: (1) testator was in "actual military service" within Wills Act, 1837 (c. 26), s. 11, at the time when he made his will; (2) notwithstanding the attestation by two witnesses the will was a soldier's will made in exercise of the privilege reserved by Wills Act, 1837 (c. 26), s. 11, & requiring no attestation; Wills Act, 1837 (c. 26), s. 15, did not apply to a will so made; & the gift to the attesting witness was therefore valid.—*Re LIMOND, LIMOND v. CUNLIFFE*, [1915] 2 Ch. 240; 84 L. J. Ch. 833; 113 L. T. 815; 59 Sol. Jo. 613.  
*Annotations*.—*As to* (1) *Consd.* *In the Estate of Grey*, [1922] P. 140. *Reid.* *Re Wernher, Wernher v. Beit*, [1918] 1 Ch. 339.

**214. —**—*—*—*In the Estate of GREY*, No. 196, *ante*.

**215. — Being in some place for purpose of proceeding to or from field of operations.**—*In the Estate of GREY*, No. 196, *ante*.

**216. Existence of actual military service must be proved.**—Probate will not be granted, on a mere motion, to the unattested will of a soldier "on service," if there be any doubt whether it is actual service within Wills Act, 1837 (c. 26).—*In the Goods of PERY* (1844), 3 Notes of Cases, 4; 2 L. T. O. S. 335.

**217. Duration of actual service—Question of fact—Whether date of declaration of termination of hostilities relevant.**—*In the Estate of GREY*, No. 196, *ante*.

**218. Attestation by beneficiary under will—Valid.**—*Re LIMOND, LIMOND v. CUNLIFFE*, No. 213, *ante*.

**219. Whether privilege dependent on military rank or education.**—The privilege of making a valid soldier's will is not dependent upon the military position or the education of testator.—*MAY v. MAY*, [1902] P. 103, n.; 71 L. J. P. 35; 18 T. L. R. 184; *sub nom.* *In the Goods of MAY*, *MAY v. MAY*, 86 L. T. 120.

## ii. Who is a Soldier.

**220. Whether includes infant.**—The will of a minor, written in pencil, after he was mortally wounded on the field of battle, & attested by one witness, admitted to probate under Wills Act, 1837 (c. 26), s. 11.—*In the Goods of FARQUHAR* (1846), 4 Notes of Cases, 651.

*Annotation*.—*Consd.* *Re Wernher, Wernher v. Beit*, [1918] 1 Ch. 339.

**221. —**—*—*—*In the Goods of HISCOCK*, No. 202, *ante*.

**222. —**—*—*—The combined effect of sects. 11 & 27 of Wills Act, 1837 (c. 26), is to preserve to infant soldiers in actual military service the power

Cairo, while still on active service & undischarged.—*Held*: the declaration was made with intent that it should operate as a will, & that the words used constituted a valid nuncupative will.—*Re BRATMONT*, [1916] N. Z. L. R. 1002.—N.Z.

**a. — Nuncupative will made before oath of allegiance taken by enlisted man—Man not on "actual military service."**—*Re BOWDEN*, [1916] N. Z. L. R. 835.—N.Z.

## PART IX. SECT. 2, SUB-SECT. 1.—A. (b) ii.

**220 i. Whether includes infant.**—Notwithstanding Wills Act, 1915, s. 6, a soldier in actual military service, may, by virtue of sect. 10 of the Act, make a valid will of personal estate, though under the age of 21 years.—*Re ELLIOTT*, [1917] V. L. R. 322.—AUS.

**b. Member of New Zealand Expeditionary Force.**—A member of the New Zealand Expeditionary Force in

*Sect. 2.—Privileges and exemptions: Sub-sect. 1, A. (b) it., & (c), B., C., D. & E.]*

which they previously possessed of exercising a general power of appointment over personal estate by will.

A. P. W. having under his father's will a general power to appoint £1,000,000 by will, made a will in 1916, when on active service, purporting to exercise the power, & was killed in action when an infant between nineteen & twenty years of age:—*Held*: the will operated as a valid exercise of the power.—*Re WERNHER, WERNHER v. BEIT*, [1918] 2 Ch. 82; 87 L. J. Ch. 372; 118 L. T. 388; 34 T. L. R. 391; 62 Sol. Jo. 503, C. A.

*Annotation*:—*Apld.* Nixon v. Prince (1918), 34 T. L. R. 444.

**223. Persons employed by East India Company.**—The term "soldier" in Wills Act, 1837 (c. 26), s. 11, extends to persons in the military service of the East India Co.—*In the Goods of DONALDSON* (1840), 2 Curt. 386; 163 E. R. 448.

*Annotation*:—*Refd.* *In the Goods of Saunders* (1865), L. R. 1 P. & D. 16.

**224. Nurse—Serving on hospital ship.**—A nurse, employed under contract by the War Office on hospital ships, wrote a letter giving the addressee full liberty to deal with her affairs & giving directions as to the disposal of her property. The letter was written during an interval of leave on shore in this country, but after the writer had received orders to re-embark:—*Held*: the letter, which was unattested, was privileged as a soldier's will within Wills Act, 1837 (c. 26), s. 11, & the person to whom it was addressed was exor. according to tenor, & as such, entitled to probate of the document.—*In the Estate of STANLEY*, [1916] P. 192; 85 L. J. P. 222; 114 L. T. 1182; 32 T. L. R. 643; 60 Sol. Jo. 604.

(c) *Airmen.*

*See* Wills Act, 1837 (c. 26), s. 11, & Wills (Soldiers & Sailors) Act, 1918 (c. 58), s. 5 (2).

### B. Form of Will.

**225. Necessity for circumstances showing testamentary intention.**—Deceased, an Army officer, when on actual military service spoke to a brother officer about making a will, & was informed, incorrectly, that if he died without making a will all his property would go to his mother. Deceased then said, "That is just what I want. I want my mother to have everything." On a motion by deceased's mother for a grant of letters of administration with a nuncupative will annexed:—*Held*: deceased's statement had not been made in circumstances showing that it was intended to be testamentary, & the motion must be refused.—*Re The Estate of DONNER* (1917), 34 T. L. R. 138; 62 Sol. Jo. 161.

**226.**—*J.*—The words "It is well for you to have these policies, then if I should croke you will

camp on active service in New Zealand is "a soldier on actual military service."—*Re MACDONALD* (1915), 34 N. Z. L. R. 1108.—N.Z.

### PART IX. SECT. 2, SUB-SECT. 1.—B.

**225 i. Necessity for circumstances showing testamentary intention.**—Testator, who was a member of the New Zealand Expeditionary Force on active service, destroyed, with the intention of revoking it, a will, which he had made, & wrote to his father explaining the reasons for the revocation. In the same letter testator stated that he had made a new will, & described its contents. Testator died on active service, & as the will could not be found, the letter was propounded as

his will & application made for administration with the will annexed:—*Held*: the letter could not be admitted as testator's will since there was no extrinsic evidence to show that it was written *animus testandi*, & its tenor was not consistent with that conclusion.—*Re MILLING* (No. 1), [1916] N. Z. L. R. 1174.—N.Z.

**225 ii.**—*J.*—In conversations with two witnesses deceased, who was a soldier on active service, said that he had made G. his next-of-kin; & in answer to a question by one witness as to what he meant by this he said, "If I got knocked out then G. would get the lot." On an application for administration of deceased's estate with the nuncupative will annexed the writing appointing G. his next-of-kin

understand how to secure your rights," in a letter by deceased, a soldier in actual military service, to his wife, held explicable otherwise than as intended to give the wife any beneficial interest in the policies, & therefore not testamentary.—*SELWOOD v. SELWOOD* (1920), 125 L. T. 26.

**227. Declaration made at instance of military authorities—Noted at the time.**—A declaration, made by a soldier on active service at the instance of the military authorities, who made a note of it at the time, to the effect that in the event of his death he desired his "effects" to be "credited" to one of his sisters, named:—*Held*: to be a valid testamentary document.—*In the Goods of SCOTT*, [1903] P. 243; 73 L. J. P. 17; 89 L. T. 588; 47 Sol. Jo. 728.

**228. Necessity for knowledge that will being made.**—It is not necessary for the validity of a soldier's nuncupative will to prove that he knew he was making a will, or that he had the power to make a will while a minor or by word of mouth. It is enough if he intended deliberately to give expression to his wishes as to the disposition of his property in the event of his death.—*Re STABLE, DALRYMPLE v. CAMPBELL*, [1919] P. 7; 88 L. J. P. 32; 120 L. T. 160.

*Annotations*:—*Fold.* Godman v. Godman, [1919] P. 229. *Apld.* Selwood v. Selwood (1920), 125 L. T. 26. *Refd.* *In the Estate of Beech, Beech v. Public Trustee*, [1923] P. 46.

**229. Necessity for knowledge of testamentary capacity.**—*Re STABLE, DALRYMPLE v. CAMPBELL*, No. 228, *ante*.

**230. Memorandum written upon regularly executed will.**—A memorandum, of a nuncupative character, written upon a regularly executed will of an officer in the army, who died of a wound received in battle, included in the probate.—*In the Goods of CHURCHILL* (1845), 4 Notes of Cases, 47.

**231. Whether will conditional—Death on active service.**—(1) The words, "I request that in the event of my death while serving in this horrid climate, or any accident happening to me," held not to make a testamentary paper conditional on the event of death while in that climate.

(2) A mere averment that deceased held such a rank in his regiment, was in such a place, & was in actual military service, at the date of writing the paper in question, is not necessarily enough to entitle such paper to be treated as a soldier's testament; but the affidavit should contain a statement of the circumstances full enough to enable the ct. to judge whether the case falls within the meaning attributed by previous cases to Wills Act, 1837 (c. 26), s. 11.—*In the Goods of THORNE* (1865), 4 Sw. & Tr. 36; 34 L. J. P. M. & A. 131; 12 L. T. 639; 11 Jur. N. S. 569; 164 E. R. 1428.

*Annotations*:—*As to* (1) *Apld.* *In the Goods of Porter* (1869), L. R. 2 P. & D. 22. *Expld.* *In the Goods of Spratt*, [1897] P. 28. *As to* (2) *Apld.* *Re Booth, Booth v. Booth*, [1926] P. 118.

was not produced:—*Held*: the words deposed to did not amount to a statement of an intention to dispose of property, but was merely a statement of what deceased had done & his opinion as to the meaning of that act; & in the absence of the writing referred to, the application must be dismissed.—*Re HUNTER*, [1919] N. Z. L. R. 95.—N.Z.

*C. Letter.*—A soldier while on active service wrote to his parents a letter in which he said, "Of course, should we ever leave New Zealand, I will make a will leaving all to you":—*Held*: the letter was testamentary.—*Re MARTIN*, [1917] N. Z. L. R. 219.—N.Z.

*d.*—*J.*—*Re LEEDHAM* (1901), 13 S. C. 450.—S. AF.

**232.** ———.]—Deceased executed a paper, in which he made use of the following language: "Being obliged to leave England to join my regiment in China, I leave this paper containing my wishes. Should anything unfortunately happen to me whilst abroad, I wish everything that I may be in possession of at that time, or anything appertaining to me hereafter, to be divided," etc. Deceased returned to England from China:—*Held*: the dispositions of the will were dependent upon the death of the deceased in China, & therefore the will itself was conditional.—*In the Goods of PORTER* (1869), L. R. 2 P. & D. 22; 39 L. J. P. & M. 12; 21 L. T. 680; 34 J. P. 247; 18 W. R. 231.

*Annotations*:—*Consd.* *In the Goods of Spratt*, [1897] P. 28. *Refd.* *Jobson v. Ross*, *In the Goods of Newton* (1873), 42 L. J. P. & M. 58; *In the Goods of Mayd* (1880), 6 P. D. 17; *Edmondson v. Edmondson* (1901), 17 T. L. R. 397.

**233.** ———.]—Deceased, a military officer on active service, wrote to his sister a letter in which he made use of the following language: "If we remain here taking pabs for some time to come the chances are in favour of more of us being killed & as I may not have another opportunity of saying what I wish to be done with any little money I may possess in case of an accident I wish to make everything I possess over to you. In the first place there is money at. . . Keep this until I ask you for it"—*Held*: the disposition of deceased's property was not dependent on his death while on active service; the document was not therefore a conditional will; & being good as a military will it was entitled to probate.—*In the Goods of SPRATT*, [1897] P. 28; 66 L. J. P. 25; 75 L. T. 518; 45 W. R. 159; 13 T. L. R. 67.

*Annotations*:—*Refd.* *Edmondson v. Edmondson* (1901), 17 T. L. R. 397; *In the Estate of Vines*, *Vines v. Vines*, [1910] P. 147. *Mentd.* *Halford v. Halford* (1896), 75 L. T. 520.

**234.** ———.]—Testator made a will & afterwards, when he was a soldier on active service with the Dardanelles expedition, he wrote a letter saying, "If I do buy it you might see that the few quids I have at Holt's go to J. S." He afterwards died in India from natural causes. The letter was admitted to be a good soldier's will:—*Held*: the letter was not merely a disposition conditional on testator's death during the Dardanelles operations but was a disposition of his property in any event, & therefore both documents must be admitted to probate.—*In the Estate of PAWLE*, *WINTER v. PAWLE* (1918), 34 T. L. R. 437.

**235. Direction to trustee under existing will.—As to payment of income.**—A guardian of a child can be appointed by a will only if the will satisfies the provisions of 12 Car. 2, c. 24, s. 8, & therefore cannot be appointed by a soldier's will within Wills Act, 1837 (c. 26), s. 11. Neither Wills Act, 1837 (c. 26), nor Stat. Frauds, s. 23, gives power to appoint a guardian by a soldier's will. A direction to a trustee under an existing will to deal with personal estate, by paying the income to a person for the benefit of an infant, is a valid disposition of personal estate within Wills Act, 1837 (c. 26), s. 11.—*In the Estate of TOLLEMACHE*, [1917] P. 246; 86 L. J. P. 154; 116 L. T. 762; 33 T. L. R. 505; 61 Sol. Jo. 696.

#### C. Powers Exercisable.

**236. Appointment of guardian.**—*In the Estate of TOLLEMACHE*, No. 235, *ante*.

*See, now*, Wills (Soldiers & Sailors) Act, 1918 (c. 58), s. 4.

#### PART IX. SECT. 2, SUB-SECT. 1.—E.

**e. Return to civil life—Whether operating as revocation of soldier's will.]**

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—Deceased on mobilisation wrote a postcard to his cousin (appet.) directing the latter, in the event of his death, to inquire of his regimental co. for

**237. Exercise of general power of appointment—Infant soldier.**—*Re WERNHER*, *WERNHER v. BEIT*, No. 222, *ante*.

**238. ———. Revoking prior appointment—In formal will.**—*NIXON v. PRINCE*, No. 241, *post*.

**239. Disposition of realty—Prior to Wills (Soldiers & Sailors) Act, 1918 (c. 58).**—*NIXON v. PRINCE*, No. 241, *post*.

**240.** ———.]—Testator in 1915 executed a will & codicil prepared by his solr. in the ordinary manner, in England. Shortly afterwards he joined the Army & went abroad, where he was wounded & taken prisoner by the Germans. In July, 1917, while in captivity, he wrote a letter to his wife dealing with family matters of business & saying: "Tell M., his solr., this affects my will, which I want added to it at once." Then followed directions as to the disposition of his real & personal estate. He died, while still a prisoner, in Oct. 1917, before any alterations had been made in his will. Probate was granted by the Registrar in common form of the will & codicil of 1915, with the letter as a second codicil. In an action by the exors. of the will & first codicil, to revoke the probate of the second codicil & establish the will & first codicil only:—*Held*: testator having died before Wills (Soldiers & Sailors) Act, 1918 (c. 58), came into operation, the letter could only operate on the personal estate, & inasmuch as it dealt with real as well as personal estate, the gifts of the personal estate not being independent of those of the realty, the letter was improperly admitted to probate.—*GODMAN v. GODMAN*, [1920] P. 261; 89 L. J. P. 193; 123 L. T. 274; *sub nom. Re GODMAN*, *GODMAN v. GODMAN*, 36 T. L. R. 434; 64 Sol. Jo. 424, C. A.

*Annotations*:—*Apld.* *Selwood v. Selwood* (1920), 125 L. T. 26. *Consd.* *In the Estate of Beech*, *Beech v. Public Trustee*, [1923] P. 46.

#### D. Effect of Will.

**241. Effect on prior formal will—Revocation—Exercise of power of appointment.**—Testator came of age in 1914, & on Dec. 12 of that year, being then possessed of certain freehold & leasehold property, settled it by deed on trusts for sale & conversion & then for himself & his children & then for such persons as he should by deed or will appoint. Afterwards on the same day he made a formal will by which he exercised the power of appointment in favour of pltf.'s daughter, & left half of all his other real & personal estate to pltf. & the other half to pltf.'s wife, & appointed pltf. exor. On May 1, 1917, testator made a soldier's will, in which he said "I leave all I have" to deff. Testator died on May 17, 1917, & so far as was known he at that time possessed no real property:—*Held*: as no contrary intention appeared, the soldier's will operated as an execution of the general power of appointment & as a revocation of the appointment in the first will, but as testator died before the passing of Wills (Soldiers & Sailors) Act, 1918 (c. 58), & therefore had no power by a soldier's will to dispose of real estate, the earlier will, which did dispose of real estate, was not revoked *in toto*, & both wills must be admitted to probate.—*NIXON v. PRINCE* (1918), 34 T. L. R. 444.

#### E. How Long Will Valid.

**242. Lapse of time will not invalidate.**—Testator, a soldier, on the eve of going into action in

anything left behind. While on active service in France he wrote to the same cousin a letter saying (*inter alia*) that, if anything happened to him, his

*Sect. 2.—Privileges and exemptions: Sub-sect. 1, E., F. & G.; sub-sects. 2 & 3.]*

India, made his will without the formalities required by Wills Act, 1837 (c. 26), s. 9; he afterwards made a codicil. He died eight years afterwards, when this will & codicil were found unrevoked:—*Held*: it was still a valid will.—*In the Goods of LEESE* (1853), 21 L. T. O. S. 24; 17 Jur. 216.

*Annotation:—Refd. Bowles v. Jackson* (1854), 1 Ecc. & Ad. 294.

243. ———.] — *Re BOOTH, BOOTH v. BOOTH*, No. 208, *ante*.

#### F. Revocation.

244. **By subsequent marriage.**—The will of a soldier on actual military service, whether same be executed according to sect. 9 or sect. 11 of Wills Act, 1837 (c. 26), or not, falls within the general provisions contained in sect. 18 of that Act & is revoked by testator's subsequent marriage.—*In the Estate of WARDROP*, [1917] P. 54; 86 L. J. P. 37; 115 L. T. 720; 33 T. L. R. 133; 61 Sol. Jo. 171.

245. **No formalities required.**—Under Wills Act, 1837 (c. 26), no formalities are required for the execution of a soldier's will & therefore none are required for its revocation.

Testator, a soldier, on Oct. 24, 1915, when under orders to proceed with his unit to South Africa, made his will in accordance with the requirements of the Wills Act, 1837 (c. 26), whereby, after certain legacies, he gave the whole of the residue of his personal estate to pltf., to whom he was then engaged to be married, & appointed her his sole extrix. Before starting he handed to her a sealed envelope, which he stated contained his will, & directed her not to open it unless anything happened to him. Subsequently, in consequence of certain statements made to him by pltf. as to her conduct during his absence, he wrote to her from South Africa directing her to hand over the will to his sister K., which she accordingly did. On Jan. 9, 1918, he wrote to K. from Cape Town a letter in which he requested her to burn his will, as he had, as he said, already cancelled it. K. accordingly burnt the will as requested. In Nov. 1918, testator died in hospital, in South Africa, & amongst his belongings there was found a copy of his original will. In an action brought by pltf. to establish the will:—*Held*: Wills Act, 1837 (c. 26), s. 20, which prescribed the formalities necessary for the revocation of wills, did not apply to soldiers' wills, & the will had been effectively revoked by the letter of Jan. 9, 1918.—*In the Estate of GOSSAGE, WOOD v. GOSSAGE*, [1921] P. 194; 90 L. J. P. 201; 124 L. T. 770; 37 T. L. R. 302; 65 Sol. Jo. 274, C. A.

cousin could "claim all belongs to me, because it is my will." Deceased died after demobilisation:—*Held*: the postcard & letter taken together constituted a good soldier's will & a return to civil life prior to death did not operate as a revocation in the absence of any expression of intention to the contrary in the document itself.—*In the Goods of COLEMAN*, [1920] 2 I. R. 332.—IR.

#### PART IX. SECT. 2, SUB-SECT. 1.—F.

f. **General rule.**—A soldier on active service, or a sailor at sea, under C. S. 1903, c. 160, respecting wills, may dispose of his personal property by an unattested written instrument, or by a nuncupative will, & may in such way, so far as such property is concerned, revoke or modify any previously written attested will.—*Re*

MCNEIL (DECEASED) (1918), 45 N. B. R. 479; 42 D. L. R. 449.—CAN.

g. **Subsequent will prepared on official form supplied to soldiers—Whether former will revoked.**—A will executed by a soldier after it had been prepared by his solr. held not to have been revoked by a will three days later, on a form supplied by the military authorities, which contained a clause revoking generally all former wills. The disposition of the property was the same in both wills & both documents were admitted to probate.—*Re ERSKINE ESTATE* (Alta.), [1918] 1 W. W. R. 249.—CAN.

#### PART IX. SECT. 2, SUB-SECT. 1.—G.

h. **Letters of administration cum testamento annexo—When granted—No executor mentioned in will.**—Applica-

#### G. Probate and Administration.

*See Stamp Act, 1815 (c. 184), sched. Part III.; Army Pensions Act, 1830 (c. 41); Admiralty Act, 1832 (c. 40); Army Prize Money Act, 1832 (c. 53).*

246. **Proof of execution—Will executed by mark—Coming from proper quarter.**—A will of a soldier in India, executed by a mark, without any proof of identity, the witnesses being dead or not forthcoming, the paper having been transmitted officially from India to the East India House, under the circumstances, received.

The paper coming from the East Indies, with some appearance of authority, & having been acted upon at the East India House, I may receive it (SIR JENNER FUST).—*In the Goods of PRENDERGAST* (1846), 5 Notes of Cases, 92.

247. ——— **Form of affidavit.**—Where a will made by a soldier while engaged on active military service was signed by his mark, before the will can be proved an affidavit must be filed in the Registry in compliance with the rules, that deceased had at the time of its execution a knowledge of its contents.—*In the Goods of HACKETT* (1859), 4 Sw. & Tr. 220; 28 L. J. P. & M. 42; 23 J. P. 152; 164 E. R. 1501.

248. ——— **Form of affidavit.**—Where a will made by an officer whilst engaged on active military service was signed by him, but not attested, the ct. required, in accordance with the practice of the Registry, that there should be an affidavit of two disinterested persons, stating in terms the signature to be in his handwriting, & that the form for an affidavit given in the rules should be strictly followed.—*In the Goods of NEVILLE* (1859), 4 Sw. & Tr. 218; 28 L. J. P. & M. 52; 164 E. R. 1500.

249. ———.] — *In the Goods of THORNE*, No. 231, *ante*.

250. **Alterations in soldier's will—Presumed made during continuance of military service.**—Where a will in testator's handwriting contains material alterations, about the making of which no information can be obtained, & such will was signed by testator whilst as a soldier he was employed in actual military service, the alterations will be presumed to have been made during the continuance of such military service, & will be included in the probate.—*In the Goods of TWEEDALE* (1874), L. R. 3 P. & D. 204; 44 L. J. P. & M. 35; 31 L. T. 799; 39 J. P. 152.

251. **Publication of part of document undesirable—What must be offered for probate.**—Where it appeared that the military authorities thought it undesirable that portions of a letter which included a military will should be published, the ct. directed that the person applying for the grant should be at liberty to offer for probate so much

tion for probate of a will refused, & letters of administration with will annexed granted of a will, made on a form prescribed by the military authorities & while testator was on active service, which purported to revoke all former wills & to be testator's last will, but made no mention of an exor., there being no blank therefor.—*Re DAIGLE ESTATE* (Alta.), [1918] 2 W. W. R. 910.—CAN.

k. ———.] — *Re RULE* (1915), 35 N. Z. L. R. 254.—N.Z.

l. **Letter expressing intention to send will.**—Deceased, who was a soldier on active service, wrote to his brother, "I will be sending a will form to you, also made out in your favour. No such document was sent by deceased with the letter in which the statement occurred or subsequently:—*Held*: the letter stated



only of the letter as was testamentary or necessary for the understanding of the testamentary part.—*In the Estate of HEXWOOD*, [1916] 1 P. 47; 85 L. J. P. 24; 114 L. T. 375; 60 Sol. Jo. 239.

**252. Intention expressed in more than one document.]**—An Army officer, when on active service, executed a will dated July 27, 1915, in the presence of two witnesses & sent it to one of the exors. with a letter dated July 26, 1915, stating that the will was only to be produced in the event of his father & mother dying before him. On July 26, 1915, he also wrote his father a letter which stated that he had made a will in the event of his father & mother dying before him, & directed that in the event of his dying first his father should, subject to certain gifts, dispose of the property as he pleased. The officer was killed in action on Aug. 15, 1915, his father & mother surviving him:—*Held*: as testator had intended his testamentary dispositions to be contained in the three documents all three should be admitted to probate.—*In the Estate of VEINON* (1916), 33 T. L. R. 11.

#### SUB-SECT. 2.—IMMUNITY FROM ARREST FOR DEBT.

See Army Act, 1881 (c. 58), s. 144; Army (Annual) Act, 1882 (c. 7), ss. 4, 5.

**253. Debt under thirty pounds.—Disobedience to judge's order not criminal.]**—*Ex p. KEMBLE* (1848), 11 L. T. O. S. 274; *sub nom. Ex p. PEARSON*, 12 J. P. Jo. 487.

#### SUB-SECT. 3.—EXEMPTION FROM TOLLS.

See Army Act, 1881 (c. 58), s. 143.

**254. What amounts to demand & receipt of toll.]**—Resp., a militia officer, was riding in company with friend; the former being in uniform, the latter in mufti. On the toll being demanded at a toll-gate, the friend handed a shilling to the keeper, at the same time drawing his attention to the fact that resp. was exempt; but the toll-keeper took toll for both horses:—*Held*: the above facts showed a demand & receipt within Mutiny Act, s. 3, & applt. was properly convicted by the magistrates for improperly taking toll.—*PELLATT v. LEDGER* (1859), 33 L. T. O. S. 105; 23 J. P. Jo. 293.

**255. Carriage engaged in carrying Volunteers.]**—A Volunteer corps were assembled at K. by regimental order for "marching out drill," & did march out, & were afterwards dismissed at the headquarters of the regiment. Three members of the corps then hired a hackney carriage, & proceeded towards home, in doing which it was necessary to pass through a turnpike. No one else was in the carriage, & the Volunteers were dressed in their uniform, & had their arms & accoutrements according to the regulations of the corps:—*Held*: the carriage was exempt from toll under Turnpike Roads Act, 1822 (c. 126), s. 32.—*TUNSTALL v. LLOYD, STEPHENSON v. TAYLOR* (1861), 1 B. & S. 95; 30 L. J. M. C. 145; 4 L. T. 243; 7 Jur. N. S. 602; 9 W. R. 600; 121 E. R. 650; *sub*

*nom. STEPHENSON v. TAYLOR. TURNSTALL v. LLOYD*, 25 J. P. 278.

*Annotation*:—*Reid. Humphrey v. Bethel* (1866), 12 Jur. N. S. 212.

**256. Passage over floating bridge.]**—A co. were authorised by Act of Parliament to purchase an ancient ferry over a river & to establish a floating bridge over it, with roads & approaches, & to take tolls for passing across the river by the bridge. The co. owned ten miles of road leading to the ferry, & one of the co.'s Acts provided that no toll should be taken at any toll-gate erected on it for soldiers on their march or on duty. The floating bridge is propelled from one side of the river to the other by steam power, & kept in its proper course in passing across the river by means of parallel chains laid across the bed of the river, which chains are passed over wheels attached to the floating bridge, & are fastened on each side of the river to heavy weights which are sunk in wells in the ground:—*Held*: neither the exemption in the co.'s Act, nor in Mutiny Act, 1861 (c. 3), applied to this floating bridge.—*WARD v. GRAY* (1865), 6 B. & S. 345; 34 L. J. M. C. 146; 12 L. T. 305; 29 J. P. 470; 11 Jur. N. S. 738; 13 W. R. 653; 122 E. R. 1223.

**257. Waggon conveying commissariat stores.—Right of rejection on arrival by army authorities.]**—A., a contractor for the supply of forage for the use of Her Majesty's forces, delivered to B. hay to be carried by him to one of the Govt. stores in performance of A.'s contract, by the terms of which the Deputy Commissary-General had a right to reject it on its arrival if of inferior quality:—*Held*: the waggon in which B. conveyed the hay was within the exemption in Turnpike Roads Act, 1822 (c. 126), s. 32.—*LONDON & SOUTH WESTERN RY. CO. v. REEVES* (1866), L. R. 1 C. P. 580; Har. & Ruth. 815; 35 L. J. M. C. 239; 14 L. T. 662; 30 J. P. 535; 12 Jur. N. S. 786; 14 W. R. 967.

*Annotation*:—*Folld. Toomer v. Reeves* (1867), L. R. 3 C. P. 62.

**258. —.]**—T., a contractor for the supply of forage for the use of Her Majesty's forces at A., was bound by his agreement to keep at A. a supply of forage sufficient for at least thirteen days' consumption. The Deputy Commissary-General had a right to inspect the forage at the store, & reject all that was of inferior quality. A waggon belonging to T. was conveying forage to the store at A. *bona fide* intended to be there delivered in performance of the agreement, & for the use of Her Majesty's forces:—*Held*: the waggon was exempt from toll under Turnpike Roads Act, 1822 (c. 126), s. 32.—*TOOMER v. REEVES* (1867), L. R. 3 C. P. 62; 37 L. J. M. C. 49; 17 L. T. 149; 31 J. P. 774; 16 W. R. 83.

**259. Private carriage of officer.]**—The exemption from payment of toll in passing along a turnpike road or over a bridge contained in Army Act, 1881 (c. 58), s. 143, in favour of carriages "employed" in the military service of the Crown & conveying officers or soldiers of the regular forces on duty does not extend to the private carriage of an officer used by him for his own convenience while on duty.—*CRAIG v. NICHOLAS*, [1900] 2 Q. B.

what deceased intended to do & not what he had already done, & therefore could not be admitted to probate.—*Re MCCLINTOCK*, [1919] N. Z. L. R. 520.—N.Z.

*m. Recall of probate—Procedure.]*—*Re MUIR*, [1919] N. Z. L. R. 632.—N.Z.

*n. Letter to deceased's wife informing her of deceased's new will—Whether*

*letter admitted to probate when pay-book lost.]*—*GOODWIN v. GOODWIN*, [1921] N. Z. L. R. 565.—N.Z.

#### PART IX. SECT. 2, SUB-SECT. 2.

*o. Application of Army Act, 1881 (c. 58), s. 144 (4).]*—*GALE v. POWLEY* (1915), 32 W. L. R. 65; 24 D. L. R. 450.—CAN.

*p. Whether committal order made*

*against army officer.]*—A committal order for default in payment of an instalment of a judgment debt ordered to be paid by the judgment debtor by instalments will be granted against the debtor, though he is an officer in the army, & the only income of which he is proved to be in receipt is his pay as such officer.—*HAMILTON v. CONINGHAM*, [1903] 2 L. R. 564, 569.—IR.



*Sect. 2.—Privileges and exemptions: Sub-sects. 3 & 4. Sects. 3, 4 & 5: Sub-sects. 1 & 2. Part X. Sects. 1 & 2: Sub-sects. 1 & 2.]*

444; 69 L. J. Q. B. 608; 82 L. T. 765; 64 J. P. 569; 49 W. R. 48; 16 T. L. R. 382; 19 Cox, C. C. 526, D. C.

*Annotation:—Distd. A.-G. v. Selby Bridge Proprietors, [1921] 3 K. B. 31.*

**260. Private motor car used on military service—Allowance made by authorities for use.]—**(1) The exemption from payment of toll in passing along a road or over a bridge contained in Army Act, 1881 (c. 58), s. 143, in favour of carriages "employed in the military service of the Crown when conveying officers & soldiers of the regular forces on duty extends to the private motor car of an officer which he is authorised to use for journeys on duty at the public expense.

(2) The exemption from payment of toll in passing along a road or over a bridge contained in that sect. in favour of carriages belonging to the Crown when conveying "officers & soldiers" of the regular forces on duty extends to a motor car belonging to the Crown, which contains, besides a non-commissioned officer & soldiers of the regular forces, a civilian employed as clerk of the works in certain Govt. works who is authorised to be conveyed in the car for the purposes of the Crown, & has a works pass from the military authorities.—*A.-G. v. SELBY BRIDGE PROPRIETORS, [1921] 3 K. B. 31; 90 L. J. K. B. 891; 125 L. T. 621; 37 T. J. R. 758, C. A.*

**261. Military car conveying civilian in employment of military authorities.]—***A.-G. v. SELBY BRIDGE PROPRIETORS, No. 260, ante.*

#### SUB-SECT. 4.—OTHER PRIVILEGES AND EXEMPTIONS.

**Exemption from jury service.]—***See Juries Act, 1870 (c. 77), s. 9, sched. XII.; Territorial Army & Militia Act, 1921 (c. 37), s. 4, sched. II.*

**Exemption from rates—Property in military occupation.]—***See RATES & RATING, Vol. XXXVIII., pp. 486, 487, Nos. 438–448.*

**Privilege from production of reports to superiors.]—***See DISCOVERY, Vol. XVIII., p. 167, Nos. 1203, 1204, 1207.*

#### SECT. 3.—OFFENCES.

**Incitement to mutiny.]—***See CRIMINAL LAW, Vol. XV., p. 638, Nos. 6795–6798.*

**Wearing of naval & military uniforms by unauthorised persons.]—***See Uniforms Act, 1894 (c. 45), ss. 2, 3, 4.*

**False statements or certificates on enlistment & discharge.]—***See Seamen's & Soldiers' False Characters Act, 1906 (c. 5), ss. 1, 2.*

#### SECT. 4.—DISCIPLINARY TRIBUNALS.

*See Part X., post.*

#### PART IX. SECT. 2, SUB-SECT. 4.

**a. Liability to rates—House in possession of military person.]—**A private house in the city, under lease to His Majesty's Principal Secretary of State for the War Department, for the purpose of being used as a place of residence by a military person, for

whom there was no suitable accommodation in any barracks in Halifax, is a "government building" within Halifax City Charter Act, 1891 (c. 58), & that personal property contained in such building was exempt from taxation for civic purposes.—*SMITH v. CITY OF HALIFAX (1902), 35 N. S. R. 373.—CAN.*

#### SECT. 5.—ACQUISITION AND USER OF LANDS.

##### SUB-SECT. 1.—MILITARY LANDS ACTS.

*See, generally, Military Lands Act, 1892 (c. 43), 1900 (c. 56), 1903 (c. 47); CONSTITUTIONAL LAW, Vol. XI., pp. 546 et seq.*

**262. Use to which land vested in Secretary of State may be put—Reasonable user for military purposes.]—***Semble:* where under the powers of Defence Act, 1842 (c. 94), & the subsequent Defence Acts land has been vested in the Secretary of State for War upon trust for the Crown such land & every part thereof may be used for all reasonable *bonâ fide* military purposes that the Govt. may require & such user cannot be controlled by the ct.

In an action to restrain deft. a General in her Majesty's Army & the officers under his command from causing or permitting rifle practice on a common, forming part of the land thus vested, in close proximity to pltf.'s house which as he alleged was a serious nuisance & occasioned damage to his property. On motion for injunction:—*Held:* (1) to such an action if sustainable the Secretary of State for War was a necessary party; (2) the allegations in the statement of claim being insufficient no interlocutory injunction could be granted.—*HAWLEY v. STEELE (1877), 6 Ch. D. 521; 46 L. J. Ch. 782; 37 L. T. 625.*

*Annotation:—As to (2) Reid. Hill v. Metropolitan Asylum District Managers (1879), 4 Q. B. D. 433.*

**263. User of commons—Action by commoners—To restrain exercise of troops on commons—Attempt to restrain military officers from obeying orders.]—***COWING v. SECRETARY OF STATE FOR WAR (1877), Times, Jan. 23.*

**264. Acquisition of property in common land—By Volunteers—Power of commanding officer to acquire land as trustee for the corps.]—***WIMBLEDON & PUTNEY COMMONS CONSERVATORS v. NICOL (1894), 10 T. L. R. 247.*

**265. Acquisition of trust property—By Admiralty—Objection of trustees to compulsory purchase—Liability of Lords Commissioners of Admiralty to be sued in official capacity.]—**An action being brought by pltf., owners of certain trust property at Dartmouth, for the purpose of establishing as against the Lords Comrs. of the Admty. & the Director-General of Naval Works that they were not entitled to enter upon, or take possession of, or to acquire by way of compulsory purchase the land of pltf., for the purpose of establishing there a training college for cadets, & the statement of claim containing allegations of certain acts of trespass by defts., their servants, & agents, for which damages & an injunction were claimed, defts. made the preliminary submission that the ct. had no jurisdiction to entertain the action for tort brought against them in their official capacity.

Pltfs. had also taken out a summons to amend the action by suing defts. in their individual as well as in their official capacity, & by adding the names of two marines & a civil engineer, who had committed the alleged trespass, as co-defts.:—*Held:* without prejudicing any just claims of pltf., the action was misconceived & would not lie, & no leave to amend should be given to pltf., as it would be changing one action into another of a substantially different character.—*RALEIGH v.*

*r. Exemption from civil process.]—**MCLELLAN v. HASELDEN, [1917] N. Z. L. R. 238.—N.Z.*

#### PART IX. SECT. 3.

**t. Assisting sailor to desert.]—***R. v. PATTERSON (1867), 27 U. C. R. 142.—CAN.*

GOSCHEN, [1898] 1 Ch. 73; 67 L. J. Ch. 59; 77 L. T. 429; 46 W. R. 90; 14 T. L. R. 36; 42 Sol. Jo. 46.

*Annotations*.—**Consd.** China Mutual Steam Navigation Co. v. MacLay, [1918] 1 K. B. 33; Hutton v. Secretary of State for War (1926), 43 T. L. R. 106. **Apld.** Mackenzie-Kennedy v. Air Council, [1927] 2 K. B. 517. **Refd.** Bainbridge v. Postmaster-General, [1906] 1 K. B. 178; Roper v. Public Works Comrs., [1915] 1 K. B. 45; Rowland v. Air Council (1923), 67 Sol. Jo. 385.

**Compensation.**—*See* CONSTITUTIONAL LAW, Vol. XI., pp. 546-548, Nos. 498, 499, 501-505, 508.

266. — **Lands ordered to be kept free from buildings—Payment of compensation delayed—Interest on compensation.**—Notice was given under Defence Act, 1860 (c. 112), requiring certain lands to be kept free from buildings; & an agreement was entered into, fixing the amount of the compensation. After a considerable interval the

agreed sum, with £30 for expenses, as provided by Defence Act, 1860 (c. 112), but without interest, was paid into the bank:—*Held*: the owner could not claim interest, & the payment was sufficient.—**SUFFOLK (EARL) v. LEWIS** (1863), 1 Hem. & M. 369; 1 New Rep. 518; 32 L. J. Ch. 232; 8 L. T. 350; 11 W. R. 521; 71 E. R. 161.

**Liability of Crown to pay expenses of paving streets—Adjoining property acquired for military purposes.**—*See* HIGHWAYS, Vol. XXVI., p. 522, No. 2230.

#### SUB-SECT. 2.—MILITARY MANŒUVRES ACTS.

*See, generally*, Military Manœuvres Acts, 1897 (c. 43), & 1911 (c. 44).

## Part X.—Disciplinary Tribunals.

### SECT. 1.—COURTS OF MARTIAL LAW.

267. **Not a court of record.**—A.-G. FOR CAPE OF GOOD HOPE v. VAN REENEN, A.-G. FOR CAPE OF GOOD HOPE v. SMIT, No. 283, *post*.

268. **Distinguished from court martial.**—Cts. administering martial law in time of war bear no analogy to courts martial administering military law under the Mutiny Act. The right to administer martial law depends upon whether a state of war in fact exists, & not upon the fact of a proclamation of martial law having been made, but where a Colonial Legislature had passed an Act of Parliament which enacted that all sentences passed by such cts. were to be deemed sentences passed in the regular & ordinary course of criminal jurisdiction:—*Held*: the Judicial Committee had no power to inquire into the propriety or impropriety of passing such an Act, & could not give leave to appeal from the sentence passed by such ct.—**TILONKO v. A.-G. OF NATAL**, [1907] A. C. 93; 76 L. J. P. C. 29; 95 L. T. 853; 23 T. L. R. 21, P. C.

*Annotations*.—**Apld.** *Re* Clifford & O'Sullivan, [1921] 2 A. C. 570. **Refd.** *R. v. General of forces of Provisional Government, Commanding Officer, Portobello Barracks & Adjutant* (1922), 67 Sol. Jo. 125.

269. — *—* The so-called "military ct." whose proceedings were in question . . . was not & did not claim to be a ct. or judicial tribunal in any legal sense of those terms. It was not a court martial, that is to say, a tribunal regularly constituted under military law, but a body of military officers entrusted by the commanding officer with the duty of inquiring into certain alleged breaches of his commands contained in the proclamation, & of advising him as to the manner in which he should deal with the offence; & its "sentences" if confirmed, will derive their force not from the decision of the military ct., but from the authority of the officer commanding His Majesty's forces in the field (**VISCOUNT CAVE**).—*Re* CLIFFORD & O'SULLIVAN, [1921] 2 A. C. 570; 90 L. J. P. C. 244; 126 L. T. 97; 37 T. L. R. 988; 65 Sol. Jo. 792; 27 Cox, C. C. 120, H. L.

*Annotations*.—**Mentd.** *R. v. Electricity Comrs., Ex p. London Electricity Joint Committee Co. (1920), Ltd.*, [1924] 1 K. B. 171; *R. v. Maidstone Prison, Ex p. Maquire* (1925), 95 L. J. K. B. 55.

#### PART X. SECT. 2, SUB-SECT. 2.

a. **Jurisdiction.**—A court-martial does not exceed or abuse its jurisdiction merely because it incidentally misconstrues a statute, admits illegal

evidence, or rejects legal evidence.—*R. v. MURPHY*, [1921] 2 I. R. 190.—**IR.**

b. **Offence punishable by death—Trial by court-martial.**—An offence

punishable by death can be tried by no other military tribunal than a court-martial.—*EGAN v. MACREADY*, [1921] 1 I. R. 265.—**IR.**

c. **Constitution—Inclusion of person**

**Relation to civil courts.**—*See* Sect. 4, sub-sect. 1, *post*.

### SECT. 2.—COURTS MARTIAL.

#### SUB-SECT. 1.—NAVAL.

*See* Naval Discipline Acts, 1866 (c. 109), 1884 (c. 39), 1909 (c. 41), 1915 (c. 30), (No. 2) 1915 (c. 73), 1922 (c. 37).

270. **Admissibility of evidence—Rejection of evidence for accused—Conviction quashed.**—**BOUNTY SHIP MUTINEERS CASE** (1791), cited in 1 East, at p. 312; 102 E. R. 121.

#### SUB-SECT. 2.—ARMY AND AIR FORCE.

*See* Army & Air Force (Annual) Act, 1927 (c. 7), & King's Regulations.

271. **Jurisdiction—After dismissal from service—Offence committed before dismissal.**—**SACKVILLE'S (LORD) COURT MARTIAL** (1760), 2 Eden, App. 371; 28 E. R. 940.

*Annotation*.—**Mentd.** A.-G. for the Province of Ontario v. A.-G. for the Dominion of Canada (1911), 81 L. J. P. C. 210.

272. — **Suspension of civil courts by proclamation—Offence before proclamation.**—(1) A British subject was charged with having on Apr. 24, 1916, taken part in an armed rebellion & in the waging of war against His Majesty the King, such act being of such a nature as to be calculated to be prejudicial to the defence of the realm, & being done with the intention & for the purpose of assisting the enemy. On May 5, 1916, he was tried before a field general court martial convened in Dublin & was convicted. On Apr. 26, 1916, His Majesty, by Proclamation issued under Defence of the Realm (Amendment) Act, 1915 (c. 34), s. 1 (7), suspended the operation of that sect. in Ireland:—*Held*: by virtue of the Proclamation the prisoner became triable by court martial notwithstanding that the offence with which he was charged had been committed before the date of publication of the Proclamation.

*Sect. 2.—Courts martial: Sub-sect. 2. Sects. 3 & 4: Sub-sects. 1 & 2.]*

(2) A field general court martial is only a particular form of a general court martial.

(3) The prisoner after his conviction was committed to prison, the commitment being in Form A. in the Third Appendix to the Rules of Procedure, 1907, made under Army Act, 1881 (c. 58):—*Held*: under Army Act, 1881 (c. 58), s. 172 (2) & (4), coupled with Rule 133a of Rules of Procedure, 1907, no defect in the form would render the detention in custody of the person under the commitment illegal; there was nothing on the face of the commitment which showed want of jurisdiction to act under it.

(4) The words "open court," in clause (c) of Rule 119 of Rules of Procedure, 1907, mean a ct. to which the public have a right to be admitted, but they do not include a ct. where the public are excluded although the accused & his representatives are allowed to be present.

There is inherent jurisdiction in every ct., including a field general court martial, to exclude the public from a trial if it is necessary for the administration of justice.—*R. v. LEWES PRISON (GOVERNOR), Ex p. DOYLE*, [1917] 2 K. B. 254; 86 L. J. K. B. 1514; 116 L. T. 407; 81 J. P. 173; 33 T. L. R. 222; 25 Cox, C. C. 635.

273. Duty to conform with rules of common law.]—*STRATFORD'S CASE* (1800), cited in 1 East, at p. 312.

274. — Inordinate punishment—Death resulting—Murder.]—*WALL'S CASE*, No. 176, *ante*.

275. General & field general court martial—Whether distinguishable.]—*R. v. LEWES PRISON (GOVERNOR), Ex p. DOYLE*, No. 272, *ante*.

276. Commitment—Validity—Alleged defect in form.]—*R. v. LEWES PRISON (GOVERNOR), Ex p. DOYLE*, No. 272, *ante*.

277. Power to sit in camera.]—*R. v. LEWES PRISON (GOVERNOR), Ex p. DOYLE*, No. 272, *ante*.

### SECT. 3.—COURTS OF INQUIRY.

278. Military court of inquiry—Legality.]—*Semble*: Military cts. of inquiry, constituted & held as in this case, are not illegal, nor contrary to the provisions of Mutiny Act.—*HOME v. BENTINCK* (1820), 8 Price, 225; 2 Brod. & Bing. 130; 4 Moore, C. P. 563; 146 E. R. 1185, Ex. Ch.

*Annotations*:—*Apld.* *Dawkins v. Rokeby* (1873), L. R. 8 Q. B. 255. *Refd.* *Dawkins v. Paulet* (1869), 9 B. & S. 768; *Chatterton v. Secretary of State for India in Council*, [1895] 2 Q. B. 189. *Mentd.* *Blake v. Pilfold* (1832), 1 Mood. & R. 198; *Hennessy v. Wright* (1888), 21 Q. B. D. 509; *Isaacs v. Cook*, [1925] 2 K. B. 391.

279. — — —.]—(1) A ct. of inquiry, instituted by the Commander-in-Chief of the army under the Articles of War to inquire into a complaint made by an officer in the army, though not a ct. of record, nor a ct. of law, nor coming within the ordinary definition of a ct. of justice, is nevertheless a ct. duly & legally constituted & recognised in the Articles of War & the Mutiny Acts.

(2) The whole question involved in this cause is a military question, to be determined, as we

think by a military tribunal & not cognisable in a ct. of law (*KELLY, C.B.*).—*DAWKINS v. ROKEBY (LORD)* (1873), L. R. 8 Q. B. 255; 42 L. J. Q. B. 63; 28 L. T. 134; 21 W. R. 544, Ex. Ch.; *on appeal* (1875), L. R. 7 H. L. 744, H. L.

*Annotations*:—*As to* (1) *Refd.* *Co-partnership Farms v. Harvey-Smith*, [1918] 2 K. B. 405. *As to* (2) *Consd.* *Re Tufnell* (1876), 3 Ch. D. 164; *Fraser v. Balfour* (1918), 87 L. J. K. B. 1116; *Heddon v. Evans* (1919), 35 T. L. R. 642. *Refd.* *Fraser v. Hamilton* (1917), 33 T. L. R. 431. *Generally, Refd.* *Dawkins v. Saxe Weimar (Prince Edward)*, *Dawkins v. Wynyard*, *Dawkins v. Stephenson* (1876), 1 Q. B. D. 499; *Barratt v. Kearns*, [1905] 1 K. B. 504. *Generally, Mentd.* *Henwood v. Harrison* (1872), L. R. 7 C. P. 606; *Dickeson v. Hilliard* (1874), L. R. 9 Exch. 79; *Robinson v. Hilliard & Hare*, *Dickeson v. Same* (1874), 22 W. R. 372; *Seaman v. Nethercliff* (1876), 2 C. P. D. 53; *R. v. Harrington* (1879), 48 L. J. Q. B. 300; *Goffin v. Donnelly* (1881), 6 Q. B. D. 307; *Munster v. Lamb* (1883), 11 Q. B. D. 588; *Hennessy v. Wright* (1888), 21 Q. B. D. 509; *Royal Aquarium & Summer & Winter Garden Soc. v. Parkinson*, [1892] 1 Q. B. 431; *Chatterton v. Secretary of State for India in Council*, [1895] 2 Q. B. 189; *Attwood v. Chapman*, [1914] 3 K. B. 275; *Slack v. Barr* (1918), 82 J. P. 91; *Everett v. Griffiths*, [1920] 3 K. B. 163; *Collins v. Whiteway*, [1927] 2 K. B. 378.

280. "Confession statement or answer to question"—Admissibility in evidence—Criminal trial in civil court.]—Rule 124 (L) of the Rules of Procedure made under Army Act, 1881 (c. 58), s. 70, which provides that "any confession, statement or answer to a question made or given at a ct. of inquiry shall not be admissible in evidence against an officer or soldier . . ." applies only to military tribunals & does not make a statement made at a ct. of inquiry inadmissible in evidence at a criminal trial in a civil ct.—*R. v. COLPUS & BOORMAN, R. v. WHITE*, [1917] 1 K. B. 574; 86 L. J. K. B. 459; 116 L. T. 703; 81 J. P. 135; 33 T. L. R. 184; 61 Sol. Jo. 269; 25 Cox, C. C. 716; 12 Cr. App. Rep. 193, C. C. A.

281. — Not strictly judicial tribunal.]—A military ct. of inquiry may not be strictly a judicial tribunal, but where such ct. has been assembled under the orders of the General Commanding-in-Chief in conformity with the Queen's Regulations for the government of the Army, a witness who gives evidence thereat stands in the same situation as a witness giving evidence before a judicial tribunal.—*DAWKINS v. ROKEBY (LORD)* (1875), L. R. 7 H. L. 744; 45 L. J. Q. B. 8; 33 L. T. 196; 40 J. P. 20; 23 W. R. 931, H. L.; *affg.* (1873), L. R. 8 Q. B. 255, Ex. Ch.

*Annotations*:—*Consd.* *Barratt v. Kearns*, [1905] 1 K. B. 504; *Heddon v. Evans* (1919), 35 T. L. R. 642. *Refd.* *Dawkins v. Saxe Weimar (Prince Edward)*, *Dawkins v. Wynyard*, *Dawkins v. Stephenson* (1876), 1 Q. B. D. 499; *Re Tufnell* (1876), 3 Ch. D. 164; *Fraser v. Hamilton* (1917), 33 T. L. R. 431; *Co-partnership Farms v. Harvey-Smith*, [1918] 2 K. B. 405; *Fraser v. Balfour* (1918), 87 L. J. K. B. 1116. *Mentd.* *Henwood v. Harrison* (1872), L. R. 7 C. P. 606; *Dickeson v. Hilliard* (1874), L. R. 9 Exch. 79; *Robinson v. Hilliard & Hare*, *Dickeson v. Same* (1874), 22 W. R. 372; *Seaman v. Nethercliff* (1876), 2 C. P. D. 53; *R. v. Harrington* (1879), 48 L. J. Q. B. 300; *Goffin v. Donnelly* (1881), 6 Q. B. D. 307; *Munster v. Lamb* (1883), 11 Q. B. D. 588; *Hennessy v. Wright* (1888), 21 Q. B. D. 509; *Royal Aquarium & Summer & Winter Garden Soc. v. Parkinson*, [1892] 1 Q. B. 431; *Chatterton v. Secretary of State for India in Council*, [1895] 2 Q. B. 189; *Attwood v. Chapman*, [1914] 3 K. B. 275; *Slack v. Barr* (1918), 82 J. P. 91; *Everett v. Griffiths*, [1920] 3 K. B. 163; *Collins v. Whiteway*, [1927] 2 K. B. 378.

282. — Position of witness giving evidence.]—*DAWKINS v. ROKEBY (LORD)*, No. 281, *ante*.

— Whether reports privileged.]—*See LIBEL & SLANDER*, Vol. XXXII., p. 111, Nos. 1430-1432.

*of legal knowledge & experience.*]—*WHELAN v. R.*, [1921] 2 I. R. 310.—*IR.*

d. Compliance with statutory regulations.—*During existence of state of war.*—Notwithstanding that a state of war is actually existing the military

authority is subject to statutory regulations as to the trial of subjects of the Crown, & a subject charged with an offence can only be tried by a court-martial constituted under & subject, as to the punishment which may be imposed, to Restoration of Order in

Ireland Act, 1920.—*EGAN v. MACREADY*, [1921] 1 I. R. 265; *sub nom. R. v. EGAN, R. v. HIGGINS*, 65 Sol. Jo. 782.—*IR.*

e. — Qualification of members.]—*FITZGERALD v. MACDONALD*, [1918] N. Z. L. R. 769.—*N.Z.*

SUB-SECT. 1.—IN GENERAL.

Sentence by court martial—Subsequent action in civil court—Estoppel.]—See ESTOPPEL, Vol. XXI., p. 238, No. 675.

*Annotation* :—**Refd.** *Re Wilson* (1845), 4 L. T. O. S. 311.

k. — —.]—Courts of justice have, in times of peace, an inherent jurisdiction to correct & set aside any

p. — — —.] — MARAIS v.  
GENERAL OFFICER COMMANDING THE

r. — Court martial held without authority.]—C. obtained a writ

*Sect. 4.—Relation to civil courts: Sub-sects. 2, 3 & 4.*  
*Part XI.]*

valid order for his detention in the Queen's Prison had been made under either 20 Vict. c. 13, s. 40 or s. 41.—*Re ALLEN* (1860), 3 E. & E. 338; 30 L. J. Q. B. 38; 7 Jur. N. S. 234; 121 E. R. 469; *sub nom. Ex p. ALLEN*, 3 L. T. 468; 9 W. R. 99.  
*Annotations:—Distd. Re Mansergh* (1861), 1 B. & S. 400; *R. v. Mount* (1875), L. R. 6 P. C. 283. *Reid. R. v. Heane* (1864), 4 B. & S. 947.

**290. — To charge in execution debtor in military custody.]**—The ct. cannot grant a *habeas corpus* to bring up debt. for the purpose of charging him in execution, who is in custody under military arrest.—*JONES v. DANVERS* (1839), 5 M. & W. 234; 7 Dowl. 394; 2 Horn & H. 84; 8 L. J. Ex. 216; 3 Jur. 582; 151 E. R. 100.

**291. Return to writ—Necessity for.]**—The ct. will not make absolute a rule for an attachment against a person to whom a writ of *habeas corpus* has been directed, simply because no return has been made to the writ; when it appears that the whole object of the writ has been satisfied by the discharge of the prisoner, & the omission to make a return is not attributable to any improper motive.—*R. v. GAVIN* (1848), 3 New Pract. Cas. 198; 11 L. T. O. S. 239; 15 Jur. 329, n.; 12 J. P. Jo. 390.

**292. — Sufficiency of.]**—It seems a sufficient return to a *habeas corpus* that debt. is in custody under the sentence of a ct. of competent jurisdiction [court martial] to inquire of the offence, & to pass such a sentence; without setting forth the particular circumstances necessary to warrant such a sentence.—*R. v. SUDDIS* (1801), 1 East, 306; 102 E. R. 119.

*Annotation:—Apld. Watson's Case* (1839), 9 Ad. & El. 731.

**293. — —.]**—On return to a *habeas corpus*, alleging that the prisoner is detained as a deserter under 5 & 6 Vict. c. 12, s. 22, it must be expressly shown that the party is a soldier & ought to be with his corps; & if this do not appear by the return, the party must be discharged.—*Re DOUGLAS* (1842), 3 Q. B. 825; 3 Gal. & Dav. 509; 12 L. J. Q. B. 49; 114 E. R. 724; *sub nom. R. v. DOUGLAS*, 7 Jur. 39.

**294. — —.]**—*R. v. GAVIN*, No. 291, *ante*.

**SUB-SECT. 3.—CERTIORARI.**

*Certiorari* generally, *see* CROWN PRACTICE, Vol. XVI., pp. 398 *et seq.*

**295. Whether writ issues to court martial—Civil rights affected.]**—Where the civil rights of a person in military service are affected by the judgment of a military tribunal, in which that tribunal has acted without jurisdiction, or has exceeded its jurisdiction, this ct. will interfere; *aliter* where nothing but the military status of the party is affected by the judgment. A captain in the Queen's service, when stationed with his regiment in India, was gazetted to a majority; & the appointment was notified in the general

of *habeas corpus* to bring up the body of P., who had been sent down from S. under sentence of a court martial held by the Governor of S. The return did not set out under what authority the Governor held the court martial:—*Held: the imprisonment was illegal, & P. was discharged.*—*PORRET'S CASE* (1844), *Perry's Oriental Cases*, 414.—*JND.*

*Man. L. R.* 117; 10 W. L. R. 706.—*CAN.*

**a. —.]**—*R. v. CITY PRISON* (GOVERNOR), *Ex p. GREEN* (1914), 43 N. S. R. 214; 19 D. L. R. 246.—*CAN.*

**b. —.]**—*R. v. GRAVES* (1919), 52 N. S. R. 365; 43 D. L. R. 696.—*CAN.*

**PART X. SECT. 4, SUB-SECT. 4.**

**c. Whether writ issues to court**

orders of the Commander-in-Chief in India at head quarters, & in the regimental orders. Subsequently, the captain having written to the colonel of that regiment an insubordinate letter, was tried by court martial in India, was dismissed the service, & the proceedings of the court martial transmitted to the Judge Advocate-General in London; three years afterwards, application being made to this ct. for a *certiorari* to bring up the judgment of the court martial, in order that it might be quashed, the ct. refused to interfere.—*Re MANSERGH* (1861), 1 B. & S. 400; 30 L. J. Q. B. 296; 121 E. R. 704; *sub nom. Ex p. MANSERGH*, 4 L. T. 469; 26 J. P. 22; 7 Jur. N. S. 825; 9 W. R. 703.

*Annotations:—Folld. Ex p. Roberts* (1879), *Times*, June 11. *Reid. Dawkins v. Rokeby* (1873), L. R. 8 Q. B. 255; *Fraser v. Balfour* (1918), 87 L. J. Q. B. 1116; *Heddon v. Evans* (1919), 35 T. L. R. 642.

**296. — Military status affected.]**—*Re MANSERGH*, No. 295, *ante*.

**297. — —.]**—*Ex p. ROBERTS* (1879), *Times*, June 11, D. C.

**298. — Offender tried by court martial—After exercise of summary jurisdiction by commanding officer.]**—*Ex p. BROWN* (1892), 37 Sol. Jo. 27, D. C.

**SUB-SECT. 4.—PROHIBITION.**

Prohibition generally, *see* CROWN PRACTICE, Vol. XVI., pp. 372 *et seq.*

**299. Whether writ issues to court martial—Proceedings erroneous.]**—The receiving pay as a soldier subjects the receiver to military jurisdiction. This ct. will not grant a prohibition to prevent the execution of the sentence of a court martial passed against A., who has received pay as a soldier, but has assumed the military character merely for the purpose of recruiting, in the usual course of that service, though the proceedings of the court martial appear to be in some instances erroneous.—*GRANT v. GOULD* (1792), 2 Hy. & Bl. 69; 126 E. R. 434.

*Annotations:—Consd. Re Poe* (1833), 5 B. & Ad. 681; *Dawkins v. Rokeby* (1866), 4 F. & F. 806; *Dawkins v. Paulet* (1869), L. R. 5 Q. B. 94. *Reid. Re Mansergh* (1861), 1 B. & S. 400; *R. v. McCarthy* (1866), 14 W. R. 918; *Dawkins v. Rokeby* (1873), L. R. 8 Q. B. 255; *R. v. Army Council, Ex p. Ravenscroft*, [1917] 2 K. B. 504; *Fraser v. Balfour* (1918), 87 L. J. Q. B. 1116; *Heddon v. Evans* (1919), 35 T. L. R. 642. *Mentd. R. v. Herford* (1860), 24 J. P. 628.

**300. — After sentence confirmed—Followed by dismissal.]**—A writ of prohibition cannot issue to a court martial after sentence pronounced by the ct. & ratified by His Majesty, & execution by dismissal from the Army, in pursuance of such sentence.—*Re POE* (1833), 5 B. & Ad. 681; 2 Nev. & M. K. B. 636; 110 E. R. 942; *sub nom. Ex p. POE*, 3 L. J. K. B. 33.

*Annotations:—Consd. Re Mansergh* (1861), 1 B. & S. 400; *R. Tuftnell* (1876), 3 Ch. D. 164; *Grant v. Secretary of State for India* (1877), 2 C. P. D. 445. *Apld. Re Clifford & O'Sullivan*, [1921] 2 A. C. 570. *Mentd. Re York* (Archbp.) (1841), 2 Q. B. 1; *Kimpton v. Willey* (1850), 14 J. P. 386; *Hoyworth v. London Corpn. & Rhodes* (1884), *Cab. & El.* 312.

*martial—Facts disclosing offence greater than military offence charged—Military offence clear upon evidence.]*—The ct. will not direct a writ of prohibition to a court martial merely because the facts which establish the military offence disclose, at the same time, a greater offence, cognisable by the civil cts., provided a military offence is clear upon the evidence.—*R. v. MCCARTHY* (1866), 14 W. R. 918.—*IR.*

—.]—*HARRIS* (1909), 19



## Part XI.—Booty of War.

**301. Absolute discretion of Crown as to disposal.**—(1) The Crown has absolute discretion in the disposal of booty of war, & can revoke or modify at will any scheme for distribution.

(2) No trust which can be enforced by a ct. of equity is created by Treasury minutes or warrants providing for distribution.—*ALEXANDER v. WELINGTON (DUKE)* (1831), 2 Russ. & M. 35; 2 State Tr. N. S. 763; 39 E. R. 308; *subsequent proceedings, sub nom. Re DECCAN ARMY* (1833), 2 Knapp, 103.

*Annotations*:—As to (1) *Refd.* The Parlement Belge (1879), 4 P. D. 129. *Generally, Refd.* Banda & Kirwee Booty (1866), L. R. 1 A. & E. 109; Kinloch v. Secretary of State for India (1882), 7 App. Cas. 619; Andersen v. Marten, [1907] 2 K. B. 248. *Mentd.* Metcalfe v. York (Archbp.) (1836), 1 My. & Cr. 547.

**302.** —[ (1) The Ct. of Admty. had no jurisdiction with respect to booty until the passing of Admiralty Court Act, 1840 (c. 65), s. 22, enacting that the ct. “shall proceed as in cases of prize of war,” must be understood to mean, not that in all respects the distribution of booty should be assimilated to that of prize, but that the ordinary course of proceeding in prize should be adopted.

(2) No person will be entitled to share in booty on the sole ground of meritorious service, unless his claim is supported on the principle of joint capture; nor will the ct. relax the principles of joint capture on the ground that part of the property captured was not strictly booty, or that the sum was of unusual magnitude.

(3) All prize belongs absolutely to the Crown, which for the last 150 years has been in the habit of granting it to “the takers” who are of two classes, actual captors & joint or constructive captors.

(4) Joint captors are those who have assisted, or are taken to have assisted, the actual captors, by conveying encouragement to them, or intimidation to the enemy.

The union of the joint captor with the actual captor under the command of the same officer alone constitutes the bond of association which the law recognises as a title to joint sharing. Community of enterprise does not constitute association, & is equally insufficient as a ground for joint sharing, if the bond of union, though originally well constituted, has ceased to be in force at the time of the capture.

Such co-operation as will confer a title to a joint share of prize is also strictly limited to encouragement to the friend & intimidation to the enemy.

(5) The distinctions between captures on land & captures at sea tend to show, that in considering joint capture of booty, a wider application than is recognised in prize cases must be allowed to the term “co-operation,” concerted action on a vaster scale than is feasible at sea being indispensable to a campaign. The rule of sight, too, which prevails at sea, is inapplicable on land.

(6) The general rule for the distribution of booty, to be adhered to as far as possible, is the rule of actual capture. In the case of an army consisting of several divisions, the line of distribution will be drawn between division & division; that division to be regarded as the actual captor, any portion of which has captured the prize.

(7) The association entitling to joint sharing must be military, & not political, & must be under the immediate command of the same commander.

(8) The co-operation which is necessary as a title to joint sharing is a co-operation directly tending to produce the capture in question. What tends to produce the capture cannot be once for all defined, but strict limits must be observed of time, place, & relation. Services rendered at a great distance from the place of capture, acts done long before the capture was contemplated, even though they affect the whole scheme of operations, cannot be deemed such co-operation as will give a title to share in booty. Indirect services will be insufficient.

(9) To entitle the Commander-in-Chief to share in booty, he must himself be in the field; but “to be in the field” it is not necessary that he should be actually present with the division that makes the capture; being in the field with one division, he is in the field with all.

But, if troops have been placed under the independent command of another, the Commander-in-Chief, though actually in the field, does not share in booty taken by those troops.

(10) No distinction should be made in the right of the general & personal staff to share in the booty; in principle, the right of both stands or falls with the Commander-in-Chief; therefore all his staff who are in the field with him are entitled to share.

(11) Under the circumstances of the case, the costs of rejected claimants ordered to be paid out of the fund.—*BANDA & KIRWEE BOOTY* (1866), L. R. 1 A. & E. 109; 35 L. J. Adm. 17; 12 Jur. N. S. 819.

*Annotations*:—As to (1) *Refd.* Banda & Kirwee Booty (1875), 33 L. T. 332. As to (4) *Consd.* The Feldmarschall, [1920] P. 289. *Generally, Mentd.* Re Banda & Kirwee Booty, Kinloch v. R., Kinloch v. R., & Secretary of State for India in Council, [1882] W. N. 164.

**303. No trust created by Royal warrant providing for distribution.**—*ALEXANDER v. WELINGTON (DUKE)*, No. 301, *ante*.

**304.** —[ The Queen by Royal warrant “granted” booty of war to the Secretary of State for India in Council “in trust” for the officers & men of certain forces, to be distributed by the Secretary of State or by any other person he might appoint, according to certain scales & proportions; any doubts arising to be determined finally by the Secretary of State or by such persons to whom he might refer them unless the Queen should otherwise order. An action having been brought against the Secretary of State for India in Council by applt., on behalf of himself & all the other persons entitled under the royal grant to share in the booty alleging a distribution of part & possession by the Secretary of State of the residue, & claiming an account & distribution of the residue:—*Held*: the warrant did not transfer the property or create a trust enforceable by the High Ct. of Justice, & the Secretary of State being merely the agent of the Crown to distribute the fund, the action could not be maintained.—*KINLOCK v. SECRETARY OF STATE FOR INDIA* (1882), 7 App. Cas. 619; 51 L. J. Ch. 885; 47 L. T. 133; 30 W. R. 845, II. L.

*Annotations*:—*Consd.* R. v. Secretary of State for War, [1891] 2 Q. B. 326; Dunn v. Macdonald (1897), 76 L. T. 444. *Refd.* Re Banda & Kirwee Booty, Kinloch v. R., Kinloch v. R., & Secretary of State for India in Council, [1882] W. N. 164. *Mentd.* Bowie v. Ailsa (1887), 13 App. Cas. 371; Faulds v. Vere, [1888] W. N. 162; Te Taira Te Paea v. Te Roera Tareha, [1902] A. C. 56; Hollinshead v. Hazleton, [1916] 1 A. C. 428.



**305. Jurisdiction of Court of Admiralty—Admiralty Court Act, 1840 (c. 65), s. 22.]—BANDA & KIRWEE BOOTY, No. 302, *ante*.**

**306. — As to booty remaining after partial distribution—Under judgment of court.]—**When the Crown grants to captors booty of war & by Order in Council made under Admiralty Court Act, 1840 (c. 65), s. 2, refers the claims of all parties whomsoever to the property captured to the judge of the High Ct. of Admlty., who is to take into consideration any capture that may have been made of any property during the operations by any claimants & is to make such order as to him shall seem right both in regard to the persons who are, & the proportions in which such persons are, entitled to share them . . . reserving, however, to His Majesty the right to direct the rates or scale of distribution according to which the property or the proceeds thereof is to be repaid to the several ranks of the force or forces to which such property may be adjudged, & the ct. proceeds to adjudge certain claimants entitled to share, & in pursuance thereof sums of money on account of the booty are distributed among the successful claimants; the High Ct. has no jurisdiction, on the application of the successful claimants, complaining that the Govt. have refused to pay over & distribute the remainder of the booty, to order that such remainder be brought into the registry of the High Ct., & abide the event of the suit; under such an order of reference the High Ct. has no power of distribution.—**BANDA & KIRWEE BOOTY (1875), L. R. 4 A. & E. 436; 44 L. J. Adm. 41; 33 L. T. 332; 3 Asp. M. L. C. 66.**

**307. Distribution follows ordinary course of proceedings in prize.]—BANDA & KIRWEE BOOTY, No. 302, *ante*.**

**308. Who entitled to share—Actual captors—One of several divisions forming army—Part only of division effecting capture.]—BANDA & KIRWEE BOOTY, No. 302, *ante*.**

**309. — Joint captors—Detachment forming rearguard of main body.]—THE MOULTAN CASE (1849), cited L. R. 1 A. & E. 174.**

*Annotation:—*Consd. Banda & Kirwee Booty (1866), L. R. 1 A. & E. 109.

**310. — — — — —.]—BHURTPORE CASE (1826), cited L. R. 1 A. & E. at p. 165.**

*Annotation:—*Consd. Banda & Kirwee Booty (1866), L. R. 1 A. & E. 109.

**311. — — — Commander-in-Chief—Necessity for action of presence “on the field.”]—KIRTTORE CASE (1827), cited in L. R. 1 A. & E. at p. 251; 35 L. J. P. M. & A. at p. 102.**

*Annotation:—*Apld. Banda & Kirwee Booty (1866), L. R. 1 A. & E. 109.

**312. — — — — — What amounts to “presence on the field.”]—BANDA & KIRWEE BOOTY, No. 302, *ante*.**

**313. — — — — — Troops making capture under independent command of another.]—BANDA & KIRWEE BOOTY, No. 302, *ante*.**

**314. — — — — — Troops arriving after fall of town.]—DHAR CASE (1857), cited in L. R. 1 A. & E. at p. 178; 35 L. J. P. M. & A. at p. 69.**

*Annotation:—*Consd. Banda & Kirwee Booty (1866), L. R. 1 A. & E. 109.

**315. — — — — — Troops far distant from scene of action.]—UMBALLA & KURNAUL CASE (1857), cited in L. R. 1 A. & E. at p. 176; 35 L. J. Adm. at p. 67.**

*Annotation:—*Consd. Banda & Kirwee Booty (1866), L. R. 1 A. & E. 109.

**316. — — — — —.]—BANDA & KIRWEE BOOTY, No. 302, *ante*.**

**317. — — — — — Where meritorious service not sufficient.]—BANDA & KIRWEE BOOTY, No. 302, *ante*.**

**318. — — — — — Part of property not strictly booty.]—BANDA & KIRWEE BOOTY, No. 302, *ante*.**

**319. — — — — — Sum involved of unusual magnitude.]—BANDA & KIRWEE BOOTY, No. 302, *ante*.**

**320. — — — — — Assisting actual takers—By encouragement.]—BANDA & KIRWEE BOOTY, No. 302, *ante*.**

**321. — — — — — By intimidation of enemy.]—BANDA & KIRWEE BOOTY, No. 302, *ante*.**

**322. — — — — — Under command of same officers with actual takers—Community of enterprise not sufficient.]—BANDA & KIRWEE BOOTY, No. 302, *ante*.**

**323. — — — — — Joint capture on land & sea compared.]—BANDA & KIRWEE BOOTY, No. 302, *ante*.**

**324. — — — — — Association must be military.]—BANDA & KIRWEE BOOTY, No. 302, *ante*.**

**325. — — — — — Degree of co-operation necessary—Must directly tend to produce capture.]—BANDA & KIRWEE BOOTY, No. 302, *ante*.**

**326. — — — — — Services rendered at great distance from place of capture.]—BANDA & KIRWEE BOOTY, No. 302, *ante*.**

**327. — — — — — Acts done long before capture contemplated.]—BANDA & KIRWEE BOOTY, No. 302, *ante*.**

**328. — — — — — Staff of Commander-in-Chief.]—BANDA & KIRWEE BOOTY, No. 302, *ante*.**

**329. Costs of claimants—Discretion of court.]—BANDA & KIRWEE BOOTY, No. 302, *ante*.**

**330. Salvage by army of British Army of ships & goods.]—**Question respecting salvage on ships recaptured from the French at Oporto by the allied British & Portuguese Army under W. Salvage not given on Portuguese property; on British without distinction as to those cargoes which had been relanded & warehoused by the enemy; value to be estimated at the port of restitution; on freight, where it is already in the course of being carried.—**THE PROGRESS (1810), 1 Edw. 210; 165 E. R. 1085.**

*Annotations:—*Refd. The Roumanian, [1916] 1 A. C. 124. Mentd. S.S. Carisbrook Co. v. London & Provincial Marine & General Insurance Co., [1902] 2 K. B. 681.

## ROYAL MARRIAGES.

*See* CONSTITUTIONAL LAW.

## ROYAL PREROGATIVE.

*See* CONSTITUTIONAL LAW.

## ROYALTIES.

*See* COPYRIGHT AND LITERARY PROPERTY ; MINES, MINERALS, AND QUARRIES ; PATENTS AND INVENTIONS.

## RUBRIC.

*See* ECCLESIASTICAL LAW.

## RURAL DISTRICT COUNCIL.

*See* LOCAL GOVERNMENT.

## RURAL PARISH.

*See* LOCAL GOVERNMENT.

## RURAL SANITARY DISTRICT.

*See* LOCAL GOVERNMENT.

## SACCHARINE.

*See* REVENUE.

## **SACRILEGE.**

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## **· SAILORS AND SEAMEN.**

*See* ROYAL FORCES ; SHIPPING AND NAVIGATION.

## **SALE BY AUCTION.**

*See* AUCTION AND AUCTIONEERS.

## **SALE BY ORDER OF COURT.**

*See* ADMIRALTY ; INTERPLEADER ; PRACTICE AND PROCEDURE ; SALE OF LAND.

# SALE OF GOODS.

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## Part I.—The Contract of Sale Generally.

### SECT. 1.—NATURE OF CONTRACT.

See, now, Sale of Goods Act, 1893 (c. 71), ss. 1 (1) (3) (4), 4 (1), 62 (1).

1. Distinguished from guarantee—Transfer of goods from purchaser unable to pay—To purchaser promising payment.]—A. sells goods to B., who being unable to pay transfers them to C., who promises A., to pay for them. This is a new sale to C. & not a mere promise by C., to pay the debt of B.—BROWNING v. STALLARD (1814), 5 Taunt. 450; 128 E. R. 764.

Distinguished from contract for sale of lands—Sale of growing crops—Statute of Frauds, ss. 4, 17.]—See AGRICULTURE, Vol. II., pp. 52–55, Nos. 280–298.

#### PART I. SECT. 1.

a. *General rule.*]—The essence of sale is transfer of property from one person to another for money or money's worth.—R. v. LANGLEY (1899), 20 C. L. T. 2; 31 O. R. 295.—CAN.

b. *Distinguished from contract for work & labour—Making of tombstone—Sale of chattel.*]—W., during her lifetime orally ordered from plffs. a tombstone, to be put up by them at the grave of her late husband. It was begun before

& completed by them after her death, & they sued her administrator, on the common counts, for the price:—*Held*: plffs.' claim was for the sale of a chattel, not one for work & labour, & there being no contract within Stat. Frauds, plffs. could not recover.—WOLFENDEN v. WILSON (1873), 33 U. C. R. 442.—CAN.

c. — *Agreement to erect building.*]—ROSS v. DOYLE (1887), 4 Man. L. R. 434.—CAN.

2. — *Sale of slag on land of third party—Licence to vendor to remove—Sale of Goods Act, 1893 (c. 71), ss. 51, 62.*]—In a counterclaim by purchasers against a vendor it appeared that the vendor was the lessee of certain land part of which was composed of slag & cinders. On adjoining lands occupied by other persons were two disused cinder tips. The vendor had obtained from these persons licences to remove from the tips slag & cinders adhering to & forming part of their lands. He then agreed with the purchasers to sell to them all the slag on the demised premises & from the tips on the lands adjoining, or so much thereof as the purchasers should desire to remove, & for that purpose to give the purchasers access to the

d. — *Labourer's own materials employed.*]—Where labourer converts materials of his own into a chattel, it can after delivery be sued on only as for goods sold & delivered.—FERGUSON v. REED (1896), 33 N. B. R. 580.—CAN.

e. — *Contract to print special form of debentures.*]—A contract to print debentures in a special form on paper supplied by the printers is a contract for the sale of goods & chattels, & not a contract for work,

demised premises & the cinder tips on the adjoining lands. After certain slag had been removed by the purchasers & sold at a profit the lessor & licensors of the vendor intervened & prevented the further removal of slag by the purchasers. The purchasers sued for damages for the vendor's default in delivering or giving access to the slag sold:—*Held*: the agreement was not a contract for the sale of goods within above Act, s. 62, so as to entitle the purchasers to recover as damages the difference between the contract & the market price of the slag under above Act, s. 51; but the agreement was a contract to grant an interest in land, & as the vendor's failure to perform his contract was due solely to a defect in his title, the purchasers could not recover any damages for the loss of their bargain.—*MORGAN v. RUSSELL & SONS*, [1909] 1 K. B. 357; 78 L. J. K. B. 187; 100 L. T. 118; 25 T. L. R. 120; 53 Sol. Jo. 136, D. C.

**3. Distinguished from contract for work & labour—Agreement to erect machinery.**—An executory agreement for the making & putting up of certain machines in the party's house is required to be stamped like any other agreement, not being within the exception in Stamp Acts in favour of agreements, etc., for or relating to the sale of goods.—*BUXTON v. BEDALL* (1803), 3 East, 303; 102 E. R. 613.

*Annotations*:—*Overd.* *Pinner v. Arnold* (1835), 2 Cr. M. & R. 613. *Dbtd.* *De Fries v. Littlewood* (1845), 9 Jur. 988. *Refd.* *Marson v. Short* (1835), 2 Bing. N. C. 118.

**4. ———.]—A.** contracted with *B.* "to build an engine of 100 horse power for the sum of £2,500, to be completed & fixed" by a certain time. The engine was intended for the purpose of pumping a mine, & was composed of various parts, which were made at *A.*'s factory, & conveyed thence & set up at different times at *B.*'s colliery, until the engine was completed. *A.* sued *B.* for the price, & in an *indebitatus* count claimed £3,000 for the price & value of a main engine, & other goods sold & delivered by him to *B.*:—*Held*: the price agreed on could not be recovered under this count, but the proper form of the count would have been, either for work, labour & materials, or for erecting & constructing an engine.—*CLARK v. BULMER* (1843), 11 M. & W. 243; 1 Dow. & L. 367; 12 L. J. Ex. 463; 152 E. R. 793. *Annotation*:—*Refd.* *Beaumont v. Brengeri* (1817), 5 C. B. 301.

**5. ———.]—Defts.** contracted with *pltf.*s. to make & supply new boilers & certain new machinery for a steam ship of *pltf.*s., & to alter the engines of such steam ship into compound surface condensing engines, according to a specification. The engines, boilers, & connections were, by the contract, to be completed in every way ready for sea so far as specified, & tried under steam by the engineers, *defts.*, previous to being handed over to the co.; the result of such trial to be to the satisfaction of the co.'s inspector. The price of the work was to be £5,800, & was to be paid as the work progressed, in the following manner, *viz.* £2,000 when the boilers were plated, and £2,000 when the whole of the work was ready for fixing on board, & the balance, £1,800, when the work was fully completed & tried under steam. These payments were only to be made on the certificate

of *pltf.*s.' inspector. The old materials removed from the ship were to become the property of *defts.* The specification contained elaborate provisions as to the fitting & fixing the new boilers & machinery on board the ship, & the adaptation of the old machinery to the new. The boilers & other new machinery contracted for were completed, & ready to be fixed on board, & one instalment of £2,000 had been paid under the contract, when the ship was lost by perils of the sea. The value of the work actually done by *defts.* under the contract amounted to £4,118. The second instalment of £2,000 was subsequently paid, at the time of which payment *pltf.*s. knew of the loss of the ship, but *defts.* did not. *Pltf.*s. claimed delivery of the boilers & other machinery completed under the contract, & this being refused, brought an action for the detention of same, or to recover back the £4,000 paid by them to *defts.*:—*Held*: the contract was an entire & indivisible contract for work to be done upon *pltf.*s.' ship for a certain price, from further performance of which both parties were released by the loss of the ship: the property in the articles manufactured was not intended to pass until they were fixed on board the ship; & consequently *pltf.*s. were not entitled to the boilers & machinery nor could they recover the £4,000 already paid as upon a failure of consideration.—*ANGLO-EGYPTIAN NAVIGATION CO. v. RENNIE* (1875), L. R. 10 C. P. 271; 44 L. J. C. P. 130; 32 L. T. 467; 23 W. R. 626; *on appeal*, L. R. 10 C. P. 571, Ex. Ch.

*Annotations*:—*Refd.* *Seath v. Moore* (1884), 11 App. Cas. 358, n.; *Lloyd Royal Belge Soc. Anon. v. Stathatos* (1917), 33 T. L. R. 390.

**6. ——— Agreement to erect fixture.]—PINNER v. ARNOLD**, No. 367, *post*.

**7. ——— Agreement to finish goods.]—HUGHES v. BREEDS**, No. 19, *post*.

**8. ——— Contract to build hotel—Agreement to take possession of work done—On bankruptcy of builder.]—B.**, a builder, undertook for a certain sum to build an hotel for a co. of which *defts.* were the trustees, & to do all the work, except the plumbing & ironmongery, which were to be done by *deft.*'s workmen. It was agreed that if *B.* became *bkpt.*, it should be lawful for *defts.* to take possession of the work already done, & put an end to the agreement, & that they should pay *B.* so much money only as should be adjudged to be the value of the work already done & fixed by him. *Defts.* employed a clerk of the works, whose duty it was to inspect the materials supplied by *bkpt.*, & none were used upon the building but such as had been approved by him. Before the hotel was completed, *B.* became *bkpt.* Shortly before the *bkpty.*, some deal sash frames, the subject among other things of the present action, were lying at *bkpt.*'s premises; to these the ironmongers of *defts.* had supplied pulleys, & in this state they had been seen & approved by the clerk of the works. After the *bkpty.*, the sash frames were brought to *deft.*'s premises: the assignees then made a demand of the sash frames & upon *deft.*'s refusal to deliver them, brought an action of trover:—*Held*: this was a contract for the performance of certain work, & not for the sale of goods, & the sash frames did not become the

labour & materials, & is within Stat. Frauds.—*CANADA BANK NOTE ENGRAVING & PRINTING CO. v. TORONTO RV. CO.* (1895), 22 A. R. 462.—*CAN.*

**1. Contract for sale or delivery of goods—Work done & materials supplied.]**

*Pltf.*s. agreed to supply a patent electric goods lift, to erect same in a certain building in Sydney & connect it with the supply cables of the City

Council to be brought within the building for £355:—*Held*: this was an agreement to do certain work & to supply certain materials, & not an agreement for the sale or delivery of goods.—*SYDNEY HYDRAULIC & GENERAL ENGINEERING CO. v. BLACKWOOD & SON* (1908), 8 S. R. N. S. W. 10; 25 N. S. W. N. 26.—*AUS.*

**g. Shipments of apples to fruit**

*company.]—DONALDSON v. SCOTT FRUIT CO.* (1914), 28 W. L. R. 609; 18 D. L. R. 18.—*CAN.*

**h. Contract to erect building.]—A** written tender by a builder offering to erect a building at a stated price, though not signed by the builder or by his authority, becomes a binding & enforceable contract on its acceptance, such a contract not being for the supply

**Sect. 1.—Nature of contract. Sect. 2.]**

property of defts. until they were fixed to the building.—*TRIPP v. ARMITAGE* (1839), 4 M. & W. 687; 1 Horn & H. 442; 8 L. J. Ex. 107; 3 Jur. 249; 150 E. R. 1597.

**Annotations:—***Apld.* *Rouch v. G. W. Ry.* (1840), 1 Q. B. 51; *Clark v. Bulmer* (1843), 11 M. & W. 243. *Distd.* *Banbury & Cheltenham Direct Ry. v. Daniel* (1884), 54 L. J. Ch. 265. *Apprd.* *Seath v. Moore* (1886), 11 App. Cas. 350; *Re Blyth Shipbuilding & Dry Docks Co., Forster v. Blyth Shipbuilding & Dry Docks Co.*, [1926] Ch. 494. *Refd.* *Young v. Cooper* (1851), 6 Exch. 259; *Turley v. Bates* (1863), 2 H. & C. 200.

**9. — Contract for set of artificial teeth—Statute of Frauds, s. 17.]**—A contract to make a set of artificial teeth is a contract for the sale of goods, wares or merchandises, within above sect. A. ordered of B. a set of artificial teeth, which were by the terms of the contract to be fitted to her mouth; before they were so fitted A. died:—*Held*: B. could not sue A.'s exor. in an action for work & labour done, & materials provided for his testatrix.

As soon as the teeth were ready, B. wrote to A., requesting her to appoint a day when he could see her for the purpose of fitting them, to which she replied as follows: "My dear Sir,—I regret, after your kind effort to oblige me, my health will prevent my taking advantage of the early day. I fear I may not be able for some days.—Yours etc." :—*Held*: there was no sufficient memorandum of a contract within above sect. In order to decide whether a contract be for work & labour, or for the sale of a chattel, the value of the skill & labour, as compared with that of the material supplied, is not a criterion.—*LEE v. GRIFFIN* (1861), 1 B. & S. 272; 30 L. J. Q. B. 252; 4 L. T. 546; 7 Jur. N. S. 1302; 9 W. R. 702; 121 E. R. 716.

**Annotations:—***Apld.* *Copland v. Miller* (1903), *Times*, Nov. 28; *R. v. Wood Green Profiteering Committee, Ex p. Boots Cash Chemists (Southern)* (1919), 89 L. J. K. B. 55.

**10. — Contract to paint picture.]**—A contract by an artist with a picture dealer to paint a picture of a given subject at an agreed price, is a contract for the sale of a chattel.—*ISAACS v. HARDY* (1884), Cab. & El. 287.

**Annotation:—***Apld.* *R. v. Wood Green Profiteering Committee, Ex p. Boots Cash Chemists (Southern)* (1919), 89 L. J. K. B. 55.

**11. Distinguished from mortgage.]—Re EASTERN & MIDLANDS RY. CO.** (1891), 65 L. T. 668; 8 T. L. R. 34.

**12. — Conditional sale.]**—In a conditional sale there is usually a period at which the purchaser, having paid the price & received the goods, has no further rights against the vendor, although the vendor, on the other hand, has a right, if he thinks fit to exercise it, to repurchase the goods subject to the terms of the condition. . . . In a mtg., on the other hand, there is no sale of the goods & there is a debt always due from the mtgor. to the mtgee. until it has been satisfied by payment or foreclosure (CAVE, J.).—*BECKETT v. TOWER ASSETS CO., LTD.*, [1891] 1 Q. B. 1; 60 L. J. Q. B. 56; 7 T. L. R. 21; *on appeal*, [1891] 1 Q. B. 638, C. A.

**Annotations:—***Refd.* *Re Eastern & Midlands Ry.* (1891), 65 L. T. 668; *Mellor's Trustee v. Maas*, [1903] 1 K. B. 226; *Johnson v. Rees* (1915), 84 L. J. K. B. 1276. *Mentd.* *Saunders v. White*, [1902] 1 K. B. 472.

of materials, but for services, & therefore not within either Sale of Goods Act or Stat. Frauds.—*WEBB & SONS v. WILLIAMS* (1907), 27 N. Z. L. R. 456.—N.Z.

**PART I. SECT. 2.**

**k. Payment for land in goods.]**—Where pltf. had agreed orally with deft. to purchase land from him, & having been let into possession had

made payments on account in money & cattle, & deft. afterwards sold the land to another, promising to repay what he had received from pltf.:—*Held*: on his refusing to do so, pltf. could recover the amount from him in an action for goods sold & delivered.—*HILL v. STANTON* (1846), 2 U. C. R. 149.—CAN.

**l. Bought & sold notes—For future delivery of goods.]**—Bought & sold

**Distinguished from bill of sale.]—See BILLS OF SALE**, Vol. VII., pp. 5, 6, Nos. 10–15.

**Distinguished from hire-purchase agreement.]—See BAILMENT**, Vol. III., pp. 92–94, Nos. 241–250.

**Distinguished from bailment.]—See No. 25, post.**

**SECT. 2.—WHAT AMOUNTS TO CONTRACT.**

*See, generally*, CONTRACT, Vol. XII., pp. 20 et seq.

**13. Mutual agreement—To sell & to buy.]**—When two persons mutually agree that one of them shall purchase the goods of the other that amounts to a contract that the one shall sell & that the other shall buy (WILDE, C.J.).—*WOOD v. COPPER MINERS' CO.* (1849), 7 C. B. 906; 18 L. J. C. P. 293; 137 E. R. 359; *subsequent proceedings* (1854), 14 C. B. 428.

**Annotations:—***Consd.* *Bealey v. Stuart* (1862), 7 H. & N. 753. *Refd.* *Harrison v. G. N. Ry.* (1852), 11 C. B. 815; *Barnes v. City of London Real Property Co.*, *Webster v. Same*, *Sollas v. Same*, *Kersey v. Same*, *Oakley, Sollas v. Same*, [1918] 2 Ch. 18.

**14. — Necessity for.]—Pltfs.** instructed an auctioneer to sell by auction a number of bales of hemp & of tow. The goods were described in the auctioneer's catalogue as so many bales in different lots with the same shipping marks, & without disclosing the difference in the commodities. Before the sale samples of the hemp & tow were on view in a showroom on the floor of which the catalogue numbers of the lots of hemp & tow were marked in chalk opposite the respective samples, & defts.' manager examined the hemp but not the tow, as he was not intending to bid for tow. When the lots representing the tow were put up for sale in the auction room, defts.' buyer made a bid which was an extravagant price for tow, & the lots were at once knocked down to him.

In an action against defts. for the price of the tow the jury found that the auctioneer intended to sell tow; that defts.' buyer intended to bid for hemp; that the auctioneer believed that the bid was made under a mistake, but that he had reasonable grounds for believing that the mistake was merely as to value; that the form of the catalogue & the negligence of defts.' manager in not more closely examining the samples at the showroom & identifying them with the lots in the catalogue contributed to cause the mistake:—*Held*: on these findings, the parties were never *ad idem* as to the subject-matter of the proposed sale, & there was, therefore, no contract of sale.—*SCRIVEN BROTHERS & CO. v. HINDLEY & CO.*, [1913] 3 K. B. 564; 83 L. J. K. B. 40; 109 L. T. 526.

**15. Whether delivery of goods—Delivery in consideration of price.]—Delivery**, in consideration of being paid the value, is a sale.—*HERBERT v. BORSTOW* (1703), 1 Salk. 25; 2 Ld. Raym. 895; 91 E. R. 25.

**16. — Deliverer to be paid commission on sale.]—The mere delivery of goods by A. to B.** will not support an action at the suit of A. for goods sold & delivered, where it appears that A. was to pay B. a commission upon the sale of the

notes for goods to be delivered may be treated as an actual sale, though the one party has not at the time a specific lot of the article in his possession, & actually set apart for the particular vendee.—*BRUNSKILL v. CHUMASCO & KEATING* (1849), 5 U. C. R. 474.—CAN.

**m. Deposit of wheat by farmer with miller.]—Pltf.**, a farmer, on leaving wheat with defts., who were millers,

goods by B.—*MILLER v. NEWMAN* (1842), 4 Man. & G. 646; 11 L. J. C. P. 265; 134 E. R. 266.

**17. Property transferred pursuant to award—Tender of price—Refusal to accept.]**—Under a submission to an arbitrator of all matters in difference between landlord & tenant, the arbitrator awarded (*inter alia*) that a stack of hay, left upon the premises by the tenant, should be delivered up by him to the landlord by a certain day, upon the tenant being paid or allowed a certain sum in satisfaction for it:—*Held*: the property in the hay did not pass to the landlord on his tender of the money, by the mere force of the award, against the consent of the tenant who refused to accept the money, or deliver up the hay; & therefore, the landlord could not maintain trover for it; but his remedy was upon the award.—*HUNTER v. RICE* (1812), 15 East, 100; 104 E. R. 782.

**18. Agreement by master of vessel to carry & deliver corn—Bringing back cargo of coal at fixed price.]**—Where the master of a vessel entered into a parol agreement to carry pltf.'s corn from A. to B., & that after having delivered it there, he would proceed to C. & fetch a cargo of coals, which he would bring back & deliver to pltf. at A., at a certain price per chaldron:—*Held*: this was not a contract or agreement for the sale of goods, within Stat. Frauds, s. 17.—*COBBOLD v. CASTON* (1824), 1 Bing. 399; 8 Moore, C. P. 456; 2 L. J. O. S. C. P. 38; 130 E. R. 161.

**19. Agreement to finish goods in tradesmanlike manner.]**—If a written paper contain a specification of goods, & the vendor by it agree "to finish the goods in a tradesmanlike manner," this agreement does not require any stamp, as it is an agreement for the sale of goods, & not for the doing of work, & it need not be specially declared on.—*HUGHES v. BREEDS* (1826), 2 C. & P. 159; 172 E. R. 72, N. P.

*Annotation*:—*Apld.* Pinner v. Arnold (1835), 2 Cr. M. & R. 613.

**20. Real nature of transaction regarded—Supply of goods—Discount of bills of exchange.]**—In an action on a guarantee for the price of gold to be supplied to a working goldsmith in the course of his business, where the goldsmith had been in the habit of indorsing bills of exchange to pltf. & obtaining from him their amount partly in gold at the usual credit price, & partly in money deducting the usual discount:—*Held*: it was a question for the jury, whether these transactions were in substance a sale of the gold, or whether that was only colourable & the real transaction a mere discount of the bills.—*EVANS v. WHYLE* (1829), Mood. & M. 468, N. P.

*Annotation*:—*Mentd.* Bonar v. Macdonald (1850), 3 H. L. Cas. 226.

**21. Transfer of invoice by broker—Second purchaser's name substituted—Second purchaser**

took the following receipt signed by them: "Received from W. I. in store 296 Bush., 5 lbs., No. 2 Treadwell wheat, fire accepted; price to be set on or before 1st Aug. next." It was proved that the word "accepted" was intended for "excepted"; that the wheat was placed in a separate bin, & kept apart from debts' wheat; & that nothing further occurred between the parties until Aug. 28, when it, with the mill, was destroyed by fire:—*Held*: the agreement did not by itself import a sale; & as there was nothing in the evidence to show that a sale was intended; pltf. could not recover.—*ISAAC v. ANDREWS* (1877), 28 C. P. 40.—*CAN.*

*n. Sale of goods distinguished from bailment.]*—When wheat or other

merchandise is received in a warehouse or elevator nominally on storage for the person delivering it, but on such terms that the identical goods are so mixed up with others that they can not be returned, & the well understood course of the business is that, unless a price is agreed on, the party delivering the goods can only require an equivalent amount of the same kind & quality to be accounted for to him, the contract between the parties is really one of sale & not of bailment, whether the vendor is to receive the price in money or an equal quantity of goods or has an option to do either, as the property in the goods has passed to the warehouseman.—*LAWLOR v. NICOL* (1898), 12 Man. L. R. 224.—*CAN.*

**22. Article lent—to be paid for if damaged—Price fixed.]**—Pltf. agreed to "lend or let" deft. a musical snuff-box, on the understanding, that if it were damaged deft. was to pay for it, & £3 10s. 0d. was fixed upon as its value. The box having been damaged while in deft.'s possession, pltf. refused to take it back, & brought an action for goods sold & delivered, to recover the £3 10s. 0d.:—*Held*: the action might be maintained.—*BIANCHI v. NASH* (1836), 1 M. & W. 545; Tyr. & Gr. 916; 5 L. J. Ex. 252; 150 E. R. 551.

*Annotations*:—*Apld.* Beverley v. Lincoln Gas Light & Coke Co. (1837), 6 Ad. & El. 829. *Distd.* Hey v. Frankenstein (1844), 8 Scott, N. R. 839.

**23. Sale by person having general property—Pawnor.]**—The pawnor of a chattel still retains his property in it, though qualified by the right existing in the pawnee, which he has a right to sell, & by the sale to transfer that property to the buyer; & if the pawnee, on the buyer's tendering him the amount due, refuses to deliver it up, the buyer may maintain trover to recover it.—*FRANKLIN v. NEATE* (1841), 13 M. & W. 481; 14 L. J. Ex. 59; 4 L. T. O. S. 214; 153 E. R. 200.

*Annotations*:—*Refd.* Flory v. Denny (1853), 7 Exch. 581; *Re* Attenborough & L. Jt. Comrs. (1855), 11 Exch. 461; *Martin v. Reid* (1862), 11 C. B. N. S. 730.

**24. Appropriation of goods delivered by mistake.]**—A. bought goods of B., which were delivered to C. a carrier, to be by him conveyed to A.'s shop. C. by mistake delivered to A. goods of the like description, but of greater value, which had been entrusted to him to deliver to a third person. A. having in ignorance of the mistake, appropriated the goods so delivered to him, afterwards agreed to pay C., who had paid their value to the owner, for the goods at the same rate that he was to have paid for those he had ordered:—*Held*: this was some evidence for the jury in support of a count for goods sold & delivered.—*COLES v. BULMAN* (1848), 6 C. B. 184; 17 L. J. C. P. 302; 11 L. T. O. S. 202; 12 Jur. 586; 136 E. R. 1220.

**25. Deposit of corn with miller by farmer—Right to claim return of equal quantity—Or market price.]**—Wherever there is a delivery of property on a contract for an equivalent in money, or some other valuable commodity, & not for the return of the identical subject-matter in its original or an altered form, this is a transfer of property for value, it is a sale & not a bailment, where, therefore, corn was deposited by farmers with a miller, to be stored & used as part of the current consumable stock or capital of the miller's trade, &

to liking of purchaser—*Acceptance in words "I will do my best."*—*ANGLO-NEWFOUNDLAND FISH CO. v. SMITH* (1902), 35 N. S. R. 267.—*CAN.*

*p. Purchase price consisting of cash & other goods.]*—Where the purchase price of goods consists of cash & other goods, the transaction is a sale, not a barter.—*OLYMPIC STONE CONSTRUCTION Co., LTD. v. MOMSEN & ROWE* (1915), 30 W. L. R. 711; 8 W. W. L. 79; 21 D. L. R. 271.—*CAN.*

*q. Sale & purchase of grain by broker.]*—A contract between client & his broker on the Montreal Corn Exchange is one of mandate & can be proven by parol evidence, & the sale & purchase of grain by the broker under that mandate is not a sale of

merchandise is received in a warehouse or elevator nominally on storage for the person delivering it, but on such terms that the identical goods are so mixed up with others that they can not be returned, & the well understood course of the business is that, unless a price is agreed on, the party delivering the goods can only require an equivalent amount of the same kind & quality to be accounted for to him, the contract between the parties is really one of sale & not of bailment, whether the vendor is to receive the price in money or an equal quantity of goods or has an option to do either, as the property in the goods has passed to the warehouseman.—*LAWLOR v. NICOL* (1898), 12 Man. L. R. 224.—*CAN.*

*o. Offer to purchase fish—Cleaned*

**Sect. 2.—What amounts to contract. Sects. 3, 4, 5 & 6.]**

was by him mixed with other corn deposited for the like purpose, subject to the right of the farmers to claim at any time an equal quantity of corn of the like quality, without reference to any specific bulk from which it was to be taken, or in lieu thereof the market price of any equal quantity, on the day on which he made his demand, with a small charge for general purposes:—*Held*: such a transaction amounted to a sale by the farmer to the miller, & was not a bailment of the corn, & entitled the miller to claim in respect thereof upon a policy of insurance against fire as for his own property, notwithstanding that such corn was not specifically insured, or described, as required by the conditions of the policy, as “goods held in trust & on commission,” upon which condition the claim was resisted by the insurers.—*SOUTH AUSTRALIAN INSURANCE CO. v. RANDELL* (1869), L. R. 3 P. C. 101; 6 Moo. P. C. C. N. S. 341; 22 L. T. 843; 16 E. R. 755, P. C.

**26. Delivery of property for equivalent in money—Or other valuable commodity.]—SOUTH AUSTRALIAN INSURANCE CO. v. RANDELL**, No. 25, *ante*.

**27. Delivery of goods to agent to be sold for benefit of deliveror.]—Pltfs.** let a piano by a hiring agreement, the piano on payment of all the instalments to become the property of the hirer. The hirer delivered the piano to deft., an auctioneer, to be sold by auction, some instalments being then unpaid. Deft. received the piano in good faith, without notice of pltfs.’ rights, sold it, & paid the proceeds to the hirer. In an action for conversion of the piano:—*Held*: the hirer had agreed to buy, & had obtained, with the consent of pltfs., possession of, the piano, the delivery by the hirer to deft. had the same effect as if the hirer were a mercantile agent, that the words “delivery under any agreement for sale” were not confined to delivery to the person receiving the goods pursuant to a sale by the person delivering them, the words “agreement for sale, pledge, or other disposition” included a delivery of goods to be sold, by the person receiving, for the benefit of the person delivering, & therefore deft. was protected from liability by Factor’s Act, 1889 (c. 45), s. 9.—*SHENSTONE & CO. v. HILTON*, [1894] 2 Q. B. 452; 63 L. J. Q. B. 584; 71 L. T. 339; 10 T. L. R. 557; 10 R. 390.

**28. Sale of power.]—BENTLEY BROTHERS v. METCALFE & CO.**, No. 722, *post*.

**Purchase or retention of goods by landlord under distress.]—See DISTRESS**, Vol. XVIII., p. 352, Nos. 898–900.

**SECT. 3.—FORMATION OF CONTRACT.**

*See, generally*, CONTRACT, Vol. XII., pp. 51–118.

**SECT. 4.—CONSIDERATION.**

*See, generally*, CONTRACT, Vol. XII., pp. 172–234.

goods within Art. 1235 C. C.; it is a commercial matter within Art. 1233 C. C. & may be established by parol evidence.—*CARRUTHERS v. SCHMIDT* (1916), 27 O. W. R. 360; 54 S. C. R. 131.—**CAN.**

**r. Agreement to haul timber—Purchase of hauler’s horses & plant by merchant.]—GAVIN’S TRUSTEE v.**

*FRASER*, [1920] S. C. 674; 57 Sc. L. R. 595.—**SCOT.**

**t. Hire of services.]—MANAVIS v. RHODESIA REDUCTION CO., LTD.** (1909), Buch. A. C. 31.—**S. AF.**

**PART I. SECT. 6.**

**a. Plaintiff’s barn removed to defendant’s land.]—BEST v. BOICE**

**SECT. 5.—ASSIGNMENT OF CONTRACT.**

*See, generally*, CONTRACT, Vol. XII., pp. 596–607; CHUSES IN ACTION, Vol. VIII., p. 431, No. 82.

**SECT. 6.—WHAT ARE “GOODS.”**

*See Sale of Goods Act, 1893 (c. 71), s. 62 (1).*

**29. Under Sale of Goods Act, 1893 (c. 71)—Current coin as curiosity.]—Current coin** may be sold as a curiosity, instead of being transferred as current coin of the realm.—*MOSS v. HANCOCK*, [1899] 2 Q. B. 111; 68 L. J. Q. B. 657; 80 L. T. 693; 63 J. P. 517; 47 W. R. 698; 15 T. L. R. 353; 43 Sol. Jo. 479; 19 Cox, C. C. 324, D. C. *Annotations*:—*Refd.* R. v. Dickinson, [1920] 3 K. B. 552; *Banque Belge v. Hambrouck*, [1921] 1 K. B. 321.

**30. — All chattels personal—Other than things in action & money.]—BEHNKE v. BEDE SHIPPING CO.**, No. 31, *post*.

**31. — Ships.]—(1)** A ship comes within the definition of “goods” in Sale of Goods Act, 1893 (c. 71), s. 62, & therefore a contract for the sale of a ship must, in order to be valid, comply with the requirements of s. 4 of the Act.

(2) Under Sale of Goods Act, 1813 (c. 71), s. 52, the ct. may, if it thinks fit, order specific performance of a contract for the sale of a ship.

(3) The Sale of Goods Act, 1893 (c. 71), s. 62, defines “goods” as “all chattels personal other than things in action & money” (WRIGHT, J.).

(4) To constitute part payment not only must the money be sent by the buyer, but it must also be either accepted or in some way acknowledged by the sellers so as to constitute a recognition by the sellers that there is a contract. The contract here provided that the deposit was to be held by the brokers pending completion of the contract; hence the brokers received it, not as agents for defts., but as stakeholders, & defts. expressly declined to give any instructions with reference to it. I hold there was no part payment within the sect. [Sale of Goods Act, 1893 (c. 71), s. 4] (WRIGHT, J.).

(5) The mere delivery of the *pro forma* contract, created or recognised by defts. in the way I have indicated, would constitute delivery of a note or memorandum in writing signed by defts. (WRIGHT, J.).

(6) The signature may be constituted by a written or printed heading if adopted or recognised by the party to be charged (WRIGHT, J.).—*BEHNKE v. BEDE SHIPPING CO.*, [1927] 1 K. B. 649; 96 L. J. K. B. 325; 136 L. T. 667; 43 T. L. R. 170; 71 Sol. Jo. 105; 17 Asp. M. L. C. 222; 32 Com. Cas. 134.

*See, generally*, SHIPPING.

—.]—*See Part II., Sect. 4, post.*

**32. Under Statute of Frauds—Fixtures.]—Fixtures** not separated from the freehold cannot be recovered under a count for goods sold.—*NUTT v. BUTLER* (1804), 5 Esp. 176; 170 E. R. 777. *Annotation*:—*Appl.* *Lee v. Risdon* (1816), 7 Taunt. 188.

**33. —.]—An action for goods sold & delivered will not lie for fixtures.]—LEE v. RISDON** (1816), 7 Taunt. 188; 2 Marsh. 495; 120 E. R. 76. *Annotations*:—*Appl.* *Salmon v. Watson* (1819), 4 Moore, C. P. 73; *Hallen v. Runder* (1834), 1 Cr. M. & R. 266.

(1863), 22 U. C. R. 439.—**CAN.**

**b. (Growing wild hay.)—Growing wild hay**, when sold to a person who is to cut & remove it the same season is “goods” within Sale of Goods Act R. S. M., 1902 (c. 152), s. 2, par. (h).—*FREDKIN v. GLINES* (1908), 18 Man. L. R. 249.—**CAN.**

**c. Hay to be grown.]—In Mar.**

**Refd.** *Colegrave v. Dias Santos* (1823), 2 B. & C. 76; *Re Butterworth, Ex p. Wilson* (1835), 2 Mont. & A. 61; *Darby v. Harris* (1841), 1 Q. B. 895; *Gough v. Wood*, [1894] 1 Q. B. 713. **Mentd.** *Ex p. Lloyd* (1834), 3 Deac. & Ch. 765; *Minshall v. Lloyd* (1837), 2 M. & W. 450; *London Loan & Discount Co. v. Drake* (1859), 6 C. B. N. S. 798; *R. v. Townley* (1871), L. R. 1 C. C. R. 315.

34. ———.]—A. having occupied a house as tenant to B. in which there were certain fixtures which A. had purchased on entering the house & which he had a right to remove during his tenancy, agreed, at B.'s request, a few days before the expiration of his tenancy, to forbear to remove the fixtures, B. agreeing to take them at a valuation to be made by two brokers, A. at the expiration of his tenancy, delivered up possession of the house to B. leaving the fixtures on the premises. On the following day the fixtures were valued by two brokers at the sum of £40 10s. & the valuation was signed by them accordingly. A. having brought *indebitatus assumpsit* for the price & value of fixtures, etc., bargained & sold, & for fixtures sold & delivered:—**Held**: the action was maintainable, & this was not a sale of an interest in land within Stat. Frauds, s. 4.—**HALLÉN v. RUNDER** (1834), 1 Cr. M. & R. 266; 3 Tyr. 959; 3 L. J. Ex. 260; 149 E. R. 1080.

**Annotations**:—**Foll.** *Lee v. Gaskell* (1876), 1 Q. B. D. 700. **Consd.** *Thomas v. Jennings* (1896), 66 L. J. Q. B. 5. **Refd.** *Darby v. Harris* (1841), 1 Q. B. 895; *Kelly v. Webster* (1852), 12 C. B. 283; *Elliott v. Bishop* (1854), 10 Exch. 496; *London Loan & Discount Co. v. Drake* (1859), 6 C. B. N. S. 798; *Re De Falbe, Ward v. Taylor*, [1901] 1 Ch. 523. **Mentd.** *Minshall v. Lloyd* (1837), 2 M. & W. 450; *Mather v. Fraser* (1855), 4 W. R. 387; *Moor v. Roberts* (1858), 3 C. B. N. S. 830.

35. ———.]—The tenant of premises having become bkpt., the trustee sold the tenant's fixtures on the premises to pltf. & he sold them to deft., the landlord. There was no agreement in writing, & the value of the fixtures was above £10. An action having been brought for the price:—**Held**: the sale was not within Stat. Frauds, s. 4, as the sale of an interest in land nor within Stat. Frauds, s. 17, as the sale of goods & chattels; & the action was therefore maintainable.—**LEE v. GASKELL** (1876), 1 Q. B. D. 700; 45 L. J. Q. B. 540; 34 L. T. 759; 40 J. P. 725; 24 W. R. 824.

**Annotations**:—**Consd.** *Thomas v. Jennings* (1896), 66 L. J. Q. B. 5. **Refd.** *Jarvis v. Jarvis* (1893), 63 L. J. Ch. 10; *Underwood v. Burgh Castle Brick & Cement Syndicate* (1921), 91 L. J. K. B. 355. **Mentd.** *Re Allen, Samuel*, [1907] 1 Ch. 575.

36. ———.]—Such a contract cannot be properly described as a contract for the sale of goods or chattels under Stat. Frauds, s. 17; nor could it be correctly described as a contract or sale of an interest concerning land, within the meaning of Stat. Frauds, s. 4; for tenants removable fixtures while annexed to the freehold are not goods & chattels, & the right to sever & remove them from the freehold to which they are attached does not give the tenant an interest in the freehold itself (**HAWKINS, J.**).—**THOMAS v. JENNINGS** (1896), 66 L. J. Q. B. 5; 75 L. T. 274; 45 W. R. 93; 12 T. L. R. 637; 40 Sol. Jo. 731.

37. ———.]—**Foreign stock**.—*Qu.*: whether a contract made by a stockbroker for foreign stock is a contract for goods, wares, & merchandises, within Stat. Frauds, s. 17 & consequently requires a note or memorandum in writing of the bargain made & signed by the parties to be charged by such contract, or their agents thereunto lawfully

authorised.—**PAWLE v. GUNN** (1838), 4 Bing. N. C. 445; 1 Arn. 200; 6 Scott, 286; 7 L. J. C. P. 206; 132 E. R. 859.

38. ———.]—**Shares in company**.—A railway Act provided that all shares in the undertaking should, to all intents & purposes, be deemed personal property, & be transmissible as such, & should not be deemed to be of the nature of real property:—**Held**: such shares might be sold without a note in writing. *Semble*: this would also be so, though the Act contained no such clause.—**BRADLEY v. HOLDSWORTH** (1838), 3 M. & W. 422; 1 Horn & H. 156; 7 L. J. Ex. 153; 150 E. R. 1210.

39. ———.]—**Shares in a joint stock banking co. are not goods, wares, or merchandises, within Stat. Frauds, s. 17.**—**HUMBLE v. MITCHELL** (1839), 11 Ad. & El. 205; 2 Ry. & Can. Cas. 70; 3 Per. & Dav. 141; 9 L. J. Q. B. 29; 3 Jur. 1188; 113 E. R. 392.

**Annotations**:—**Appl.** *Knight v. Barber* (1846), 16 M. & W. 66. **Refd.** *Bowby v. Bell* (1846), 3 C. B. 284; *Walker v. Bartlett* (1856), 18 C. B. 845; *Colonial Bank v. Whinney* (1886), 11 App. Cas. 426. **Mentd.** *Phone v. Gillon* (1845), 15 L. J. Ch. 65.

40. ———.]—The ct. will decree a specific performance of an agreement for the sale of a certain number of shares in a railway co. A parol agreement for the sale of such shares, is binding; for they are neither an interest in or concerning lands, within Stat. Frauds, s. 4; nor goods, wares or merchandises, within sect. 17.—**DUNCURT v. ALBRECHT** (1841), 12 Sim. 189; 59 E. R. 1104.

**Annotations**:—**Consd.** *Watson v. Spratley* (1854), 10 Exch. 222. **Refd.** *Cheale v. Kenward* (1858), 3 De G. & J. 27; *Bennett v. Blain* (1863), 15 C. B. N. S. 518; *Colonial Bank v. Whinney* (1885), 30 Ch. D. 269.

41. ———.]—**Certificates of shares in a railway co. may be declared on as goods sold.**—**LAWTON v. HICKMAN** (1846), 9 Q. B. 563; 4 Ry. & Can. Cas. 336; 16 L. J. Q. B. 20; 7 L. T. O. S. 430; 10 Jur. 543; 115 E. R. 1390.

**Annotations**:—**Refd.** *Muttilloll Seal v. Dent* (1853), 5 Moo. Ind. App. 328. **Mentd.** *Van Boven's Case* (1846), 9 Q. B. 669.

42. ———.]—A contract for the sale of railway shares is not a contract for the sale of goods, wares, or merchandise, within Stat. Frauds, s. 17.—**BOWLBY v. BELL** (1846), 3 C. B. 284; 4 Ry. & Can. Cas. 692; 16 L. J. C. P. 18; 7 L. T. O. S. 300; 10 Jur. 669; 136 E. R. 114.

**Annotation**:—**Mentd.** *Bayley v. Wilkins* (1849), 7 C. B. 886.

43. ———.]—A share in a joint stock mining co. is not goods, wares, or merchandise within Stat. Frauds, s. 17.—**WATSON v. SPRATLEY** (1854), 10 Exch. 222; 2 C. L. R. 1434; 24 L. J. Ex. 53; 24 L. T. O. S. 79; 2 W. R. 627; 156 E. R. 424.

**Annotations**:—**Refd.** *Walker v. Bartlett* (1856), 18 C. B. 845. **Mentd.** *Toppin v. Lomas* (1855), 16 C. B. 145; *Powell v. Jessop* (1856), 18 C. B. 336; *Hayter v. Tucker* (1858), 4 K. & J. 243; *Bulmer v. Norris* (1860), 9 C. B. N. S. 19; *Bennett v. Blain* (1863), 15 C. B. N. S. 518; *Entwistle v. Davis* (1867), L. R. 4 Eq. 272; *Webber v. Lee* (1882), 9 Q. B. D. 315; *Watson v. Black* (1885), 16 Q. B. D. 270; *Re Hollon, Forbes v. Harcastle* (1893), 68 L. T. 160.

44. ———.]—**Copies of treatise ordered to be printed**.—Pltf., a printer, verbally agreed to print for deft. five hundred copies of a treatise, to which a dedication was to be prefixed, at a certain price per sheet, including paper. The treatise was

1910, deft. sold to pltf. the crop of hay to be grown during the ensuing season on a certain quarter section of land, & gave him a permit to enter & cut:—**Held**: as there was, at the time of the sale, no grass or hay growing on the land & to be severed, the subject-matter of the sale did not come under the definition of the word "goods"

in Sale of Goods Act.—**SHARPE v. DUNDAS** (1911), 18 W. L. R. 86; 21 Man. L. R. 194.—**CAN.**

d. **Sale of trees growing upon land**—"Cullings."—In an action claiming damages for entering pltf.'s land & cutting & removing timber therefrom, it appeared that, prior to the date of

pltf.'s deed pltf.'s grantor had sold to deft. the whole of the "cullings" on the land, i.e. such timber as was left on the land fit for cutting & sawing into lumber, & that a portion of the cullings had been cut & removed prior to the date of pltf.'s deed:—**Held**: the sale was one of "goods" within the Sale of Goods Act.—**HINGLEY v. LYND**



**Sect. 6.—What are “goods.” Sects. 7 & 8.]**

printed, & after the proof sheet of the dedication was revised by deft. & returned to pltf., he, for the first time, discovered that it contained libellous matter, & refused to complete the printing of it:—*Held*: this was not a contract for the sale of goods, within Stat. Frauds, s. 17, as extended by Statute of Frauds Amendment Act, 1828 (c. 14), s. 7.—*CLAY v. YATES* (1856), 1 H. & N. 73; 25 L. J. Ex. 237; 27 L. T. O. S. 126; 2 Jur. N. S. 908; 4 W. R. 557; 156 E. R. 1123.

*Annotations*:—*Consd.* *Lee v. Griffin* (1861), 1 B. & S. 272. *Refd.* *Appleby v. Meyers* (1867), 36 L. J. C. P. 331. *Mentd.* *Stubbs v. Holywell Rty.* (1867), 15 W. R. 869.

**Growing crops.]—See AGRICULTURE, Vol. II., pp. 52 *et seq.***

**Existing & future goods.]—See Part II., Sect. 5, sub-sect. 1, *post*.**

**SECT. 7.—CONDITIONAL SALE.**

*See Sale of Goods Act, 1893 (c. 71), s. 1 (2).*

**45. What amounts to conditional sale—Agreement to purchase from pledgee—If pledge not redeemed.]—COPPER v. DICKENSON** (1615), 3 Bulst. 70; 81 E. R. 60; *sub nom.* *CAPPER v. DICKINSON*, 1 Roll. Rep. 215.

*Annotation*:—*Refd.* *Leggo v. Evans* (1840), 8 Dowl. 177.

**46. — Sale of mare subject to return—On payment of specified sum—If proving to be in foal.]—WILLIAMS v. BURGESS**, No. 162, *post*.

**47. — Goods sold by auction—Condition for resale if purchase-money not paid.]—Where goods are sold by auction, subject to a condition that, if the purchase-money be not paid on the following day, they may be resold, & the loss recovered from the bidder making default, & the right of resale is accordingly exercised, the deficiency cannot be recovered in an action for goods bargained & sold, as the effect of the reservation of the power of resale is to make the original sale conditional, & not absolute.—JAMOND v. DAVALL** (1847), 9 Q. B. 1030; 16 L. J. Q. B. 136; 11 Jur. 266; 115 E. R. 1569.

*Annotations*:—*Refd.* *Pott v. Flather* (1847), 11 Jur. 735; *Chinery v. Viall* (1860), 5 H. & N. 288; *Iogers v. Hadley* (1863), 2 H. & C. 227.

**48. — Sale subject to approval of purchaser.]—A, having applied to B, a coach-maker, to build for him a carriage of a particular description, the latter at his request, sent him a drawing, which A. returned with objections. B. thereupon wrote to A., expressing his regret that the drawing sent did not meet his approbation, adding, “if you order, every attention shall be paid to any particulars you may think proper.”**

(1919), 52 N. S. R. 422; 44 D. L. R. 743.—CAN.

**e. Share in partnership.]—A share in a partnership constitutes an equitable chose in action, & Sale of Goods Act, 1908, do not apply to a sale of such a share.—MCGREGOR v. NELSON** (1915), 34 N. Z. L. R. 375.—N.Z.

**PART I. SECT. 7.**

**1. What amounts to conditional sale—Agreement for delivery & acceptance of sleepers.]—BINGHAM RIVER TIMBER CO., LTD. v. JOHNSON** (1922), 25 W. A. L. R. 106.—AUS.

**g. — Manufacturing wheat into flour—Flour to pass inspection as superfine.]—STEPHENSON v. RANNEY** (1851), 2 C. P. 196.—CAN.

**h. — Notes given for purchase-money—Undertaking not to put another cab on route.]—GLEASON v. KNAPP** (1876), 26 C. P. 553.—CAN.

**A. in answer wrote, “I have duly received your reply to my last, & can only continue to wonder at your disinclination to furnish me with so simple a drawing as I then requested, with the view of obviating as far as possible the chance of any misconception which might otherwise arise in respect to my order, which I can now of course give in general terms only, & on the assumption that you undertake to execute it in a manner which shall meet my approval, not only on the score of workmanship, but also that of convenience & taste.” The carriage was thereupon built & forwarded to A., who found many faults in it, & rejected it:—*Held*: the order having been given & accepted on the express condition that the carriage should meet the approval of A. “on the score of convenience & taste,” the latter was entitled, acting *bonâ fide*, & not from mere caprice, to reject it.—ANDREWS v. BELFIELD** (1857), 2 C. B. N. S. 779; 140 E. R. 622.

**49. — —.]—REPETTO v. FRIARY S.S. CO., LTD.** (1901), 17 T. L. R. 265.

*Annotation*:—*Mentd.* *Diggle v. Ogston Motor Co.* (1915), 84 L. J. K. B. 2165.

**50. — —.]—An agreement for the sale of a steamer provided that the price should be “paid as follows: 10 per cent. on approval of the steamer as far as can be seen without opening up . . .” & on the purchaser so approving & paying deposit, “the vendors agree to open up engines boilers water-ballast tanks for purchaser’s inspection & approval. . . . If steamer not approved of deposit to be returned immediately.” On approval of engines, boilers, etc., the vendors were to dry-dock the vessel for inspection of ship’s bottom, etc. The purchaser’s inspectors inspected that portion of the vessel which did not require opening up, paid the deposit, & subsequently inspected the opened up portions & disapproved of her:—*Held*: a *bonâ fide* exercise of judgment on inspection entitled the purchaser to disapprove, & the deposit was recoverable back by him, whether the disapproval of his inspectors was based upon reasonable grounds or not.—HÆGERSTRAND v. ANNE THOMAS S.S. CO., LTD.** (1905), 10 Com. Cas. 67, C. A.

**51. — Agreement for sale of chattel—In consideration of agreement to purchase land—Subject to title.]—Pltf. & one T. entered into an agreement in writing by which T. agreed to sell & pltf. to buy a plot of land for the sum of £385 “subject to purchaser’s solrs.’ approval of title & restrictions”; & in consideration of the above transaction pltf. agreed to sell & T. agreed to buy a motor car for the sum of £300, “completion of such sale & purchase to be carried out simultaneously with above transaction.” Shortly after-**

**n. — Order given by defendant to another company should be accepted.]**

—*JOHN DEERE PLOW CO. v. SHANNON* (1912), 21 W. L. R. 192; 3 D. L. R. 746.—CAN.

**o. — Timber to be removed by specified time.]—DEMPSTER v. RUSSELL** (1912), 21 O. W. R. 449; 3 O. W. N. 719; 2 D. L. R. 14.—CAN.

**p. — Condition that bank filed of buyer’s financial standing.]—MCCOOL v. GRANT & DUNN** (1920), 48 O. L. R. 630; 58 D. L. R. 373; 20 O. W. N. 34.—CAN.

**q. — Executory contract.]—In the case of an agreement to sell goods, under which the property therein is to remain in the seller until the goods are fully paid for, the contract is an executory one, & the default of either party give the other good cause for rescinding it. When on default of the buyer the seller seizes the goods &**

**k. — Effect of agreement for resale.]—Deft. sold pltf’s. some tea, & orally agreed that he would take back, at an advance of ten cents a pound, such part thereof as pltf’s. should have in stock unsold at a certain date:—*Held*: there was but one entire conditional contract—not one contract to sell the tea to pltf’s., & another to buy it back—& therefore the delivery of the tea by deft. satisfied Stat. Frauds, & pltf’s. were entitled to recover for deft.’s refusal to take back the unsold tea.—LUMSDEN v. DAVIES** (1885), 11 A. R. 585.—CAN.

**l. — Timber & logs to be removed before stipulated date.]—JOHNSTON v. SHORTREED** (1886), 12 O. R. 633.—CAN.

**m. — Supplementary agreement to exchange horses for another team—If horses found unsuitable.]—MCLEOD v. MCCUTCHIEON** (Man.) (1907), 5 W. L. R. 159.—CAN.

wards plffs. gave possession of the motor car to T. "on loan" none of the purchase-money for it having been paid, & T. sold it to deft. who bought in good faith & without notice of any right of pltf. in respect thereof. Subsequently the pltf.'s solrs. refused to approve of the restrictions in connection with the land. In an action to recover possession of the car :—*Held* : assuming that the two parts of the document were dependent on each other, the agreement as to the land did not confer a mere option on pltf. to buy, but was an agreement by him to buy conditional upon his solrs. approving of the restrictions ; consequently the agreement as to the sale of the motor car to T. was conditional ; a conditional agreement came within Sale of Goods Act, 1893 (c. 71), s. 25 (2), & therefore T. had "agreed to buy" the car within the sect. & deft. had acquired a good title thereto.—*MARTEN v. WHALE*, [1917] 2 K. B. 480 ; 86 L. J. K. B. 1305 ; 117 L. T. 137 ; 33 T. L. R. 330, C. A.

#### SECT. 8.—QUASI-CONTRACT.

52. **Wrongful possession or dealing with goods—Right of owner to waive tort & sue in contract—Goods obtained from bankrupt after act of bankruptcy.**—A., after committing an act of bkpcy. in order to procure his discharge from an arrest at the suit of B., draws & indorses to B. a bill of exchange, which C. accepts in expectation of receiving goods of A.'s into his hands. C. receives the goods, sells them, & pays the amount of the bill to B., the assignees of A. cannot maintain an action against B. for this money as money had & received to their use.

At this time A. being a bkpt. could exercise no disposing power over the goods in the hands of C. They were the property of the assignees, & the assignees may, if they think proper, bring an action of trover for the conversion of these goods, or they may ratify the act by bringing an action for goods sold & delivered ; but they cannot consider the property as changed by the act of a party who held them under no contract or authority (*LORD ELLENBOROUGH*).—*WALLER v. DRAKEFORD* (1816), 1 Stark, 481 ; 171 E. R. 536, N. P.

53. — — — — —.] — After bkpcy., 85 bundles of yarn, of the value of £114, had been delivered by the bkpt. to defts., as they alleged, to meet an accommodation bill which they were about to give the bkpt. The goods were accom-

panied by an invoice, which stated them to be bought by defts. of the bkpt. :—*Held* : the assignees might waive the tort, & bring *assumpsit* for goods sold & delivered.—*RUSSELL v. BELL* (1842), 10 M. & W. 340 ; 152 W. R. 500.

54. — — — — — **Removal of goods—Plaintiff must prove title.**—Where pltf. in an action for goods sold & delivered, proved the possession of the goods by himself, & their removal by defts. ; & it appeared that the goods consisted of spar lying on the lands of A., & that pltf. claimed under A. by a written agreement not produced :—*Held* : this was not sufficient proof of title to the goods, from which a contract between the parties could be implied.—*LEE v. SHORE* (1822), 1 B. & C. 94 ; 2 Dow. & Ry. K. B. 198 ; 1 L. J. O. S. K. B. 48 ; 107 E. R. 36.

*Annotations* :—*Refd.* *Nicol v. Hennessey* (1896), 44 W. R. 584. *Mentd.* *Hodgson v. Forster* (1822), 2 Dow. & Ry. K. B. 221.

55. — — — — — **Goods wrongfully sold by servant—Purchaser refusing to deliver up.**—The servant of A., a farmer, having been ordered by his master to sell some sheep for ready money, sold them on trust to a person to whom he was indebted, & who refused to deliver them back to the real owner, or to pay for them, without deducting the money due to himself from the servant. The master brought an action for goods sold & delivered :—*Held* : pltf. had a right to waive the tort & sue in *assumpsit*.—*JONES v. BATCH* (1823), 1 L. J. O. S. K. B. 106.

56. — — — — — **Wrongful sale by co-owner of shares in ship—Presumption of agreement to pay reasonable price.**—Pltf. was the owner of certain shares in a ship. Deft., who was the managing owner of the ship, being desirous of selling the ship, in a letter addressed to pltf. asked her for a bill of sale of her shares. This she refused to give, but subsequently she offered to sell her shares for £100. Deft., without further communication with her, sold the ship with the consent of all the other co-owners at a price which would have yielded to pltf. in respect of her shares a less sum than £100 :—*Held* : there was an implied contract on the part of deft. to pay for the shares as upon a contract of sale, & though there was no presumption of law that deft. agreed to pay any price asked, yet it being found that the price asked was a reasonable one, a presumption arose from the facts of the case that deft. agreed to pay that price.—*NICOL v. HENNESSEY* (1896), 44 W. R. 584 ; 12 T. L. R. 485 ; 40 Sol. Jo. 601 ; 1 Com. Cas. 410.

offers them for sale he thereby elects to terminate the agreement, & therefore, cannot when his offer of sale to the public proves abortive change his mind & sue the buyer for the unpaid

amount of the purchase price, unless the contract contains a provision giving him that power.—*HAYES v. MAYNE* (Sask.), [1927] 4 D. L. R. 1070 ; [1927] 3 W. W. R. 524. — **CAN.**

r. — — — **Purchase of furniture.**—*LAWRENCE v. LAWRENCE'S TRUSTEE, LAWRENCE v. SIVRIGHT & MILLER* (1899), 6 S. L. T. 356.—**SCOT.**

## Part II.—Formation of Contract.

### SECT. 1.—CAPACITY OF PARTIES.

See Sale of Goods Act, 1893 (c. 71), s. 2; & generally, CONTRACT, Vol. XII., pp. 22 *et seq.*

**Administrator of property of convict.]—**See CRIMINAL LAW, Vol. XIV., p. 495, No. 5459.

**Agents—Capacity to contract with principal.]—**See generally, AGENCY, Vol. I., pp. 467 *et seq.*

— **Capacity to bind principal.]—**See, generally, AGENCY, Vol. I., pp. 319–324, 346–384, 396–423, Nos. 393–412, 571–885.

**Aliens.]—**See ALIENS, Vol. II., pp. 132, 133, Nos. 83–85.

— **Trading with enemy.]—**See ALIENS, Vol. II., pp. 162 *et seq.*

**Clergy.]—**See ECCLESIASTICAL LAW, Vol. XIX., p. 365, Nos. 1824–1826.

**Clubs.]—**See, generally, CLUBS, Vol. VIII., pp. 515 *et seq.*

**Committee of lunatic.]—**See LUNATICS, Vol. XXXIII., p. 212, Nos. 1186–1188.

**Companies.]—**See, generally, COMPANIES, Vol. IX., pp. 628 *et seq.*; Vol. X., pp. 1171 *et seq.*

**Corporations.]—**See, generally, CORPORATIONS, Vol. XIII., pp. 378 *et seq.*

**Executors.]—**See, generally, EXECUTORS, Vol. XXIV., pp. 564 *et seq.*

**Hawkers & pedlars.]—**See, generally, MARKETS & FAIRS, Vol. XXXIII., pp. 564 *et seq.*

**Infants.]—**See, INFANTS, Vol. XXVIII., pp. 153–175, Nos. 131–359.

**Local authorities.]—**See, generally, LOCAL GOVERNMENT, Vol. XXXIII., pp. 36 *et seq.*; CORPORATIONS, Vol. XIII., pp. 378 *et seq.*

**Lunatics.]—**See, generally, LUNATICS, Vol. XXXIII., pp. 128 *et seq.*

**Married women.]—**See, generally, HUSBAND & WIFE, Vol. XXVII., pp. 178 *et seq.*

**Partners.]—**See PARTNERSHIP, Vol. XXXVI., pp. 362, 363, Nos. 388–396.

**Receivers.]—**See, generally, RECEIVERS.

**Servants.]—**See MASTER & SERVANT, Vol. XXXIV., pp. 124 *et seq.*; AGENCY, Vol. I., pp. 355, 381, 382, Nos. 628–641, 847, 864.

**Ship's officers.]—**See, generally, SHIPPING.

### SECT. 2.—IDENTITY OF PARTIES.

See CONTRACT, Vol. XII., pp. 22 *et seq.*; MISTAKE, Vol. XXXV., pp. 97 *et seq.*

### SECT. 3.—FORMALITIES OF CONTRACT.

#### SUB-SECT. 1.—IN GENERAL.

See Sale of Goods Act, 1893 (c. 71), ss. 3, 4; & generally, CONTRACT, Vol. XII., pp. 51 *et seq.*

**57. When contract implied—Retainer of goods—Goods supplied under voidable contract.]—**To an action by indorsee against indorser of a bill of exchange, deft. pleaded, that, when he indorsed the bill, he was so intoxicated, & thereby so entirely deprived of sense, understanding, & the use of his reason, as to be unable to comprehend the

meaning, nature, or effect of the indorsement. or to contract thereby; of which pltf., at the time of the indorsement, had notice:—*Held*: to be a good answer to the action, & not to amount to an argumentative traverse of the indorsement.

In many cases the law does not require an actual agreement between the parties, but implies a contract from the circumstances; in fact, the law itself makes the contract for the parties. Thus, in actions for money had & received to pltf.'s use, or money paid by him to deft.'s use, the action may lie against deft., even though he may have protested against such a contract. So, a tradesman who supplies a drunken man with necessaries may recover the price of them if the party keeps them when he becomes sober, although a count for goods bargained & sold would fail (*POLLOCK, C.B.*).—*GORE v. GIBSON* (1845), 13 M. & W. 623; 14 L. J. Ex. 151; 4 L. T. O. S. 319; 9 Jur. 140; 153 E. R. 260.

*Annotations*:—*Consd. Matthews v. Baxter* (1873), L. R. 8 Exch. 132. *Refd. Molton v. Camroux* (1848), 2 Exch. 487; *Imperial Loan Co. v. Stone* (1892), 61 L. J. Q. B. 449.

**58. — — — — —.]—**Deft. ordered of pltf. two dozen of port & two dozen of sherry, with the understanding, that, if it were not approved, he should return it. Pltf. sent him four dozen of port & four dozen of sherry. Deft. was not satisfied with its quality, & returned the whole, except one bottle of the port & one dozen of the sherry, with a letter to pltf., in which he stated that his order was for two dozen of each kind of wine; that he should not have refused to keep the four dozen if the quality had suited him, but that, as it did not, he returned the four dozen of port, minus one bottle, which he had tasted, & three dozen of the sherry:—*Held*: deft. was liable only for the price of the wine he actually kept.—*HART v. MILLS* (1846), 15 M. & W. 85; 15 L. J. Ex. 200; 153 E. R. 771.

*Annotation*:—*Refd. Levy v. Green* (1857), 8 E. & B. 575.

**59. — Conduct of parties—Acting in accordance with unexecuted draft—Onus of proof.]—**B. had for some years supplied the M. Railway Co. with coals. At last it was suggested by B. that a contract should be entered into between them. After their agents had met together the terms of agreement were drawn up by the agent of the M. Co. & sent to B. B. filled up certain parts of it which had been left in blank, & introduced the name of the gentleman who was to act as arbitrator in case of differences between the parties, wrote "approved" at the end of the paper, & signed his own name. B.'s agent sent back the paper to the agent of the M. Co., who put it in his desk, & nothing further was done in the way of a formal execution of it. Both parties for some time acted in accordance with the arrangements mentioned in the paper, coals were supplied & payments made as therein stated, & when some complaints of inexactness in the supply of coals, according to the terms stated in the paper, were made by the M. Co., there were explanations & excuses given by B., & the "contract" was mentioned in the correspondence, & matters went on as before.

#### PART II. SECT. 3, SUB-SECT. 1.

**t. Foreign contract—Valid where made.]—**A contract for the sale of goods to ptfs. at a certain price, pay-

able in Toronto, was made by deft. at Chicago, through his agent there, the goods to be shipped by the G. T. Ry. Co. from Toronto. No sold note was signed by the broker until after action

brought for the non-delivery; but it was proved that Stat. Frauds, s. 17, was not in force in Illinois:—*Held*: the contract, being valid where it was made, could be enforced here, though

Finally disagreements arose, & B. denied that there was any contract which bound him in the matter :—*Held* : these facts, & the actual conduct of the parties, established the existence of such a contract, & there having been a clear breach of it B. must be held liable upon it.

The *onus* of showing that both parties had acted on the terms of an agreement which had not been, in due form, executed by either, lies upon the party who rests his case on that circumstance (LORD BLACKBURN).—BROGDEN *v.* METROPOLITAN RY. CO. (1877), 2 App. Cas. 666, 11. L.

*Annotations* :—*Consd.* Carlill *v.* Carbolic Smoke Ball Co., [1893] 1 Q. B. 256 ; Keighley, Maxsted *v.* Durant, [1901] A. C. 240. *Refd.* Household Fire Insce. *v.* Grant (1879), 4 Ex. D. 216 ; Renhorn *v.* Fraser, [1892] 2 Ch. 27 ; Waring & Gillow *v.* Thompson (1912), 29 T. L. R. 154 ; Coope *v.* Ridout, [1920] 2 Ch. 411.

—*See, generally, CONTRACT, Vol. XII., pp. 112 et seq.*

#### SUB-SECT. 2.—CONTRACTS FOR £10 OR UPWARDS.

*See Sect. 4, post.*

#### SECT. 4.—CONTRACTS FOR £10 OR UPWARDS.

##### SUB-SECT. 1.—IN GENERAL.

*See Sale of Goods Act, 1893 (c. 71), s. 4.*

*Pleading statute.*—*See CONTRACT, Vol. XII., pp. 171, 172, Nos. 1256-1269.*

##### SUB-SECT. 2.—WHAT CONTRACTS INCLUDED.

**60. Executory contract.**—*Executory contracts for goods, not within Stat. Frauds.*—TOWERS *v.* OSBORNE (1722), 1 Stra. 506 ; 93 E. R. 664.

*Annotations* :—*Apld.* Simon *v.* Mefivier (1766), 1 Wm. Bl. 599 ; Clayton *v.* Andrews (1767), 4 Burr. 2101. *Distd.* Rondeau *v.* Wyatt (1792), 2 Hy. Bl. 63 ; Cooper *v.* Elston (1796), 7 Term Rep. 14. *Apld.* Buxton *v.* Bodall (1803), 3 East. 303. *Distd.* Garbutt *v.* Watson (1822), 5 B. & Ald. 613. *Consd.* Smith *v.* Surman (1829), 4 Man. & Ry. K. B. 455. *Dbld.* Pinner *v.* Arnold (1835), 2 Cr. M. & R. 613. *Refd.* Emmerson *v.* Heelis (1809), 2 Taunt. 38 ; Head *v.* Baddeley (1837), 6 Ad. & El. 459 ; Lee *v.* Griffin (1861), 1 B. & S. 272.

**61.** — *Executory contracts for goods not within Stat. Frauds.*—CLAYTON *v.* ANDREWS (1767), 4 Burr. 2101 ; 98 E. R. 96.

*Annotations* :—*Distd.* Rondeau *v.* Wyatt (1792), 2 Hy. Bl. 63 ; Cooper *v.* Elston (1796), 7 Term Rep. 14. *N.F.* Garbutt *v.* Watson (1822), 5 B. & Ald. 613.

**62.** — *Goods for future delivery.*—A. & B. enter into a verbal agreement for the sale of goods, to be delivered to A. at a future period ; there is neither earnest paid, a note or memorandum in writing signed, nor any part of the goods delivered ; this contract is void, being within Stat. Frauds, though it is executory, & though it has been admitted by B. in his answer to a bill in Chancery filed by A.—RONDEAU *v.* WYATT (1792), 2 Hy. Bl. 63 ; 126 E. R. 430.

*Annotations* :—*Apld.* Cooper *v.* Elston (1796), 7 Term Rep. 14. *Distd.* Groves *v.* Buck (1811), 3 M. & S. 178. *Consd.* Garbutt *v.* Watson (1822), 5 B. & Ald. 613. *Distd.* Bailey *v.* Sweeting (1861), 9 C. B. N. S. 843. *Refd.* Cooth *v.* Jackson (1801), 6 Ves. 12 ; Emmerson *v.* Heelis (1809), 2 Taunt. 38.

not in writing.—GREEN *v.* LEWIS (1867), 26 U. C. R. 618.—*CAN.*

#### PART II. SECT. 4, SUB-SECT. 1.

**a. Statute of Frauds, s. 17.—Whether in force in Canada.**—By 25 Geo. 3, c. 2, the above sect. is in force in

Canada in commercial cases, & therefore a sale of goods to any greater value than £10 sterling cannot be proved, where no part of the goods have been delivered, no earnest given, & no memorandum in writing made of the contract.—HUNT *v.* BRUCE (1901), 8 Q. P. R. 1235.—*CAN.*

**63.** *Sale of goods at one place to be afterwards delivered at another.*—A sale of goods for £10 by sample in one place to be afterwards delivered at another, is within Stat. Frauds, s. 17, if no part of the goods contracted for were delivered nor any thing given by the buyer to bind the bargain, nor any memorandum thereof in writing.—COOPER *v.* ELSTON (1796), 7 Term Rep. 14 ; 101 E. R. 830.

**64.** — *—*—*—*—A contract for the purchase of a quantity of oak pins, for the price of upwards of £10, which were not then made, but were to be cut out of slabs & delivered to the buyer :—*Held* : not to be within Stat. Frauds, s. 17.—GROVES *v.* BUCK (1814), 3 M. & S. 178 ; 105 E. R. 577.

*Annotation* :—*Consd.* Smith *v.* Surman (1829), 9 B. & C. 561.

**65.** — *—*—*—*—A parol contract for the sale of 300 sacks of flour “to be prepared & shipped by a certain day” is within Stat. Frauds, s. 17.—GARBUIT *v.* WATSON (1822), 5 B. & Ald. 613 ; 1 Dow. & Ry. K. B. 219 ; 106 E. R. 1315.

*Annotations* :—*Distd.* Cobbold *v.* Gaston (1823), 1 C. & P. 51. *Apld.* Smith *v.* Surman (1829), 9 B. & C. 561. *Refd.* Pinner *v.* Arnold (1835), 2 Cr. M. & R. 613.

**66.** — *—*—*—*—Where A. agreed to supply B. with a quantity of turnip seed, & B. agreed to sow it on his own land, & sell the crop of seed produced therefrom to A. at £1 1s. the Winchester bushel ; & the seed so produced at the price agreed upon exceeded in value the sum of £10 :—*Held* : this contract was within Stat. Frauds, s. 17, & void for want of memorandum in writing.—WATTS *v.* FRIEND (1830), 10 B. & C. 446 ; L. & Welsb. 193 ; 5 Man. & Ry. K. B. 439 ; 8 L. J. O. S. K. B. 181 ; 109 E. R. 516.

*Annotation* :—*Distd.* Williams *v.* Burgess (1839), 10 Ad. & El. 499.

**67.** — *—*—*—*—LEE *v.* GRIFFIN, No. 9, *ante*.

— *Goods to be acquired by seller upon a contingency.*—*See Sect. 5, sub-sect. 2, post.*

—*See Sale of Goods Act, 1893 (c. 71), s. 4 (2).*

**68. Contract for sale of goods & other objects—Entire contract.**—L., a cornfactor at N., agreed to sell barley of pltf. to deft., to be delivered at L.’s warehouse at D., to go by the first boat of L. which went from N. to D., at 38s. per quarter, which was a higher price on account of its being to be delivered at L.’s expense ; & the barley being then in the hands of T., deft. desired him to see it delivered & measured & put up properly, & the barley was sent by L.’s first boat, & the invoice delivered to deft., who requested time to pay, but afterwards refused to accept the barley : in *assumpsit* for the price :—*Held* : this was a contract for the sale of goods within Stat. Frauds, s. 17, & not a mixed contract for the carriage as well as sale, though the price was enhanced by the carriage ; & deft.’s having appointed the particular boat, & having desired T. to inspect the loading, did not amount to an acceptance on his part.—ASTLEY *v.* EMERY (1815), 4 M. & S. 262 ; 105 E. R. 831.

**69.** — *—*—*—*—Declaration stated that deft., on July 22, 1831, was indebted to pltf. in £703 for goods sold, & that, in consideration thereof, & that pltf. would buy wool of him, to the value of £531, & would give him time for payment of the £703 till Oct. 25, 1834, deft., on July 22, promised to pay pltf. for the wool & for the goods

#### PART II. SECT. 4, SUB-SECT. 2.

**b. Release of existing debt.**—An agreement to transfer goods above the value of £10 in return for the release of an existing debt is within Stat. Frauds, s. 17, & Lord Tenterden’s Act, & must therefore be evidenced by

*Sect. 4.—Contracts for £10 or upwards: Sub sects. 2, 3 & 4, A.]*

previously sold, by accepting a bill at three months from July 22, when requested; that pltf. sold deft. the wool on the above terms, consented to give time, etc., & drew a bill for the aggregate amount due; that he requested deft. to pay him the amount by accepting such bill, but that deft. would not pay same by accepting the bill, or otherwise. Pleas: Stating facts which rendered the contract as to the wool void under Stat. Frauds, s. 17. That pltf. sold the wool with a warranty, which he broke, & deft. returned the wool. General demurrer:—*Held*: the special contract failing as to the £531, the whole failed, & consequently the pleas were a complete answer to the action.—*HEAD v. BALDREY* (1837), 6 Ad. & El. 459; 2 Nev. & P. K. B. 217; Will. Woll. & Dav. 464; 7 L. J. Q. B. 94; 112 E. R. 175.

*Annotations*:—*Mentl. Mechelen v. Wallace* (1837), 7 Ad. & El. 49; *Lang v. Purves* (1862), 15 Moo. P. C. C. 359.

**70.** ———.]—A contract for the sale of goods of the value of £10 or upwards is not the less within Stat. Frauds, s. 17, because it also embraces something to which Stat. Frauds does not extend.

Where it was agreed by parol, between A. & B., that A. should sell B. a mare & foal, & should at his own expense keep them until a certain day, & that A. should also for a given time keep & feed a mare & foal belonging to B., & that, in consideration of all this, B. should fetch away A.'s mare & foal on the day named, & pay him £30:—*Held*: this, so far as it related to the sale of A.'s mare & foal, was a contract within Stat. Frauds, s. 17, & void for want of writing—no point having been made at the trial as to the value.—*HARMAN v. REEVE* (1856), 18 C. B. 587; 25 L. J. C. P. 257; 27 L. T. O. S. 172; 4 W. R. 599; 139 E. R. 1500.

*Annotation*:—*Consd. Savage v. Canning* (1867), 16 W. R. 133.

**71.** ——— *Severable contract.*]—The traveller of A. & co. in London, having called upon B. in the country for orders, B. gave an absolute order for a quantity of cream of tartar, & offered to take a quantity of lac dye at a certain price; the traveller said the price was too low, but that he would write to his principals, & if B. did not hear from them in one or two days, he might consider that his offer was accepted. A. & co. never wrote to B., but sent all the goods:—*Held*: this was not a joint order for them all so as to make the acceptance of the cream of tartar the acceptance of the lac dye also, within Stat. Frauds, s. 17.—*PRICE v. LEA* (1823), 1 B. & C. 156; 2 Dow. & Ry. K. B. 295; 107 E. R. 59.

*Annotation*:—*Refd. Elliott v. Thomas* (1837), 3 M. & W. 170.

**72.** ———.]—*MAYFIELD v. WADSLEY*, No. 210, *post*.

**73.** Entire contract for sale of quantity of goods—Each under ten pounds.]—A. went to the shop of B. & co., linendrapers, & contracted for the purchase of various articles, each of which was under the value of £10, but the whole amounted

to £70. A separate price for each article was agreed upon; some A. marked with a pencil, others were measured in his presence, & others he assisted to cut from larger bulks. He then desired that an account of the whole might be sent to his house, & went away. A bill of parcels was accordingly sent, together with the goods, when A. refused to accept them:—*Held*: (1) this was all one contract, & within Stat. Frauds, s. 17; (2) there was no delivery & acceptance of any of the goods so as to take the case out of the operation of Stat. Frauds, s. 17.—*BALDEY v. PARKER* (1823), 2 B. & C. 37; 3 Dow. & Ry. K. B. 220; 1 L. J. O. S. K. B. 229; 107 E. R. 297.

*Annotations*:—*As to* (1) *Apld. Bigg v. Whisking* (1853), 14 C. B. 195. *Refd. Elliott v. Thomas* (1837), 3 M. & W. 170; *Franklyn v. Lamond* (1847), 4 C. B. 637; *Sarl v. Bourdillon* (1856), 1 C. B. N. S. 188; *Bailey v. Sweeting* (1861), 9 C. B. N. S. 843. *As to* (2) *Distd. Cusack v. Robinson* (1861), 1 B. & S. 299. *Refd. Maberley v. Sheppard* (1833), 10 Bing. 99; *Saunders v. Topp* (1849), 4 Exch. 390.

**74.** ——— *Bought in different places.*]—A. & B. went, in one day, to several places, distant a few miles from each other, where they agreed for the purchase & sale of several lots of timber; & at the last place, a memorandum of the whole transaction was made & signed by A. Part of the timber was accepted by B., but he refused to take the rest:—*Held*: the whole formed one joint contract.—*BIGG v. WHISKING* (1853), 14 C. B. 195; 2 C. L. R. 617; 139 E. R. 80.

*Annotation*:—*Refd. Bailey v. Sweeting* (1861), 9 C. B. N. S. 843.

**75.** Contract for redelivery on condition.]—*WILLIAMS v. BURGESS*, No. 162, *post*.

**76.** Goods reduced below ten pounds by credit.]—Where a bill for £10 10s. was delivered to deft., & in the bill credit is given for £1 & deft. admits that it is correct, this admission is sufficient to take the case out of Stat. Frauds.—*DANVERS v. KITCHINGMAN* (1848), 10 L. T. O. S. 348.

**77.** Contract to paint picture.]—*COPLAND v. MILLER* (1903), *Times*, Nov. 28.

SUB-SECT. 3.—EFFECT OF STATUTE OF  
FRAUDS, s. 4.

*See Stat. Frauds, s. 4.*

**78.** Contract for sale of goods & interest in land.]

—Bill for specific performance of an agreement for the sale of lands & chattels. Plea, Stat. Frauds. Deft. during the negotiation, delivered a particular of the whole signed by him. The agreement was afterwards made at a less price. Both parties gave instructions to an attorney to prepare the conveyance; & deft. delivered to him the particular, as instructions for the deed, which was prepared. This is not sufficient to take it out of the statute, & being void as to the lands, is void *in toto*.—*COOKE v. TOMBS* (1794), 2 Anst. 420; 145 E. R. 922.

*Annotations*:—*Apld. Lea v. Barber* (1794), 2 Anst. 425 a. *Refd. Wood v. Benson* (1831), 2 Cr. & J. 94.

**79.** ———.]—*LEA v. BARBER* (1794), 2 Anst. 425, n.; 145 E. R. 924.

*Annotation*:—*Refd. Wood v. Benson* (1831), 2 Cr. & J. 94.

11 C. L. 146.—IR.

*d. Contract for sale not to be performed within a year.*]—*BANKS v. WILLIAMS* (1912), 12 S. R. N. S. W. 382; 29 N. S. W. W. N. 95.—AUS.

*e. ———.*]—Pltf. agreed with deft. for the purchase of a piano at a certain price, & upon certain terms of payment, deft. agreeing to guarantee that the instrument was then free from defect, & should so continue for five years; & that in case of its becoming defective

written signed by the person to be charged.—*SANDS v. NORMAN* (1903), 4 S. R. N. S. W. 234; 21 N. S. W. W. N. 89.—AUS.

*c. Judicial sales.*]—Judicial sales are not within Stat. Frauds.—*Re JONES, HACKETT v. THE BLAKELEY* (1903), 8 Exch. C. R. 327.—CAN.

PART II. SECT. 4, SUB-SECT. 3.

**78i.** Contract for sale of goods & interest in land.]—Pltf., tenant

from year to year of deft. of a plot of ground & a cottage built on it, agreed to surrender the premises in consideration of being permitted to pull down the cottage & hold the materials for his own use, or of being paid the value of the materials; upon the faith of which pltf. surrendered the premises to deft. —*Held*: the agreement required to be in writing, under Stat. Frauds, although the interest in land moved, not to, but from pltf.—*RONAYNE v. SHERRARD* (1877), 1. R.

80. —.]—Counts in *indebitatus assumpsit* for houses bargained & sold, & for carcases bargained & sold, can only be supported by proof of a written assignment to deft., within Stat. Frauds. —PENNINGTON v. STATMAN (1825), 3 L. J. O. S. K. B. 220.

81. —.]—(1) In *assumpsit*, the first count recited an agreement that pltf. should grant, & deft. take, a lease of lands; & that all straw, etc., which should be on the lands when possession was given up to deft., should be valued to pltf. by persons named respectively by pltf. & deft., & the amount paid to pltf. by deft.; that, on the execution of the lease, deft. should accept it, & execute a counterpart; & that either party, making default in performance, should forfeit £300; mutual promises to perform the agreement; that deft. entered under the agreement, & took possession of the straw, etc.; that afterwards deft. proposed that the straw, etc., should be valued to pltf. by D., on the respective behalves of pltf. & deft.; that pltf. assented; that the straw, etc., was valued to pltf. by D.; that pltf. was ready to grant the lease according to the agreement, but deft. did not pay the amount of the valuation. Second count for goods bargained & sold & taken by deft. under such bargain & sale. Plea to the first count, that the first agreement was in writing, signed by pltf. & deft.; & the proposal & assent that D. should value, only verbal. To the second count, that the goods consisted of straw, etc., which were bargained & sold under a written agreement between pltf. & deft., according to which they were to be valued by persons chosen respectively, by pltf. & deft.; & that no such valuation had been made, but only a valuation by D.; that deft. was ready, & had proposed, that they should be valued as in the agreement; but pltf. refused.

Replication, (a) to the plea to the first count, that, by the proposal & assent, & the valuation accordingly made, pltf. & deft. respectively waived performance of so much of the agreement as related to the valuation, & substituted the valuation by D.; (b) to the plea to the second count, that the straw, etc., was bargained & sold under the agreement in the first count mentioned; that afterwards deft. proposed, etc., as in first count, & pltf. assented, & D. valued accordingly; by means of which pltf. & deft. waived, etc., as in the replication to the plea to the first count. Rejoinder, to replication (a) that the waiver & substitution were by word of mouth only. To replication (b) that the proposal & assent were by word of mouth only. On general demurrer to the rejoinder:—*Held*: the original was an entire agreement relating to an interest in lands, & necessarily in writing; even if the parties could waive the whole verbally, they appeared by the record not to have done so; & that a part of it could not be verbally waived, even supposing that part to have been, if standing by itself, an agreement not required to be in writing.

(2) The plea commenced by a general allegation that pltf. ought not to have or maintain his afore-

said action thereof against deft.; then followed matter expressly confined to the first count, with a verification & prayer of judgment whether the pltf. ought to have or maintain his aforesaid action thereof. The record then went on thus: & as to the second count, etc., with matter expressly confined to the second count, & verification & prayer of judgment, as before:—*Held*: the first part was a plea pleaded to the first count only, though informally, & was good on demurrer to the rejoinder.—HARVEY v. GRABHAM (1836), 5 Ad. & El. 61; 2 Har. & W. 146; 6 Nev. & M. K. B. 754; 5 L. J. K. B. 235; 111 E. R. 1089.

*Annotations*:—As to (1) *Reid*, Sanderson v. Graves (1875), L. R. 10 Exch. 234. *Generally*, *Reid*, Mechelen v. Wallace (1837), 7 Ad. & El. 49; Thames Haven Dock Co. v. Brynner (1850), 5 Exch. 696.

82. —.]—Pltf. agreed to let a house to deft., & to sell him certain furniture & fixtures therein, & to make certain alterations & improvements in the house; & deft. agreed to take the house, & to pay for the furniture & fixtures & alterations:—*Held*: this was an agreement relating to an interest in land, within Stat. Frauds, s. 4.—VAUGHAN v. HANCOCK (1846), 3 C. B. 766; 16 L. J. C. P. 1; 8 L. T. O. S. 118; 10 Jur. 926; 136 E. R. 307.

83. —.]—In consideration that A., who was tenant of a messuage & premises under a parol agreement for a seven years' lease, would give up the immediate possession thereof to B., in order that B. might enter thereon as tenant, & also as a compensation for certain improvements made by A. on the premises, & for the value of certain articles left thereon by A., B. agreed to pay A. £100. A. accordingly relinquished & gave up possession of the premises to B., who was thereupon accepted as tenant from year to year, at a different rent from that formerly paid by A.; & B. afterwards, in part performance of the agreement on his part, paid A. £51. In an action brought by A., in the county ct., to recover the balance of the £100 the judge ruled that the contract in respect of which pltf. sued was not a contract for the sale of an interest in or concerning lands, within Stat. Frauds, s. 4. The ct. on appeal reversed his decision.—KELLY v. WEBSTER (1852), 12 C. B. 283; 21 L. J. C. P. 163; 19 L. T. O. S. 298; 16 J. P. 458; 16 Jur. 838; 138 E. R. 912.

*Annotation*:—*Reid*, Hodgson v. Johnson (1858), E. B. & E. 685.

As to what constitutes an "interest in land," see SALE OF LAND.

Contract for sale of growing crops, etc.]—See AGRICULTURE, Vol. II., pp. 52 *et seq.*

Contract for sale not to be performed within a year.]—See CONTRACT, Vol. XII., pp. 118–125, Nos. 768–828.

#### SUB-SECT. 4.—ACCEPTANCE.

##### A. In General.

See Sale of Goods Act, 1893 (c. 71), s. 4 (3).

84. Necessity for.]—In *assumpsit* for goods sold & delivered, where the price is above £10 &

within that period deft. would upon pltf. returning it within that time, refund the purchase-money:—*Held*: a contract not to be performed within a year.—NICHOLLS v. NORDHEIMER (1871), 22 C. P. 48.—CAN.

1. —Regiment to be supplied with groceries.]—A contract, not in writing, entered into on May 26 for the supply of a regiment with groceries for a year from June 1, following, subject to be sooner determined in case

the regiment should leave the Province, is void under Stat. Frauds.—REID v. HARDING (1870), 2 Han. 137.—CAN.

g. Approved notes required by the vendor.—No proper note left with vendor.]—The conditions of sale required approved notes for the purchase-money. The morning after the sale the purchaser called on the seller & drew a note signed by himself only for the goods he said he had purchased. A dispute arose as to the goods to which he was entitled, & he went away

leaving the note. Some days after he returned & offered another note with sureties, which was refused & the seller on the same day sent back the first note:—*Held*: clearly insufficient to take the case out of Stat. Frauds.—KAITLING v. PARKIN (1874), 23 C. P. 569.—CAN.

#### PART II. SECT. 4, SUB-SECT. 4.—A.

84i. Necessity for.]—A mere delivery of goods by the vendor, without



**Sect. 4.—Contracts for £10 or upwards: Sub-sect. 4, A. & B. (a).]**

nothing was paid as earnest to bind the bargain, nor was there any memorandum in writing, signed by deft. or his agent; two things must be proved to entitle pltf. to recover: (a) that deft. in fact ordered the goods; & (b) that he accepted them with an intent to take to them as owner.—*SMITH v. ROLT* (1840), 9 C. & P. 696, N. P.

85. —[In order to satisfy Stat. Frauds, s. 17, there must be both an acceptance of the goods, or part of them, & an actual receipt of them. In order to satisfy the same enactment it is not necessary that the acceptance of the goods should follow or be contemporaneous with the receipt of them; an acceptance prior to the receipt will suffice. In an action for goods sold & delivered, it appeared that deft. went to pltf's. at Liverpool, & said he wanted to buy from 150 to 200 firkins of butter. He then went with one of them to their cellar, where he was shown a lot of 156 firkins, six of which he opened & inspected. Afterwards, on the same day, pltf's. & deft. made a verbal agreement, by which deft. agreed to buy that specific lot at 77s. per hundredweight. When the price had been agreed on, deft. took a card on which his name & address in London were written "Edmund Robinson, 1, Wellington Street, London Bridge, London," & wrote on it "156 firkins butter to be delivered at Fenning's Wharf, Tooley Street." He gave this to pltf's., & at the same time said that his agents, Messrs. C., at Liverpool, would give directions how the goods were to be forwarded to Fenning's Wharf. Pltf's., by C.'s directions, delivered the butter to P.'s car's to be forwarded to deft. at Fenning's Wharf. Pltf. sent an invoice, dated Oct. 25, 1860, to the address on deft.'s card. He received in answer a letter purporting to come from a clerk in deft.'s office, acknowledging the receipt of the invoice, & stating that, on deft.'s return, he would no doubt attend to it. A clerk at Fenning's Wharf proved that Messrs. Fennings stored goods for their customers, & had a butter warehouse; that deft. had used the warehouse for fifteen years, & was in the habit of keeping his butters there till he sold them. On Oct. 26 P. & co. had delivered a part of the 156 firkins in question at the warehouse, & delivered the residue afterwards. The witness could not say whether any one came to inspect them or not, but he proved that they were delivered up by Fenning to P. & co. under a delivery order from deft., dated Oct. 27:—*Held*: there was evidence of an acceptance & actual receipt sufficient to satisfy the statute.—*CUSACK v. ROBINSON* (1861), 1 B. & S. 299; 30 L. J. Q. B. 261; 4 L. T. 506; 7 Jur. N. S. 542; 9 W. R. 735; 121 E. R. 726.

*Annotations*:—*Refd.* Bog Lead Mining Co. v. Montague (1861), 10 C. B. N. S. 481; Williamson v. Barton (1862), 7 H. & N. 899; Smith v. Hudson (1865), 6 B. & S. 431; Bolton v. L. & Y. Ry. (1866), L. R. 1 C. P. 431; Reuss v. Pickles (1866), L. R. 1 Exch. 342; Kibble v. Gough (1878), 38 L. T. 204; *Re* Roberts, Evans v. Roberts (1887), 36 Ch. D. 196.

86. —[In order to satisfy Stat. Frauds there must be an acceptance & actual receipt of the goods, or part of them, with the consent of the vendor, & if before such acceptance the vendor rescinds the contract, the assignees of the buyer in the case of his bkpey. cannot claim them.

*Semble*: if the assignees do any act to accept the goods it will take the case out of the statute.

Deft., on Nov. 3, 1863, entered into a verbal contract with W. to sell him 48½ quarters of

barley, at 35s. per quarter. The sale was by sample, & the bulk was taken, on Nov. 7, by deft. to the Swaffham railway station & left there, with a delivery note: "Great Eastern Railway: To the station master, Swanham Station. Receive 97 coombs of barley, consigned to the order of Mr. W., of D., from T. M. H., Castle Acre, charges." It is the custom of the trade for the buyer to compare the sample with the bulk as delivered, & if the examination is not satisfactory to strike it, i.e. either refuse to accept it or allow it to remain as the property of the vendor; & it was in the power of W. to strike the corn if it had not proved according to sample. On Nov. 9 W. was adjudicated a bkpt., & on Nov. 11 deft. gave notice to the station master not to deliver the corn to bkpt. or his assignees, or any other person, without his written consent, which the station master promised. At the time of the notice bkpt. had given no order or direction respecting the corn, nor had he examined it to see whether the bulk corresponded with the sample, nor had he given any notice to deft. that he accepted or declined it. On Dec. 1 the assignees of W. claimed the corn; on Dec. 5 the railway co., on an indemnity from deft., delivered it to him. In an action by the assignees to recover the value of the corn:—*Held*: there was no acceptance sufficient to satisfy Stat. Frauds.—*SMITH v. HUDSON* (1865), 6 B. & S. 431; 6 New Rep. 103; 34 L. J. Q. B. 145; 12 L. T. 377; 11 Jur. N. S. 622; 13 W. R. 683; 122 E. R. 1254.

*Annotations*:—*Refd.* *Re* Bell, *Ex p.* Clarke (1877), 47 L. J. Bcy. 33; Taylor v. Smith, [1893] 2 Q. B. 65; *Re* Watson, *Ex p.* Atkin, [1904] 2 K. B. 753; Lamb v. Wright, [1924] 1 K. B. 857.

87. **Must be clear & unequivocal—Constructive acceptance not sufficient—In absence of express provision.**—*HANSON v. ARMITAGE*, No. 185, *post*.

88. —[The acceptance of goods by the buyer, if they are above £10 value, & there has been no written memorandum of the contract, under Stat. Frauds, must be clear & unequivocal; & the ct. will not allow a constructive acceptance to be sufficient.—*NICHOLLE v. PLUME* (1824), 1 C. & P. 272; 171 E. R. 1192.

*Annotations*:—*Refd.* Edan v. Duffield (1841), 1 Q. B. 302; Bushel v. Wheeler (1844), 15 Q. B. 442, n.

89. **Terms need not be proved.**—*TOMKINSON v. STAIGHT*, No. 157, *post*.

90. **Nature & effect of acceptance—Buyer not precluded from questioning quantity or quality.**—

The acceptance & actual receipt of goods, which make a written memorandum unnecessary under Stat. Frauds, s. 17, are not such an acceptance & receipt as will preclude the purchaser from questioning the quantity or quality of the goods, or in any way disputing the fact of the performance of the contract by the vendor. The effect of such statutory acceptance & receipt is merely to dispense with the necessity of a written memorandum of the contract. Deft. purchased wheat of pltf. by sample, & directed that the bulk should be delivered on the next morning to a carrier named by himself, who was to convey it to the market town of W.; & deft. himself took the sample away with him. On the following morning the bulk was delivered to the carrier; & deft. resold it at W. on that day by the same sample. The carrier conveyed the wheat, by order of deft., who had never seen it, to the sub-vendee, who rejected it as not corresponding with the sample; & deft., on notice of this, repudiated his contract with pltf. on the same ground:—*Held*: there was evidence

an actual acceptance by the vendee of some part thereof, is not sufficient within Stat. Frauds.—*DALEY v. MARKS*

(1838), Ber. 524.—*CAN.*

84 ii. —[—*JACKSON v. BANK OF NOVA SCOTIA* (1893), 9 Man. L. R.

75.—*CAN.*

84 iii. —[—*WINGFIELD v. STEWART* (1909), 7 E. L. R. 511.—*CAN.*

to warrant a jury in finding acceptance & actual receipt by deft., within Stat. Frauds, s. 17.

The acceptance to let in parol evidence of the contract appears to us to be a different acceptance from that which affords conclusive evidence of the contract having been fulfilled (LORD CAMPBELL, C.J.).—MORTON v. TIBBETT (1850), 15 Q. B. 428; 19 L. J. Q. B. 382; 15 L. T. O. S. 274; 14 Jur. 669; 117 E. R. 520.

*Annotations*.—**Consd.** Hunt v. Hecht (1853), 8 Exch. 814. **Expld.** Coombs v. Bristol & Exeter Ry. (1858), 3 H. & N. 510. **Apprvd.** Currie v. Anderson (1860), 2 E. & E. 592. **Consd.** Castle v. Sworder (1861), 6 H. & N. 828; Watson v. Hodgson (1876), 40 J. P. 487. **Apprvd.** Kibble v. Gough (1878), 38 L. T. 204. **Distd.** Taylor v. Smith, [1893] 2 Q. B. 65. **Refd.** Duncan v. Tindall (1853), 13 C. B. 258; Meredith v. Meigh (1853), 2 E. & B. 364; Holmes v. Hoskins (1854), 2 W. R. 376; Parker v. Wallis (1855), 5 E. & B. 21; Tomkinson v. Staught (1856), 17 C. B. 697; Hart v. Bush (1858), E. B. & E. 494; Cusack v. Robinson (1861), 1 B. & S. 299; Smith v. Hudson (1865), 6 B. & S. 431; Grimoldby v. Wells (1875), L. R. 10 C. P. 391; Page v. Morgan (1885), 15 Q. B. D. 228.

**91. Right of buyer to examine goods delivered.]**

—BOWES v. PONTIFEX, No. 92, *post*.

**Admissibility of parol evidence after acceptance.]**  
—See Sub-sect. 9, *post*.

### B. What may amount to.

#### (a) In General.

See Sale of Goods Act, 1893 (c. 71), s. 4 (3).

**92. General rule—Any act recognising contract.]**—On a contract for goods within Stat. Frauds, the acceptance, to satisfy the statute, must be by some act or conduct on the part of the buyer, indicating an intention to retain the goods, or such as reasonably would lead the seller to think they are accepted, & this may be by retention of them for such a time as reasonably might lead to that conclusion.

There was a later case [Hunt v. Hecht, No. 119, *post*.], in which it was held that there was no acceptance unless there had been a reasonable opportunity to the buyer of seeing that the article delivered was such as had been ordered (BRAMWELL, B.).—BOWES v. PONTIFEX (1863), 3 F. & F. 739, N. P.

**93. ———.]**—BARNETT v. FARLEY, No. 122, *post*.

**94. ———.]**—It is not necessary in order to satisfy Stat. Frauds, s. 17, that there should be an absolute acceptance of goods; there is sufficient evidence of an acceptance of goods within the sect. where upon delivery of the goods the purchaser has received them & done any act in relation thereto recognising the existence of a contract for the purchase of them by him, though he subsequently refuses the goods. So, where there was a sale of wheat by sample, & the purchaser having received a number of sacks of wheat delivered under the contract into his premises, opened the sacks & examined their contents to see if they were equal to sample, but immediately after so doing gave notice to the seller that he refused the wheat as not being equal to sample.—**Held**: that there was evidence of an acceptance.—PAGE v. MORGAN (1885), 15 Q. B. D. 228; 54 L. J. Q. B. 434; 53 L. T. 126; 33 W. R. 793, C. A.

*Annotations*.—**Distd.** Taylor v. Smith, [1893] 2 Q. B. 65. **Refd.** Abbott v. Wolsey (1895), 64 L. J. Q. B. 587.

### PART II. SECT. 4, SUB-SECT. 4.— B. (a).

**h. Receipt & retention of goods.]**—Where there is no sufficient memorandum of the bargain for the sale of goods, the mere receipt & retention of the goods for a few days, by the purchaser, is evidence upon which a jury may find that the purchaser accepted them.—SERVICE v. WALKER (1877), 3 V. L. R. (Law) 182.—AUS.

**k. Machinery stopped in transitu.]**—Where a purchase was made on behalf of a co. of certain machinery of which delivery was to be taken where it lay & part was removed by a carrier on behalf of the co. but was stopped in transitu.—**Held**: this did not show an acceptance within Stat. Frauds so as to render a note in writing unnecessary.—MOLVER v. DUKE CO. (1879), 5 V. L. R. 449.—AUS.

**95. ———.]**—ABBOTT & CO. v. WOLSEY, No. 116, *post*.

**96. Question for jury.]**—By the conditions of a sale by auction, the purchaser was to pay 30 per cent. upon the price, upon being declared the highest bidder, & the residue before the goods were removed. A lot was knocked down to A., as the highest bidder, & delivered to him immediately. After it had remained in his hands three or four minutes, he stated that he had been mistaken in the price, & refused to keep it. No part of the price had been paid.—**Held**: it was a question of fact for the jury, whether there had been a delivery by the seller, & an actual acceptance by the buyer intended by both parties to have the effect of transferring the right of possession from one to the other.—PHILLIPS v. BISTOLLI (1824), 2 B. & C. 511; 3 Dow. & Ry. K. B. 822; 2 L. J. O. S. K. B. 116; 107 E. R. 474.

*Annotations*.—**Distd.** Tomkinson v. Staught (1856), 17 C. B. 697. **Refd.** Maberley v. Sheppard (1833), 10 Bing. 99; Malins v. Freeman (1838), 6 Scott, 187.

**97. ———.]**—In an action for the price of a fire engine sold by pltf. to deft., deft. pleaded Stat. Frauds, & pltf. replied, that deft. had accepted the goods. It appeared that deft., after the sale of the fire engine to him by pltf., had taken a person to look at it, & had mentioned who were likely to want to buy it, & that to another person deft. said, "I know that I am going to do it," & that to a third he said, "I have a concern in the engine":—**Held**: it was for the jury to consider on this evidence, whether deft. had treated the fire engine as his, & dealt with it as such, for, if so, pltf. was entitled to a verdict.—BAINES v. JEVONS (1836), 7 C. & P. 288, N. P.

**98. ———.]**—W., living at Hereford ordered goods, at a price above £10, of A., living at Bristol, & directed that they should be sent by the "Hereford" sloop to Hereford. They were sent accordingly; & a letter of advice was also sent to W., with an invoice, stating the credit to be three months. On their arrival at Hereford, they were placed in the warehouse of the owner of the sloop, where W. saw them; & he then said to the warehouseman that he would not take them; but he made no communication to A. till the end of five months, when he repudiated the goods. In an action by A. against W. for the price.—**Held**: the judge ought not to have told the jury that there was no acceptance & actual receipt under Stat. Frauds, s. 17, but should have left them to find, upon these facts, whether or not there had been such acceptance & actual receipt.—BUSHEL v. WHEELER (1844), 15 Q. B. 442, n.; 3 L. T. O. S. 125; 8 Jur. 532; 117 E. R. 526.

*Annotations*.—**Distd.** Norman v. Phillips (1845), 14 M. & W. 277. **Apd.** Morton v. Tibbett (1850), 15 Q. B. 428. **Consd.** Meredith v. Meigh (1853), 2 E. & B. 364; Castle v. Sworder (1861), 6 H. & N. 828. **Refd.** Taylor v. Smith, [1893] 2 Q. B. 65.

**99. ———.]**—Acceptance a question for the jury upon the evidence.—HARRISON v. BISHTON (1855), 25 L. T. O. S. 257.

**100. ———.]**—Action for goods bargained & sold, above the value of £10. The evidence was, that the contract was not in writing, that the goods were weighed by defts.' servant subsequent to the

**l. Qualified acceptance.]**—CARTER v. BINGHAM (1872), 32 U. C. R. 615.—CAN.

**m. Correspondence showing definite acceptance.]**—McGRATH v. BLACK (N. S.) (1909), 6 E. L. R. 501.—CAN.

**n. Goods & invoice sent together—Invoice returned not corresponding with agreement.]**—Deft., an Irish tradesman,

*Sect. 4.—Contracts for £10 or upwards: Sub-sect. 4, B. (a), (b) & (c).]*

contract, & placed with defts.' cart, but on arriving at defts.' warehouse were refused:—*Held*: it was for the jury to decide in what character the goods were delivered to & accepted by defts.' servant; & there was evidence of an acceptance & delivery to satisfy Stat. Frauds.—*KERSHAW v. OGDEN* (1865), 3 H. & C. 717; 6 New Rep. 125; 34 L. J. Ex. 159; 12 L. T. 575; 11 Jur. N. S. 642; 13 W. R. 755; 159 E. R. 713.

**101. Acceptance of delivery order.]**—A hogshead of wine in the warehouse of the London Dock co. was sold for £13, & a delivery order given to the vendee. There was no contract in writing:—*Held*: the acceptance of the delivery order by the vendee was not an actual acceptance of the wine within Stat. Frauds.—*BENTALL v. BURN* (1824), 3 B. & C. 423; 5 Dow. & Ry. K. B. 284; 3 L. J. O. S. K. B. 42; 107 E. R. 791.

*Annotations*:—*Folld. Farina v. Home* (1846), 16 M. & W. 119. *Refd.* *Dublin City Distillery v. Doherty*, [1914] A. C. 823.

**102. —.]**—Goods were shipped by pltf. from abroad to this country, on the verbal order of deft., at a price exceeding £10. They were sent to a shipping agent of pltf.'s in London, who received them & warehoused them with a wharfinger, informing deft. of their arrival. The wharfinger handed to the shipping agent a delivery warrant, whereby the goods were made deliverable to him to his assignees by indorsement, on payment of rent & charges. The agent indorsed & delivered this warrant to deft., who kept it for several months, & notwithstanding repeated applications, did not pay the price of or charges upon the goods, nor return the warrant, but said he had sent it to his solr., & that he intended to resist payment, for that he had never ordered the goods; & that they would remain for the present in bond:—*Held*: there was no such delivery to & acceptance by deft. of the goods, as to satisfy Stat. Frauds, s. 17.—*FARINA v. HOME* (1846), 16 M. & W. 119; 16 L. J. Ex. 73; 8 L. T. O. S. 277; 153 E. R. 1124.

*Annotations*:—*Consd.* *Saunders v. Topp* (1849), 4 Exch. 390. *Apld.* *Meredith v. Meigh* (1853), 2 E. & B. 364. *Consd.* *Castle v. Swarder* (1861), 6 H. & N. 828. *Refd.* *Knights v. Wiffen* (1870), L. R. 5 Q. B. 660; *Dublin City Distillery v. Doherty*, [1914] A. C. 823.

**103. Acceptance by assignees in bankruptcy.]**—Goods were sent to a trader on a contract of sale & return, within Stat. Frauds, & he having become bkpt. before the delivery of them, they were received & detained by his assignees; the vendor thereupon brought an action of trover, to which the assignees pleaded that the goods were bargained & sold before the bkpcy.:—*Held*: there was no acceptance to support a bargain & sale, & the property in the goods did not pass to the assignees.—*SADLER v. WHITMORE* (1840), 5 Jur. 315.

**104. —.]**—*SMITH v. HUDSON*, No. 86, *ante*.

**105. Receipt & retainer of invoice.]**—Deft., a builder at Wallingford, gave pltf., a timber merchant in London, a verbal order for timber, directing it to be sent to the Paddington station of the G. W. Ry. co., to be forwarded to him at Wallingford, as had been the practice between the parties on previous dealings between them. The timber was accordingly sent, & arrived at the Wallingford station on Apr. 19, & deft. was informed by the railway clerk of its arrival, upon which he said he would not take it. An invoice

was sent a few days after, which deft. received & kept, without making any communication to pltf. himself until May 28, when he informed pltf. that he declined taking the timber:—*Held*: although there might be a scintilla of evidence for the jury of an acceptance of the timber within Stat. Frauds, yet there was not sufficient to warrant them in finding that there was such an acceptance; & the ct. set aside a verdict found for pltf. as not warranted by the evidence.—*NORMAN v. PHILLIPS* (1845), 14 M. & W. 277; 14 L. J. Ex. 306; 9 Jur. 832; 153 E. R. 481.

*Annotations*:—*Distd.* *Saunders v. Topp* (1849), 4 Exch. 390. *Consd.* *Morton v. Tibbett* (1850), 15 Q. B. 428; *Coombs v. Bristol & Exeter Ry.* (1858), 3 H. & N. 510. *Refd.* *Hunt v. Hecht* (1853), 8 Exch. 814; *Castle v. Swarder* (1861), 4 L. T. 865; *Taylor v. Smith*, [1893] 2 Q. B. 65.

**106. —.]**—*HART v. BUSH*, No. 188, *post*.

*(b) Acceptance of Sample.*

**107. Sample part of bulk.]**—Sugars, which were in the King's warehouse under the locks of the King & the owner, from whence they could not be removed till the duties were paid, were advertised for sale by auction on Sept. 20, when samples of half a pound weight from each hogshead, drawn after the sugars had been weighed & the duties ascertained at the King's beam, were produced to the bidders assembled; & the auctioneer, having then before him the printed catalogue of sale, containing the lots, marks, & number of hogsheads, & the gross weights of the sugars; & also another written paper containing the conditions of sale, which latter he read to the bidders, as the conditions on which the sugars mentioned in the catalogue were to be sold; but the two papers were neither externally annexed nor contained any internal reference to each other, wrote down on the catalogue the name of the highest bidder, & the sum bid for the particular lots: having first informed the bidders that the duties were not then paid, but would be paid on the morrow by the seller; & after the biddings closed, the samples were delivered to & accepted by the purchaser, according to the usual practice at such sales, as part of his purchase to make up the quantity marked as weighed at the King's beam; & a fire having consumed the sugars on Sept. 22, before the duties could be paid, & without the default of the seller:—*Held*: (1) at common law there was a sale to change the property at the time & place of auction; though the goods could not be delivered till the duties were paid, which was known at the time; such being the manifest intent of the contracting parties; & consequently, the loss must fall upon the buyer; (2) assuming a sale of goods by auction to be within Stat. Frauds, s. 17, which whether it were or not was not now necessary to be decided, & therefore requiring to be evidenced by a memorandum in writing of the bargain signed by the party to be charged, or his authorised agent, except where the buyer shall receive part of the goods sold; yet here the delivery to & acceptance of the samples by the buyer; which delivery was made as part of the thing purchased, & upon which the duties were paid; at any rate, took the case out of the statute; (3) *semble*: taking sales of goods by auction to be within Stat. Frauds, s. 17, the auctioneer or broker, who is a middle man, must be taken to be the agent of both parties, so as to bind the purchaser by his signature.

gave a verbal order for goods to pltf., who carried on business in England, & the goods were sent by the route agreed upon by the parties. The invoice was forwarded at the same time,

but was immediately returned by deft., with a letter stating that it did not correspond with the agreement, & notifying his refusal to take the goods:—*Held*: there was no evidence of any

receipt & acceptance of the goods by deft., & an action against him for the price could not be maintained.—*HOPKIN v. MCCARTHY* (1882), 10 L. R. Ir. 266.—*IR*.

After earnest given, the vendor cannot sell the goods to another without a default in the vendee (LORD ELLENBOROUGH, C.J.).—*HINDE v. WHITEHOUSE* (1806), 7 East, 558; 3 Smith, K. B. 528; 103 E. R. 216.

*Annotations*.—As to (1) *Apld.* Carruthers v. Payne (1828), 5 Bing. 270. *Consd.* Sparta v. Benecke (1850), 10 C. B. 212. *Apld.* Furley v. Bates (1863), 33 L. J. Ex. 43. *Refd.* Alexander v. Gardner (1835), 1 Bing. N. C. 671. As to (2) *Apld.* Kenworthy v. Schofield (1824), 2 B. & C. 945. *Consd.* Turley v. Bates (1863), 2 H. & C. 200; *Sweeting v. Turner* (1871), L. R. 7 Q. B. 310. As to (3) *Refd.* Emmerson v. Heells (1809), 2 Taunt. 38. *Generally, Refd.* Dickenson v. Liliwal (1815), 1 Stark. 128; North Staffordshire Ry. v. Peek (1860), E. B. & E. 988; *Pelce v. Corf* (1874), L. R. 9 Q. B. 210; *Rossiter v. Miller* (1878), 39 L. T. 173; *Oliver v. Hunting* (1890), 44 Ch. D. 205.

108. —.]—The delivery of a sample, which is no part of the thing sold, will not take a sale out of Stat. Frauds, but if the sample be delivered as part of the bulk, it then binds the contract.—*TALVER v. WEST* (1816), Holt, N. P. 178; 171 E. R. 205, N. P.

109. —.]—*EVANS v. GARDNER* (1850), 15 L. T. O. S. 274, n.

*Annotation*.—*Refd.* Morton v. Tebbutt (1850), 15 L. T. O. S. 274.

110. —.]—Pltf. sold to deft. a stack of hay standing on pltf.'s land; at the time of the sale deft. took from the bulk about a pound weight as a sample:—*Held*: there was a delivery & acceptance of part to satisfy the Stat. Frauds.—*WARD v. ALDRIDGE* (1854), 22 L. T. O. S. 228; 18 J. P. 57.

111. —.]—Where goods are sold by sample, the handing over the samples to the buyer does not, in the absence of evidence of an usage or custom to the contrary, amount to a delivery & acceptance of a part of the thing sold, so as to take the case out of Stat. Frauds, s. 17, but it is otherwise where the buyer draws samples from the bulk after he has purchased the goods.—*GARDNER v. GROUT* (1857), 2 C. B. N. S. 340; 29 L. T. O. S. 110; 140 E. R. 448.

112. — Retention without objection.]—A. bought a certain quantity of wheat, in value above £10, which wheat was to be reduced to a certain standard by dressing. After the making of the contract, A. sent for a small portion of the wheat, which was then sent to him, but not dressed, whereby it fell short of the standard agreed upon, but he retained it, without objecting to it:—*Held*: this was a part acceptance within Stat. Frauds; & retaining the portion so sent amounted to a waiver of the full performance of the contract by pltf. as to that portion.—*GILLIAT v. ROBERTS* (1850), 19 L. J. Ex. 410.

113. Sample not part of bulk.]—*TALVER v. WEST*, No. 108, *ante*.

114. — Asked for after sale—Prices written on labels.]—*SIMONDS v. FISHER* (1857), cited in 2 C. B. N. S. at p. 342; 140 E. R. 449.

*Annotation*.—*Distd.* Gardner v. GROUT (1857), 2 C. B. N. S. 340.

115. — Sale by sample.]—*GARDNER v. GROUT*, No. 111, *ante*.

116. —.]—Where goods sold were delivered to the buyer, who took a sample from them, & after examining it, said that the goods were not equal to his sample, & that he would not have them:—*Held*: there was evidence of an act done by him in relation to the goods which recognised a pre-existing contract of sale, & therefore, evidence of an acceptance within Sale of Goods Act, 1893 (c. 71), s. 4.—*ABBOTT & CO. v. WOLSEY*, [1895] 2 Q. B. 97; 64 L. J. Q. B. 587; 72 L. T. 581; 59

J. P. 500; 43 W. R. 513; 11 T. L. R. 414; 39 Sol. Jo. 502; 14 R. 455, C. A.

Sale by sample.]—See Part III., Sect. 6, *post*.

### (c) Inspection.

117. Inspection followed by rejection.]—A. having sent to B. a bale of sponge under a verbal order from the latter, for which he charged 11s. per pound; B. returned it, & at the same time wrote a letter to A. stating that he had examined the sponge, & finding that it was not worth more than 6s. per pound he had sent it back:—*Held*: this letter did not amount to such an acceptance of the goods as would take the case out of Stat. Frauds.—*KENT v. HUSKINSON* (1802), 3 Bos. & P. 233; 127 E. R. 128.

*Annotations*.—*Distd.* Anderson v. Hodgson (1818), 5 Price, 630; *Jackson v. Lowe* (1822), 7 Moore, C. P. 219.

118. —.]—Where a vendee verbally agreed, at a public market, with the agent of the vendor to purchase 12 bushels of tares, then in vendor's possession, constituting part of a larger quantity in bulk, to remain in vendor's possession till called for, & the agent, on his return home, measured the 12 bushels, & set them apart for the vendor:—*Held*: this did not amount to an acceptance by the latter, so as to take the case out of Stat. Frauds, s. 17.—*HOWE v. PALMER* (1820), 3 B. & Ald. 321; 106 E. R. 680.

*Annotations*.—*Apld.* Hanson v. Armitage (1822), 5 B. & Ald. 557. *Consd.* Smith v. Surman (1829), 4 Man. & Ry. K. B. 455. *Apld.* Johnson v. Dodgson (1837), 2 M. & W. 653. *Distd.* Pettitt v. Mitchell (1842), 4 Man. & G. 819. *Consd.* Norman v. Phillips (1845), 9 Jur. 832. *Expld.* Morton v. Tibbett (1850), 15 Q. B. 428. *Refd.* Bushel v. Wheeler (1844), 8 Jur. 532.

119. —.]—There can be no acceptance & actual receipt of goods within Stat. Frauds, s. 17, unless the vendee has had an opportunity of judging whether the goods sent correspond with the order.

Where deft. agreed to purchase of pltf. bones of a particular kind, to be separated from a heap of various bones, & gave pltf. a note addressed to a wharfinger to receive & ship the bones; & pltf. accordingly sent to the wharf some bones, which, on inspection, deft. refused to accept, on the ground that they were not what he bargained for:—*Held*: although there was a receipt, there was no acceptance to satisfy Stat. Frauds.—*HUNT v. HECHT* (1853), 8 Exch. 814; 1 C. L. R. 506; 22 L. J. Ex. 293; 21 L. T. O. S. 158; 155 E. R. 1583.

*Annotations*.—*Consd.* Coombs v. Bristol & Exeter Ry. (1858), 3 H. & N. 510. *Apld.* Bowes v. Pontifex (1863), 3 F. & F. 739; *Smith v. Hudson* (1865), 6 B. & S. 431. *Refd.* Holmes v. Hoskins (1854), 9 Exch. 753; *Castle v. Swarder* (1860), 5 H. & N. 281; *Taylor v. Smith*, [1893] 2 Q. B. 65.

120. —.]—A verbal contract was made for the purchase of 20 coombs of turnip seed on June 21, 1854. On July 26 it was delivered at defts.' premises. Defts., always repudiated the goods, alleging the seed to be hot & mouldy; but they had spread it out in their premises, alleging that this was done by pltf.'s authority:—*Held*: as on the trial pltf. denied this authority, & as the seed was shown to be of good quality, there was evidence to go to the jury of an acceptance & receipt by defts. so as to satisfy Stat. Frauds.—*PARKER v. WALLIS* (1855), 5 E. & B. 21; 3 W. R. 417; 119 E. R. 390.

*Annotation*.—*Apld.* Castle v. Swarder (1860), 29 L. J. Ex. 235.

121. —.]—P. purchased of deft. by sample, some wheat, to be delivered in London: the contract not being in writing. Deft. sent the wheat, by

### PART II. SECT. 4, SUB-SECT. 4.—B. (c).

o. Whether taking of samples from cargo.]—*SCOTT v. MELADY* (1898), 27 A. R. 193.—CAN.

p. Examination of goods on arrival.]—*STEINE v. KORBIN* (1909), 9 W. L. R. 670; 2 Sask. L. R. 6.—CAN.

*Sect. 4.—Contracts for £10 or upwards: Sub-sect. 4, B. (c) & (d).]*

railway, to the London station of the railway co., consigned to P., & informed him of such consignment. The co. warehoused the wheat, gave notice to P., & entered the wheat in their books as "from" deft. "to P." The usual course of business of the co., in warehousing corn, is to keep it for fourteen days free of charge, after which time it is removed by the consignee or delivered to him by the co. at his expense. It is also the custom for the consignee, before finally accepting the corn, to take a bulk sample & compare it with the purchase sample. The day after the arrival of the wheat, P. sent for a bulk sample: he examined it the next day, & said "do not work it," i.e. do not bring it home, "at present." Afterwards, on the same day, P., being in difficulties, sent to his creditors to call a meeting of them for the next day but one. Deft. & other creditors attended on that day. Deft. asked for an order for the wheat, which P. would have given, but for the other creditors, who interfered. Deft. then went to the railway station stopped the wheat, & directed the co. to hold it to his order. On an issue to try whether the wheat was the property of P.'s assignees or of deft. :—*Held*: assuming the *transitus* to have been at an end on the arrival of the wheat at the co.'s warehouse, there was no acceptance of the wheat by P. within Stat. Frauds, s. 17, & the property never vested in P.—*NICHOLSON v. BOWER* (1858), 1 E. & E. 172; 28 L. J. Q. B. 97; 5 Jur. N. S. 246; 120 E. R. 873.

*Annotations*:—*Consd.* Cusack v. Robinson (1861), 1 B. & S. 299. *Expld.* Taylor v. G. E. Ry., [1907] 1 K. B. 774.

122. —.]—Deft., a builder, being employed by K., for whom he had built a house, to fit it up & furnish it, verbally ordered some settees to be made for one of the rooms by pltf. at a price agreed on at the time of the order. Upon their being brought home deft. before they were taken from the cart, remarked that the legs were not so stout as he had ordered, & said, "I wish they had been stouter legs." Pltf., however, said they were according to order. Nothing further then passed on the subject, & deft. assisted pltf. in taking them from the cart & placing them in the room. After they were placed, K. came in, & objected that they were not wide enough in the seat, & thereupon deft. asked pltf. if they could be altered to meet K.'s wishes, to which pltf. replied he would consider, & let deft. know to-morrow what could be done. A day or two afterwards he told deft. they could not be altered on account of the expense, whereupon deft. refused to pay for them :—*Held*: there was no evidence for the jury, in an action by pltf. for goods sold & delivered, of an acceptance by receipt of the goods by deft. to satisfy Stat. Frauds, & a nonsuit was rightly directed.

It is not necessary, in order to satisfy Stat. Frauds, that there should be such an acceptance as would preclude a purchaser from making a subsequent complaint; but there must be such an acceptance as to show his recognition of a compulsion to take the articles delivered to him under a contract for the sale of them (*BRAMWELL, B.*).—*BARNETT v. FARLEY* (1864), 4 New Rep. 113; 11 L. T. 107; 12 W. R. 748.

123. —.]—Pltf. verbally sold to deft. 6 bales of wool. On July 31, the goods were sent off by pltf., & delivered at a railway station, & were received there & taken to his own premises by deft., who then unpacked the wool, & wrote the same day to pltf. stating that two of the bales were inferior to sample, & adding, "Please say what is to be done in the matter." Pltf. replied

by a letter of Aug. 1, denying that the bales were not equal to sample. On Aug. 4, deft., who had been from home since Aug. 1, returned, & having seen pltf.'s letter, sent the goods back to the railway station, & telegraphed to pltf. refusing to accept them. Between July 31 & Aug. 4, deft. offered the goods for sale in the market, stating, however, according to his own evidence, that he had not accepted the goods, & that he would have to make other arrangements before he could sell. Pltf. having brought his action to recover the price of the goods from deft., the jury at the trial found that two of the bales were not equal to sample, & the judge thereupon directed a verdict, & gave judgment for deft. :—*Held*: judgment was rightly entered for deft., as there was no evidence of a sufficient acceptance & receipt of the goods, within Stat. Frauds, s. 17, to take the case out of Stat. Frauds; & deft.'s conduct had not precluded him from rejecting the goods as not equal to sample.—*RICKARD v. MOORE* (1878), 38 L. T. 841, C. A.

*Annotation*:—*Consd.* Page v. Morgan (1885), 15 Q. B. D. 228.

124. —.]—Deft. verbally agreed to purchase a specific quantity of barley from pltf., on the terms that the bulk should be well dressed & equal to sample. Pltf., accordingly delivered an instalment of the barley to deft., whose foreman received it & gave a receipt marked "not equal to sample." Next morning deft. himself inspected the bulk, & wrote immediately to pltf. refusing to accept on the ground that the barley was not well dressed nor equal to sample. In an action by pltf. for goods sold & delivered to deft. :—*Held*: there was evidence for the jury of an acceptance sufficient to satisfy Stat. Frauds, s. 17.

The object of the statute is that, where there was no contract in writing, there must be some overt act to render the bargain binding. . . . The ct. will look at parol evidence of a contract when the statute is satisfied (*COTTON, L.J.*).—*KIBBLE v. GOUGH* (1878), 38 L. T. 204, C. A.

*Annotations*:—*Distd.* Rickard v. Moore (1878), 38 L. T. 841. *Appld.* Page v. Morgan (1885), 15 Q. B. D. 228. *Refd.* Perkins v. Bell (1892), 61 L. J. Q. B. 589; Taylor v. Smith, [1893] 2 Q. B. 65.

125. —.]—*PAGE v. MORGAN*, No. 94, *ante*.

126. —.]—*TAYLOR v. SMITH*, No. 225, *post*.

127. —.]—*ABBOTT & Co. v. WOLSEY*, No. 116, *ante*.

128. *Inspection coupled with express approval.*—Deft. verbally agreed to buy some sheep, which he selected from pltf.'s flock, & directed them to be sent to a field of his, which was accordingly done. Two days afterwards he sent his man to remove the sheep from the field to his farm, which was some miles distant, & on their arrival he counted them over, & said, "It is all right" :—*Held*: (1) this was evidence for the jury of his acceptance of the sheep, so as to satisfy Stat. Frauds, notwithstanding he afterwards repudiated the purchase, & sent the sheep back to pltf.; (2) *qu.*: whether under the statute, there can be an acceptance before delivery.—*SAUNDERS v. TOPP* (1849), 4 Exch. 390; 18 L. J. Ex. 374; 154 E. R. 1264.

*Annotation*:—*As to* (2) *Consd.* Cusack v. Robinson (1861), 1 B. & S. 299.

129. *Comparison with sample & adjustment of allowance.*—Hops were sold by sample, & before prompt day, the buyer's foreman attended at the warehouse of the seller's factors to see them weighed, compared each pocket with the sample, & adjusted allowances on some which he objected to :—*Held*: this was a sufficient acceptance to satisfy Stat. Frauds, s. 17.—*SIMMONDS v. HUMBLE*



(1862), 13 C. B. N. S. 258; 1 New Rep. 27; 9 L. T. 168; 143 E. R. 103.

(d) *Acts of Ownership in relation to Goods.*

**130. Resale—Resale of part.**—After a bargain & sale of a stack of hay between the parties on the spot, evidence that the vendee actually sold part of it to another person, by whom, though against the vendee's approbation, it was taken away, is sufficient to warrant the jury in finding a delivery to & acceptance by the vendee, thereby taking the case out of Stat. Frauds.—*CHAPLIN v. ROGERS* (1800), 1 East, 192; 102 E. R. 75.

*Annotations*:—*Consd.* *Blenkinsop v. Clayton* (1817), 7 Taunt. 597. *Distd.* *Howe v. Palmer* (1820), 3 B. & Ald. 321. *Consd.* *Morton v. Tibbett* (1850), 15 Q. B. 428. *Apld.* *Marshall v. Green* (1875), 1 C. P. D. 35. *Refd.* *Smith v. Surman* (1829), 9 B. & C. 561; *Maberley v. Sheppard* (1833), 10 Bing. 99; *Edan v. Duffield* (1841), 5 Jur. 317; *Rawlinson v. Mort* (1905), 93 L. T. 555. *Mentd.* *Hilton v. Tucker* (1888), 57 L. J. Ch. 973.

**131. — Resale of whole.**—By party already in possession.]—Where one person being in possession of goods belonging to another agrees by parol to become the purchaser of them, his subsequent acts may amount to proof of an acceptance, so as to satisfy Stat. Frauds.

Pltf. was the owner of some goods lying in bond, & entered in the name of deft., a custom house agent. Pltf. being indebted to deft. gave him a written authority to sell the goods, & pay himself out of the proceeds. Deft. not having sold them, subsequently agreed by parol to purchase them, & he then sold them, & credited pltf. with their value:—*Held*: this was evidence of an acceptance of the goods by deft.—*EDAN v. DUFFIELD* (1841), 1 Q. B. 302; 4 Per. & Dav. 656; 5 Jur. 317; 113 E. R. 1147.

*Annotations*:—*Distd.* *Lillywhite v. Devereux* (1846), 15 M. & W. 285. *Refd.* *Taylor v. Wakefield* (1856), 6 E. & B. 765.

**132. — — — — —**.]—*MORTON v. TIBBETT*, No. 90, ante.

**133. Marking goods.**—*BALDEY v. PARKER*, No. 73, ante.

**134. — — — — —**.]—If the purchaser of goods, at the time of the sale, write his name upon a particular article, with intent to denote that he has purchased it, & to appropriate it to his own use, this is enough to take the sale, as to the article written upon, out of Stat. Frauds, but not as to other articles bought at the same time.—*HODGSON v. LE BRET* (1808), 1 Camp. 233; 170 E. R. 941, N. P.

*Annotations*:—*Expld.* *Boulter v. Arnott* (1833), 2 L. J. Ex. 97. *Dtd.* *Elliott v. Thomas* (1837), 3 M. & W. 170. *Consd.* *Saunders v. Topp* (1849), 4 Exch. 390. *Apld.* *Marshall v. Green* (1875), 45 L. J. Q. B. 153.

**135. — — — — —**.]—*ANDERSON v. SCOT* (1808), 1 Camp. 235, n.; 170 E. R. 941, N. P.

*Annotations*:—*N.F.* *Proctor v. Jones* (1826), 2 C. & P. 532. *Distd.* *Boulter v. Arnott* (1833), 3 Tyr. 267. *Dtd.* *Saunders v. Topp* (1849), 4 Exch. 390. *Refd.* *Marshall v. Green* (1875), 45 L. J. Q. B. 153.

**136. — — — — —**.]—The marking, by the vendor, of casks of wine lying in the docks with the initials of the purchaser, at his request, & in his presence, the terms of payment not having been settled at the time, & consequently the contract not being complete, is not an acceptance under Stat. Frauds, s. 17.—*PROCTOR v. JONES* (1826), 2 C. & P. 532; 172 E. R. 241.

**137. — — — — —**.]—Deft. ordered goods of H., the *del credere* agent of pltf., at a stipulated price, to be paid for on delivery; & on receiving notice that the goods had arrived at H.'s warehouse,

went there, & directed a boy whom he saw there to put a certain mark on the goods. On deft.'s refusal to receive the goods by reason of a dispute about the price, an action was commenced against him by pltf.; after which, at H.'s request, deft. wrote in H.'s ledger, at the bottom of a page, containing the statement of the goods in question & headed with pltf.'s name, the words "Received the above," which he signed:—*Held*: there was no evidence to go to the jury of a delivery & acceptance, sufficient to satisfy Stat. Frauds.—*BILL v. BAMENT* (1841), 9 M. & W. 36; 11 L. J. Ex. 81; 152 E. R. 16.

*Annotations*:—*Distd.* *Acraman v. Morrice* (1849), 8 C. B. 449. *Refd.* *Farina v. Home* (1846), 16 L. J. Ex. 73; *Bailey v. Sweeting* (1861), 9 C. B. N. S. 843. *Mentd.* *Hamilton v. Terry* (1852), 11 C. B. 954; *Williams v. Wheeler* (1860), 8 C. B. N. S. 299; *Gibson v. Holland* (1865), L. R. 1 C. P. 1; *Lucas v. Dixon* (1889), 22 Q. B. D. 357; *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360.

**138. Measuring & cutting timber.**—A., by parol, sold to B. the timber of certain growing trees, at a price exceeding £10. B. gave directions for cutting the trees, & offered to sell the butts to C., the person who had measured them, but this not being acceded to, B. asked him if he knew any person who wanted any butts. A., by letter, required B. to pay for the timber. B., by letter, answered that he had bought the timber, but that it was conditioned to be sound, & was not so. In *assumpsit* for the price of the timber:—*Held*: (1) there was a contract for the sale of goods within Stat. Frauds, s. 17; (2) there was no part acceptance, or actual receipt, of the goods by the buyer.—*SMITH v. SURMAN* (1829), 9 B. & C. 561; 4 Man. & Ry. K. B. 455; 7 L. J. O. S. K. B. 296; 109 E. R. 209.

*Annotations*:—*As to* (1) *Refd.* *Bailey v. Sweeting* (1861), 30 L. J. C. P. 150. *As to* (2) *Consd.* *Morton v. Tibbett* (1850), 15 Q. B. 428. *Refd.* *Wright v. Percival* (1839), 8 L. J. Q. B. 258. *Generally, Refd.* *Marshall v. Green* (1875), 1 C. P. D. 35. *Mentd.* *Falmouth v. Thomas* (1832), 1 Cr. & M. 89; *Shelton v. Livius* (1832), 2 Tyr. 420; *R. v. Hockworthy* (1838), 7 L. J. M. C. 24; *Rodwell v. Phillip* (1842), 9 M. & W. 501; *Washbourn v. Burrows* (1847), 1 Exch. 107; *Haughton v. Morton* (1855), 27 L. T. O. S. 36; *Wilkinson v. Evans* (1866), L. R. 1 C. P. 407.

**139. Employment of third person to complete unfinished article.**—Deft. employed pltf. to construct a waggon, & while the vehicle was in pltf.'s yard unfinished, procured a third person to fix on the ironwork & a tilt:—*Held*: this did not constitute an acceptance under Stat. Frauds, s. 17.—*MABERLEY v. SHEPPARD* (1833), 10 Bing. 99; 3 Moo. & S. 436; 2 L. J. C. P. 181; 131 E. R. 843.

*Annotations*:—*Refd.* *Edan v. Duffield* (1841), 1 Q. B. 302; *Rushel v. Wheeler* (1844), 15 Q. B. 442; *Acraman v. Morrice* (1849), 19 L. J. C. P. 57.

**140. Ordering employment of horses & servants for carriage.**—Deft. having agreed to buy a carriage of pltf.s, came after it was finished to pltf.s' manufactory, bringing with her a cover for the hind seat, & a set of traces, which the carriage had been previously made to fit. One of pltf.s. said the carriage was complete; deft. got into it, & said it was a very nice one. Deft. then desired pltf.s. to order post horses to take it home, stating, that she would call at 4.30 p.m.; she added, that she had brought a cover to put over the hind seat, & directed that it should be put over twice doubled. The cover was accordingly put over the seat in her presence & agreeably to her directions. The afternoon having proved wet, at 5 p.m. deft. came to pltf.s., & stated her intention, owing to the badness of the weather, not to take the carriage home that evening. Deft. afterwards refused to pay the



*Sect. 4.—Contracts for £10 or upwards: Sub-sect. 4, B. (d), (e), (f) & (g), & C.; sub-sect. 5, A.]*

price demanded by plffs., & did not take the carriage away:—*Held*: these facts constituted a sufficient acceptance to satisfy Stat. Frauds.—*WRIGHT v. PERCIVAL* (1839), 8 L. J. Q. B. 258; 3 Jur. 1145.

141. —[—A. agreed to purchase of B. a carriage, then standing in the shop of B., A. at the same time desiring that certain alterations might be made in it. The alterations having been made, the carriage was, at A.'s request, placed in the back shop. On Saturday, Nov. 14, A. called at the shop, & requested B. to hire a horse & man for him, & to send the carriage to his house on the following day, in order that he might take a drive in it, A. having previously intimated his intention to take the carriage out a few times, in order that, as he was going to take it abroad, it might pass the custom house as a second hand carriage. The carriage was accordingly sent to & used by A. on the Sunday, A. paying for the hire of the horse & man. A. afterwards refused to take or to pay for the carriage:—*Held*: there was a sufficient acceptance of the carriage by A. before Sunday, Nov. 15, within Stat. Frauds, s. 17, to entitle pltf. to recover upon a count for goods bargained & sold.—*BEAUMONT v. BRENGERI* (1847), 5 C. B. 301; 10 L. T. O. S. 227; 136 E. R. 893.

*Annotations:—Refd. Marvin v. Wallace* (1856), 2 Jur. N. S. 689; *Cusack v. Robinson* (1861), 1 B. & S. 299.

142. *Removal of goods to third party's warehouse.*—[Deft., having bargained with pltf. for the purchase of wool from pltf. at a certain price, removed it to a warehouse, used by deft. for that purpose, but belonging to a third party; there the wool was weighed & packed in sheeting of deft.'s. The course of dealing was that the wool remained on these premises till paid for. The wool in question was not removed or paid for:—*Held*: there was a sufficient delivery & acceptance of the goods, within Stat. Frauds, s. 17, to ground an action for goods sold & delivered, though pltf. retained a special interest in them, not properly a lien, in respect of the understood engagement not to remove them till paid for.—*DODSLEY v. VARLEY* (1840), 12 Ad. & El. 632; Arn. & H. 128; 4 Per. & Dav. 448; 5 Jur. 316; 113 E. R. 954.

*Annotations:—Refd. Bushel v. Wheeler* (1844), 15 Q. B. 442. *Mentd. Dyer v. Cowley* (1848), 12 Jur. 776.

143. —[—*CUSACK v. ROBINSON*, No. 85, *ante*.

144. *Ordering alterations to articles.*—[Where a party deals with an article, which he has ordered, to which nothing remains to be done to make it complete, as by directing a different lining to be placed in a cloak, this is exercising such a dominion over the article as constitutes an acceptance within Stat. Frauds.—*BAX v. BEETHAM* (1844), 4 L. T. O. S. 112.

145. *Continued use by buyer of goods already in his possession—Not amounting to sale or alteration.*—[A., being himself yearly tenant of a house to B., underlet the house & furniture at a weekly rent to C. A. being desirous of getting rid of his tenancy at the end of the current year, offered to sell the furniture to C. for £50; which C. thought too much, but verbally agreed to have it valued, & to pay so much as it should be found worth, on B.'s agreeing, to accept him as his tenant instead of A. The furniture was valued at £80, which C. refused to give, but then offered the £50. Before the expiration of the year, an agent of A.

took the key out of the door & gave it to C., telling him that he must settle with A. himself about the furniture. B. refused to accept C. as his tenant, & he continued to occupy the house & use the furniture as before, but continually giving notice to A. to take away the furniture, which he refused to do; & after the lapse of three months, C. sent it to a broker's:—*Held*: upon these facts, there was no evidence to go to the jury of an acceptance by C. of the furniture, under a contract of sale, to satisfy Stat. Frauds.—*LILLYWHITE v. DEVEREUX* (1846), 15 M. & W. 285; 6 L. T. O. S. 103; 153 E. R. 857.

146. — *Use referable to agreement for joint use.*—[*HAZARD v. CHEW* (1894), 11 T. L. R. 37.

147. *Dealing with bill of lading.*—[Deft. verbally ordered of plffs. at Liverpool stores above the price of £10 for his ship *Phoenix*, to be sent by steamer to Constantinople. Plffs. selected the stores, & sent them to the steamer, together with two barrels of flour belonging to deft., which he had sent to their warehouses to be so dealt with. Deft. directed plffs. to make out the bill of lading for the stores as shipped in their name, & deliverable to Messrs. H. & co. at Constantinople, assigning as a reason that plffs. were known to them. The bill of lading was so made out for the whole, including the flour, & the freight paid by plffs. Three days after, on Oct. 16, 1855, deft. repaid them the freight, & the bill of lading was handed to him; he forwarded it to his captain, but it was delayed in reaching him. On receiving it, in Mar. 1856, the captain searched for the stores at Constantinople, but they were not to be found. On Nov. 6, 1856, deft. sent the bill of lading to plffs., with a letter, saying, "I inclose the bill of lading for stores sent out to the *Phoenix*. Please see after them. I think the master of the steamer must account for them." In an action to recover the price of the stores:—*Held*: there was ample evidence of an acceptance & actual receipt by deft., within Stat. Frauds, s. 17.—*CURRIE v. ANDERSON* (1860), 2 El. & E. 592; 29 L. J. Q. B. 87; 6 Jur. N. S. 442; 8 W. R. 274; 121 E. R. 223.

*Annotation:—Refd. Kibble v. Gough* (1878), 38 L. T. 204.

#### (c) *Acceptance of Part.*

148. *Whether an acceptance—Severable contract.*—[*PRICE v. LEA*, No. 71, *ante*.

149. — *Condition annexed to part.*—[In a negotiation by letter for the sale of two [A. & B.] sets of goods, a condition was imposed with respect to A. set. That condition was not acceded to by letter. Subsequently a parol contract was made, dispensing with the condition. B. set of goods to the sale of which no condition was annexed was delivered; a few days after A. set was delivered, but was returned & repudiated:—*Held*: under the Stat. Frauds, there was neither written contract of sale nor part acceptance & delivery in respect of A. set.—*HOLDERNESS v. BASS* (1850), 16 L. T. O. S. 210.

150. — *Several classes of goods.*—[Where a joint order is given for several classes of goods, the acceptance of one class is a part acceptance of the whole, within Stat. Frauds, s. 17.

*Semble*: if the purchaser of goods has used, in the opinion of the jury, more of them than was necessary for experiments, that does not amount to an acceptance within the statute.—*ELLIOTT v.*

#### PART II. SECT. 4, SUB-SECT. 4.— B. (e)

148 i. *Whether an acceptance—Severable contract.*—[*CONNACHER v. PARLEE*

(1885), 24 N. B. R. 586.—*CAN.*

148 ii. —[—*SLOBODIAN v. KNIGHT*, [1921] 3 W. W. R. 399.—*CAN.*

a. *Contract for manufacture & sale*

*of hundred chucks—Delivery of nine chucks amounts to acceptance.*—[*PETRIE v. RAB* (1919), 46 O. L. R. 19; 16 O. W. N. 311.—*CAN.*

THOMAS (1838), 3 M. & W. 170; 1 Horn & H. 38; 7 L. J. Ex. 129; 150 E. R. 1102.

*Annotations*.—*Apld.* Biggs v. Whisking (1853), 14 C. B. 195. Ex. 110. *Refd.*

151. — **Ready made & future goods.**—Where an order is given for goods, some of which are ready made at the time of the contract, & the rest are to be manufactured according to order, & the goods which are ready made are afterwards delivered & paid for, the acceptance of them is a part acceptance of the whole, to satisfy the provisions of Stat. Frauds, s. 17, & Statute of Frauds Amendment Act, 1828 (c. 14), s. 7, as the whole forms one entire contract.—SCOTT v. EASTERN COUNTIES RY. CO. (1843), 12 M. & W. 33; 13 L. J. Ex. 14; 2 L. T. O. S. 102; 7 Jur. 996; 152 E. R. 1100.

*Annotations*.—*Consd.* Biggs v. Whisking (1853), 2 C. L. R. 617. *Apld.* Union Bank of London v. Lenanton (1878), 47 L. J. Q. B. 408. *Refd.* Sari v. Bourdillon (1856), 2 Jur. N. S. 1208.

152. — *GEDDIS v. STAPLETON* (1844), 3 L. T. O. S. 78.

153. — **Entire contract.**—*Deft.* verbally agreed to purchase of *pltf.* sixty Stilton cheeses, & directed thirty to be sent to the warehouse of A. for another person, & thirty to the warehouse of B. for himself. The cheeses were delivered accordingly on Oct. 28, & those sent to the warehouse of A. were kept & resold to a third person; but about Nov. 20 the other parcel of cheeses was returned to *pltf.* as damaged:—*Held*: the contract for the sixty cheeses was one entire contract, & the acceptance of the thirty delivered at the warehouse of A. was a sufficient acceptance to satisfy Stat. Frauds.—MITCHELL v. KING (1846), 7 L. T. O. S. 527.

154. — **Parol evidence of contract.**—MORTON v. TIBBETT, No. 90, *ante*.

#### (f) Retention by Buyer.

155. **General rule.**—BOWES v. PONTIFEX, No. 92, *ante*.

156. **Goods sent subject to approval—Effect of delay in return.**—A party to whom goods to the amount of £10 & upwards are delivered, subject to approval under a parol order, must refuse to accept them in a reasonable time; if he does not, he is to be treated as having accepted them.—COLEMAN v. GIBSON (1832), 1 Mood. & R. 168, N. P.

157. **Goods treated as security for debt.**—In order to take a case out of Stat. Frauds, s. 17, it is only necessary to prove the broad fact of acceptance to enable the vendor to lay the terms of the contract before the jury, & it is not necessary to prove upon what terms the goods were accepted.

A. sold a pianoforte to B. for £15 10s., & delivered it at B.'s shop. B. kept it, but refused to pay for it, alleging that it was delivered upon an agreement that it should remain as security for the payment of certain outstanding bills which he had discounted for A. In an action for the price of the pianoforte:—*Held*: there was a sufficient acceptance within Stat. Frauds; & parol evidence was admissible to show the terms of the bargain.

Acceptance . . . only establishes the broad fact of the relation of vendor & vendee (WILLIAMS, J.).—TOMKINSON v. STAIGHT (1856), 17 C. B. 697;

25 L. J. C. P. 85; 26 L. T. O. S. 221; 2 Jur. N. S. 354; 4 W. R. 299; 139 E. R. 1250.

#### (g) Retention by Seller.

See Sub-sect. 5, B. (b), *post*.

#### C. Time for Acceptance.

158. **May be after action brought.**—Under a plea of *nunquam indebitatus* in debt for goods bargained & sold, it is open to *deft.* to take the objection that the contract is void by Stat. Frauds, s. 17. But, *semble*: the objection is answered by showing an acceptance & actual receipt of part of the goods after action brought.—FRICKER v. THOMLINSON (1840), 1 Man. & G. 772; 133 E. R. 543.

*Annotations*.—*Consd.* Lucas v. Dixon (1889), 22 Q. B. D. 357. *Refd.* Gibson v. Holland (1865), 13 L. T. 293.

159. **Whether acceptance can be before delivery.**—SAUNDERS v. TOPP, No. 128, *ante*.

160. — *CUSACK v. ROBINSON* No. 85, *ante*.

161. **Must be before disclaimer by seller.**—It was verbally agreed, between the owner of goods & a person who was in possession of those goods as his tenant, that the tenant might, if he pleased, at the termination of his tenancy, purchase the goods for a sum exceeding £10, but was not to take them till the money was paid. At the expiration of the tenancy the buyer tendered the price; but it was refused by the vendor, who denied the validity of the bargain. After this the buyer proceeded to take away the goods; the vendor prevented him, & took possession of them. In an action of trover by the buyer against the vendor:—*Held*: on these facts there was no evidence to go to the jury of an acceptance & actual receipt to bind the bargain; as at the time when the buyer took to the goods as owner the parol contract had been already disaffirmed by the vendor; *semble*: if the buyer had been authorised by the contract to take the goods as owner, & had, without any fresh authority from the vendor, taken to them as owner before the contract was disaffirmed, it would have bound the contract, not only in favour of the vendor, but also in favour of the buyer.—TAYLOR v. WAKEFIELD (1856), 6 E. & B. 765; 27 L. T. O. S. 185; 2 Jur. N. S. 1086; 119 E. R. 1049.

*Annotations*.—*Distd.* Bailey v. Sweeting (1861), 9 C. B. N. S. 843. *Refd.* Smith v. Hudson (1865), 6 B. & S. 431.

#### SUB-SECT. 5.—ACTUAL RECEIPT.

##### A. In General.

162. **Effect of actual receipt—Contract with condition for resale.**—*Pltf.* entered into a parol agreement to sell to *deft.* a mare for £20 subject to the condition that, if it should prove to be in foal *deft.* should, on receiving £12 from *pltf.*, return it on request. *Pltf.* delivered the mare & received £20. On its proving to be in foal, he tendered to *deft.* £12 & requested him to return the mare which *deft.* refused to do:—*Held*: the contract to return it on payment of £12, was not a distinct contract of sale, but one of condition of the original sale to *deft.*; & the delivery of the mare to *deft.* took the whole agreement out of Stat. Frauds, s. 17, so

#### PART II. SECT. 4, SUB-SECT. 4.—B. (f).

b. *For unreasonable time.*—PART-  
RIDGE & CO. (N.Z.), LTD. v. BIGNELL  
& HOLMES, BIGNELL & HOLMES v.  
PARTIDGE & CO. (N.Z.), LTD., [1924]  
N. Z. L. R. 769.—N.Z.

#### PART II. SECT. 4, SUB-SECT.

c. *Within stipulated time.*—METROPOLITAN ENGINEERING WORKS v. DEBRUNNER (1917), 1 L. R. 45 Cal. 481.—IND.

#### PART II. SECT. 4, SUB-SECT. 5.—A.

d. *Effect of actual receipt.*—After

delivery of the logs to *deft.* he cannot object in an action for breach of the agreement in not paying a sum of money to a creditor of *pltf.* in consideration of getting the logs, that the contract is void under Stat. Frauds, not being in writing.—DOLLARD v. POTTS (1866), 6 All. 443.—CAN.

**Sect. 4.—Contracts for £10 or upwards: Sub-sect. 5, A. & B. (a) & (b).]**

as to enable *pltf.* to sue *deft.* for the refusal to return it.—*WILLIAMS v. BURGESS* (1839), 10 Ad. & El. 499; 2 Per. & Dav. 422; 8 L. J. Q. B. 286; 3 Jur. 893; 113 E. R. 189.

**B. What may amount to.**

**(a) In General.**

**163. Question for jury.]—***BLINKINSOP v. CLAYTON*, No. 203, *post*.

**164. —.]—***KERSHAW v. OGDEN*, No. 100, *ante*.

**165. Order to seller's agent to deliver.]—**A written order given by the seller of goods to the buyer, directing the person in whose care the goods are to deliver them, is a sufficient delivery within Stat. Frauds.—*SEARLE v. KEEVES* (1797), 2 Esp. 598; 170 E. R. 468.

**166. Delivery of sample part of bulk.]—**When goods are sold by sample, & the sample delivered is part of the bulk, & the bulk thereby diminished, this is a part delivery within Stat. Frauds.—*KLINITZ v. SURRY* (1805), 5 Esp. 267; 170 E. R. 807.

**Annotations:—***Refd.* *Maclean v. Dunn* (1828), 4 Bing. 722; *Durrell & Evans* (1862), 1 H. & C. 174.

**167. Shipment abroad.]—**(1) Where a party in England refuses to accept goods which he has agreed to buy abroad, the delivery of them abroad, on board a ship chartered by him is not a sufficient delivery to render unnecessary a memorandum of the bargain in writing, as required by Stat. Frauds.

(2) The special count of the declaration stated a contract for goods at the then usual & shipping price at the port of loading. Such count is not supported by the memorandum of an agreement which is silent as to the price altogether. Neither can the count be maintained by the presumption that the law will affix a reasonable price, that is, such a price as the jury, upon the trial of the cause, shall, under all the circumstances, decide to be reasonable, to the commodity where the memorandum is silent as to the price, inasmuch as the then usual & shipping price at the port of loading & the reasonable price affixed by the law, may be totally different.—*ACEBAL v. LEVY* (1834), 10 Bing. 376; 4 Moo. & S. 217; 3 L. J. C. P. 98; 131 E. R. 949.

**Annotations:—***As to* (2) *Apld.* *McCullin v. Gilpin* (1881), 6 Q. B. D. 516. *Refd.* *Goodman v. Griffiths* (1857), 1 H. & N. 574; *Fitzmaurice v. Bayley* (1860), 9 H. L. Cas. 78. *Generally, Refd.* *Lamond v. Devalle* (1847), 16 L. J. Q. B. 136.

**168. Delivery of excess—Refusal to accept—Sample taken.]—**A. gave B. a written order for 10 firkins of butter, which were to be sent to A. by a particular carrier. B. sent by that carrier 12 firkins instead of 10. A. refused to receive more than 10 firkins; & as the carrier would not deliver less than the whole number sent, he refused to take the butter at all. He, however, drew a sample from one of the firkins.—*Held*: under these circumstances, there had been neither an actual nor a constructive delivery of the butter to A., & consequently no acceptance thereof by him, so as to satisfy Stat. Frauds.—*GORMAN v. BODDY* (1845), 2 Car. & Kir. 145.

**169. — Goods retained but no appropriation made.]—**In an action for goods sold & delivered, to recover the price of ten hogsheads of claret, it appeared that *defts.*, having verbally ordered

certain hogsheads of *pltf.* the latter, in Oct., sent them fifteen, whereupon *defts.* by letter, informed *pltf.* that they had requested ten only should be shipped, & that they could take that number only on their proving satisfactory, & that they would hold the other five on *pltf.*'s account. In answer to this, *pltf.* replied by letter, which, after stating that he regretted that any misunderstanding as to *defts.*' order should have taken place; & after stating that other vintages were inferior, & that the wine sent was of superior character concluded thus:—"You will ascertain in the spring whether you have room for it, & you have seen that we are not stringent with old customers as to credit." *Defts.* placed the wine in a bonded warehouse in their own names, & shortly afterwards tasted the wine, & disapproved of it, & gave *pltf.* notice in the early part of April, that they would not take any part of it.—*Held*: (1) supposing there was a written contract by which *defts.* were bound to take ten hogsheads of claret, that contract was not executed, as fifteen & not ten hogsheads had been delivered, & no particular ten had been selected out of the fifteen; & (2) there was no acceptance within Stat. Frauds, s. 17, inasmuch as *defts.* under the contract had the option of rejecting the wine in the spring, & they had availed themselves of that option.—*CUNLIFFE v. HARRISON* (1851), 6 Exch. 903; 20 L. J. Ex. 325; 17 L. T. O. S. 189; 155 E. R. 813.

**Annotations:—***Generally, Refd.* *Levy v. Green* (1859), 1 E. & E. 969; *Boswell v. Kilborn* (1862), 15 Moo. P. C. C. 309.

**170. Potatoes dug by buyer—Part disposed of.]—***Pltf.*, by parol agreed to buy of *deft.* all the potatoes in a certain field of *deft.*'s, at so much a ton, & to dig & remove them at his own expense. He employed & paid labourers to dig them, & sent his own sacks to the field, in which sacks the potatoes, as they were dug, were placed by his men, & the sacks were then carried to another part of the field, & the potatoes there emptied out of them in heaps, or "clamped," on the ground. During the digging, one sackful of the potatoes was, by *pltf.*'s authority, taken by one of the men employed, & consumed by him for food. Before the whole were dug *deft.* refused to complete his contract, or to permit the residue of the potatoes to be dug, or those which had been dug to be removed from his field.—*Held*: there was, on the above state of facts, evidence of a part delivery & acceptance of the goods, to take the case out of Stat. Frauds, s. 17.—*SMITH v. HUDSON* (1863), 8 L. T. 253.

**171. Delivery at railway station—Claim to goods by assignees in bankruptcy.]—***SMITH v. HUDSON*, No. 86, *ante*.

**172. Timber cut by buyer & resold.]—**A sale of growing timber, to be taken away as soon as possible by the purchaser, is not a contract or sale of land, or any interest therein, within Stat. Frauds, s. 4.

*Deft.* by word of mouth purchased certain growing trees for £28 of *pltf.* on the terms that he, *deft.*, should remove them as soon as possible. *Deft.* accordingly cut down some of the trees & agreed to sell the tops & stumps to a third person. *Pltf.* then countermanded the sale, & prohibited *deft.* from cutting down the rest of the trees. *Deft.*, however, cut down the remainder, & carried the whole away.—*Held*: the case was within

1. 4, §1  
B. (a).

**e. General rule.]—**To make a contract for the sale of goods binding by acceptance there must, in addition,

be an actual receipt of all or part of the goods by the purchaser, & there can be no receipt without delivery.—*MAHER v. NEW ZEALAND LOAN & MERCANTILE AGENCY CO., LTD.* (1897), 16 N. Z. L. R. 120.—*N.Z.*

**f. Delivery of part.]—***LEADLAY v. MCROBERTS* (1886), 13 A. R. 378.—*CAN.*

**g. Inspection of lambs.]—***LISTER v. MUNRO*, [1924] N. Z. L. R. 1137.—*N.Z.*

Stat. Frauds, s. 17, & before the sale was countermanded there was an acceptance & actual receipt of part of the goods sold within that sect.—**MARSHALL v. GREEN** (1875), 1 C. P. D. 35; 45 L. J. Q. B. 153; 33 L. T. 404; 24 W. R. 175, D. C.

*Annotations*.—**Consd.** *Lavery v. Pursell* (1888), 39 Ch. D. 508; *Jones v. Tankerville*, [1909] 2 Ch. 440. **Refd.** *Jarvis v. Jarvis* (1893), 63 L. J. Ch. 10; *Stephenson v. Thompson*, [1924] 2 K. B. 240. **Mentd.** *Kauri Timber v. Taxes Comr.*, [1913] A. C. 771.

**173. Goods in possession of sheriff.**—The owner of goods which are in the custody of the sheriff under a *fi. fa.* may make a valid sale & delivery of possession of them to a purchaser.

D., a shipbuilder, being indebted to pltf. in a large sum, as security made an equitable assignment to them, dated May 21, 1875, of all his right & interest in a steamship built for but not delivered to the Turkish Govt., & retained by D. as having a lien on the vessel for its price. D. also agreed to execute any further assurance of the ship to pltf. which they might require. This assignment was not registered under Bills of Sale Act, 1854 (c. 36), nor was the ship registered as a British ship under Merchant Shipping Act, 1854 (c. 104), s. 19. By an agreement, dated June 24, 1876, D. agreed to sell to pltf. certain machinery, fixtures, & loose tools upon his business premises at a valuation, but this agreement was never signed by the parties to it. On July 18, 1876, the sheriff, under an execution issued upon a judgment obtained against D. by a creditor, took possession of the machinery, fixtures, & tools, & also of the steamship. On Aug. 22, pltf., the sheriff's officer being still in possession, under an authority from D. took formal possession of part of the articles comprised in the agreement of June 24, 1876. Deft., having obtained a judgment against D., a writ of *fi. fa.* was issued, & on Sept. 13 a levy on the machinery, fixtures, tools, etc., was made under the writ. On an interpleader issue to try pltf.'s right to the steamship, & to the machinery, etc., as against deft.:—**Held**: pltf. had a good title to the ship, & to the machinery, etc., as against deft., because the possession taken by pltf. on Aug. 22, of the machinery, etc., constituted a sufficient actual acceptance & receipt to take the agreement of May 21 out of Stat. Frauds, s. 17, & the sale by D. to pltf. of the machinery, etc., was valid, notwithstanding they were in the custody of the sheriff when pltf. took possession.—**UNION BANK OF LONDON v. LENANTON** (1878), 3 C. P. D. 243; 47 L. J. Q. B. 409; 38 L. T. 698; 3 Asp. M. L. C. 600, C. A.

*Annotations*.—**Refd.** *The James W. Elwell*, [1921] P. 351. **Mentd.** *Gapp v. Bond* (1887), 19 Q. B. D. 200.

(b) *Goods Remaining in Seller's Possession.*

**174. General rule.**—It is not disputed that if a vendor who has sold goods should, after the sale has been completed, agree with the vendee to retain the physical possession of the goods, but on such terms that the nature & character of his former possession is changed from that of owner to that of bailee for the purchaser, that transaction will amount to an acceptance & actual receipt of the goods within Stat. Frauds, s. 17, & necessarily to a good constructive delivery sufficient to create a pledge (**LORD ATKINSON**).—**DUBLIN CITY DISTILLERY, LTD. v. DOHERTY**, [1914] A. C. 823; 83 L. J. P. C. 205; 111 L. T. 81; 58 Sol. Jo. 413, H. L.

*Annotations*.—**Refd.** *Wrightson v. McArthur & Hutchings*, [1921] 2 K. B. 807. **Mentd.** *Re Allester*, [1922] 2 Ch. 211.

**175. Goods remaining at buyer's request.**—If a man bargains for the purchase of goods, & desires the vendor to keep them in his possession for an especial purpose for the vendee, & the vendor accepts the order, this is a sufficient delivery of the goods within Stat. Frauds. It is no objection to a constructive delivery of goods, that it is made by words, parcel of the parol contract of sale.—**ELMORE v. STONE** (1809), 1 Taunt. 458; 127 E. R. 912.

*Annotations*.—**Distd.** *Howe v. Palmer* (1820), 3 B. & Ald. 321; *Carter v. Toussaint* (1822), 5 B. & Ald. 855. **N.F.** *Proctor v. Jones* (1826), 2 C. & P. 532; **Distd.** *Smith v. Surman* (1829), 9 B. & C. 561. **Apld.** *Wright v. Percival* (1839), 8 L. J. Q. B. 258; *Beaumont v. Brengeri* (1847), 5 C. B. 301. **Distd.** *Holmes v. Hoskins* (1854), 9 Exch. 753. **Apld.** *Marvin v. Wallis* (1856), 6 E. & B. 726; *Castle v. Sward* (1861), 4 L. T. 865; *Dublin City Distillery v. Doherty*, [1914] A. C. 823. **Refd.** *Blenkinsop v. Clayton* (1817), 1 Moore, C. P. 328; *Edan v. Dudfield* (1841), 1 Q. B. 302; *Coombs v. Bristol & Exeter Ry.* (1858), 3 H. & N. 510; *Martin v. Reid* (1862), 11 C. B. N. S. 730; *Langton v. Waring* (1865), 18 C. B. N. S. 315.

**176. —**—A. agreed to purchase a horse from B. for ready money, & to take him within a time agreed upon. About the expiration of that time, A. rode the horse, & gave directions as to its treatment, etc., but requested that it might remain in B.'s possession for a further time, at the expiration of which he promised to fetch it away & pay the price; to this B. assented. The horse died before A. paid the price or took it away:—**Held**: there was no acceptance of the horse within Stat. Frauds.—**TEMPEST v. FITZGERALD** (1820), 3 B. & Ald. 680; 106 E. R. 809.

*Annotations*.—**Apld.** *Hanson v. Armitage* (1822), 1 Dow. & Ry. K. B. 128; *Smith v. Surman* (1829), 4 Man. & Ry. K. B. 455. **Consd.** *Elliott v. Pybus* (1834), 10 Bing. 512; *Morton v. Tibbett* (1850), 15 Q. B. 428. **Fold.** *Holmes v. Hoskins* (1854) 9 Exch. 753. **Distd.** *Farrer v. Kirkby* (1888), 4 T. L. R. 543. **Refd.** *Studdy v. Sanders* (1826), 5 B. & C. 628; *Scott v. England* (1844), 4 L. T. O. S. 141.

**177. —**—Pltf. sold a horse to deft. at the price of £30 by parol agreement, the horse to be fired & remain in pltf.'s possession until fit to be sent to grass. At the end of twenty-two days the horse was, by deft.'s direction, taken to graze at K. park, & there entered in pltf.'s name:—**Held**: there was no delivery to, or acceptance of the horse by deft., to satisfy Stat. Frauds, s. 17.—**CARTER v. TOUSSAINT** (1822), 5 B. & Ald. 855; 1 Dow. & Ry. K. B. 515; 106 E. R. 1404.

*Annotations*.—**Apld.** *Smith v. Surman* (1829), 4 Man. & Ry. K. B. 455. **Consd.** *Morton v. Tibbett* (1850), 15 Q. B. 428. **Distd.** *Castle v. Sward* (1861), 6 H. & N. 828. **Consd.** *Dublin City Distillery v. Doherty*, [1914] A. C. 823. **Refd.** *Baldevy v. Parker* (1823), 2 B. & C. 37; *Wilkins v. Bromhead* (1844), 6 Man. & G. 963; *Beaumont v. Brengeri* (1847), 5 C. B. 301; *Marvin v. Wallis* (1856), 6 E. & B. 726.

**178. —**—Where goods of the value of £144 were made to order & remained in the possession of the vendor at the request of the vendee, with the exception of a small part which the latter took away:—**Held**: there was no acceptance of the residue of the goods within Stat. Frauds, s. 17.—**THOMPSON v. MACERONI** (1824), 3 B. & C. 1; 4 Dow. & Ry. K. B. 619; 2 L. J. O. S. K. B. 208; 107 E. R. 635.

*Annotation*.—**Distd.** *Elliott v. Thomas* (1838), 3 M. & W. 170.

**179. —**—A. agreed to buy of B. fifteen head of cattle. A. was about to pay the purchase-money, but, not finding his cheque book, offered B. to give him the cheque any time he would call for it. A. asked that the cattle might remain in B.'s field three days, & that his, A.'s, man might feed them with some hay there, to be supplied by B. This was done. A. afterwards refused

PART II. SECT. 4, SUB-SECT. 5.—B. (b).

h. *Goods remaining with vendor by agreement.*—**LIVINGSTONE v. COLPITTS** (1900), 21 C. L. T. 102.—**CAN.**  
j. —.—**GARDNER v. BELCHER** (1902), 22 N. Z. L. R. 27.—**N.Z.**

*Sect. 4.—Contracts for £10 or upwards: Sub-sect. 5, B. (b) & (c); sub-sect. 6, A.]*

to pay for them:—*Held*: there was no evidence to go to the jury of an acceptance & actual receipt of the cattle within Stat. Frauds, so as to bind the bargain.—*HOLMES v. HOSKINS* (1854), 9 Exch. 753; 23 L. T. O. S. 70; 2 W. R. 376; 156 E. R. 323.

*Annotation*:—*Refd.* Harman v. Reeve (1856), 18 C. B. 587.

180. —.]—The case for deft. had been put upon the point that there had been no acceptance of the horses, but there was abundant evidence of it. No doubt under the conditions there could not have been a change of property before payment without pltf.'s assent; but there was evidence of such assent. Deft. with the consent of pltf., left the horses in the stable & it might be inferred that he did so as owner of the horses. That was put to the jury as evidence that deft. had taken possession of the horses & they found, in effect, that he had. There was evidence to support that conclusion, & therefore the verdict must stand (*LORD COLERIDGE, C.J.*).—*FARRER v. KIRKBY* (1888), 4 T. L. R. 543, D. C.

181. *Goods remaining at seller's request.*—Pltf. sold a horse to deft., by verbal agreement, for a sum above £10. The bargain was for immediate delivery; but pltf. requested deft. to lend the horse to him, pltf., & by deft.'s consent, pltf. kept the horse. Afterwards deft. refused to take the horse. The jury, on the question being put to them, found that the bargain was complete before the arrangement as to the loan took place:—*Held*: there was an acceptance of the horse by deft. within the exception of Stat. Frauds, s. 17.—*MARVIN v. WALLIS* (1856), 6 L. & B. 726; 25 L. J. Q. B. 369; 27 L. T. O. S. 182; 2 Jur. N. S. 689; 4 W. R. 611; 119 E. R. 1035.

*Annotations*:—*Consd.* Castle v. Swarder (1860), 5 H. & N. 281; *Nicholls v. White* (1910), 103 L. T. 800; *Dublin City Distillery v. Doherty*, [1914] A. C. 823. *Refd.* Taylor v. Wakefield (1856), 6 E. & B. 765; *Cusack v. Robinson* (1861), 1 B. & S. 299.

182. *Request by buyer to buy back.*—Pltfs., wine & spirit merchants, kept a bonded warehouse, where they took in other persons' goods as well as their own, charging warehouse rent. On this warehouse pltfs. had one key & the custom house officer another. Deft. agreed to buy of pltfs. 2 puncheons of rum which were to remain in bond till wanted, deft. to have six months' further credit. Pltfs. sent to deft. an invoice describing the puncheons by marks & numbers with the words "free six months," which was explained to mean that they might remain in pltfs.' warehouse without charge for six months. Pltfs. entered in the rum book of their warehouse the puncheons of rum as sold to deft., & proved that after this entry they had no power to get the goods out. The rum remained in the warehouse for two years, during which time deft. on several occasions asked pltfs. to take back the goods or buy them of him:—*Held*: there was evidence to go to the jury that the character in which pltfs. held the goods was changed; & if they held as warehousemen for deft., there was evidence of an acceptance &

receipt of the goods by deft. so as to satisfy Stat. Frauds, s. 17.—*CASTLE v. SWORDER* (1861), 6 H. & N. 828; 30 L. J. Ex. 310; 4 L. T. 865; 8 Jur. N. S. 233; 9 W. R. 697; 158 E. R. 341, Ex. Ch.

*Annotations*:—*Distd.* *Re Roberts, Evans v. Roberts* (1887), 36 Ch. D. 196. *Consd.* *Dublin City Distillery v. Doherty*, [1914] A. C. 823. *Refd.* *McClellan v. Nicolle* (1861), 4 L. T. 863.

183. *Request by seller to give up possession.*—Pltf. verbally agreed to purchase from deft. a rick of hay standing upon deft.'s land for £100. By the terms of the contract pltf. was to be at liberty to send his men to tie & press the hay, & deft. was to cart it to the nearest railway station. On the following day deft. telegraphed to pltf., "Don't send press; am writing," & followed this by a letter in which he said that he had sold the hay to some one else, & asked pltf. "to be kind enough to give up possession." In an action by pltf. for damages for breach of contract:—*Held*: the contract was one to which the principle of constructive delivery & receipt under Sale of Goods Act, 1893 (c. 71), s. 4, applied; deft.'s telegram & letter afforded evidence of such constructive delivery & receipt; & pltf. was therefore entitled to damages.—*NICHOLLS v. WHITE* (1910), 103 L. T. 800, D. C.

*(c) Delivery to Servant or Agent.*

184. *Whether "acceptance."*—If goods are ordered verbally, the delivery of them to a carrier is sufficient to bind the contract according to Stat. Frauds, where the purchaser has been in the habit of receiving goods from the vendor by the same mode of conveyance.—*HART v. SATLEY* (1814), 3 Camp. 528; 170 E. R. 1470, N. P.

*Annotations*:—*Distd.* *Coats v. Chaplin* (1842), 3 Q. B. 483. *Apprd.* *Morton v. Tibbett* (1850), 15 Q. B. 428. *Overd.* *Meredith v. Meigh* (1853), 2 E. & B. 364. *N.F.* *Hart v. Bush* (1858), E. B. & E. 494. *Refd.* *Harris v. Matthews* (1839), 3 Jur. 1192.

185. —.]—A., a merchant in London, had been in the habit of selling goods to B., resident in the country, & of delivering them to a wharfinger in London, to be forwarded to B. by the first ship. In pursuance of a parol order from B., goods were delivered to, & accepted by the wharfinger to be forwarded in the usual manner:—*Held*: this not being an acceptance by the buyer, was not sufficient to take the case out of Stat. Frauds, s. 17.

We are of opinion that it will not be right to suffer any constructive acceptance to satisfy the provisions in the absence of proof of any express contract in writing (*ABBOTT, C.J.*).—*HANSON v. ARMITAGE* (1822), 5 B. & Ald. 557; 1 C. & P. 273, n.; 1 Dow. & Ry. K. B. 128; 106 E. R. 1295.

*Annotations*:—*Apld.* *Nicholls v. Plume* (1824), 1 C. & P. 272. *Consd.* *Smith v. Surman* (1829), 9 B. & C. 561. *Expld.* *Harris v. Matthews* (1839), 3 Jur. 1192. *Distd.* *Saunders v. Topp* (1849), 4 Exch. 390. *Consd.* *Morton v. Tibbett* (1850), 15 Q. B. 428. *Refd.* *Baldry v. Parker* (1823), 2 B. & C. 37; *Johnson v. Dodgson* (1837), 2 M. & W. 653; *Norman v. Phillips* (1845), 9 Jur. 832; *Hunt v. Hecht* (1853), 8 Exch. 814; *Meredith v. Meigh* (1853), 2 E. & B. 364; *Coombs v. Bristol & Exeter Ry.* (1858), 3 H. & N. 510; *Cusack v. Robinson* (1861), 1 B. & S. 299.

186. —.]—A. bought of B. 500 hundred-weight of clover seed, to be delivered at the Plough

**PART II. SECT. 4, SUB-SECT. 5.—B. (c).**

184 i. *Whether "acceptance."*—*ADAMS v. BROWN* (1863), 2 W. & W. 176.—*AUS.*

184 ii. —.]—*STONE v. BLANEY* (1908), 10 W. A. L. R. 1.—*AUS.*

184 iii. —.]—*MARTIN v. SWAN AERATED WATER CO., LTD.* (1913), 15 W. A. L. R. 112.—*AUS.*

184 iv. —.]—The receipt of goods by a common carrier from the vendor,

without any specific direction or authority from the vendee, will not amount to an acceptance by the vendee within the Statute.—*DALEY v. MARKS* (1838), Ber. 524.—*CAN.*

184 v. —.]—*TAIT & SUTHERLAND v. GIBSON LUMBER CO. (Sask.)* (1908), 8 W. L. R. 350.—*CAN.*

184 vi. —.]—*THOMPSON v. PLAYFAIR* (1912), 22 O. W. R. 866; 3 O. W. N. 1539; 26 O. L. R. 624; 6 D. L. R. 263.—*CAN.*

184 vii. —.]—Where there is a sale of goods which at the time of the sale are not in the possession of the vendor, but in the possession of a third party, & that third party is made aware of the sale & consents to the goods remaining in his possession as the goods of the vendee, that is sufficient actual change of possession to support the sale.—*SCHARF v. DILLABOUGH* (1915), 30 W. L. R. 846; 8 W. W. R. 221.—*CAN.*



**Inn, Banbury, on Apr. 27.** The seed was delivered on Apr. 27 to one of the servants of the Plough Inn, at which A. was in the habit of putting up, & there remained till May 13, when A. refused to take it:—*Held*: as the place where the seed was delivered was a place appointed by A., & was moreover the inn at which he generally put up, this was such an acceptance as would satisfy Stat. Frauds, which requires an acceptance by the party himself to make him liable in the absence of a written contract.—**HARRIS v. MATTHEWS** (1839), 3 Jur. 1192.

**187.** —.]—Goods of above the value of £10, were verbally ordered to be shipped consigned to the A. co. at Liverpool. The A. co. were carriers by inland navigation to the residence of the vendee. The goods were shipped on board the M., a vessel selected by the vendor; a bill of lading was signed, making the goods deliverable to the A. co. at Liverpool, & was forwarded to them; of all which the vendee had notice, & did & said nothing. Then the goods perished at sea on their voyage to Liverpool; & the vendee refused to have anything to do with them. The above facts being proved in an action for goods sold & delivered, leave was reserved to enter a verdict for pltf., if these facts were evidence on which the jury would have been justified in finding an acceptance & receipt within Stat. Frauds, s. 17:—*Held*: (1) the shipment on board a vessel selected by the vendor & the signature of a bill of lading making the goods deliverable to the vendee's agent, though a sufficient delivery to support an action for goods sold & delivered, was not sufficient to bind the contract; (2) the receipt of the bill of lading by the A. co., they being carriers only, & the non-feasance of the vendee on hearing that the goods had been shipped, were not, under the circumstances, sufficient evidence to justify the jury in finding a verdict for pltf. *Semble*: the acceptance & retention of a bill of lading, by the consignee, may be equivalent to an actual receipt of the goods.—**MEREDITH v. MEIGH** (1853), 2 E. & B. 384; 1 C. L. R. 648; 22 L. J. Q. B. 401; 21 L. T. O. S. 137; 17 Jur. 649; 118 E. R. 803; *sub nom.* **MEREDITH v. LEE**, 1 W. R. 368.

*Annotations*:—As to (1) *Refd.* **Smith v. Hudson** (1865), 6 B. & S. 431. As to (2) *Refd.* **Cusack v. Robinson** (1861), 1 B. & S. 299. *Generally*, **Consd. Currie v. Anderson** (1860), 2 E. & E. 592. *Refd.* **Coombs v. Bristol & Exeter Ry.** (1858), 3 H. & N. 510; **Hart v. Bush** (1858), E. B. & E. 494; **Castle v. Swower** (1861), 6 H. & N. 828.

**188.** —.]—Deft., at Lancaster, verbally ordered goods of the value of more than £10 to be sent to him at Lancaster from London by pltf.; & he directed that the goods should be sent by sea from G.'s wharf, which was the only wharf in London whence goods were shipped for Lancaster; & from which wharf goods had previously been sent by pltf. to deft. Pltf. sent the goods to G.'s wharf; whence the wharfinger sent them by a ship, selected by himself, for Liverpool; but the cargo was lost by the ship being wrecked on her voyage from London to Liverpool. An invoice was sent, at the time of the shipment, by pltf. to deft.; which deft. never received:—*Held*: deft. did not accept & actually receive the goods, within Stat. Frauds, s. 17.—**HART v. BUSH** (1858), E. B. & E. 494; 27 L. J. Q. B. 271; 4 Jur. N. S. 633; 120 E. R. 593.

*Annotations*:—**Consd.** **Currie v. Anderson** (1860), 2 E. & E. 592. **Apld.** **Smith v. Hudson** (1865), 6 B. & S. 431.

**189.** —.]—Deft., being the holder of a

delivery order for goods, sent his servant to the warehouseman to lodge the order & fetch a portion of the goods, which were removed to deft.'s premises:—*Held*: an acceptance of the goods by deft. within Stat. Frauds, s. 17.—**BAYLIS v. LUNDY** (1861), 4 L. T. 176; 9 W. R. 556; 1 Mar. L. C. 85.

**190.** —.]—**KERSHAW v. OGDEN**, No. 100, *ante*.

**191.** —.]—Deft. met pltf. on a road driving a horse, & asked the price of the same, & told pltf. that if he would take a certain sum for it he might send the horse to a farm at which deft. was living. Pltf. on the same evening sent the horse to the farm:—*Held*: there had been a sufficient delivery & acceptance within Stat. Frauds.—**BOOTH v. MURPHY** (1885), 1 T. L. R. 385, D. C.

#### SUB-SECT. 6.—EARNEST OR PART PAYMENT.

##### A. Earnest.

**192. Effect of earnest—Contract binding.**—**LEAK v. MORRICE** (1682), 2 Cas. in Ch. 135; 22 E. R. 883.

**193.** —.]—Earnest only binds the bargain, & on default in the vendee, vendor may sell to another.—**LANGFORD v. TILER** (1704), 1 Salk. 113; 6 Mod. Rep. 162; Holt, K. B. 96; 91 E. R. 104.

*Annotations*:—**Apld.** **Hinde v. Whitehouse** (1806), 7 East, 558. *Refd.* **Bloxam v. Sanders** (1825), 4 B. & C. 941. *Mentd.* **Ryall v. Rolle** (1749), 1 Atk. 165; **Montague v. Baron** (1825), 5 Dow. & Ry. K. B. 532; **Petty v. Anderson** (1825), 3 Bing. 170; **Clay v. Harrison** (1829), 10 B. & C. 99; **Laidler v. Burlinson** (1837), 2 M. & W. 602.

**194.** —.]—**POPHAM v. EYRE** (1774), Loft, 786; 98 E. R. 919.

*Annotation*:—*Mentd.* **Davis v. Symonds** (1787), 1 Cox, Eq. Cas. 402.

**195.** —.]—**HINDE v. WHITEHOUSE**, No. 107, *ante*.

**196.** —.]—**Passing of property.**—Where A. agrees by parol to sell a carriage to B. & B. gives him £5 in earnest, & it is arranged that the parties shall meet & settle the balance on the following morning:—*Held*: the sale was complete on the payment of the earnest money, & the property in the carriage passed to B. at that moment, & A. could not bring an action for money had & received, to receive the sum for which the carriage was sold, in consequence of previous orders by him, after the payment of the £5 & before the final settlement with B.—**SAGE v. ROBINSON** (1848), 10 L. T. O. S. 445.

**197.** —.]—**Contract of exchange.**—If A. & B. agree to exchange horses, & B. give a sum of money to A. to bind the bargain, A. may maintain an action against B. for not delivering his horse, without alleging any delivery of, or offer to deliver, his own to B., for the payment of earnest money vests the property of pltf.'s horse in B. But in such an action A. must allege a demand on B. for his horse; stating that B. did not deliver, though often requested so to do, is not sufficient; & such a defective allegation may be taken advantage of on a general demurrer.—**BACH v. OWEN** (1793), 5 Term Rep. 409; 101 E. R. 229.

*Annotations*:—*Refd.* **Radford v. Smith** (1838), 3 M. & W. 254. *Mentd.* **Bowdell v. Parsons** (1808), 10 East, 359.

**198. What constitutes earnest—Delivery of bags to be filled—To facilitate performance of contract.]**

#### PART II. SECT. 4, SUB-SECT. 6.—A.

**192 1. Effect of earnest—Contract binding.**—**ALLINGHAM v. O'MAHONEY** (1873), 14 N. B. R. (1 Pug.) 326.—**CAN.**

*k. Failure of purchaser to complete contract—After payment of earnest—Right of purchaser to recover earnest money.*—Pltf. agreed to purchase 500 bales of cotton yarn from defts. & to

deposit 5 rupees per bale as earnest money. He deposited somewhat more than half of the earnest money & there-after repudiated the contract:—*Held*: pltf. was not entitled to recover that



**Sect. 4.—Contracts for £10 or upwards: Sub-sect. 6, A. & B.; sub-sect. 7, A.]**

—**SUMNER & LEIVESLEY v. BROWN (JOHN) & Co., No. 218, post.**

**199. — Deposit.]**—(1) The deposit paid upon a contract between vendor & purchaser is in the nature of an earnest or guarantee for the fulfilment of the contract as well as a part payment of the purchase-money, & a vendor obtaining rescission owing to default in completion by the purchaser is entitled to the deposit, in the absence of any express stipulation to the contrary in the contract.

(2) The fact that the deposit is in the hands of stakeholders cannot affect the respective rights of the vendor & purchaser therein.—**HALL v. BURNELL**, [1911] 2 Ch. 551; 81 L. J. Ch. 46; 105 L. T. 409; 55 Sol. Jo. 737.

**Annotations:**—As to (1) **Apld.** **Holford v. Trim** (1921), 65 Sol. Jo. 768. **Refd.** **Farrant v. Olver** (1922), 91 L. J. Ch. 758.

**200. — Promise to give cheque & accept drafts—Subsequent delivery of documents.]**—Sale of Goods Act, 1893, s. 4, sub-s. 1: "A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall . . . give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made & signed by the party to be charged or his agent in that behalf."

**Defts.** on Jan. 9, 1924, agreed to sell a quantity of wood to a partnership firm. This firm had previously bought another parcel of wood from **defts.** & owed money to them in respect thereof. The firm, being in financial difficulties, formed a limited co. for the purpose of raising further capital & duly notified **defts.** On July 9, 1924, after a discussion between **defts.** & the directors of the new co. with regard to the indebtedness of the old firm to **defts.**, it was orally agreed that the new co. should give **defts.** a cheque & three bills in respect of the indebtedness of the old firm & that **defts.** should supply to the new co. the goods sold under the contract of Jan. 9, 1924, & accept the new co. as buyers of the goods. The new co., subsequently on July 14, 1924, gave to **defts.** the cheque & three bills, but **defts.** did not deliver the goods under the contract of Jan. 9, 1924, to the new co. The two partners in the old firm then brought an action against **defts.** for breach of the contract of Jan. 9, 1924. To that action **defts.** put in a defence signed by counsel in which they pleaded, in paragraph 3, that it had been agreed by the contract of July 9, 1924, that the new co. should give **defts.** on the following Monday a cheque & three drafts & that **defts.** would supply to the new co. instead of to the old firm the goods sold under the contract of Jan. 9, 1924, & accept that co. as buyers of the goods. The pleadings were then amended & the action was reconstituted, the partners in the old firm being struck out & the new co. substituted as **pltf.**, & the cause of action was stated to be a breach of the agreement of July 9, 1924. **Defts.** then amended their defence & relied upon Sale of Goods Act, 1893 (c. 71), s. 4, as a defence to that amended action:—**Held:** (1) paragraph 3 of the original un-

amended defence which was signed by counsel constituted a sufficient note or memorandum in writing of the contract signed by an agent of the party to be charged to satisfy Sale of Goods Act, 1893 (c. 71), s. 4, inasmuch as the new departure with regard to the parties & the cause of action when the action was reconstituted must be treated as the commencement of the action within the meaning of the rule in **Lucas v. Dixon**, No. 214, *post*; (2) the promise on July 9, 1924, to give the cheque & to accept & deliver the three drafts did not, although followed subsequently by the delivery of the cheque & drafts, constitute an earnest to bind the contract, as the cheque & drafts were not handed over at the time the contract was made but subsequently in part performance of the contract; (3) the payment of the cheque & the three drafts was something given in part payment for the goods within Sale of Goods Act, 1893 (c. 71), s. 4.—**FARR, SMITH & Co. v. MESSERS, LTD.**, [1928] 1 K. B. 397; 97 L. J. K. B. 126; 44 T. L. R. 48.

**201. Right of vendor to retain — On failure of purchaser to complete.]**—**HALL v. BURNELL**, No. 199, *ante*.

**B. Part Payment.**

**202. What constitutes part payment — General rule.]**—**BEHNKE v. BEDE SHIPPING CO.**, No. 31, *ante*.

**203. — "Striking off bargain."]**—(1) If a purchaser of goods draws the edge of a shilling over the hand of the vendor, & returns the money into his own pocket, which in the north of England is called the striking off a bargain, this is not a part payment within Stat. Frauds.

(2) Where a person who has contracted for the purchase of goods, offers to resell them as his own, whether this is proof of a delivery to himself, is a question for the jury.—**BLENKINSOP v. CLAYTON** (1817), 7 Taunt. 597; 1 Moore, C. P. 328; 129 E. R. 238.

**Annotations:**—As to (2) **Distd.** **Tempest v. Fitzgerald** (1820), 3 B. & Ald. 680. **Consd.** **Morton v. Tibbett** (1850), 15 Q. B. 428; **Farr, Smith v. Messers** (1927), 44 T. L. R. 48. **Refd.** **Smith v. Surman** (1829), 4 Man. & Ry. K. B. 455; **Coombs v. Bristol & Exeter Ry.** (1858), 3 H. & N. 510.

**204. — Payment of deposit by brokers—Recognition by buyer.]**—Where a broker, according to the usual practice, pays the deposit for the vendee, who afterwards recognises the payment by part payment to the brokers, this is not an admission to dispense with the production of the bought & sold notes, there having been no acceptance of part of the goods sold.—**DANIEL v. PIDDING** (1845), 6 L. T. O. S. 192.

**205. — Agreement to set off debt.]**—**Pltf.** owed **deft.** a debt, & while it remained due sold him goods by sample to a larger amount, & exceeding £10, without note or memorandum in writing of the bargain for sale. Part of that bargain was, that the debt due from **pltf.** was to go in part payment by **deft.** to him, but no actual payment of money was made by either, nor was any receipt given by **deft.** for **pltf.**'s debt to him. The goods were supplied to **deft.**, who returned them as inferior to sample, & the jury found that he had never accepted them. Verdict for **deft.**

portion of the earnest money which he had paid.—**ROSHAN LAL v. DEHLI CLOTH & GENERAL MILLS CO.** (1910), 1 L. R. 33 All. 166.—**IND.**

**PART II. SECT. 4, SUB-SECT. 6.—B.**

**1. What constitutes part payment—Onus of proof.]**—Where **pltf.**, suing upon a contract for the sale of goods

which is within Stat. Frauds, s. 17, seeks to establish acceptance of or payment for the goods so as to satisfy the sect., he must prove that the goods were accepted or paid for in pursuance of the contract sued on.—**METROPOLITAN KNITTING & HOSIERY CO., LTD. v. THOMAS BURNLEY & SONS, LTD.** (1924), 35 C. L. R. 232.—**AUS.**

**m. — Payment made to garnishee.]**—The primary creditor sued the primary debtor to recover damages for refusal to accept & pay for a horse bought by the primary debtor from the primary creditor for \$50. At the time of the sale the primary debtor had deposited \$5 in the hands of the garnishee, which was to have been paid

On motion for a new trial :—*Held* : nothing had been given in earnest to bind the bargain, or in part of payment, within Stat. Frauds, s. 17, so as to make the contract binding on the buyer.—*WALKER v. NUSSEY* (1847), 10 M. & W. 302; 16 L. J. Ex. 120; 8 L. T. O. S. 318; 11 Jur. 23; 153 E. R. 1203.

*Annotations* :—*Apprvd.* Norton v. Davison, [1899] 1 Q. B. 401. *Refd.* Smith v. Hudson (1863), 8 L. T. 253.

206. — Sum overpaid in previous transaction.]—Where, upon an oral contract for the supply of goods, it was a term of the contract that a sum of money which had been overpaid to the vendor upon a previous sale of goods by him to the purchaser should be retained by the vendor on account of the price of the goods contracted to be supplied :—*Held* : there was not a part payment which would satisfy Sale of Goods Act, 1893 (c. 71), s. 4 (1).—*NORTON v. DAVISON*, [1899] 1 Q. B. 401; 68 L. J. Q. B. 265; 80 L. T. 139; 47 W. R. 275; 15 T. L. R. 160, C. A.

*Annotation* :—*Refd.* Parker v. Crisp (1918), 63 Sol. Jo. 157.

207. — Cheque sent by post—Not accepted by sellers.]—Pltf. verbally agreed by telephone with defts. to buy from them certain goods above the value of £10 & to send them a cheque for £10 in part payment. Pltf. sent a cheque for £10 by post, & later on, in answer to a telephonic message from defts., he sent a second cheque for the balance by post. These two cheques were received by the same post, & defts. at once returned them, alleging that there was no concluded contract. In an action to recover damages for non-delivery of the goods :—*Held* : as the cheques were not accepted by defts., there was no payment within Sale of Goods Act, 1893 (c. 71), s. 4 (1), & the post office was not defts.' agent to accept payment on their behalf so as to take the case out of Sale of Goods Act, 1893 (c. 71).—*DAVIS v. PHILLIPS, MILLS & Co.* (1907), 24 T. L. R. 4.

*Annotations* :—*Distd.* Parker v. Crisp, [1919] 1 K. B. 481. *Consd.* Behnke v. Bede Shipping Co., [1927] 1 K. B. 649.

208. — Conditionally retained by sellers.]—For a part payment by a buyer to satisfy Sale of Goods Act, 1893 (c. 71), s. 4 (1), there must be an acceptance of it by the seller of such a nature as affords some evidence of the contract which is in question, but the acceptance need not be unqualified.

On Apr. 22, 1918, pltf. verbally agreed to buy from defts. for £387 10s. a quantity of saccharin, & on the same day he sent his cheque in accordance with the agreed mode of payment. On the following day, the duty on saccharin having in the meantime been increased, defts. wrote to pltf. : "As you are aware the duty on saccharin since yesterday has been increased practically double, & unless you are able to pay the excess duty we regret we shall be unable to send you the goods. We will return your cheque with pleasure upon hearing from you that you will not require the goods." Pltf. refused to pay the increased duty, there being no stipulation in the contract to that effect, & after some correspondence defts. returned

over to the primary creditor when the horse was delivered. There was no delivery, no acceptance, no memorandum in writing, & nothing given by way of earnest :—*Held* : there had been no compliance with Statute of Frauds, s. 17, & the payment to the garnishee was not sufficient to satisfy the statute.—*WEESE v. PEAL*, 21 C. L. T. 43.—*CAN.*

n. — Payment for cords of wood.]—Pltf. agreed with deft. to sell him 500 cords at 3s. 9d. a cord. M. had agreed to cut this wood for pltf. at

2s. 6d. a cord, & deft. was to pay M. the 2s. 6d. & the pltf. 1s. 3d. as owner of the trees :—*Held* : a payment on account by deft. to M. took the agreement sued upon out of the statute, being a payment on the contract as much as if made to the pltf.—*BRADY v. HARRAHY* (1861), 21 U. C. R. 340.—*CAN.*

o. Contract repudiated.—Right of purchaser to recover deposit.]—*SMALL v. DOMINION AUTOMOBILE Co.* (1915), 7 O. W. N. 700; 8 O. W. N. 236; 23 D. L. R. 304.—*CAN.*

pltf.'s cheque a few days later :—*Held* : there had been a part payment to satisfy Sale of Goods Act, 1893 (c. 71), s. 4 (1).—*PARKER v. CRISP & Co.*, [1919] 1 K. B. 481; 88 L. J. K. B. 775; 121 L. T. 598; 35 T. L. R. 112; 63 Sol. Jo. 157.

*Annotation* :—*Consd.* Behnke v. Bede Shipping Co., [1927] 1 K. B. 649.

209. — Deposit with stakeholder.]—*BEHNKE v. BEDE SHIPPING Co.*, No. 31, ante.

210. Effect of part payment.]—A. being the occupier of a farm, quitted same on Mar. 25, 1821, & was succeeded in the possession by B. A. had sown forty acres with wheat, & it appeared that at a meeting between A. & B. in Feb. 1821, A. asked B. if he would take the forty acres of wheat at £200, telling him, that if he did not, he should not have the farm. B. said that he would take it. A person present then valued the dead stock, & having so done, asked to whom he was to value it; B. said that it was to be valued to him, & then promised to pay A. for the wheat & the dead stock on a given day, & he did pay a sum of money on account. B. afterwards had possession of the farm, the growing wheat, & the dead stock :—*Held* : (1) in *indebitatus assumpsit* for crops bargained & sold, & goods sold & delivered, the contract for the dead stock was distinct from any contract for the sale of the growing wheat, & the possession of the farm, & A. was entitled to recover to that amount; (2) as B. had had the growing wheat, & had made a part payment on account, A. was entitled in this action to recover the remainder of the price agreed to be paid for it.—*MAYFIELD v. WADSLEY* (1824), 3 B. & C. 357; 5 Dow. & Ry. K. B. 224; 3 L. J. O. S. K. B. 31; 107 E. R. 766.

*Annotations* :—*As to* (1) *Apld.* Evans v. Roberts (1826), 5 B. & C. 829. *Distd.* Scroell v. Boxall (1827), 1 Y. & J. 396. *Refd.* Falmouth v. Thomas (1832), 2 L. J. Ex. 57; Hallon v. Runder (1834), 1 Cr. M. & R. 266; Mechelen v. Wallace (1837), 7 Ad. & El. 49.

211. —]—A contract for the making & sale of bricks above £20, to be delivered within a year from the time when, according to deft.'s evidence, the contract was completed, by a letter of his in answer to a parol proposal :—*Held* : valid; there having been a part acceptance & payment on account.—*CATLING v. PERRY* (1860), 2 F. & F. 140.

#### SUB-SECT. 7.—THE NOTE OR MEMORANDUM.

##### A. In General.

See Sale of Goods Act, 1893 (c. 71), s. 4 (1).

See, generally, CONTRACT, Vol. XII., pp. 129 et seq.

212. To whom addressed—Third party—Party's own agent.]—A letter signed by the party to be charged, written to his own agent, referring to letters of the agent stating the terms upon which the latter has made a contract on his behalf with the other party for the purchase of goods, is a sufficient note or memorandum of the bargain to satisfy Stat. Frauds, s. 17.—*GIBSON v. HOLLAND*

#### PART II. SECT. 4, SUB-SECT. 7.—A.

p. To whom addressed.—To principal by agent.]—A letter written to deft. by an agent employed by him to make a contract on his behalf, informing him of the making of such contract & of the terms thereof, is a sufficient memorandum of the bargain within Stat. Frauds, s. 17.—*RYRIE v. CRUIKSHANK* (1896), 17 N. S. W. L. R. (Law) 195; 13 N. S. W. W. N. 41.—*AUS.*

q. Validity of objection that defendant cannot sue plaintiff.]—The contract is

*Sect. 4.—Contracts for £10 or upwards: Sub-sect. 7, A. & B. (a) & (b).]*

(1865), L. R. 1 C. P. 1; Har. & Ruth. 1; 35 L. J. C. P. 5; 13 L. T. 293; 11 Jur. N. S. 1022; 14 W. R. 86.

*Annotations:—*Reid. *Caregan v. Richards* (1866), 15 L. T. 252; *Lucas v. Dixon* (1889), 22 Q. B. D. 357; *Re Hoyle*, *Hoyle v. Hoyle*, [1893] 1 Ch. 84; *Re Holland*, *Gregg v. Holland*, [1902] 2 Ch. 360.

**213. Pleading—Whether insufficiency of memorandum must be specially pleaded.**—*JOHNSON v. DODGSON*, No. 242, *post*.

**214. Time for making.**—A note or memorandum of a contract for the purposes of Stat. Frauds, s. 17, must, in order to be available in an action on the contract, have been in existence when the action was commenced.—*LUCAS v. DIXON* (1889), 22 Q. B. D. 357; 58 L. J. Q. B. 161; 37 W. R. 370, C. A.

*Annotations:—*Consd. *Re Holland*, *Gregg v. Holland*, [1902] 2 Ch. 360; *Hawkins v. Duché*, [1921] 2 K. B. 226. *Apld.* *Farr, Smith v. Messers* (1927), 44 T. L. R. 48. *Reid. Re Hoyle*, *Hoyle v. Hoyle*, [1893] 1 Ch. 84.

**Admissibility of parol evidence.**—*See* Sub-sect. 9, *post*.

### B. Form of.

#### (a) In General.

*See, generally*, CONTRACT, Vol. XII., pp. 131 *et seq.*

**215. No special form necessary.**—Pltf. on June 26, verbally agreed to purchase of deft. a smack load of herrings then on its way from Arklow to Liverpool, at 32s. 6d. per mace, to be delivered on the following day, & paid deft. £20 as earnest to bind the bargain. Deft. afterwards expressing a wish to have an agreement written out, pltf. said, "I'll write a bit of a note to specify I've bought the fish," & thereupon he wrote & gave to deft. the following memorandum:—"Liverpool, June 26, 1861—This is to certify that I, R. B., bought of B. J. all the fish in the smack *Eliza Jane*, now on her way from Arklow, the fish to be in good condition, at the price of 32s. 6d. per mace." The smack not arriving, & the fish not being delivered on June 27 pltf. subsequently declined to take them, & brought an action for breach of the parol contract to deliver on June 27. Deft. denied any contract to deliver on that day, & relied on the written memorandum. The jury found a verdict for pltf., but leave was reserved to deft. to enter a nonsuit if the ct. should think the written document conclusive:—*Held*: making the rule absolute for a nonsuit, the memorandum was to be taken as evidence of the contract. It was intended by the parties to be a reduction into writing of the terms of their bargain, &, although somewhat informal, it condescended upon all the important points, viz. the quantity & quality of the fish, & the price, & the omission to mention the payment of the deposit money was immaterial, as it was not necessary that it should appear in the written document.—*BRUMBY v. JOHNSTON* (1862), 5 L. T. 715.

**216. Verbal acceptance of written offer.**—Pltf., a seed merchant in Kent, wrote to defts., seedsmen in London, offering to sell the seed of growing turnips, to which defts. replied, asking the quantities & price for white globe turnip seed.

Pltf. answered that all he could offer at present was the produce of 5 acres, at 18s. 6d. a bushel, delivered at the Bricklayers' Arms Station. Defts. offered to take 2 or 3 acres at 16s. 6d. Pltf. wrote, saying he could not accept less than 18s., his contract price with London houses. Defts. then wrote the following letter: "In reply to your favour of this morning, we beg to say, as our neighbours are giving you 18s. per bushel for white globe turnip, we, as a beginning with you, will take the produce of 3 acres at that price, to be delivered, as soon as harvested, free of carriage to London station. Let us know what other sorts you may have to offer, as also worzel seed of sorts for 1861 harvest. Waiting your reply, we remain, etc." Pltf. verbally told defts. he accepted the offer. Defts. having refused to receive the seed:—*Held*: there was a binding contract in writing within Stat. Frauds, s. 17, although pltf. never replied in writing to defts.' last letter.—*WATTS v. AINSWORTH* (1862), 1 H. & C. 83; 31 L. J. Ex. 448; 6 L. T. 252; 158 E. R. 810.

**217. Written contract—Subsequent inconsistent terms.**—Dft. authorised his brokers by letter to buy for him a cargo of bone ash at a certain price per ton, "on a basis of 70 per cent. mean of two London chemists: usual London terms, viz. cash in twenty-eight days, less 2½ per cent." This offer was communicated by deft.'s brokers to the sellers' brokers by letter as follows: "We can take the cargo at, etc., cash in twenty-eight days from last day of landing, less 2½ per cent.: to be analysed by two London chemists." The sellers accepted the offer, & sent a bought-note to the buyer's brokers, describing the terms of payment thus, "Payment, cash before delivery, allowing a discount of 2½ per cent. equal to cash in Liverpool within twenty-eight days from last day of landing":—*Held*: there was no substantial difference between the offer & the acceptance, & consequently that there was a binding contract between the parties.—*HEYWORTH v. KNIGHT* (1864), 17 C. B. N. S. 298; 4 New Rep. 288; 33 L. J. C. P. 298; 10 Jur. N. S. 866; 144 E. R. 120. *Annotation:—*Reid. *Chinnock v. Ely* (1864), 11 L. T. 536.

**218. Railway company's delivery note.**—In an action by pltf. for the price of goods sold & delivered, defts. counterclaimed for damages for breach of contract. The counterclaim was based upon a contract for the sale of potatoes alleged to have been verbally made between defts. & pltf. Defts. alleged that they sent to pltf. certain bags on account of the contract, & they relied upon a railway co.'s delivery note signed by one of pltf. in which the receipt of the bags was acknowledged, as a note or memorandum of the contract within Sale of Goods Act, 1893 (c. 71), s. 4, & they also relied upon the sending of the bags as an earnest to bind the contract:—*Held*: (1) the railway co.'s delivery note was not a note or memorandum of the contract within Sale of Goods Act, 1893 (c. 71), s. 4, & (2) the bags were merely sent to facilitate performance of the contract & could not be regarded as an earnest given to bind it.—*SUMNER & LEIVESLEY v. BROWN (JOHN) & Co.* (1909), 25 T. L. R. 745.

*Annotation:—As to (2) Consd. Farr, Smith v. Messers* (1927), 44 T. L. R. 48.

sufficiently authenticated if it has been recognised in writing by the party sued upon it. It is no objection to the maintenance of the action that deft. himself cannot enforce the same contract against pltf. because pltf. has never signed it.—*POPE v. PICTOU STEAMBOAT Co.* (1865), 2 Old. 18.—CAN.

**r. Entry made in defendant's contract book.**—*NASMYTH Co. v. ALEX-*

*BROWN MILLING & ELEVATOR Co.* (1904), 4 O. W. R. 451; 25 C. L. T. 38; 9 O. L. R. 21.—CAN.

### PART II. SECT. 4, SUB-SECT. 7.—B. (a).

**t. Written acceptance of written offer.**—A. signed & sent W. B. a letter offering to sell him goods of the value of

£10 & upwards on condition therein specified. B. by a subsequent letter accepted A.'s offer:—*Held*: Sale of Goods Act, 1896 (No. 1422), s. 9 (1), requiring a note or memorandum in writing of the contract did not preclude B. from enforcing the agreement to sell.—*PATTERSON v. DOLMAN*, [1908] V. L. R. 354.—AUS.  
**a. Dates of sales, articles sold, &**

**219. Pro formâ contract handed to plaintiffs.]—**BEHNKE v. BEDE SHIPPING CO., No. 31, *ante*.

**220. Plea in defence setting out oral contract.]—**FARR, SMITH & CO. v. MESSERS, LTD., No. 200, *ante*.

(b) *Document containing Repudiation of Contract.*

See CONTRACT, Vol. XII., pp. 134–136, Nos. 901–915.

**221. Contract not absolutely recognised—Condition added as to time.]—**A memorandum in writing of a contract for the purchase of flour by deft. of pltf., a miller, taken by pltf.'s rider, in his common order book, in these terms: "Feb. 19, 1811, of John Smith, £64," which was explained by the witness to mean so much received of deft. in satisfaction of a former order; "Do. 40 of 3, 58s.," which was explained to mean a new order for 40 sacks of flour called thirds, at 58s. a sack, & this without any signature, is not a sufficient memorandum in writing of the bargain within Stat. Frauds, s. 17, to bind deft.; though it was read over to him by his desire at the time it was written. Such defective memorandum cannot be supplied by a letter written afterwards by deft., in which, though he recognised the order, yet he insisted that the flour had not been delivered in time, & therefore he was not bound to take it; & it was not competent for pltf. to prove, by the parol testimony of the person who took the order, that there was no such term in the contract as to deliver the flour within a given time.—COOPER v. SMITH (1812), 15 East, 103; 104 E. R. 783.

*Annotations:—*Folld. Richards v. Porter (1827), 2 B. & C. 437. *Appld.* Acebal v. Levy (1834), 10 Bing. 376. *Consd.* Haughton v. Morton (1855), 27 L. T. O. S. 36. *Refd.* Wilkinson v. Evans (1866), L. R. 1 C. P. 407; Buxton v. Rust (1871), L. R. 7 Exch. 1.

**222. ———.]—**A. sent to B. on Jan. 25, an invoice of five pockets of hops, & delivered the hops to a carrier to be conveyed to B. In the invoice A. was described as the seller & B. as the purchaser of the hops. B. afterwards wrote to A. as follows: "The hops I bought of A. on Jan. 23 are not yet arrived. I received the invoice: the last were longer on the road than they ought to have been; however, if they do not arrive in a few days, I must get some elsewhere":—*Held*: the invoice & this letter, taken together, did not constitute a note in writing of the contract to satisfy Stat. Frauds, s. 17.—RICHARDS v. PORTER (1827), 6 B. & C. 437; 9 Dow. & Ry. K. B. 497; 5 L. J. O. S. K. B. 175; 108 E. R. 512.

*Annotations:—**Appld.* Haughton v. Morton (1855), 27 L. T. O. S. 36. *Refd.* Smith v. Surman (1829), 4 Man. & Ry. K. B. 455; Dobell v. Hutchinson (1835), 3 Ad. & El. 355; Archer v. Baynes (1850), 5 Exch. 625; Wilkinson v. Evans (1866), L. R. 1 C. P. 407; Buxton v. Rust (1871), L. R. 7 Exch. 1.

**223. ———.]—**Repudiation on grounds that goods not in accordance with contract.]—SMITH v. SURMAN, No. 138, *ante*.

**224. ———.]—**Deft. verbally agreed to purchase of pltf. certain barrels of flour. Deft. afterwards wrote to pltf., stating, that he had received some barrels, which were not so fine as the sample, & were not the barrels he had bought, & that he would not have them. In answer pltf. wrote as follows: "Annexed you have invoice of the flour sold you last Friday. I am very much astonished at your finding fault with the flour. It was sold to you subject to your examining the

bulk; & it was not until after you had examined it, & satisfied yourself both of quality & condition, that you confirmed the purchase. What was forwarded you was the same you saw. Under these circumstances you cannot, therefore, object to fulfil your agreement." Deft. replied as follows: "I beg to say the barrels I have received is not the same I saw. I took a sample with me from the sample I have, & the barrels I saw was quite as fine as I compared them with, nor was they lumpy. Now the barrels I have received is all very lumpy, & none of them so fine as the same. If you will take them back & pay charges, I will with pleasure send them. There must be some mistake about them":—*Held*: the letters did not constitute a sufficient note or memorandum in writing of the contract within Stat. Frauds, s. 17.—ARCHER v. BAYNES (1850), 5 Exch. 625; 20 L. J. Ex. 54; 155 E. R. 274.

*Annotations:—**Refd.* Haughton v. Morton (1855), 27 L. T. O. S. 36; Wilkinson v. Evans (1866), Har. & Ruth. 552.

**225. ———.]—**Terms of contract not stated.]—Deft., who carried on business at Manchester, orally agreed to purchase from pltf., timber merchants at Liverpool, a quantity of spruce deals, to be forwarded to Manchester by a carrier nominated by deft. An invoice of the goods was sent by pltf., to deft., & the carrier also sent an advice note to inform him of the arrival of the goods at Manchester. This note specified the number of the deals, & stated them to be consigned by pltf., but did not state their price, nor refer to the invoice or any other document. On Oct. 28, the day of the arrival of the goods, & on the following day, deft. inspected them, & subsequently wrote & signed the following memorandum on the advice note: "Rejected. Not according to representation." On Nov. 8, he wrote to pltf., rejecting the goods as not being according to contract:—*Held*: (1) there was not a sufficient note of the bargain within Stat. Frauds, s. 17; (2) the proper conclusion from the facts was that there had been no such dealing with the goods by deft. as to constitute an acceptance of them by him within Stat. Frauds, s. 17.—TAYLOR v. SMITH, [1893] 2 Q. B. 65; 61 L. J. Q. B. 331; 67 L. T. 39; 40 W. R. 486; 36 Sol. Jo. 306, C. A.

*Annotations:—**As to* (1) *Refd.* Abbott v. Wolsey, [1895] 2 Q. B. 97. *As to* (2) *Consd.* Taylor v. G. E. Ry., [1901] 1 K. B. 774. The case was dealt with by the Ct. as merely involving a question of fact. . . . The case declares no principle of law & is in my opinion of no general application (BIGHAM, J.).

**226. ———.]—**THIRKELL v. CAMBI, No. 291, *post*.

**227. All essential terms referred to.]—**A. upon one & the same occasion bought several parcels of goods of B., one parcel, consisting of chimney glasses, amounting to £38 10s. 6d., for ready money, the rest, some of which had to be manufactured, on credit. The goods were sent to A. at different times. The chimney glasses being damaged in the carriage, A. declined to receive them. A. afterwards, in answer to an application by B. for payment for the whole of the goods, wrote to him in substance as follows: "The only parcel of goods selected for ready money was the chimney glasses, amounting to £38 10s. 6d., which goods I have never received, & have long since declined to have, for reasons made known to you at the time: with regard to the rest, I am ready to pay," etc.

*amounts charged.]—*KELLY v. THOMPSON (1902), 36 N. B. R. 718.—CAN.

PART II. SECT. 4, SUB-SECT. 7.—  
B. (b).

b. Offer to perform order in part  
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*refused—Letter cancelling whole contract.]—*K. entered the sale of certain groceries in a book which was not produced, but pltf. produced a list of the things ordered, & their prices & K. afterwards sent the order in a letter

signed by him to defts., who thereupon wrote pltf., "K. reports a sale that we cannot prove in full, but will accept for," enumerating certain articles. Upon pltf. insisting on the completion of the order in full, defts. cancelled

**Sect. 4.—Contracts for £10 or upwards: Sub-sect. 7, B. (b) & (c).]**

An action having been brought to recover the value of the whole of the goods, A. paid into ct. sufficient to cover all but the price of the chimney glasses, & the jury found that the chimney glasses were sold under a separate contract from the rest of the goods:—*Held*: the letter, inasmuch as it contained an admission of the bargain & of all the substantial terms of it, was a sufficient note or memorandum of the contract to satisfy Stat. Frauds, s. 17, notwithstanding the subsequent attempted repudiation of liability.—**BAILEY v. SWEETING** (1861), 9 C. B. N. S. 843; 30 L. J. C. P. 150; 9 W. R. 273; 142 E. R. 332.

**Annotations**:—*Distd. Forster v. Rowland* (1861), 7 H. & N. 103. *Consd. McClean v. Nicolle* (1861), 4 L. T. 863; *Gibson v. Holland* (1865), L. R. 1 C. P. 1; *Smith v. Hudson* (1865), 6 B. & S. 431. *Fold. Wilkinson v. Evans* (1866), L. R. 1 C. P. 407; *Buxton v. Rust* (1872), L. R. 7 Exch. 279. *Consd. Lucas v. Dixon* (1889), 22 Q. B. D. 357. *Refd. Jackson v. Oglander* (1865), 2 Hem. & M. 465; *Caregan v. Richards* (1866), 15 L. T. 252; *Nesham v. Selby* (1872), 41 L. J. Ch. 173; *McCaul v. Strauss* (1883), Cab. & El. 106; *Elliott v. Dean* (1884), Cab. & El. 283; *Re Hoyle, Hoyle v. Hoyle*, [1893] 1 Ch. 84; *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360; *Dewar v. Mintoft*, [1912] 2 K. B. 373; *Thirkell v. Cambi*, [1919] 2 K. B. 590.

**228.** —[.]—**WILKINSON v. EVANS**, No. 240, post.

**229.** —[.]—Pltf. on Jan. 11, 1871, bought of deft. a parcel of wool, worth more than £10, "the whole to be cleared in about twenty-one days." A memorandum of the terms of the bargain was handed by pltf. to deft. None of the wool was delivered, & there was no part payment of the price. On Feb. 8, deft. wrote: "It is now twenty-eight days since you & I had a deal for my wool, which was for you to have taken all away in twenty-one days from the time you bought it. I do not consider it business to put it off like this; therefore I shall consider the deal off, as you have not completed your part of the contract." Pltf. had, in fact, completed his part on the true construction of the contract. On Feb. 9, in answer to the pltf.'s request to see a copy of the contract contained in the memorandum of Jan., deft. wrote in these terms, enclosing a copy: "I beg to enclose copy of your letter of Jan. 11." In an action for non-delivery of the wool:—*Held*: the letter of Feb. 9, with its enclosure, taken in connection with that of Feb. 8, constituted an unambiguous recognition of the existence of the contract & of its terms; & there was, therefore, a sufficient memorandum in writing signed by deft. to satisfy Stat. Frauds, s. 17.—**BUXTON v. RUST** (1872), L. R. 7 Exch. 279; 41 L. J. Ex. 173; 27 L. T. 210; 20 W. R. 1014, Ex. Ch.

**Annotations**:—*Consd. Thirkell v. Cambi*, [1919] 2 K. B. 590. *Refd. Dewar v. Mintoft*, [1912] 2 K. B. 373.

**230.** —[.]—A letter signed by deft. cancelling a contract & referring to an enclosed invoice which contained all the terms of the contract:—*Held*: a sufficient note or memorandum of the bargain signed by the party to be charged within Stat. Frauds, s. 17.—**ELLIOTT v. DEAN** (1884), 1 Cab. & El. 283.

**231.** — **Repudiation on grounds of no liability.**—A verbal order for goods was given,

it altogether:—*Held*: the letters were a sufficient memorandum within Stat. Frauds, s. 17.—**OCKLEY v. MASSON** (1881), 6 A. R. 108.—**CAN.**

**B. (c).**

**c. General rule.**—Where a contract which is sought to be enforced is contained in a series of letters or

documents in order to constitute such contract in sufficient memorandum within Stat. Frauds it is not necessary that the letters or documents should expressly refer to each other: all that is requisite is that they should be connected with each other by necessary inference & natural intentment.—**BALLANTINE v. HAROLD** (1893), 19 V. L. R. 465.—**AUS.**

with a direction that they should be sent by a particular route. The goods were afterwards sent by another route, & a letter written to the purchaser by the vendors stating the original order & the alteration in the mode of transit, & enclosing an invoice which contained the particulars of the goods & the price. The goods did not reach the purchaser, who, on being applied to afterwards for payment, wrote a letter in which he acknowledged the original order, but declined to pay on the ground that the goods were not sent by the route directed. In an action for the price of the goods, the jury found that deft., by his conduct, had ratified the alteration in the route:—*Held*: the letters & invoice constituted a memorandum in writing of the original contract within Stat. Frauds, & the alteration of the route having been ratified by deft., pltf. were entitled to recover although the ratification was not in writing.—**LEATHER CLOTH CO. v. HIERONIMUS** (1875), L. R. 10 Q. B. 140; 44 L. J. Q. B. 54; 32 L. T. 307; 23 W. R. 593.

**Annotations**:—*Consd. Hartley v. Hymans*, [1920] 3 K. B. 475. *Refd. Hickman v. Haynes* (1875), L. R. 10 C. P. 598.

**(c) Connected Documents.**

See CONTRACT, Vol. XII., pp. 136 et seq.

**232. Necessary connection apparent on face of documents.**—Two distinct written instruments cannot be coupled together so as to constitute a sufficient memorandum within Stat. Frauds, unless, on the face of them they appear to be necessarily connected with each other.—**SMITH v. DIXON** (1839), 3 Jur. 770.

**233. Documents expressly referring to one another—Letter referring to previous correspondence—Assenting to contract.**—A correspondence, consisting of several letters between the parties to a contract originally made by parol, in one of which letters the terms of the contract were mentioned by the purchaser & not repudiated, but constructively assented to, by the vendor in a subsequent letter referring to the former one:—*Held*: to constitute a sufficient memorandum of the contract within Stat. Frauds.—**FYSON v. KITTON** (1855), 3 C. L. R. 705; 24 L. T. O. S. 232; *sub nom.* **FYSON v. KITTON**, 3 W. R. 233.

**234. — Incomplete document referring to another containing terms.**—If there is a signed paper, signed by an agent duly authorised thereto, which paper though agreeing to do something, leaves the subject-matter of the agreement unexplained, but refers to another paper which contains the full particulars of the explanation, the two may be connected together, so as to constitute a contract valid under Stat. Frauds.—**RIDGWAY v. WHARTON** (1857), 6 H. L. Cas. 238; 27 L. J. Ch. 46; 29 L. T. O. S. 390; 4 Jur. N. S. 173; 5 W. R. 804; 10 E. R. 1287, H. L.; *affg.* (1854), 3 De G. M. & G. 677, L. C.

**Annotations**:—*Distd. Leo v. Griffin* (1861), 30 L. J. Q. B. 252. *Consd. Baumann v. James* (1868), 3 Ch. App. 508. *Apid. Long v. Millar* (1879), 4 C. P. D. 450; *Cave v. Hastings* (1881), 7 Q. B. D. 125. *Refd. Barker v. Allan* (1859), 5 H. & N. 61; *Heys v. Astley* (1863), 4 De G. J. & Sm. 34; *Jones v. Victoria Graving Dock Co.* (1877), 2 Q. B. D. 314; *Rossiter v. Miller* (1878), 3 App. Cas. 1124; *Shardlow v. Cotterell* (1881), 20 Ch. D. 90; *Oliver v.*

**d. Document confirming verbal arrangements.**—**KELLY v. CALEDONIAN COAL CO.** (1898), 19 N. S. W. L. R. 1.—**AUS.**

**e. Documents connected by reasonable inference—Receipt & memorandum of sale of barley.**—**PHIPPEN v. HYLAND** (1869), 19 C. P. 416.—**CAN.**

**f. —**[.]—Pltf. wrote deft. asking particulars in respect to a stock of



Hunting (1890), 44 Ch. D. 205; *Thirkell v. Cambi*, [1919] 2 K. B. 590; *Wade v. L. & N. W. Ry.* (1920), 90 L. J. K. B. 593; *Franco-British Ship Store Co. v. Compagnie des Chargeurs Francaise* (1926), 42 T. L. R. 735. **Mentd.** *James v. Rice* (1854), 5 De G. M. & G. 461; *Bigg v. Strong* (1857), 3 Sm. & G. 592; *Homfray v. Fothergill* (1866), L. R. 1 Eq. 567; *Brook v. Hook* (1871), L. R. 6 Exch. 89; *Vale of Neath Colliery Co. v. Furness* (1876), 45 L. J. Ch. 276; *Durant v. Roberts & Keighley, Maxsted*, [1900] 1 Q. B. 629.

**235. Documents connected by reasonable inference—Letter & bill of parcels.]—**SAUNDERSON *v.* JACKSON, No. 283, *post*.

**236. — Entry by auctioneer in sale catalogue against lot sold—Entry of agent's name.]—**Where goods were sold by auction to an agent, the auctioneer wrote the initials of the agent's name, together with the prices, opposite the lots purchased by him, in the printed catalogue; & the principal afterwards, in a letter to the agent, recognised the purchase:—**Held:** the entry in the catalogue, & the letter, coupled together, were a sufficient memorandum of the contract within Stat. Frauds.—*PHILLIMORE v. BARRY* (1808), 1 Camp. 513; 170 E. R. 1040, N. P.

**237. — In conditions of sale in catalogue.]—**KENWORTHY *v.* SCHOFIELD, No. 257, *post*.

**238. — Order signed by seller in books of buyer.]—**(1) An order for goods, written & signed by the seller in a book of the buyers, but not naming the buyers, may be connected with a letter of the seller to his agent mentioning the name of the buyer, & with a letter of the buyer to the seller claiming the performance of the order, to constitute a complete contract within Stat. Frauds.

(2) It is no objection to the validity of a contract for the sale of goods signed by the seller, that the seller cannot enforce the same contract against the buyer, because the buyer has never signed it.—*ALLEN v. BENNET* (1810), 3 Taunt. 169; 128 E. R. 67.

**Annotations:—***As to* (1) **Consd.** *Ridgway v. Wharton* (1857), 6 H. L. Cas. 238; *Jones v. Joyner* (1900), 82 L. T. 768. **Refd.** *Stratford v. Bosworth* (1813), 2 Ves. & B. 311; *Dobell v. Hutchinson* (1835), 3 Ad. & El. 355; *Laythorp v. Bryant* (1836), 2 Bing. N. C. 735; *Warner v. Willington* (1856), 3 Drew. 523; *Williams v. Byrnes* (1863), 1 Moo. P. C. C. N. S. 154; *Long v. Millar* (1879), 4 C. P. D. 450; *Stokes v. Whicher*, [1920] 1 Ch. 411.

**239. Letter by purchaser alleging breach of contract—Letters by vendor's solicitors denying breach.]—**The purchaser of 100 sacks of good English seconds flour, at 45s. a sack, wrote to the vendors as follows: "I hereby give you notice, that the corn you delivered to me in part performance of my contract with you for 100 sacks of good English seconds flour, at 45s. per sack, is of so bad a quality that I cannot sell it, or make into saleable bread. The sacks of flour are at my shop, & you will send for them, otherwise I shall commence an action." To which the vendors answered by their attorney, "Messrs. L. & L. consider they have performed their contract with you as far as it has gone, & are ready to complete the remainder; & unless the flour is paid for at the expiration of one month, proceedings will be taken for the amount":—**Held:** a jury was warranted in concluding that the contract mentioned in the vendors' answer, was the same as

that particularised in the purchaser's letter, & therefore, the two writings constituted a sufficient memorandum of the contract under Stat. Frauds, s. 17.—*JACKSON v. LOWE* (1822), 1 Bing. 9; 7 Moore, C. P. 219; 130 E. R. 4.

**Annotations:—****Refd.** *Coe v. Duffield* (1822), 7 Moore, C. P. 252; *Dobell v. Hutchinson* (1835), 3 Ad. & El. 355; *Johnson v. Dodgson* (1837), 2 M. & W. 653; *Haughton v. Morton* (1855), 27 L. T. O. S. 36; *Wilkinson v. Evans* (1866), Har. & Ruth. 552.

**240. — Written on back of invoice.]—**A. having sold some cheeses & candles to B., sent him an invoice of the goods. B. returned the invoice with a note, signed by him, on the back, to the following effect: "The cheese came to-day, but I did not take them in, for they were very badly crushed. So the candles & cheese is returned":—**Held:** the contents of the invoice were sufficiently referred to by the note on the back of it, & the two together constituted a sufficient memorandum in writing of the bargain to satisfy Stat. Frauds.—*WILKINSON v. EVANS* (1866), L. R. 1 C. P. 407; Har. & Ruth. 552; 35 L. J. C. P. 224; 12 Jur. N. S. 600; 14 W. R. 963.

**Annotations:—****Distd.** *Caregan v. Richards* (1866), 15 L. T. 252. **Apld.** *Buxton v. Rust* (1872), L. R. 7 Exch. 279; *Elliott v. Dean* (1884), Cab. & El. 283. **Distd.** *Cox v. Hoare* (1906), 95 L. T. 121. **Consd.** *Thirkell v. Cambi*, [1919] 2 K. B. 590. **Refd.** *McCaull v. Strauss* (1883), Cab. & El. 106; *De Hoyle, Hoyle v. Hoyle*, [1893] 1 Ch. 84; *Dewar v. Mintoft*, [1912] 2 K. B. 373.

**241. — Inventory—Valuation—Letters by purchaser to vendor & agent.]—**Deft. having purchased the lease of a house at a public auction, he afterwards wrote to the auctioneer, requesting him to send the key, & stating, that his auctioneer was desirous of taking an inventory of the fixtures. The auctioneers accordingly met, & disagreeing as to the valuation, appointed an umpire, to whom they inclosed an inventory, stating the fixtures to be the property of pltf., & valued to deft. The umpire made a valuation, & appraised the fixtures at a certain sum, & returned the inventory with an appraisement duly stamped. Deft., by letter afterwards requested pltf.'s auctioneer to remove the fixtures, which was done; & on the following day, deft. wrote pltf. that he would attend at the house & pay them the amount of the fixtures, as settled by the appraisers. The first & last letters were signed by deft., but the first only was stamped:—**Held:** taking the inventory, appraisement, & correspondence together, they established a sufficient memorandum of the contract to satisfy Stat. Frauds.—*HEMMING v. PERRY* (1828), 2 Moo. & P. 375.

**242. — Letter referring to goods of same character.]—**(1) The traveller of pltf., hop merchants in London, agreed with deft., at Leeds, for the sale to him, by sample, of a quantity of hops. Deft. wrote in his own book, which he kept, the following memorandum, "Leeds, Oct. 19, 1836. Sold J. D. deft., 27 pockets Playsted, 1836, Sussex, at 103s.; 4 pockets Selme, Beckley, at 95s. The bulk to answer the sample. Samples & invoice to be sent per Rockingham coach. Payment in bankers' at two months." This was signed by the traveller on behalf of pltf. Deft., on the same day, wrote to pltf., requesting them to deliver "the 27 pockets Playsted & the 4

boards which deft. had for sale. Deft. replied, giving particulars asked respecting quantities & prices. Pltf. wrote accepting the offer & placing a definite order for the spruce boards mentioned in deft.'s letter. Receipt of this letter was acknowledged:—**Held:** the correspondence constituted a sufficient memorandum in writing to comply with the Statute.—*RHODES & Co., LTD. v. McKEEN* (GEORGE)

& Co., LTD. (1921), 51 N. S. R. 178.—**CAN.**

**g. —.]—**Deft. verbally ordered goods from pltf. & subsequently pltf. showed deft. a written order & left a copy thereof with him. Later deft. wrote pltf. "Owing to conditions here I will ask you to hold my order until I let you know, I may need same & may have to cancel it." On his examination for discovery deft. ad-

mitted that the order he referred to in the letter was the said written order:—**Held:** the said letter & order were sufficiently connected by deft.'s evidence to be read together, & constituted a sufficient memorandum in writing to satisfy Sale of Goods Act, R. S. S., 1920 (c. 197), s. 6.—*STIRNE v. MATHIEU* (Sask.), [1923] 3 W. W. R. 493.—**CAN.**

**h. —.]—**A memorandum, which



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pockets Selmes, 1836, Sussex," to a third party. *Qu.*: whether this letter sufficiently referred to the contract in question, so as that it might have been connected with the entry in the book, for the purpose of constituting a memorandum of the contract within the Statute.

(2) The bulk samples & invoice were sent to deft. by the coach, pursuant to the contract, but he returned them as not answering to the samples by which he bought. The jury, in an action for the price of the hops, found that the samples did answer the contract:—*Held*: there was no acceptance of the goods within Stat. Frauds.

(3) *Semble*, the defence that there has not been a sufficient memorandum in writing of a contract to satisfy Stat. Frauds, may be taken under the general issue, without being specially pleaded.—*JOHNSON v. DODGSON* (1837), 2 M. & W. 653; *Murp. & H. 271*; 6 L. J. Ex. 185; 1 Jur. 739; 150 E. R. 918.

*Annotations*:—*As to* (2) *Refd.* *Norman v. Phillips* (1845), 14 M. & W. 277; *Meredith v. Meigh* (1853), 17 Jur. 649. *As to* (3) *Refd.* *Hemming v. Treneary* (1839), 9 Ad. & El. 926. *Generally, Mentd.* *Buttemere v. Hayes* (1839), 5 M. & W. 456; *Herbert v. Turner* (1842), 6 Jur. 194; *Foster v. Mentor Life Assoc.* (1854), 3 E. & B. 48; *Durrell v. Evans* (1862), 1 H. & C. 174; *Buckton v. L. & N. W. Ry.* (1916), 87 L. J. K. B. 234; *Cohen v. Roche*, [1927] 1 K. B. 169.

**243. — Acceptance of offer by telegram—Signature of agent.**—Pltf. having entered into a contract with C., the brother of deft., for the sale of some hay, brought an action against deft. for not accepting. The judge at the trial admitted letters & telegrams signed by C. as evidence against deft., & the jury found for pltf.:—*Held*: there was sufficient evidence of the authority, & the two telegrams, of which one was signed in C.'s name, & in the other the name of deft. was not mentioned as buyer, together constituted a sufficient memorandum of the contract to satisfy Stat. Frauds, on the ground that deft. might be treated as the undisclosed principal of C., who appeared on the telegrams to be liable as principal.—*MCBLAIN v. CROSS* (1871), 25 L. T. 804.

**244. — Entry in auctioneer's sales ledger—No reference to conditions of sale.**—Pltf. sent a mare to be sold by auction at deft.'s repository. Deft. advertised the mare for sale by auction on Mar. 28, 1872, & circulated a printed catalogue of the horses to be sold at his sale, with conditions of sale annexed, in which pltf.'s mare was described as lot 49. Deft. had a sales ledger, which was headed, "Sales by auction, Mar. 28, 1872," in which pltf.'s mare was also numbered 49; but neither the catalogue nor the conditions of sale were annexed to the sales ledger, nor were they referred to therein. On Mar. 28, 1872, the lots described in the catalogue were put up by deft. for sale under the conditions. Pltf.'s mare was put up for sale & knocked down to M. for £33, & thereupon deft.'s clerk wrote in the columns of the sales ledger left blank for this purpose, the name of M. as purchaser, & the price. M. afterwards refused to take the mare:—*Held*: the catalogue & the conditions of sale were not

sufficiently connected with the entries in the sales ledger to make a note or memorandum in writing of a contract by M. to satisfy Stat. Frauds, s. 17.—*PERCE v. CORF* (1874), L. R. 9 Q. B. 210; 43 L. J. Q. B. 52; *sub nom.* *PIERCE v. CORF*, 29 L. T. 919; 38 J. P. 214; 22 W. R. 299.

*Annotations*:—*Apld.* *Rishton v. Whatmore* (1878), 8 Ch. D. 467. *Consd.* *Wylson v. Dunn* (1887), 34 Ch. D. 569; *Potter v. Peters* (1895), 64 L. J. Ch. 357; *Dewar v. Mintoft*, [1912] 2 K. B. 373. *Refd.* *McCaull v. Strauss* (1883), Cab. & El. 106; *Bell v. Balls*, [1897] 1 Ch. 663; *Cohen v. Roche*, [1927] 1 K. B. 169.

**245. —**—*At a sale by auction* subject to conditions, the auctioneer entered in his sale book the names of the vendor & purchaser, the subject-matter of the sale, & the amount of the purchase-money, but omitted, in the entry, to embody or make any reference to the conditions of sale. There was no other memorandum or contract in writing:—*Held*: there was no sufficient contract in writing within Stat. Frauds, & specific performance refused as against the purchaser.—*RISHTON v. WHATMORE* (1878), 8 Ch. D. 467; 47 L. J. Ch. 629; 26 W. R. 827.

**246. — Sold note—Delivery order with buyer's name.**—*GINNER v. KING* (1890), 7 T. L. R. 140, C. A.

**247. — Order—Invoice.**—*FAVETS v. AUSTIN & Co.* (1891), 7 T. L. R. 332.

**248. — Letter—Envelope in which contained.**—An envelope & a letter which is shown by evidence to have been inclosed in it are so connected together that the envelope may be used to supply the name of one of the parties to a memorandum in writing of a contract within Stat. Frauds, s. 4, or Sale of Goods Act, 1893 (c. 71), s. 4.—*PEARCE v. GARDNER*, [1897] 1 Q. B. 688; 66 L. J. Q. B. 457; 76 L. T. 441; 45 W. R. 518; 13 T. L. R. 349, C. A.

*Annotations*:—*Apld.* *Last v. Hucklesey* (1914), 58 Sol. Jo. 431. *Consd.* *Stokes v. Wheeler*, [1920] 1 Ch. 411. *Refd.* *Chaproniere v. Lambert* (1917), 86 L. J. Ch. 726.

**249. — Recognising unsigned document.**—A letter written by an agent within the scope of his authority, which refers to & recognises an unsigned document as containing the terms of a contract made by his principal, is a sufficient memorandum of the contract within Stat. Frauds, s. 4, & it is not necessary, in order to satisfy Stat. Frauds, that the principal should have authorised the agent to sign the letter as a record of the contract.—*JOHN GRIFFITHS CYCLE CORPN., LTD. v. HUMBER & Co., LTD.*, [1899] 2 Q. B. 414; 68 L. J. Q. B. 959; 81 L. T. 310, C. A.; *on appeal, sub nom.* *HUMBER & Co. v. JOHN GRIFFITHS CYCLE CO.* (1901), 85 L. T. 141, H. L.

*Annotations*:—*Consd.* *Thirkell v. Cambi*, [1919] 2 K. B. 590. *Refd.* *Daniels v. Trefusis*, [1914] 1 Ch. 788; *Grindell v. Bass*, [1920] 2 Ch. 487.

**250. — Signature of vendor's order book by vendee—Name of vendor stamped on cover.**—A purchaser of goods signed a memorandum in a paper book, in which orders were generally put, slipped into a leather cover. The name of the seller did not appear in the memorandum, but was stamped upon the cover:—*Held*: this was a sufficient memorandum to satisfy Sale of Goods

contained the terms of a contract for the unconditional sale of goods, was made at the time of the negotiation between the parties, but was signed by neither. Subsequently the transaction was referred to in a letter written by the vendor to the purchaser, apparently relating to the memorandum, but insisting that the contract was conditional, & that the condition had not been performed. An action having been brought against vendor for nondelivery:

—*Held*: the memorandum & letter, taken in conjunction, did not constitute a sufficient note in writing within Stat. Frauds.—*HAUGHTON v. MORTON* (1855), 27 L. T. O. S. 36.—*IR.*

**k. —**—*OETZES & GERITSEN v. NEW ZEALAND LOAN & MERCANTILE AGENCY CO., LTD.* (1899), 18 N. Z. L. R. 198.—*N.Z.*

**l. —**—*Where an agent in a letter to his principal reported having "sold"*

wheat which he described as "all your wheat":—*Held*: such reference to a sale was not necessarily a reference to two other documents previously drawn, nor did it incorporate them so as to form a complete note of the contract.—*WOOD BROTHERS v. KENNEDY* (1907), 27 N. Z. L. R. 344.—*N.Z.*

**m. —**—*WILSON, BALK & Co., LTD. v. WILSON*, [1921] N. Z. L. R. 397.—*N.Z.*

Act, 1803 (c. 71), s. 4.—**JONES BROTHERS v. JOYNER** (1900), 82 L. T. 768, D. C.

—[See, also, Nos. 253, 254, *post*.]

**Admissibility of evidence to connect.**—[See Nos. 234, 248, *ante*.]

### C. Contents of.

#### (a) Parties.

See **CONTRACT**, Vol. XII., pp. 143 *et seq.*

**251. Necessity for names of parties—Both parties.**—**CHAMPION v. PLUMMER**, No. 280, *post*.

**252.** —[—]—A memorandum of sale of goods in the vendor's book, signed by the vendee in initials, the vendor's name not appearing in the book, is not a sufficient note in writing to satisfy Stat. Frauds; nor will the defect be cured by a letter from the vendee, in which the vendor's name does appear, unless the letter clearly refers to the memorandum.—**JACOB v. KIRK** (1839), 2 Mood. & R. 221, N. P.

**253.** — **Connection of documents to ascertain.**—**JACOB v. KIRK**, No. 252, *ante*.

**254.** —[—]—Deft. went into pltf.'s shop, & agreed to purchase certain goods in the aggregate exceeding the value of £10. The several articles, with their respective prices, were entered in pltf.'s "order book" on the fly leaf at the beginning of which were written the names of pltf.s; & deft. wrote his name at the foot of the entry, for the purpose of verifying the bargain:—**Held**: a sufficient signature of the contract by both parties to satisfy Stat. Frauds, s. 17.—**SARL v. BOURDILLON** (1856), 1 C. B. N. S. 188; 26 L. J. C. P. 78; 2 Jur. N. S. 1208; 5 W. R. 196; 140 E. R. 79.

**Annotations**:—**Consd.** **Jones v. Joyner** (1900), 82 L. T. 768. **Refd.** **Newell v. Radford** (1867), L. R. 3 C. P. 52.

**255.** — **Characters of parties.**—In order to make a valid note or memorandum of a contract for the sale of goods within Stat. Frauds, s. 17, the names of the parties to the contract must appear upon the document as such parties. A., the purchaser from B. of goods above the value of £10, signed a document in the following terms, "A. agrees to buy the whole of the lots of marble purchased by B., now lying at Lyme Cobb, at 1s. per foot":—**Held**: B.'s name not being mentioned as seller, the document was not a note or memorandum of the contract within Stat. Frauds, s. 17.—**VANDENBERGH v. SPOONER** (1866), L. R. 1 Exch. 316; 4 H. & C. 519; 35 L. J. Ex. 201; 14 L. T. 701; 30 J. P. 646; 12 Jur. N. S. 527; 14 W. R. 843.

**Annotations**:—**Distd.** **Newell v. Radford** (1867), L. R. 3 C. P. 52. **Dtd.** **Cohen v. Roche**, [1927] 1 K. B. 169. **Refd.** **Jones v. Joyner** (1900), 82 L. T. 768.

**256.** — **Admissibility of parol evidence.**—On a purchase of flour, J. W., a duly authorised agent of deft. made the following entry in a book belonging to N., "Mr. N. 32 sacks cullasses at 39s., 280 lbs. to wait orders.—J. W." In an action by N. for the non-delivery of the flour, this entry was proved, & it was proved by parol evidence that N. was a baker, & deft. a flour merchant: & a correspondence subsequent to the purchase was put in relating to the delivery of flour by deft. to pltf.:—**Held**: the above entry was a sufficient memorandum in writing of the contract to satisfy Stat. Frauds: for that the parol evidence of the relative trades of the parties was admissible, &

independently of the correspondence, showed that deft. was the seller & pltf. the buyer of the flour.—**NEWELL v. RADFORD** (1867), L. R. 3 C. P. 52; 37 L. J. C. P. 1; 17 L. T. 118; 16 W. R. 79.

**Annotations**:—**Fold.** **Cohen v. Roche**, [1927] 1 K. B. 169. **Refd.** **Sheers v. Thimbleby** (1897), 76 L. T. 709; **Re Holland, Gregg v. Holland**, [1902] 2 Ch. 360.

**257.** — **Agent's name.**—At a sale of goods by auction, certain conditions of sale were read before the biddings commenced, but were not attached to the catalogue. An agent for deft. was the highest bidder for a lot & the auctioneer put down the price £105, & the agent's name opposite that lot. in his catalogue:—**Held**: sales of goods by auction are within Stat. Frauds, s. 17, & no sufficient memorandum of the bargain was signed to satisfy Stat. Frauds, s. 17, the conditions of sale not being annexed to the catalogue. Had they been annexed, it would have sufficed to put down the agent's name, that of his principal not being necessary.—**KENWORTHY v. SCHOFIELD** (1824), 2 B. & C. 945; 4 Dow. & Ry. K. B. 556; 2 L. J. O. S. K. B. 175; 107 E. R. 633.

**Annotations**:—**Apld.** **Hushton v. Whatmore** (1878), 8 Ch. D. 467. **Refd.** **Dale v. Humfrey** (1858), E. B. & E. 1004; **North Staffordshire Ry. v. Peck** (1860), E. B. & E. 986; **Maddison v. Alderson** (1883), 8 App. Cas. 467; **Oliver v. Hunting** (1890), 41 Ch. D. 205.

**258.** — **Agent acting for undisclosed principal.**—D. M. & co., brokers in London, being employed by one S. to purchase oil, dealt with T. & M., brokers, who were employed by pltf. to sell oil, without either broker disclosing the names of their principals. D. M. & co. delivered to T. & M. a note as follows: "Sold this day for Messrs. T. & M. to our principal ten tons of oil," specifying the terms & price, which was above £10. The note was signed D. M. & co., brokers. Quarter per cent. brokerage to D. M. & co. D. M. & co. did not disclose the name of their principal S. till after the lapse of an unreasonable time, when S. had become insolvent. Pltf. sued D. M. & co. for not accepting the oil, laying the sale as by himself to D. M. & co. Defts. denied the contract. On the trial, pltf. proved a custom in the trade that, when a broker purchased without disclosing the name of his principal, he was liable to be looked to as principal:—**Held**: evidence of the custom was admissible, as not contradicting the written instrument, but explaining its terms, or adding a tacitly implied incident; & the note thus explained was a sufficient memorandum of the contract sued upon to satisfy Stat. Frauds.—**DALE v. HUMFREY** (1858), E. B. & E. 1004; 6 W. R. 854; 120 E. R. 783; *sub nom.* **HUMFREY v. DALE**, 27 L. J. Q. B. 390; 31 L. T. O. S. 328; 5 Jur. N. S. 191. Ex. Ch.

**Annotations**:—**Apld.** **Fleet v. Murton** (1871), L. R. 7 Q. B. 126; **Hutchinson v. Tatham** (1873), L. R. 8 C. P. 482. **Consd.** **Southwell v. Bowditch** (1876), 1 C. P. D. 374. **Distd.** **Miller, Gibb v. Smith & Tyrer**, [1917] 2 K. B. 141. **Refd.** **Myers v. Sarl** (1860), 3 E. & B. 306; **Fild v. Leelan** (1861), 6 H. & N. 617; **Robinson v. Mollett** (1875), 33 L. T. 544; **Pike v. Ongley** (1887), 18 Q. B. D. 708; **Re North Western Rubber Co. v. Hüttenbach**, [1908] 2 K. B. 907; **Produce Brokers Co. v. Olympia Oil & Cakes Co.**, [1916] 1 A. C. 314; **Re Sutro & Hellbut, Symons**, [1917] 2 K. B. 348; **Westacott v. Hahn**, [1918] 1 K. B. 495; **Palgrave, Brown v. S.S. Turid**, [1922] 1 A. C. 397; **Rederi Akt. Aeolus v. Hillas** (1925), 95 L. J. K. B. 103.

**259.** —[—]—The vendor's name was omitted from the conditions of sale by auction of a house & from the indorsed form of contract to be signed by a purchaser. The house was not

### PART II. SECT. 4, SUB-SECT. 7.— C. (a).

**n. Necessity for names of.]**—Where an offer, signed by deft. to exchange a stock of goods for land, did not in any way designate the person to whom it

was supposed to be made or for whom it was intended, & such person could not be ascertained without extrinsic parol evidence adding to the memorandum:—**Held**: not to be an agreement in writing within the statute so as to entitle pltf. to specific performance;

& an acceptance of an offer beneath deft.'s signature, signed by pltf.'s assignor, did not cure the defect.—**WHITE v. TOMALIN** (1890), 19 O. R. 513.—**CAN.**  
**o.** —[—]—Where a memorandum was written on ordinary letter-paper of the purchasers, upon which was

*Sect. 4.—Contracts for £10 or upwards: Sub-sect. 7,  
C. (a) & (b) i., ii., iii., iv. & v.]*

sold at the auction; but subsequently deft. sent a letter addressed on the face of it to J. & co., who were the auctioneers, offering to purchase the house for £350, & stating that if his offer was accepted he would "sign contract on auction particulars." J. & co. replied by letter stating that on behalf of their client, who was the vendor, naming her, they accepted the offer "subject to contract as agreed. We enclose draft contract." The draft was identical with the contract embodied in the conditions of sale & indorsement, except that the draft stated the vendor's name; but deft. never signed it:—*Held*: as the offer contained the names of both contracting parties, though one was only agent of an undisclosed vendor, on its acceptance there was a valid contract within Stat. Frauds; the acceptance was absolute & unconditional, inasmuch as a form of contract definitive in all its terms was identified by the offer, & signature to the form of contract was unnecessary.—*FILBY v. HOUNSELL*, [1896] 2 Ch. 737; 65 L. J. Ch. 852; 75 L. T. 270; 45 W. R. 232; 12 T. L. R. 612; 40 Sol. Jo. 703.

*Annotations*:—*Consd.* Clark v. Robinson (1903), 51 W. R. 443; Luvsey v. Palmer, [1916] 2 Ch. 233; Rossdale v. Denny, [1921] 1 Ch. 57. *Refd.* Chillingworth v. Esche (1923), 129 L. T. 808.

**260.** —[— *Parol evidence to identify principal.*—In an action on a written agreement, purporting on the face of it to be made by deft. & subscribed by him for the sale & delivery by him of goods above the value of £10, it is not competent for deft. to discharge himself on an issue on the plea of *non assumptit*, by proving that the agreement was really made by him by the authority of, & as agent for, a third person, & that pltf. knew those facts at the time the agreement was made & signed.—*HIGGINS v. SENIOR* (1841), 8 M. & W. 834; 11 L. J. Ex. 199; 151 E. R. 1278.

*Annotations*:—*Apld.* Calder v. Dobell (1871), L. R. 6 C. P. 486. *Refd.* Holding v. Elliott (1860), 5 H. & N. 117; Wako v. Harrop (1861), 9 W. R. 788; Fawkes v. Lamb (1862), 31 L. J. Q. B. 98; Williamson v. Barton (1862), 7 H. & N. 899; Royal Exchange Assce. v. Moore (1863), 2 New Rep. 63; Fisher v. Marsh (1865), 6 B. & S. 411; Cropper v. Cook (1868), L. R. 3 C. P. 194; Fleet v. Murton (1871), L. R. 7 Q. B. 126; Armstrong v. Stokes (1872), L. R. 7 Q. B. 598; Southwell v. Bowditch (1876), 45 L. J. Q. B. 630; Pontifex & Wood v. Hartley (1893), 62 L. J. Q. B. 196; Roderlakt. Argonaut v. Hani, [1918] 2 K. B. 247; Ariadne S.S. Co. v. McKelvie, [1922] 1 K. B. 518. *Mentd.* Fox v. Frith (1842), 10 M. & W. 131; Bristowe v. Whitmore (1861), 4 J. T. 622; Browning v. Provincial Insee. for Canada (1873), L. R. 5 P. C. 263.

**261.** —[—C., a broker, was authorised by deft. to buy cotton for him, but not to disclose his name. C.'s credit not being good enough to enable him to obtain a contract upon his own sole responsibility, he gave pltf's. the name

of his principal, & bought & sold notes were exchanged between pltf's. & C., in which the latter was named as the buyer. C. sent deft. an advice note informing him that he had bought the cotton of pltf's. "for him," & deft. did not repudiate the transaction. An invoice was made out to C., & the market falling, C. was called upon by pltf's. to accept & pay for the cotton, & threatened with legal proceedings. Failing to obtain payment from C., pltf's. sued deft.:—*Held*: the fact of deft.'s name being disclosed at the time of the contract did not preclude pltf's. from having recourse to him; parol evidence of the circumstances under which the contract was made was admissible; & the insertion of C.'s name in the contract, though his principal was known at the time, & the subsequent demands upon C. for payment, did not necessarily amount to an election on the part of pltf's. to give credit to C., & to him only.—*CALDER v. DOBELL* (1871), L. R. 6 C. P. 486; 40 L. J. C. P. 224; 25 L. T. 129; 19 W. R. 978, Ex. Ch.

*Annotations*:—*Refd.* Fleet v. Murton (1871), L. R. 7 Q. B. 126; Browning v. Provincial Insee. for Canada (1873), L. R. 5 P. C. 263; Curtis v. Williamson (1874), L. R. 10 Q. B. 57. *Mentd.* Longman v. Hill (1891), 7 T. L. R. 639; Codling v. Mowlen, [1914] 2 K. B. 61; Bennett v. Whitehead, [1926] 2 K. B. 380.

**262.** *Effect of party signing as agent.*—H. made a verbal offer to C., which C. verbally accepted, for the sale to C. of 3,000 bales of jute to arrive. In a claim made by C. against H. for non delivery, the only note or memorandum in writing of the contract which C. relied upon was a document signed by H. which purported to be a contract for the sale of the jute to C. by S. Brothers, by H., their agent:—*Held*: there was no note or memorandum in writing, within Sale of Goods Act, 1893 (c. 71), s. 4, of a contract of sale between H. & C.—*Re Cox, McEuen & Co. & HOARE, MARR & Co.* (1907), 96 L. T. 719, C. A.; *affg.* S. C. *sub nom.* Cox v. HOARE (1906), 95 L. T. 121.

(b) *Terms.*

i. *In General.*

*See CONTRACT*, Vol. XII., pp. 148 *et seq.*

**263.** *Must contain all essential terms.*—Deft. verbally ordered of pltf. certain looking-glasses & other articles. The glass was to be best plate glass, & deft. required them to be sent by a particular boat. Pltf. sent an invoice & letter to deft. by post, with charges for insurance, loan of packing cases, etc. Deft. replied that the articles had not arrived, he objected to the charge for loan of cases in the invoice, saying nothing as to the rest. The goods were sent off, not by the boat deft. had ordered, but by another, & were lost on the voyage:—*Held*: there was not a sufficient note in writing of the bargain by deft. to satisfy

a printed heading of the name of the trading firm representing the purchasers, but contained no other reference to the purchasers:—*Held*: such memorandum did not comply with Sale of Goods Act, 1893, s. 6.—*WOOD BROTHERS v. KENNEDY* (1907), 27 N. Z. L. R. 344.—N.Z.

P. —[—*MURRAY* HOPKINS,  
[1919] N. Z. L. R. 689.—N.Z.

**PART II. SECT. 4, SUB-SECT. 7.—  
C. (b) i.**

**263 i.** *Must contain all essential terms.*—The conditions of sale must be annexed to the list of purchasers, so as to make a complete contract to bind the vendee under Stat. Frauds. The signed list should show the weight & value of the articles purchased, & the price given for them.—*SANDFORD*

v. O'DONOHUE (1841), 1 Ont. Dig. 380.—CAN.

**263 ii.** —[—The note or memorandum required by Sale of Goods Act, 1919 (c. 4), s. 4, must contain all the terms agreed upon by the parties at the time such note or memorandum is made & signed.—*BERRY v. ROBINSON* (1921), 67 D. L. J. 500; 49 N. B. R. 166.—CAN.

**263 iii.** —[—*MAHALEN v. DUBLIN & CHAPELIZOD DISTILLERY CO.* (1877), 1 R. 11 C. L. 83.—IR.

**263 iv.** —[—Deft. purchased at an auction certain lots of maize, the property of pltf's, the bulk of which was in store. In an action for not removing the maize within the time mentioned in the conditions of sale, & to recover the loss upon a re-sale, pltf's. & the

auctioneer deposed that the sale was by sample; & it appeared that samples had been exhibited at the auction, but the entry in the auctioneer's books of the sales to deft. omitted to state that the sale was by sample:—*Held*: the sale having been in fact by sample, the entry in the auctioneer's book omitted a material term of the contract in not stating that the sale was by sample, & therefore was not sufficient memorandum of the contract under Stat. Frauds.—*M'MULLEN v. HELBERG* (1879), 6 L. R. Ir. 463.—IR.

**263 v.** —[—To constitute a valid memorandum of a contract for the sale of goods of the value of £10 or upwards it should contain all the material terms of the contract, including the names of the contracting parties, or a description sufficient to identify them.—*WOOD*

Stat. Frauds, & he was not liable.—*McCLEAN v. NICOLLE* (1861), 4 L. T. 863; 9 W. R. 811; *sub nom. M'LEAN v. NICOLL*, 7 Jur. N. S. 999.

264. —. —.]—*LEE v. GRIFFIN*, No. 9, *ante*.

265. —. —.]—*Deposit money*.—*BRUMBY v. JOHNSTON*, No. 215, *ante*.

266. —. —.]—Defts.' departmental manager orally agreed on their behalf to buy certain goods from pltf. & signed an order form on which was printed the clause, "orders to be acknowledged by return," but this term had not been orally agreed & no acknowledgment was sent to defts. In an action for breach of the contract defts. pleaded that there was merely an offer & no contract, that there was no written memorandum to satisfy Sale of Goods Act, 1893 (c. 71), s. 4, as the only document contained a clause which had not been agreed to:—*Held*: the words on the order form, "orders to be acknowledged by return," were not intended to be words of contract, & the words "by return" related only to the time within which, & not to the method by which, acknowledgment was to be made, & therefore there was a concluded contract & a sufficient memorandum & pltf. was entitled to recover.—*WILLIS v. BAGGS & SALT* (1925), 41 T. L. R. 453; 69 Sol. Jo. 543.

## ii. Agreement of Parties.

See CONTRACT, Vol. XII., pp. 149, 150, Nos. 1026–1032.

267. *Must show agreement of parties*.—*HOLD-ERNESSE v. BASS*, No. 149, *ante*.

268. —. —.]—*Letters containing terms of sale—No admission of existence of contract*.—A letter written by deft. in answer to letters of pltf. containing the terms of a bargain for the sale of cotton, held not to amount to a sufficient memorandum within Stat. Frauds, s. 17, because it did not amount to an absolute admission of the existence of a contract in the terms alleged by pltf., being equally consistent with the existence of a different contract.—*CAREGAN v. RICHARDS* (1866), 15 L. T. 252.

269. —. —.]—*Inclusion of additional terms*.—A traveller for defts. saw pltf., a builder, & showed him a specification of various kinds of timber which defts. had on offer for sale. Pltf. marked some items that he wished to buy, & the traveller said he might have them. Next day the traveller delivered to pltf. a sold note stating the transaction, but bearing in small print along one side the words: "Goods are sold subject to their being on hand & at liberty when the order reaches the head office." Pltf. denied that he ever saw this condition, & there was evidence as to the difficulty of reading it. Some of the items of timber not having been delivered, pltf. sued for damages for

breach of the oral agreement in the county ct., & defts. relied in defence on the condition, or, in the alternative, on a custom of the trade corresponding to the condition. The county ct. judge gave judgment in favour of pltf., holding (a) the alleged custom was not proved, & (b) pltf. never saw the condition, & that an ordinary business man acting with ordinary care might be excused for not doing so:—*Held*: by the Ct. of Appeal, there was evidence to support the county ct. judge's finding; as the sold note contained a condition not part of the original verbal contract & not assented to by pltf., it was not a proper memorandum in writing of the agreement between the parties; & pltf. was entitled to succeed on the oral contract, the defence that there was no sufficient memorandum in writing of the agreement not having been pleaded.—*ROE v. NAYLOR* (R. A.), LTD. (1918), 87 L. J. K. B. 958; 119 L. T. 359, C. A.

*Annotations*:—*Distd. Walls v. Centaur Co.* (1921), 126 L. T. 242. *Refd. Armour v. Walford* (London), [1921] 3 K. B. 473; *Koskas v. Standard Marine Inco.* (1927), 137 L. T. 165. *Mentd. The Luna*, [1920] P. 22.

## iii. Goods Sold.

See CONTRACT, Vol. XII., p. 150, No. 1033.

270. *Memorandum containing no reference to quality*.—Where a broker employed by the seller alone, effects a contract by means of a note sent to & accepted by the purchaser, a variation between this note & a note sent by the broker to the seller is immaterial. Letters not containing any reference to the quality or the time for payment of goods sold as agreed upon do not constitute a sufficient memorandum of the contract to satisfy Stat. Frauds.—*MCCAUL v. STRAUSS & Co.* (1883), Cab. & El. 106.

## iv. Time for Payment.

See, generally, CONTRACT, Vol. XII., pp. 150, 151, Nos. 1034–1037.

271. *Necessity to state*.—*MCCAUL v. STRAUSS & Co.*, No. 270, *ante*.

## v. Price.

See CONTRACT, Vol. XII., p. 152, Nos. 1040–1052.

272. *Where price agreed on—Sum of money*.—The note or memorandum in writing of the bargain in the case of a sale of goods for the price of £10 or upwards, required by Stat. Frauds, s. 17, must state the price for which the goods were sold.—*ELMORE v. KINGSCOTE* (1826), 5 B. & C. 583; 8 Dow. & Ry. K. B. 343; 108 E. R. 217.

*Annotations*:—*Apld. Acebal v. Levy* (1834), 10 Bing. 376. *Expld. Hoadly v. McLaine* (1834), 10 Bing. 482. *Consd. Ashcroft v. Morrin* (1842), 4 Man. & G. 450.

*BROTHERS v. KENNEDY* (1907), 27 N. Z. L. R. 344.—*N.Z.*

263 vi. —. —.]—*HANSEN v. CRAIG & ROSE* (1859), 21 Dunl. (Ct. of Sess.) 432; 31 Sc. Jur. 236.—*SCOT*.

PART II. SECT. 4, SUB-SECT. 7.—C. (b) ii.

267 i. *Must show agreement of parties*.—A statement in a letter written to a third person by one of defts., that he had an offer from pltf. for the purchase of a schooner, but not stating in the letter that he had accepted it, is not a sufficient memorandum in writing within Stat. Frauds, R. S. N. S. 1900, c. 141, s. 11, to enable the party making the offer to recover damages for breach of contract against the writer for failure to deliver the schooner.—*ALLEN v. GRAVES* (1908), 43 N. S. R. 249; 6 E. L. R. 347.—*CAN.*

PART II. SECT. 4, SUB-SECT. 7.—C. (b) iii.

q. *Printed form of words—Containing terms known to parties to be untrue—Whether terms part of contract*.—*CARLISLE NEPHEWS & Co. v. HURMOOK ROY* (1883), 1 L. R. 9 Calc. 679; 13 C. L. R. 120.—*IND.*

r. *Memorandum containing no note of specific goods contracted for*.—A letter from the terms of which the exact quantity of goods said to be contracted for can be ascertained by subsequent measurement, but from which it cannot be ascertained that the goods to be measured are the specific goods contracted for, is not a sufficient note or memorandum in writing, within Stat. Frauds.—*CARROLL v. COWELL* (1838), 1 Jebb & S. 43.—*IR.*

PART II. SECT. 4, SUB-SECT. 7.—C. (b) iv.

t. *Left to be settled by further negotiations—No agreement made—Rights of parties*.—A contract in writing for the sale of goods is not complete, under Stat. Frauds, s. 17, where, although the price is stated in it, the contract shows upon its face that the time for payment is left to be settled by further negotiations, as to which there has been no agreement; & the fact that possession of the goods is taken under the terms of the agreement does not affect the rights of the parties.—*HOUSE v. BROWN* (1907), 10 O. W. R. 396; 14 O. L. R. 500.—*CAN.*

PART II. SECT. 4, SUB-SECT. 7.—C. (b) v.

a. *Necessity to state*.—Where the real contract for sale of goods is to be

*Sect. 4.—Contracts for £10 or upwards: Sub-sect. 7, C. (b) v., & D. (a) & (b).]*

**273. —** “The then usual & shipping price.”]—*ACEBAL v. LEVY*, No. 167, *ante*.

**274. No price fixed—Inference for sale at reasonable price.**—*HOADLY v. M'LAIN*, No. 446, *post*.

**275. —** “On moderate terms.”]—An order for goods “on moderate terms,” is a sufficient memorandum within Stat. Frauds, s. 17.—*ASH-CROFT v. MORRIN* (1842), 4 Man. & G. 450; 11 L. J. C. P. 265; 6 Jur. 783; 134 E. R. 185.

*Annotations:—Apld.* *Joyce v. Swann* (1864), 17 C. B. N. S. 84. *Refd.* *Pontifex v. Wilkinson* (1845), 1 C. B. 75; *Marshall v. Powell* (1846), 8 L. T. O. S. 159.

**276. Ambiguity—Admissibility of parol evidence.**—Declaration stated that deft. had sold pltf. eighteen pockets of Kent hops at the price of £5 per hundredweight, but failed to deliver according to promise. Issue being joined on *non assumpsit*, it appeared that the contract was in writing, as follows: sold 18 pockets Kent hops, at 100s.: & that a pocket contained more than a hundredweight:—*Held*: evidence might be given to show that, by usage of the hop trade, a contract so worded was understood to mean £5 per hundredweight.—*SPICER v. COOPER* (1841), 1 Q. B. 424; 1 Gal. & Dav. 52; 10 L. J. Q. B. 241; 5 Jur. 1036; 113 E. R. 1195.

*Annotations:—Consd.* *Sarl v. Bourdillon* (1856), 1 C. B. N. S. 188. *Refd.* *Foster v. Mentor Life Assce.* (1854), 18 Jur. 827; *Newell v. Radford* (1867), L. R. 3 C. P. 52.

**277. —** Reference to price list.]—Deft. agreed to purchase of pltf. certain goods at a discount of 25 per cent. from a list of goods with prices annexed, & he signed an order for the goods referring to the list. The terms as to discount were not mentioned in the order. Deft. afterwards wrote to pltf. requesting him to send the invoice, which he did. Deft. wrote in reply a letter, signed by him, returning the invoice & declining to take the goods:—*Held*: (1) the order was not a sufficient memorandum of the bargain within Stat. Frauds, s. 17, as it did not contain the price; (2) the letter returning the invoice was not a sufficient admission of the contract as stated in the invoice, so as to satisfy the statute.—*GOODMAN v. GRIFFITHS* (1857), 1 H. & N. 574; 26 L. J. Ex. 145; 28 L. T. O. S. 321; 5 W. R. 369; 156 E. R. 1331.

#### D. Signature.

##### (a) Necessity for.

See *CONTRACT*, Vol. XII., pp. 152, 153, Nos. 1053–1066.

**278. General rule.**—Pltf. cannot sue another for not accepting goods, if the contract note was only signed by pltf.; for if pltf. acted as a broker, he cannot sue as a principal; & if he were a principal, his signing would not bind deft.—*RAYNER v. LINTHORNE* (1825), 2 C. & P. 124; Ry. & M. 325; 172 E. R. 57, N. P.

**279. —**—*SMITH v. SPARROW*, No. 307, *post*.

**280. Signature of both parties.**—A note or memorandum in writing of a contract for the sale of goods, signed by the seller only, is not a sufficient memorandum within Stat. Frauds.—*CHAMPION v. PLUMMER* (1805), 1 Bos. & P. N. R. 252; 127 E. R. 458.

*Annotations:—Expld.* *Allen v. Bennet* (1810), 3 Taunt. 169.

in writing the true consideration must be stated.—*BRUCE v. GARNETT* (1884), 10 V. L. R. (L.) 126.—*AUS*.

#### PART II. SECT. 4, SUB-SECT. 7.— D. (b).

**b. Surname.**—A memorandum is

“signed” within Stat. Frauds, if only the surname of the purchaser is written on it by the auctioneer.—*FARQUHAR v. BILLMAN* (1901), 40 N. S. R. 289.—*CAN.*  
c. Printed heading—Word “and” inserted by agent of both parties.—*GIBB v. CANADIAN NORTHERN CON-*

*Consd.* *Gale v. Wells* (1824), 1 C. & P. 388. *Distd.* *Hemming v. Perry* (1828), 2 Moo. & P. 375. *Consd.* *Dobell v. Hutchinson* (1835), 3 Ad. & El. 355. *Apld.* *Graham v.*

238; *Warner v. Willington* (1856), 3 Drew. 523; *Skelton v. Cole* (1857), 1 De G. & J. 587; *Hunfrey v. Dale* (1858), 5 Jur. N. S. 191; *Liverpool Borough Bank v. Eccles* (1859), 4 H. & N. 139; *Williams v. Byrnes* (1863), 1 Moo. P. C. C. N. S. 154. *Mentd.* *Brown v. De Winton*, *Gay v. Lander* (1848), 6 C. B. 336.

**281. Whether validity of contract affected.**—*ALLEN v. BENNET*, No. 238, *ante*.

**282. Necessity for signature of other party.**—A memorandum signed by defts., whereby they agreed to give so much for goods, takes the case out of Stat. Frauds, s. 17, though not signed by the seller, nor expressing any consideration for defts.’ promise, otherwise than by inference from their own obligation.—*EGERTON v. MATHEWS* (1805), 6 East, 307; 2 Smith, K. B. 389; 102 E. R. 1304.

*Annotations:—Apld.* *Allen v. Bennet* (1810), 3 Taunt. 169. *Consd.* *Laythorpe v. Bryant* (1836), 3 Scott, 238; *Sieve-wright v. Archibald* (1851), 17 Q. B. 103. *Apld.* *Sarl v. Bourdillon* (1856), 1 C. B. N. S. 188. *Refd.* *Bateman v. Phillips* (1812), 15 East, 272; *Jenkins v. Reynolds* (1821), 3 Brod. & Bing. 14; *Lees v. Whitcomb* (1828), 3 C. & P. 289; *Williams v. Byrnes* (1863), 1 Moo. P. C. C. N. S. 154.

**Sale by auction.**—See *AUCTION & AUCTIONEERS*, Vol. III., pp. 7, 8, Nos. 47–49, 52, 53.

##### (b) Sufficiency of.

See *CONTRACT*, Vol. XII., pp. 158–160, Nos. 1121–1143.

**283. Printed heading—Name of vendor on bill of parcels.**—(1) A bill of parcels in which the vendor’s name is printed, delivered to the vendee at the time of an order given for the future delivery of goods, seems to be a sufficient memorandum of the contract within Stat. Frauds.

(2) At all events, a subsequent letter written & signed by the vendor referring to the order, may be connected with the bill of parcels, so as to take the case out of the statute.—*SAUNDERSON v. JACKSON* (1800), 2 Bos. & P. 238; 3 Esp. 180; 126 E. R. 1257.

*Annotations:—As to (1)* *Distd.* *Schneider v. Norris* (1814), 2 M. & S. 286. *Consd.* *Asheroff v. Morrin* (1842), 6 Jur. 783. *Expld.* *Hubert v. Treherne* (1842), 3 Man. & G. 743. *Consd.* *Durrell v. Evans* (1862), 1 H. & C. 174. *Apld.* *Cohen v. Roche*, [1927] 1 K. B. 169. *Refd.* *Wade v. L. & N. W. Ry.* (1920), 90 L. J. K. B. 593. *As to (2)* *Consd.* *Allen v. Bennet* (1810), 3 Taunt. 169. *Apld.* *Jackson v. Lowe* (1822), 1 Bing. 9. *Consd.* *Kenworthy v. Schofield* (1824), 2 B. & C. 945. *Distd.* *Richards v. Porter* (1827), 5 L. J. O. S. K. B. 175. *Apld.* *Hoadly v. M'Laine* (1834), 10 Bing. 482; *Dobell v. Hutchinson* (1835), 3 Ad. & El. 355; *Johnson v. Dodgson* (1837), 2 M. & W. 653. *Distd.* *Smith v. Dixon* (1839), 3 Jur. 770. *Foldd.* *Buxton v. Rust* (1872), 41 L. J. Ex. 173. *Refd.* *Laythorpe v. Bryant* (1836), 2 Bing. N. C. 735; *Jackson v. Oglander* (1865), 2 Hem. & M. 465. *Generally, Refd.* *Murphy v. Böese* (1875), 44 L. J. Ex. 40. *Mentd.* *Squire v. Campbell* (1836), 1 My. & Cr. 459.

**284. —**—A bill of parcels, in which the name of the vendor is printed, & that of the vendee written by the vendor, is a sufficient memorandum of the contract within Stat. Frauds to charge the vendor.—*SCHNEIDER v. NORRIS* (1814), 2 M. & S. 286; 105 E. R. 388.

*Annotations:—Apld.* *Jackson v. Lowe* (1822), 1 Bing. 9. *Distd.* *Richards v. Porter* (1827), 5 L. J. O. S. K. B. 175. *Apld.* *Johnson v. Dodgson* (1837), 2 M. & W. 653. *Consd.* *Durrell v. Evans* (1862), 1 H. & C. 174; *Tourret v. Cripps* (1879), 48 L. J. Ch. 567; *Hucklesby v. Hook* (1900), 82 L. T. 117. *Apld.* *Behnke v. Bede Shipping Co.*, [1927] 1 K. B. 649; *Cohen v. Roche*, [1927] 1 K. B. 169. *Refd.* *Laythorpe v. Bryant* (1836), 2 Hodg. 25; *Hughes v.*

*STRUCTION Co. (B. C.)*, [1918] 3 W. W. R. 396; 43 D. L. R. 276.—*CAN.*

d. Sale note not signed but contract note signed—Whether sufficient.]—*RUSSELL & BAIRD, LTD. v. HOBAN*, [1922] 2 I. R. 159.—*IR.*



Budd (1840), 8 Dowl. 478; *Jenkyns v. Galsford & Thring* (1863), 31 L. J. P. M. & A. 122; *Buxton v. Rust* (1872), L. R. 7 Exch. 279; *Evans v. Hoare*, [1892] 1 Q. B. 593; *Wade v. L. & N. W. Ry.* (1920), 90 L. J. K. B. 593. *Mentd.* *Toms v. Cumming* (1845), 1 Lut. Reg. Cas. 200.

**285. — Adopted & recognised by parties.]**—*BEHNKE v. BEDE SHIPPING CO.*, No. 31, *ante*.

**286. Document written by third party—In presence of defendant.]**—A buyer of goods requested D., the agent of the seller, to write a note of the contract in the buyer's book: D. did so, & signed the note with his own name:—*Held*: such note was not a sufficient note, under Stat. Frauds, to bind the buyer.—*GRAHAM v. MUSSON* (1839), 5 Bing. N. C. 603; 7 Scott, 769; 8 L. J. C. P. 324; 3 Jur. 483; 132 E. R. 1232.

*Annotations:—Folld.* *Graham v. Fretwell* (1841), 3 Man. & G. 368. *Expld.* *Mews v. Carr* (1856), 1 H. & N. 484. *Distd.* *Durrell v. Evans* (1862), 1 H. & C. 174. *Refd.* *Williams v. Byrnes* (1863), 1 Moo. P. C. C. N. S. 154; *Vanderbergh v. Spooner* (1866), 14 L. T. 701.

**287. —.]**—The traveller of the vendors signed, at the request of the vendees, the following entry of a contract for the sale of goods in a book of the latter, "Of North & Co. London, 150 mats Ma. sugar at 71s. 6d. as sample. Per sea, Fanning's wharf, first & second ships." For four years preceding, a variety of similar entries had been signed by the traveller, & goods had been supplied pursuant thereto, which had been accepted & paid for:—*Held*: the entry was not a sufficient note or memorandum of the contract, under Stat. Frauds, s. 17, to bind the vendees.—*GRAHAM v. FRETWELL* (1841), 3 Man. & G. 368; 4 Scott, N. R. 25; 11 L. J. C. P. 41; 133 E. R. 1186.

**288. Signature by agent—Name of defendant appearing in body of document.]**—*JOHNSON v. DODGSON*, No. 242, *ante*.

**289. — Agent for purposes other than making contract.]**—*PITTS v. BECKETT*, No. 336, *post*.

**290. —.]**—Where the parties to the contract have not constituted the bought & sold notes the contract:—*Held*: the contract may be proved by parol, & the bought note signed by the broker may be evidence of the contract to satisfy Stat. Frauds.

Where the parties agree that the bought & sold notes shall be the contract, then such notes are the contract; but where the parties have not so agreed, it is competent to contract by parol, & the bought & sold notes may constitute the memoranda in writing of such contract (*ERLE, J.*).—*FENNELLS v. PINDER* (1851), 17 L. T. O. S. 148.

**291. — Instructed to repudiate.]**—By Sale of Goods Act, 1893 (c. 71), s. 4 (1), a contract for the sale of any goods of the value of £10 or upwards shall not be enforceable by action unless, failing other alternatives, "some note or memorandum in writing of the contract be made & signed by the party to be charged or his agent in that behalf":—*Held*: (1) a letter signed by the party to be charged or his agent in that behalf, & referring to other letters as containing the terms of a contract may, although it repudiates liability on the contract, be a sufficient note or memorandum in writing; but if, while referring to other letters, it refuses to admit that they contain the terms of the contract, it is not a sufficient note or memorandum; (2) the letters in question omitted a material term of the contract; (3) a solr. instructed to deny a contract with which his client is charged is not the client's agent to make or sign a note or memorandum in writing of the contract for the purposes of the statute.—*THIRKELL v. CAMBI*, [1919] 2 K. B. 590; 89 L. J. K. B. 1; 121 L. T. 532; 35 T. L. R. 652; 63 Sol. Jo. 723; 24 Com. Cas. 285, C. A.

**292. Sale by auction—Signature by auctioneer.]**

—Two stacks of straw each above the value of £10 were sold by auction in separate lots to the same purchaser. The auctioneer wrote his name in the sale catalogue against the printed description of the first stack sold, but against that of the second stack, underneath his name, he wrote "do":—*Held*: this was a sufficient signature within Sale of Goods Act, 1893 (c. 71), s. 4 (1).—*REYNOLDS v. HOOPER* (1902), 19 T. L. R. 33. *Annotation:—Folld.* *Cohen v. Roche*, [1927] 1 K. B. 169.

**293. —.]**—*Deft.*, an auctioneer, circulated a printed catalogue on the front page of which it was stated that he, therein described by name, would sell on a specified date certain lots of furniture; the other pages set forth the lots to be sold. At the sale *deft.* had before him an auctioneer's book consisting of large sheets of paper, each of which had pasted upon it a leaf from the printed catalogue, & on each side of the leaf a space for notes. *Deft.*'s name was nowhere written by him in this book. One of the lots, comprising certain chairs of no unusual value, which were the property of *deft.* himself, was knocked down to *pltf.* for £60. *Deft.* then wrote in his book against that lot the price at which it had been sold & the name of *pltf.* as purchaser. To an action by *pltf.* against *deft.* for delivery up of the chairs & alternatively damages for alleged breach of contract, *deft.* pleaded that Sale of Goods Act, 1893 (c. 71), s. 4, had not been complied with:—*Held*: there was within the sect. a note or memorandum in writing of the contract duly signed by *deft.* & otherwise sufficient, & an enforceable contract between the parties.—*COHEN v. ROCHE*, [1927] 1 K. B. 169; 95 L. J. K. B. 945; 136 L. T. 219; 42 T. L. R. 674; 70 Sol. Jo. 942.

**294. Signature by party other than party to be charged.]**—The nephew of *pltf.* having a horse to sell, some negotiations took place between them; but as they could not agree as to price the horse was not sold; subsequently, however, *pltf.* wrote to his nephew, making an offer for the horse, stating in his letter that he should consider it a bargain if he did not hear to the contrary. His nephew did not reply, & having a sale shortly afterwards of some of his effects, the horse was sold by mistake, the auctioneer having had instructions from the nephew not to sell it. Two days after the sale the nephew wrote to *pltf.* the contents of which letter showed that he intended to accept his uncle's offer:—*Held*: in an action by *pltf.* against the auctioneer for the conversion of the horse, as there was no memorandum in writing binding the nephew at the time of the sale, & no evidence that he had at that time accepted the offer, the property in the horse had not then vested in *pltf.*, & he could not rely on the subsequent letter of the nephew, as that would not relate back so as to complete *pltf.*'s title at the time in question.—*FELTHOUSE v. BINGLEY* (1863), 1 New Rep. 401; 7 L. T. 835; 11 W. R. 429, Ex. Ch.

**295. Signature by party to be charged—Verbal assent.]**—A proposal in writing, signed by the party to be charged, & accepted by parol by the party to whom it is made, is a sufficient memorandum or note of an agreement to satisfy Stat. Frauds, s. 4.—*REUSS v. PICKSLEY* (1866), L. R. 1 Exch. 342; 4 H. & C. 588; 35 L. J. Ex. 218; 15 L. T. 25; 12 Jur. N. S. 628; 14 W. R. 924, Ex. Ch.

*Annotations:—Refd.* *Godwin v. Francis* (1870), L. R. 5 C. P. 295; *Buxton v. Rust* (1872), L. R. 7 Exch. 279; *Dartford Union v. Trickett* (1888), 59 L. T. 754; *Re New Eborhardt Co., Ex p. Menzies* (1889), 43 Ch. D. 118; *Filby v. Hounsell*, [1896] 2 Ch. 737; *Hartley v. Hymans*, [1920] 3 K. B. 475. *Mentd.* *Rye v. Purcell*, [1926] 1 K. B. 446.



*Sect. 4.—Contracts for £10 or upwards: Sub-sect. 8, A., B. & C. (a), (b), (c) & (d).]*

**SUB-SECT. 8.—AGENCY FOR SIGNATURE.**

*A. In General.*

See Sale of Goods Act, 1893 (c. 71), s. 4; & generally, AGENCY, Vol. I., pp. 277, 278, 284–286, 415, 421, Nos. 92–95, 156–170, 1109, 1153.

**296. Signature on behalf of purchaser.—By seller's agent.]**—It is competent for the seller's agent to act for the purchaser; & in that case a note signed by him would bind the purchaser (WILDE, B.).—DARRELL *v.* EVANS (1861), 6 H. & N. 660; 158 E. R. 272; *sub nom.* DURRELL *v.* EVANS, 36 L. J. Ex. 254; 4 L. T. 254; 7 Jur. N. S. 585; 9 W. R. 638; *subsequent proceedings* (1862), 1 H. & C. 174, Ex. Ch.

**297. ——— No evidence of authority.]**—In an action to recover the price of clocks sold by pltf. to defts., it appeared that pltf.'s traveller when he took the order for the goods wrote out in the presence of deft. upon printed forms two memoranda of it, putting deft.'s name upon them, & handing one of the papers to deft., who kept it:—*Held*: there was no evidence that pltf.'s traveller signed the memoranda as agent of deft., so as to bind him within Stat. Frauds, s. 17.—MURPHY *v.* BOESE (1875), L. R. 10 Exch. 126; 44 L. J. Ex. 40; 32 L. T. 122; 23 W. R. 474.

**298. ——— Agent exceeding his authority.]**—Pltf. instructed defts., cotton brokers, to buy for him fifty bales of cotton, & they sent him a bought note, advising him that they had bought for him of H. & co., fifty bales, to arrive by a certain ship. In pursuance of this contract pltf. paid money to defts. Defts. being employed to buy cotton for other persons as well as pltf., had, in fact, entered into one contract with H. & co. for three hundred bales:—*Held*: pltf. was entitled to recover back the money so paid, on the ground of failure of consideration, no such contract as that authorised & alleged to have been made having ever, in fact, been made.

Pltf. authorised defts. to make one contract, & they made a totally different one (POLLOCK, C.B.).—BOSTOCK *v.* JARDINE (1865), 3 H. & C. 700; 6 New Rep. 164; 34 L. J. Ex. 142; 12 L. T. 577; 11 Jur. N. S. 586; 13 W. R. 970; 159 E. R. 707.

*Annotation:—Refd.* Robinson *v.* Mollett (1875), L. R. 7 H. L. 802.

**299. Memorandum by seller's clerk.—In presence of surety for purchaser.]**—A memorandum written by a clerk of pltf's. in the presence of deft., that deft. had called to say that he would be responsible for goods delivered to H. is not sufficient undertaking within Stat. Frauds.—DIXON *v.* BROOMFIELD (1814), 2 Chit. 205.

*Annotation:—Refd.* Simpson *v.* Penton (1834), 4 Tyr. 315.

**300. Position of signature immaterial.]**—Pltf., a hop grower, having sent samples of hops for sale to his factor, with instructions as to price, defts., who were hop merchants, called at N.'s office to see the samples, but could not agree as to price. Subsequently, on the same day, defts. met pltf., & after a conversation about the hops, they went with him to N.'s office, & there, in N.'s presence, made pltf. an offer for the hops, which, in the presence & hearing of defts., pltf. asked N. whether he should accept, & was advised by him so to do. Thereupon N. wrote out in his book

a sale note in duplicate, each part of which was dated "Oct. 19." At the request of defts., the date in each part was, with pltf.'s consent, altered by N. to "Oct. 20," in order to give defts. a longer time for payment; & then one part, so altered, was torn from the book by N., & handed to defts., who took it away & kept it. The note so handed to defts. was in the following words: "Messrs. E. & co. bought of J. & W." etc. The note on the counterfoil in the book which was retained by N. was as follows: "Sold to Messrs E. & co." etc. The name "Messrs E. & co." in each part was written by N., & neither part was otherwise signed by defts. The samples & an invoice were subsequently sent to defts., & kept by them. In an action by pltf. against defts. for not accepting the hops the above facts were proved:—*Held*: (1) there was evidence for the jury of the intention of the parties that N. should be their agent for the purpose of making a written record of a contract binding upon both of them; (2) if that were so, the writing of defts.' name by N. at the head of the sale note was a sufficient signature, binding defts. to the contract within Stat. Frauds, s. 17.—DURRELL *v.* EVANS (1862), 1 H. & C. 174; 31 L. J. Ex. 337; 7 L. T. 97; 10 W. R. 665; 158 E. R. 848, Ex. Ch.; *revers.* S. C. *sub nom.* DARRELL *v.* EVANS (1861), 6 H. & N. 660.

*Annotations:—As to (1) Distd.* Murphy *v.* Boese (1875), L. R. 10 Exch. 126. *As to (2) Appl.* Cohen *v.* Roche, [1927] 1 K. B. 169. *Generally, Refd.* Simmonds *v.* Humble (1862), 13 C. B. N. S. 258.

**301. Whether parties must intend signature to be binding.]**—DURRELL *v.* EVANS, No. 300, *ante*.

**302. Verbal contract by agent as principal.—Written contract signed as agent.]**—*Re* COX, MCEUEN & CO. & HOARE, MARR & CO., No. 262, *ante*.

*B. Auctioneers.*

See Sale of Goods Act, 1893 (c. 71), s. 4; & generally, AUCTION & AUCTIONEERS, Vol. III., pp. 7–11, Nos. 45–76.

*C. Brokers.*

*(a) In General.*

**Agency of broker.]**—See AGENCY, Vol. I., pp. 279, 572, 573, Nos. 108–112, 2152, 2153.

**Authority of broker.]**—See AGENCY, Vol. I., pp. 307, 310, 322, 335–338, 340, 341, 348, 349, 363, 367, 369, 375–377, Nos. 306, 333, 399, 400, 495, 503, 510–512, 530–534, 584–588, 722–726, 762–764, 774–777, 817–825.

**Degree of care required.—Presumption in favour of broker.]**—See AGENCY, Vol. I., p. 430, No. 1221.

*(b) Agency for Either Party.*

See AGENCY, Vol. I., pp. 284, 285, Nos. 158–164.

*(c) When Personally Liable.*

See, generally, AGENCY, Vol. I., pp. 631, 633, 636, 637, Nos. 2546, 2557, 2559, 2577–2598, 2690.

*(d) Form of Contract.*

See, generally, CONTRACT, Vol. XII., pp. 158–160, Nos. 1126–1143.

**303. General rule.]**—An action was brought by a broker in his own name for his principal:—*Held*: where the contract was by an agent who acted by authority the agent's note in writing

**PART II. SECT. 4, SUB-SECT. 8.—C. (d).**

**e. Sufficiency of memorandum.—In absence of bought & sold notes.]**—In the absence of a bought & sold note:—*Held*: the following memorandum:

"Sold R. G. (def't.), for J. R. (pl'tf.), one hundred loads of oatmeal, to be delivered here immediately, & to be full weight, & to be fully equal to sample, at 28s. per load, cash," was evidence of the contract, & as it stated all the

terms of the contract, & was made while the authority of the agent for both parties continued, it was a sufficient memorandum to satisfy Stat. Frauds.—RICHY *v.* GARVEY (1847), 10 I. L. R. 544.—*IR*.

was the note of the parties, & this would take it out of Stat. Frauds.—ANON. (1773), Lofft, 330, 332; 98 E. R. 678, 679.

**304. Delivery of bought & sold notes—Whether sufficient to satisfy statute.**—Where a broker is authorised by one man to sell goods, & to buy such goods for another, an entry in his books of a sale of these goods from the one to the other, signed by him, is a binding contract between the parties. The bought & sold note, which is a copy of this entry, is not sent to the parties for their approbation, but to inform them of the terms of the contract.—HEYMAN v. NEALE (1809), 2 Camp. 337; 170 E. R. 1176, N. P.

*Annotations*:—**Refd.** Henderson v. Barnewall (1827), 1 Y. & J. 387; Thornton v. Charles (1842), 9 M. & W. 802; Sievwright v. Archibald (1851), 17 Q. B. 103.

**305. ———.**—*Qu.*: whether the bought & sold notes made by a broker are not sufficient to satisfy Stat. Frauds, although he makes no entry in his book.—DICKINSON v. LILWALL (1815), 4 Camp. 279; 1 Stark. 128; 171 E. R. 89, N. P.

*Annotations*:—**Refd.** Trueman v. Loder (1840), 11 Ad. & El. 589; Sievwright v. Archibald (1851), 17 L. T. O. S. 264.

**306. ———.**—The entry of sale made in the broker's book is not of necessity to be treated as the only evidence of a contract to satisfy Stat. Frauds.

The terms of a contract of sale were entered in the broker's book & not signed by him but he delivered to the parties the bought & sold notes embodying the terms of the entry & signed those notes:—**Held**: the parties were bound.—GOOM v. AFLALO (1826), 6 B. & C. 117; 9 Dow. & Ry. K. B. 148; 5 L. J. O. S. K. B. 31; 108 E. R. 396.

*Annotations*:—**Fold.** Thornton v. Meux (1827), Mood. & M. 43. **Refd.** Henderson v. Barnewall (1827), 1 Y. & J. 387; Thornton v. Charles (1842), 9 M. & W. 802; Sievwright v. Archibald (1851), 17 Q. B. 103.

**307. ———.**—A broker having a general authority to purchase spices for one person, having purchased some for that person on a Saturday, went to another person on the Sunday & offered them to him for sale, saying that he would deliver the contract on the Monday. The person to whom they were offered said, that he must have the contract on that day, the Sunday. A bought note was accordingly delivered to him on the Sunday. The broker could not say when he made out a sold note for the vendor; whether it was within a week or more from the Sunday; but stated that he informed him of the sale on the Monday or Tuesday. The entry in the broker's book was not signed:—**Held**: (1) the contract was not sufficient under Stat. Frauds; & (2) supposing it were so, yet that it would be void on account of its having been made on a Sunday.

To render a contract valid there must be mutuality; both sides should be bound. . . . If a broker is bound to put both names at once, then no fraud can be practised; but if he is to be at liberty to put down my name one day & the other party's another, then it may give rise to many & serious mischiefs (BEST, C.J.).—SMITH v. SPARROW (1826), 2 C. & P. 544; 172 E. R. 247, N. P.; *affd.* (1827), 4 Bing. 84.

*Annotation*:—*As to* (2) **Refd.** Beaumont v. Brengerl (1847), 5 C. B. 301.

**308. ———.**—Where a broker effects a sale between two parties the bought & sold notes delivered to them & not the entry in his book are the proper evidence of the contract.—THORNTON v. MEUX (1827), Mood. & M. 43, N. P.

*Annotations*:—**Consd.** Sievwright v. Archibald (1851), 17 Q. B. 103. **Refd.** Thornton v. Charles (1842), 11 L. J. Ex. 302.

**309. ———.**—Where on a sale of goods bought & sold notes are given the bought & sold notes constitute the contract between the parties & not the entry of the contract made by the broker in his book, but if there be no bought & sold notes the entry in the broker's book may be resorted to. If there be a material discrepancy between the bought & sold notes there is no contract. *Qu.*: whether the signing of bought & sold notes by the clerk of the broker is sufficient.—TOWNEND v. DRAKEFORD (1843), 1 Car. & Kir. 20.

**310. ———.**—As between buyer & seller, the bought & sold notes, signed & delivered by a broker acting for both parties, when they agree, & there is no signed entry of the contract in the broker's book, are the memorandum in writing which constitutes the contract binding on both parties within Stat. Frauds. But when they materially vary, there is no such binding contract; & neither the bought note delivered to the buyer, nor the sold note delivered to the seller, can then be treated by itself as such memorandum in writing. The entry of the contract made in the broker's book, & signed by him, constitutes the binding contract between the parties; & a variance between it & the bought or sold note afterwards delivered by the broker would not affect its validity.—SIEWWRIGHT v. ARCHIBALD (1851), 17 Q. B. 103; 17 L. T. O. S. 264; 117 E. R. 1221; *sub nom.* SIEWWRIGHT v. ARCHIBALD, 20 L. J. Q. B. 529; 15 Jur. 947.

*Annotations*:—**Apld.** Elsenden v. Levy (1863), 11 W. R. 259. **Distd.** Parton v. Crofts (1864), 16 C. B. N. S. 11. **Refd.** Heyworth v. Knight (1864), 4 New Rep. 288. **Mentd.** Lucas v. Dixon (1889), 22 Q. B. D. 357; *Re* Hoyle, Hoyle v. Hoyle, [1893] 1 Ch. 84.

**311. Bought notes delivered to both parties by mistake.**—A broker made a contract with deft. for the purchase of goods & delivered by mistake a bought note to each party & did not mention his principal's, the buyer's, name, but made a proper entry of it in his book:—**Held**: the buyer might maintain an action for breach of this contract.—GALE v. WELLS (1824), 1 C. & P. 388; 171 E. R. 1243, N. P.

**312. Effect of material alteration in one note—Without consent of other party.**—A material alteration in a sale note by the broker, after the bargain made, at the instance of the seller, without the consent of the purchaser, annuls the instrument, so as to preclude the seller from recovering upon the contract evidenced by the instrument so altered by him.—POWELL v. DIVETT (1812), 15 East, 29; 104 E. R. 755.

*Annotations*:—**Consd.** White v. Benekendorff (1873), 29 L. T. 475. **Refd.** Sievwright v. Archibald (1851), 17 Q. B. 103; Pattinson v. Luckley (1875), L. R. 10 Exch. 330. **Mentd.** Davidson v. Cooper (1843), 11 M. & W. 778.

**313. ———.**—A material alteration in a sold note, made by the buyer, without the knowledge or consent of the seller, prevents the former from suing on the contract, notwithstanding the duty of the latter may not be varied by the alteration. A sold note in the following form, "Sold for W. & C. 100 tons of crushed sugar, as per sample, in hogsheads" at, etc., was altered by the buyer without the privity of the seller, by adding at the foot of the paper the words "of their own manufacture" with an asterisk as a mark of reference, & a corresponding asterisk in the body of the note, after the word "sample" & within the parenthesis:—**Held**: the added words imported that the sample was of manufacture of W. & C.; & whether they applied to the sample or to the bulk, they constituted a material alteration, which, as against the buyer, avoided the contract.—MOLLETT v. WACKERBARTH (1847), 5 C. B. 181;

*Sect. 4.—Contracts for £10 or upwards: Sub-sect. 8, C. (d); sub-sect. 9.]*

17 L. J. C. P. 47; 10 L. T. O. S. 164; 11 Jur. 1065; 136 E. R. 845.

*Annotation:—*Refd. Brown v. Byrne (1854), 2 C. L. R. 1599.

**314.** ———. ———.]—Pltfs. as brokers, bought for deft. upon Jan. 6, 5 tons of indiarubber at 2s. 11½d. per lb., & sent him a bought note in which the indiarubber was set out as deliverable "during the month of Jan." A corresponding sold note was sent to the sellers, at whose instance pltfs. struck out "during the month of Jan.," & wrote "forthwith," but did not communicate the alteration to deft. On Jan. 7, deft. decided to throw up the contract, & sent an order to pltfs. to sell at 3s. Pltfs. could only sell at 2s. 10d., & having paid the sellers at the rate of 2s. 11½d. sued deft. for the difference. Pltfs. having been nonsuited:—*Held*: the alteration was material; pltfs. could not treat themselves as principals & recover for goods bargained & sold; & the alteration being material pltfs. had paid to the sellers what deft. was not bound to pay, & consequently could not recover for money paid to deft.'s use.—*WHITE v. BENEKENDORFF* (1873), 29 L. T. 475.

**315. Sufficiency of one note—Note signed by vendee & delivered to vendor—Variance from note sent to vendee.**—A vendee of goods is bound by the contract, as stated in the note signed by him, & delivered by the broker who effected the sale to the vendor, although this note varies from the note delivered by the broker to the vendee.—*ROWE v. OSBORNE* (1815), 1 Stark. 140; 171 E. R. 427, N. P. *Annotations:—*Distd. Cowie v. Remfrv (1846), 3 Moo. Ind. App. 448. Refd. Sievwright v. Archibald (1851), 17 Q. B. 103.

**316.** ———. ———.]—C. & co. & H. & co. were merchants at Calcutta. H. & co. sold to C. & co. a large quantity of indigo, through the medium of a broker, who drew up a sold note addressed to H. & co., & submitted it to H. for his approval, when H. having objected to a particular word remaining, the broker took the sold note to C., & informed him of H.'s objection. C. struck his pen through the word objected to by H., placing his initials over that erasure, & returned it to the broker, who thereupon delivered it, so altered, to H. & co. The broker delivered to C. & co., on the following day, a bought note, which differed in certain material terms from the sold note. In an action brought by H. & co. against C. & co. for non-performance of the contract contained in the sold note, the Supreme Ct. at Calcutta was of opinion, that the sold note alone formed the contract, & found for pltfs.:—*Held*: the transaction was one of bought & sold notes, & the circumstances attending C.'s alteration of the sold note & affixing his initials, were not sufficient to make that note alone, a binding contract; & there being a material variation in the terms of the bought note with the sold note, they together did not constitute a binding contract.—*COWIE v. REMFRY* (1846), 5 Moo. P. C. C. 232; 3 Moo. Ind. App. 448; 10 Jur. 789; 13 E. R. 479.

*Annotations:—*Consd. Heyworth v. Knight (1864), 17 C. B. N. S. 298. Refd. Parton v. Crofts (1864), 16 C. B. N. S. 11.

**317.** ———. Bought note.]—*FENNELL v. PINDER*, No. 290, ante.

**318.** ———. ———.]—*SIEVWRIGHT v. ARCHIBALD*, No. 310, ante.

**319.** ———. ———.]—A broker contracted with another broker for the purchase of a quantity of oil to be delivered in four separate parcels & sent to his principal a bought note signed by himself & which contained a provision that each delivery was to stand as a separate contract. Some of the

parcels were delivered in accordance with the contract:—*Held*: there was sufficient evidence of a binding contract & the bought note was a sufficient memorandum of it under Stat. Frauds, s. 17, to charge the buyer.—*Re THORP, Ex p. THOMAS* (1865), 5 New Rep. 230; 11 L. T. 586; 11 Jur. N. S. 49, L. C.

**320.** ———. ———.]—A broker, acting for pltf., made a contract for the sale of goods to deft., sending a note to each party, but signing only that which was sent to the seller; he, however, entered the contract in his book in which he signed both the bought & the sold note. Deft. kept the note which was sent to him without objection until called upon to accept the goods, when he repudiated the contract, assigning for reason that the note sent to him was not signed:—*Held*: (1) the conduct of deft. amounted to an admission that the broker had authority to make the contract for him, & consequently his signature to the sold note bound deft.; (2) the signed entry in the broker's book was a sufficient memorandum of the bargain to satisfy Stat. Frauds.—*THOMPSON v. GARDINER* (1876), 1 C. P. D. 777.

**321.** ———. Sold note.]—In an action for not accepting goods bought through a broker the sold note bearing the signature of the broker who acted for both buyer & seller is a note or memorandum in writing of the bargain signed by a lawfully authorised agent of the buyer to satisfy Stat. Frauds, s. 17.—*PARTON v. CROFTS* (1864), 16 C. B. N. S. 11; 3 New Rep. 513; 33 L. J. C. P. 189; 10 L. T. 34; 12 W. R. 553; 143 E. R. 1027.

**322.** ———. Intention to be bound only on signature by other party.]—If A. signs a note to the following effect, "I have this day sold to B. 50 tons of hemp," & does not intend to be bound as seller, unless B. signs a note to bind himself as buyer, there is no contract between them.—*MOORE v. CAMPBELL* (1854), 10 Exch. 323; 2 C. L. R. 1084; 23 L. J. Ex. 310.

*Annotations:—*Refd. Humfrey v. Dale (1858), 31 L. T. O. S. 328. Mentd. Noble v. Ward (1867), L. R. 2 Exch. 135; Ogle v. Vane (1867), 7 B. & S. 855; Stewart v. Eddowes, Hudson v. Stewart (1874), L. R. 9 C. P. 311; Tyers v. Rosedale & Ferryhill Iron Co. (1874), 29 L. T. 751.

**323. Material variance between bought & sold notes.**—If a broker deliver a bought & sold note which materially differ, there is no valid contract.—*CUMMING v. ROEBUCK* (1816), Holt, N. P. 172.

*Annotations:—*Consd. Sievwright v. Archibald (1851), 17 Q. B. 103. Refd. Goom v. Affalo (1826), 6 B. & C. 117. Mentd. Clark v. Calvert (1819), 3 Moore, C. P. 96; Herbert v. Sayer (1844), 5 Q. B. 965.

**324.** ———.]—A broker employed to effect a sale of goods for his principal made a verbal contract with a vendee & after entering it into his own book without signing it, delivered a bought & sold note to the vendor & vendee respectively, each paper differing in its terms:—*Held*: there was no memorandum in writing of the contract to bind either party under Stat. Frauds.—*GRANT v. FLETCHER* (1826), 5 B. & C. 436; 8 Dow. & Ry. K. B. 59; 108 E. R. 163.

*Annotations:—*Consd. Sievwright v. Archibald (1851), 17 Q. B. 103. Refd. Goom v. Affalo (1826), 5 L. J. O. S. K. B. 31; Henderson v. Barnwell (1827), 1 Y. & J. 387. Mentd. Wilkins v. Wright (1833), 3 Tyr. 824.

**325.** ———.]—In an action by the vendee against the vendor on a contract made through a broker it is sufficient for the vendee to produce the bought note handed to him by the broker & to show the employment of the latter by the vendor. If the sold note vary from the bought note it lies on the vendor to prove that variance by producing the sold note. When a contract is made through a broker the bought & sold notes delivered to the parties constitute the contract not the entry made

by the broker in his book especially when by the usage of trade the bought & sold notes are looked upon as the contract.—*HAWES v. FORSTER* (1834), 1 Mood. & R. 368.

*Annotations*.—*Consd.* Thornton v. Charles (1842), 9 M. & W. 802; *Sievevright v. Archibald* (1851), 17 Q. B. 103. *Refd.* Pitts v. Beckett (1845), 13 M. & W. 743; Cowie v. [?], 1 Moo. P. C. C. 232; Parton v. Crofts

326. —[Qu. : whether the memorandum of a sale on a broker's book signed by him is admissible as evidence of the contract to satisfy Stat. Frauds, in cases when there is no other written contract or where the bought & sold notes disagree.—*THORNTON v. CHARLES* (1842), 9 M. & W. 802; 11 L. J. Ex. 302; 152 E. R. 340.

*Annotations*.—*Refd.* Sievevright v. Archibald (1851), 17 Q. B. 103; Mollett v. Robinson (1872), L. R. 7 C. P. 84.

327. —[—]—*TOWNEND v. DRAKEFORD*, No. 309, *ante*.

328. —[—]—*SIEVEWRIGHT v. ARCHIBALD*, No. 310, *ante*.

329. — Notes delivered on different days.]—*SMITH v. SPARROW*, No. 307, *ante*.

330. — Evidence to explain variation—*Mercantile usage*.]—A broker gave the following bought & sold notes. "We have this day bought for your use, from J. O. B., 100 tons dry palm oil, at £31 10s. per ton, to be taken from the quay at landing weights, with customary allowances, etc., in cash at fourteen days from delivery, less 2½ per cent. discount; the above oil to be delivered from the *Speedy* or *Charlotte*, expected to arrive about Nov. or Dec. next"; & "We have this day sold for your use, payment in fourteen days by cash, less 2½ per cent. discount from delivery, 100 tons dry palm oil, at £31 10s. per ton, *ex Speedy* & *Charlotte*, to arrive":—*Held*: evidence of mercantile usage was admissible to explain all the variances between these notes; & being so explained, the variances were not material, & did not avoid the contract.—*BOLD v. RAYNER* (1836), 1 M. & W. 343; 2 Gale, 41; Tyr. & Gr. 820; 5 L. J. Ex. 172; 150 E. R. 465.

*Annotations*.—*Apld.* Brown v. Byrne (1854), 3 E. & B. 703. *Refd.* Sievevright v. Archibald (1851), 17 Q. B. 103.

331. — Custom to send bought note only.]—A broker having bought for deft. part of a cargo of fruit, lying at a wharf, belonging to one owner, was desired by deft. to buy some more, & bought on the same day, another part of the same cargo lying at the same wharf, but belonging to pltf. & he sent sold notes of each lot to each owner, but one bought note of the whole to deft., all three notes being signed by himself as broker. Dft. having refused to accept the fruit:—*Held*: in an action for not accepting the parcel bought of pltf., even if evidence of a custom, in such cases, to send one bought note was admissible, yet, as the bought & sold notes varied, there was no contract with pltf. within Stat. Frauds.—*FISENDEN v. LEVY* (1863), 11 W. R. 259.

332. — Principals described in one note—*Named in other note*.]—That the principals are not named but only described in the sold note, & are named in the bought note, is no objection on Stat. Frauds (*WILLES, J.*).—*CROPPER v. COOK* (1868), L. R. 3 C. P. 194; 17 L. T. 603; 16 W. R. 596.

*Annotations*.—*Refd.* Calder v. Dobell (1871), L. R. 6 C. P. 486; Mollett v. Robinson (1872), L. R. 7 C. P. 84.

333. — Broker employed by seller only.]—*MCCAUL v. STRAUSS & Co.*, No. 270, *ante*.

—[—]—*See, further*, CONTRACT, Vol. XII., pp. 89, 90, Nos. 547–554.

334. Signature by broker's clerk.]—A broker

cannot, without the assent of his principal, delegate his authority.

Where A. having goods to sell, employed a broker for the purpose, & B. being desirous of purchasing them, authorised the broker's salesman to offer a certain price, who in consequence brought the parties together, & who having concluded the contract, in the absence of the salesman, dictated to him the terms of it; of which he made an entry in his master's book, but did not sign it, & afterwards communicated the circumstances to the broker, who directed a clerk to enter & sign the contract in his book & sent a sale note signed by himself, to A. but no bought note was sent to B.:—*Held*: there was no note or memorandum in writing signed by an agent duly authorised, to satisfy Stat. Frauds, s. 17.—*HENDERSON v. BARNEWALL* (1827), 1 Y. & J. 387; 148 E. R. 721.

335. —[—]—*TOWNEND v. DRAKEFORD*, No. 309, *ante*.

336. Machine copy in broker's book—Whether sufficient writing.]—(1) A., having a quantity of wool to dispose of, placed a sample of it at his brokers' for sale, & B., having examined the sample at the brokers' office purchased from A., in the presence of the broker, part of the wool at an agreed price, it being stipulated by B. that the wool was to be delivered in good dry condition. On the same day the broker sent to A. a sold note of the contract, which however, omitted all mention of the stipulation that the wool was to be in good dry condition, & to note whatever was sent to B. The wool was accordingly sent by the broker to B. who refused to receive it, on the ground that it was not in good dry condition, according to the contract. An action for goods sold & delivered having been brought to recover back the price of the wool:—*Held*: the broker was not authorised to make the contract set forth in the sold note, omitting the condition, & there was consequently no memorandum or note in writing of the contract to satisfy Stat. Frauds.

(2) *Qu.*: whether a machine copy of a contract, made in the broker's book, would be a sufficient writing within the statute.—*PITTS v. BECKETT* (1845), 13 M. & W. 743; 14 L. J. Ex. 358; 4 L. T. O. S. 97; 153 E. R. 312.

*Annotation*.—*As to* (1) *Refd.* Sievevright v. Archibald (1851), 17 Q. B. 103.

#### SUB-SECT. 9.—ADMISSIBILITY OF PAROL EVIDENCE.

*See* CONTRACT, Vol. XII., pp. 160, 161, 353–358, Nos. 1144–1171, 2938–2976; & generally, DEEDS, Vol. XVII., pp. 302 *et seq.*

*See* Sale of Goods Act, 1893 (c. 71), s. 4.

337. After statute satisfied—By memorandum in writing—*Discharge of agent*.]—Stat. Frauds does not exclude parol evidence that a written contract for the sale of goods, purporting to be made between A. the seller, & B. the buyer, was, on B.'s part, made by him only as agent for C.—*WILSON v. HART* (1817), 7 Taunt. 295; 1 Moore, C. P. 45; 129 E. R. 118.

*Annotations*.—*Distd.* Graham v. Musson (1839), 3 Jur. 483; Higgins v. Senior (1841), 8 M. & W. 834. *Consd.* Beckham v. Drake (1841), 9 M. & W. 79. *Apld.* Dale v. Humfrey (1858), E. B. & E. 1004. *Refd.* Marston v. Roe d. Fox (1838), 8 Ad. & El. 14; Taylor v. Salmon (1838), 4 My. & Cr. 134; Trueman v. Loder (1840), 11 Ad. & El. 589; Armstrong v. Stokes (1872), L. R. 7 Q. B. 598; Maspons y Hermano v. Mildred (1882), 9 Q. B. D. 530.

338. — Omission of substantial term.]—*GOODMAN v. GRIFFITHS*, No. 277, *ante*.

#### PART II. SECT. 4, SUB-SECT. 9.

338 i. After statute satisfied—By memorandum in writing—*Omission of substantial term*.]—*CALDER v. HALLETT* (1900), Terr. L. R. 1.—*CAN.*

*Sect. 4.—Contracts for £10 or upwards: Sub-sects. 9 & 10, A. & B.]*

**339.** *Real terms not expressed.]—*GOODMAN v. GRIFFITHS, No. 277, *ante*.

**340.** *—.]—*ROGERS v. HADLEY, No. 415, *post*.

**341** *— Rescission of contract.]—*Under Sale of Goods Act, 1893 (c. 71), s. 4, an agreement which the law requires to be in writing is merely not enforceable by law if not in writing, but it is not invalid for all purposes, & the law as laid down in Stat. Frauds, s. 17, is altered to that extent; & although a contract required to be in writing cannot be varied by parol, parol evidence is admissible to prove a total abandonment or rescission of a written contract.—MORRIS v. BARON & Co., [1918] A. C. 1; 87 L. J. K. B. 145; 118 L. T. 34, H. L.

*Annotations:—***Apld.** British & Beningtons v. N. W. Cachar Tea Co., [1923] A. C. 48; Rose & Frank Co. v. Crompton, [1925] A. C. 445. **Refd.** Cutts v. Taital Ry. (1918), 62 Sol. Jo. 423; Elton Cop Dyeing Co. v. Broadbent (1919), 89 L. J. K. B. 89; Hartley v. Hymans, [1920] 3 K. B. 475; Edwards v. Motor Union Insee., [1922] 2 K. B. 249; Levey v. Goldberg, [1922] 1 K. B. 688; Norwich Union Fire Insee. Soc. v. Colonial Mutual Fire Insee., [1922] 2 K. B. 461.

**342.** *— Abandonment of contract.]—*MORRIS v. BARON & Co., No. 341, *ante*.

**343.** *By acceptance—Terms of contract.]—*Deft. ordered goods by letter, which did not mention any time for payment. Pltf. sent the goods & an invoice:—*Held*: parol evidence was admissible to show that the goods were supplied on credit, the letter not being a valid contract within Stat. Frauds.

That liability arises from his receipt & acceptance of the goods: & if pltf. relied on that, deft. would have been at liberty to show upon what terms he accepted them, by going into evidence of the conversation which took place at the time the order was given by which it appears that the contract was to pay at six months' credit, & by a bill at three months' (PARKE, B.).—LOCKETT v. NICKLIN (1848), 2 Exch. 93; 19 L. J. Ex. 403; 154 E. R. 419.

**339 i.** *Real terms not expressed.]—*Where a contract was evidenced by the bought & sold notes prepared by the broker who brought about the sale, which notes described merely the quantity & quality of certain wheat, together with the season of its growth:—*Held*: evidence was not admissible to show that the sale was of a specific parcel of wheat.—GELLING v. CRISPIN (1917), 18 S. R. N. S. W. 18.—**AUS.**

**339 ii.** *—.]—*CHAMBERLAIN v. SMITH (1861), 21 U. C. R. 103.—**CAN.**

**339 iii.** *—.]—*PETERS v. HAMILTON (1879), 19 N. B. R. (3 P. & B.) 284.—**CAN.**

**339 iv.** *—.]—*Under a written contract for the sale by description of a specific article, namely, a gasoline engine with a pump standard, it not being pretended that it did not answer such description, such contract must be taken to cover, as it purported to do, the whole contract between the parties, & parol evidence is not admissible to show a warranty made prior to the entering into of the contract which is inconsistent with the written warranty, as it would be allowing the admission of parol evidence to control, vary, add to, or subtract from the written contract.—NORTHEY MANUFACTURING Co. v. SANDERS (1899), 31 O. R. 475.—**CAN.**

**339 v.** *—.]—*Evidence is admissible to show that a written contract for the sale of farm machinery is subject to collateral verbal agreements or conditions.—J. I. CASE

THRESHING MACHINE Co. & OSTER v. WELSH (Sask.), [1918] 3 W. W. R. 57.—**CAN.**

**339 vi.** *—.]—*SMITH GRAIN Co. v. SPENCER, [1918] 2 W. W. R. 1073; 11 Sask. L. R. 328; 42 D. L. R. 269.—**CAN.**

**339 vii.** *—.]—*PHINNEY & Co., LTD. v. VACHERESSE (1919), 52 N. S. R. 508.—**CAN.**

**339 viii.** *—.]—*SPURR v. GREVATT (N. S.), [1923] 3 D. L. R. 137.—**CAN.**

**339 ix.** *—.]—*CLARTON v. SHAW (1872), 9 B. L. R. 245; 16 W. R. 414.—**IND.**

**1.** *To show article sold was specific article.]—*Where a written contract for the sale of a personal chattel is couched in general terms equally apt to express a sale of any article of a certain class, or the sale of a specific article of that class, parol evidence is admissible to show that a specific article was contracted for & to ascertain & identify that specific article.—BRUTON v. FARM & DAIRY MACHINERY Co., [1910] V. L. R. 196.—**AUS.**

**g.** *— Meaning of words—"Stuff."]*—JOHNSTON v. WILSON (1878), 28 C. P. 432.—**CAN.**

**h.** *— "Work" "rig."]*—CHRISTIE v. BURNETT (1886), 10 O. R. 609.—**CAN.**

**k.** *— "All the assets."]*—Where a contract contained the words "all the assets, roughly 1,800 sheep, etc."—*Held*: parol evidence was

**344.** *—.]—*TOMKINSON v. STAIGHT, No. 157, *ante*.

**345.** *—.]—*KIBBLE v. GOUGH, No. 124, *ante*.

**346.** *By execution of contract.]—*To an action for goods sold deft. pleaded, that he was possessed of a public-house, & it was agreed that, in consideration that deft. would give up possession of same, pltf. would pay deft. £100, & discharge deft. from the debt; that pltf. paid the £100, & deft. quitted the house. The agreement was not in writing:—*Held*: having been executed, it was receivable as evidence to prove the plea. *Semble*: the plea, though pleaded as an equitable defence, was a good plea at common law, by way of accord & satisfaction.—LAVERY v. TURLEY (1860), 6 H. & N. 239; 30 L. J. Ex. 49; 158 E. R. 98.

*Annotation:—***Mentd.** *Re* Rownson, Field v. White (1885), 29 Ch. D. 358.

#### SUB-SECT. 10.—EFFECT OF STATUTORY PROVISIONS.

##### A. In General.

*See* Sale of Goods Act, 1893 (c. 71), s. 4; CONTRACT, Vol. XII., pp. 161 *et seq.*

**347.** *Effect of non-compliance with statute—Contract not void—Merely unenforceable by action.]—**Semble*: the absence of a memorandum in writing & of the other conditions mentioned in Sale of Goods Act, 1893 (c. 71), s. 4 (1), does not make the contract void or voidable. The only effect is that it is unenforceable. The contract being good, all the legal consequences of a contract follow, so that if the contract is for the sale of specific goods the property in them passes to the buyer. If the buyer after making the purchase refuses to fulfil any of the statutory conditions, the seller may call upon the buyer to pay for the goods, & if he fails to comply may treat the contract as rescinded.—TAYLOR v. GREAT EASTERN RY. Co., [1901] 1 K. B. 774; 70 L. J. K. B. 499; 84 L. T. 770; 49 W. R. 431; 17 T. L. R. 304; 45 Sol. Jo. 381; 6 Com. Cas. 121.

admissible to prove what in fact constituted all the assets & what was the number of sheep.—WANNENBERG v. TOOTH, [1912] C. P. D. 750.—**S. AF.**

**1.** *Identification of plant by collateral papers.]—*REID v. SMITH (1882), 2 O. R. 69.—**CAN.**

**m.** *To prove price.]—*JEFFCOOT v. NORTH BRITISH OIL Co. (1873), 1 R. 8 C. L. 17.—**IR.**

**n.** *To prove quantity of pipes ordered.]—*A party having agreed by written missive to furnish cast iron pipes of a certain size & price, payable on delivery, but without specification of the quantity:—*Held*: incompetent to prove the quantity by parol.—POLLOCK & DICKSON v. M'ANDREW (1828), 7 Sh. (Ct. of Sess.) 189; 25 Fac. Coll. 223.—**SCOT.**

**o.** *By acceptance—Terms of contract.]—*WILKIE v. HUNT (1861), 1 W. W. & A'B. 66.—**AUS.**

**p.** *Correspondence not specifically connected—Parol evidence to explain.]—*BALLANTYNE v. WATSON (1880), 30 C. P. 529.—**CAN.**

#### PART II. SECT. 4, SUB-SECT. 10.—A.

**q.** *Parol variation of contract in writing—Whether allowed.]—*A contract required to be in writing by Sale of Goods Act, 1920 (c. 40), s. 6, cannot be varied by a new oral agreement, even if the variation relates to a part of the contract which, if it stood by itself, would not be required to be in writing.—NUGENT v. DAVIES, [1923] 1 D. L. R. 1040; 53 O. L. R. 458.—**CAN.**



**348. Remedy other than by action on contract—Rescission of contract by seller—If buyer does not pay.]—**TAYLOR v. GREAT EASTERN RY. CO., No. 347, *ante*.

— **Account stated.]—**See CONTRACT, Vol. XII., p. 165, Nos. 1201-1204.

**349. Proof of contract for collateral purpose—Defence to trespass.]—**To a declaration in trespass for taking a horse & cart, *deft.* pleaded that he was possessed of a field & a crop of grass growing thereon, & that he distrained the horse & cart, damage feasant; *pltf.* replied, that *deft.* agreed to sell & sold, & *pltf.* agreed to buy & bought of *deft.*, the said crop of grass, with liberty to *pltf.* to cut the said grass, & take it from the said close when fit to be cut; & that *pltf.* by virtue of the agreement entered into the possession of the said crop, & brought his horse & cart for the purpose of cutting & carrying away the said crop of grass, wherefore *deft.* committed the trespasses *de injuriâ*. *Deft.*, in his rejoinder, traversed the agreement:—*Held*: on these pleadings *pltf.* was bound to show a valid contract in law for the sale of the grass; & therefore, there being no note in writing of the agreement for the sale, *pltf.* could not recover, even though it was to be considered as a sale of an interest in land.—CARRINGTON v. ROOTS (1837), 2 M. & W. 248; Murph. & H. 14; 6 L. J. Ex. 95; 1 Jur. 85; 150 E. R. 748.

*Annotations*:—*Consd.* Britain v. Rossiter (1879), 11 Q. B. D. 123. *Refd.* Reade v. Lamb (1851), 6 Exch. 130; Williams v. Lake (1859), 6 Jur. N. S. 45; Williams v. Wheller (1860), 8 C. B. N. S. 299. *Mentd.* Leroux v. Brown (1852), 12 C. B. 801.

**350. — Performance operating as accord & satisfaction—Liability under another contract.]—**LAVERY v. TURLEY, No. 346, *ante*.

**351. — “Agreement to buy” within Factors Acts, 1877 (c. 39).]—**Sect. 4 of the above Act provides that where any goods have been sold or contracted to be sold, & the vendee obtains possession of the documents of title thereto from the vendor, any sale, pledge, or disposition of such goods or documents by such vendee so in possession shall be as valid & effectual as if such vendee were an agent or person entrusted by the vendor with the documents within the principal Acts as amended by the Act itself, provided the person to whom the sale, pledge, or other disposition is made has not notice of any lien or other right of the vendor in respect of the goods. It is not necessary, in order that the above-mentioned sect. should be applicable, that there should be a memorandum of the contract for sale of the goods so as to satisfy Stat. Frauds; it is sufficient that there should be a *de facto* contract for sale, the vendee under which has obtained from the vendor possession of the documents of title to the goods; & a sale by such a vendee will give to a *bonâ fide* purchaser without notice a good title to the goods, free from any lien or other right of the original vendor in respect thereof.—HUGILL v. MASKER (1889), 22 Q. B. D. 364; 58 L. J. Q. B. 171; 60 L. T. 774; 37 W. R. 390, C. A.

#### B. Effect on Property.

See Sale of Goods Act, 1893 (c. 71), s. 4.

**352. Whether property passes—Trove against vendor.]—**Stat. Frauds will prevent a parol agreement to buy goods without either earnest or delivery, from giving the buyer any property in them. In such case therefore the buyer cannot maintain trove against the vendor, who sells them to another person. Where a sale is not immediate, it is not within that statute.—ALEXANDER v. COMBER (1788), 1 Hy. Bl. 20; 120 E. R. 13.

**353. — —.]—**FELTHOUSE v. BINDLEY, No. 294, *ante*.

**354. — Insurable interest of purchaser.]—**(1) Messrs. H. & Co., being the owners of two ships, called the *Antelope* & the *Maria*, trading to the coast of Africa, & which were then expected to arrive in Liverpool with cargoes of palm oil, agreed verbally to sell to *pltf.* 200 tons of oil, 100 tons to arrive by the *Antelope*, & 100 tons to arrive by the *Maria*. The *Antelope* did afterwards arrive with 100 tons of oil on board, which were delivered by H. & Co. to *pltf.* The *Maria* having 50 tons of palm oil on board was lost by perils of the sea. *Pltf.* having insured the oil on board the *Maria*, together with their expected profits thereon:—*Held*: they had no insurable interest, as the contract they had entered into with H. & Co., being verbal only, was incapable of being enforced.

(2) The contract is to sell the goods when they arrive, but there was no memorandum in writing, & consequently no contract which was capable of being enforced, at the time either of the insurance or the loss; & if it ultimately did become capable of being enforced, that was only by the subsequent past delivery & acceptance, which was after the loss had occurred (PARKE, B.).—STOCKDALE v. DUNLOP (1840), 6 M. & W. 224; 9 L. J. Ex. 83; 7 L. T. 804; 4 Jur. 681; 151 E. R. 391.

*Annotations*:—*As to* (1) *Consd.* Felthouse v. Bindley (1862), 11 C. B. N. S. 869. *Refd.* Johnson v. Macdonald (1842), 9 M. & W. 600; Sutherland v. Pratt (1843), 11 M. & W. 296; Royal Exchange Assco. v. M'Swiney (1850), 19 L. J. Q. B. 222; Meredith v. Meigh (1853), 17 Jur. 649. *As to* (2) *Consd.* Stock v. Inglis (1882), 9 Q. B. D. 708.

**355. — Right to sue carrier.]—**Goods exceeding £10 in price were verbally ordered of *pltf.*; no particular mode of carriage was specified, nor was there any evidence of any particular course of dealing between *pltf.* & vendee. *Pltf.* afterwards forwarded the goods by *deft.*, who was a common carrier. The goods were lost while in *deft.*'s custody:—*Held*: *pltf.* was the proper party to bring an action for the loss of the goods, the property therein not having passed to the vendee.—COATS v. CHAPLIN (1842), 3 Q. B. 483; 2 Gal. & Dav. 552; 11 L. J. Q. B. 315; 6 Jur. 1123; 114 E. R. 592.

*Annotations*:—*Appld.* Coombs v. Bristol & Exeter Ry. (1858), 3 H. & N. 510. *Consd.* Felthouse v. Bindley (1862), 11 C. B. N. S. 869. *Refd.* Bushel v. Wheeler (1844), 15 Q. B. 442, n.; Machu v. L. & S. W. Ry. (1848), 5 Ry. & Can. Cas. 302; Crouch v. G. N. Ry. (1856), 11 Exch. 742; Bailey v. Sweeting (1861), 9 C. B. N. S. 843.

**356. —.]—**(1) A. agreed verbally to buy of B. all the whalebone he could procure at a certain price, to be sent by a particular railway. A. agreeing to pay the carriage. Some whalebone, to an amount exceeding £10, having been delivered at the railway station by B. consigned to A. & having been duly invoiced to him, was lost in the transit. B. then wrote requesting A. to make a claim against the co.:—*Held*: there having been no acceptance & receipt of the goods within Stat. Frauds, s. 17, A., the consignee, was not entitled to sue the railway co. for the loss.

(2) The liability of the carrier cannot be altered by anything which takes place after the loss; it must be certain at the moment of the loss. . . . I suggested, in the course of argument, that the only way in which *pltf.* could make out that the action was well brought by him, as consignee, would have been to show that he had adopted something done by the carrier, as his agent, adoption being equivalent to a prior demand (POLLOCK, C.B.).

Here, as there was no acceptance of the goods by the vendee, & nothing else to take the case out of the statute, the property did not pass to



*Sect. 4.—Contracts for £10 or upwards: Sub-sect. 10, B. Sect. 5: Sub-sects. 1 & 2, A.]*

*pltf. (POLLOCK, C.B.).—COOMBS v. BRISTOL & EXETER RY. CO. (1858), 3 H. & N. 510; 27 L. J. Ex. 401; 6 W. R. 725; 157 E. R. 572.*

*Annotations:—As to (1) Distd. Mead v. S. E. Ry. (1870), 18 W. R. 735. Refd. Wallis v. G. N. Ry. (Ir.) (1903), 12 Iry. & Can. Tr. Cas. 38. Generally, Refd. Pontifex v. Hartley (1892), 8 T. L. R. 657. Mentd. Clay v. Oxford (1886), 15 L. T. 286.*

**357. — Sale of specific goods.]—TAYLOR v. GREAT EASTERN RY. CO., No. 347, ante.**

**358. Effect of subsequent satisfaction of statutory provisions—Whether action based on right of property maintainable.]—STOCKDALE v. DUNLOP, No. 354, ante.**

**359. —.]—MORGAN v. SYKES (1841), cited in 3 Q. B. at p. 486; 114 E. R. at p. 594; sub nom. SYKES v. MORGAN, 11 L. J. Q. B. at p. 316.**

**360. —.]—COOMBS v. BRISTOL & EXETER RY. CO., No. 356, ante.**

## SECT. 5.—SUBJECT-MATTER OF THE CONTRACT.

### SUB-SECT. 1.—EXISTING AND FUTURE GOODS.

*See Sale of Goods Act, 1893 (c. 71), s. 5.*

**361. General rule.]—I further think that as a general rule any person may sell or offer for sale at any price whatsoever goods of which he is not the owner, but which he expects or hopes to acquire (STIRLING, J.).—AJELLO v. WORSLEY, [1898] 1 Ch. 274; 67 L. J. Ch. 172; 77 L. T. 783; 46 W. R. 245; 14 T. L. R. 168; 42 Sol. Jo. 212.**

*Annotations:—Apld. Spalding v. Gamage (1917), 34 R. P. C. 289. Refd. Spalding v. Gamage & Benetfink (1914), 110 L. T. 530; Spalding v. Gamage (1918), 35 R. P. C. 101.*

**362. Oil to be made from seed.]—A contract for selling & delivering oil, not yet expressed from seed in the vendor's possession, is exempted from stamp duty as a contract relating to the sale of goods within 48 Geo. 3, c. 149, Sched., Part 1, Title Agreement, Exemption.—WILKS v. ATKINSON (1815), 6 Taunt. 11; 1 Marsh. 412; 128 E. R. 935.**

*Annotations:—Apld. Pinner v. Arnold (1835), 2 Cr. M. & R. 613. Refd. Squier v. Hunt (1816), 3 Price, 68; Pickford v. Grand Junction Ry. (1841), 8 M. & W. 372; De Fries v. Littlewood (1845), 9 Jur. 988. Mentd. Levy v. Herbert (1817), 7 Taunt. 314.*

**363. —.]—In Jan. 1858, C. agreed to sell to pltf. all the crop of oil of peppermint grown on his farm in that year at 21s. per pound. In Sept. C. wrote to pltf. for bottles to put the oil in. Pltf. sent the bottles, & C. having weighed the oil put it in pltf.'s bottles, labelled them with the weight, & made out invoices. Before, however, he had completed the filling of the bottles he sold & delivered several of them to deft. Pltf. had for many years past bought of C. his crop of oil of peppermint, & it was usual for C. when the bottles were filled, to deliver them to a carrier to take to a railway station. In detinue, by pltf. against deft., for the bottles of oil of peppermint delivered to him:—Held: the putting the oil in pltf.'s bottles was an act of appropriation which vested the property in pltf.—LANGTON v. HIGGINS (1859), 4 H. & N. 402; 28 L. J. Ex. 252; 33 L. T. O. S. 166; 7 W. R. 489; 157 E. R. 896.**

*Annotations:—Apld. Ogg v. Shuter (1875), 44 L. J. C. P. 161. Consd. Anderson v. Morice (1876), 1 App. Cas. 713. Refd. Chinery v. Viall (1860), 29 L. J. Ex. 180; Heilbutt v. Hickson (1872), L. R. 7 C. P. 438.*

### PART II. SECT. 5, SUB-SECT. 1.

**369 i. Goods to be acquired by seller.]—THOMSON BROTHERS v. THOMSON (1886), 13 R. (Ct. of Sess.) 88.—SCOT.**

*r. Contract to supply logs.]—POLLEY v. WATERHOUSE (1856), 3 All. 291.—CAN.*

*t. Contract to supply printing paper.]*

**364. Flour not yet prepared.]—GARBUETT v. WATSON, No. 65, ante.**

**365. Crop not yet sown.]—WATTS v. FRIEND, No. 66, ante.**

**366. —.]—Deft., in Mar., agreed to sell to pltf. "200 tons of regent potatoes grown on land belonging to deft. in W., at £3 10s. per ton, to be delivered in Sept. & Oct., & paid for as taken away." In Mar. deft. had sixty-eight acres ready for potatoes, which were afterwards sown, & were amply sufficient to have grown more than 200 tons in an ordinary season; but in Aug., without any default in deft., the disease attacked the crop, & deft. was able to deliver only about 80 tons:—Held: the contract was for potatoes off specific land, & was therefore a contract for a part of a specific crop, although not sown at the time; & the contract was subject to the implied condition that the parties shall be excused if before breach performance becomes impossible from the perishing of the thing without default of the contractor.—HOWELL v. COUPLAND (1876), 1 Q. B. D. 258; 46 L. J. Q. B. 147; 33 L. T. 832; 40 J. P. 276; 24 W. R. 470, C. A.**

*Annotations:—Distd. Ashmore v. Cox, [1899] 1 Q. B. 436. Consd. Nickoll & Knight v. Ashton, Edridge, [1901] 2 K. B. 126. Distd. Lebeaupin v. Crispin, [1920] 2 K. B. 714. Consd. Re Walt, [1927] 1 Ch. 696. Refd. Krell v. Henry, [1903] 2 K. B. 740; Re Shipton, Anderson & Harrison's Arbitration, [1915] 3 K. B. 676. Mentd. Clark v. Lindsay (1903), 88 L. T. 198; Re Hull & Meux, [1905] 1 K. B. 588; Horlock v. Beal, [1916] 1 A. C. 486.*

**367. Machine to be made.]—Pltf. contracted to make for defts. a copper plate press, to be ready in three months, defts. to pay part of the price by instalments, up to the delivery of the press, the remainder in six months:—Held: this was a contract relating to the sale of goods.**

If it had appeared that part of the contract was to fix it to the floor, or the walls of deft.'s house, so as to make it a fixture, I should have doubted whether it was a contract for the sale of goods within the meaning of the Act [Stamp Act, 1815 (c. 184)] (PARKE, B.).—PINNER v. ARNOLD (1835), 2 Cr. M. & R. 613; Gale, 271; Tyr. & Gr. 1; 5 L. J. Ex. 1; 150 E. R. 261.

*Annotations:—Refd. Chanter v. Dickinson (1843), 5 Man. & G. 253; Gurr v. Seudds (1855), 11 Exch. 190. Mentd. Santos v. Illidge (1859), 6 C. B. N. S. 841.*

**368. Goods to be acquired by seller.]—A contract for the sale of goods, to be delivered at a future day, is not invalidated by the circumstances that at the time of the contract, the vendor neither has the goods in his possession, nor has entered into any contract to buy them, nor has any reasonable expectation of becoming possessed of them by the time appointed for delivering them, otherwise than by purchasing them after making the contract.—HIBBLEWHITE v. M'MORINE (1839), 5 M. & W. 462; 8 L. J. Ex. 271; 3 Jur. 509; 151 E. R. 195.**

*Annotations:—Refd. Mortimer v. McCallan (1840), 6 M. & W. 55; Ramoll Thackoorsaydass v. Soojunnull Phondmull (1848), 4 Moo. Ind. App. 339. Mentd. Grizewood v. Blane (1851), 11 C. B. 526; Sikes v. Wild (1861), 1 B. & S. 587; Thacker v. Hardy (1878), 4 Q. B. D. 685.*

**369. —.]—Pltf. called on deft.'s agent, & told him he had a quantity of wool, part his own clip, part what he had contracted to buy of other farmers, & that the whole quantity amounted to 2,300 stones, 100 stones more or less. Pltf. afterwards wrote to the same agent, saying that he had succeeded in getting the promise of another clip, which would stand about 550 stones, & that**

*—CLARKE v. R. (1890), 2 Exch. C. R. 141.—CAN.*

*a. Contract for sale of copper.]—ECKERT v. LONDON ELECTRIC RY. CO. (1918), 57 S. C. R. 610.—CAN.*

go along with his other wool. In the following month, deft.'s agent wrote to pltf., saying, deft. desires me to offer you for "your wool" 16s. a stone. Pltf. wrote back, "I agree to your offer for the wool, of 16s. a stone." Pltf. afterwards tendered 2,700 stones of wool, which deft. refused to accept:—*Held*: the written offer & acceptance formed a good contract in writing to purchase certain wool of pltf. described as "your wool"; evidence of the previous conversation & letters was admissible to explain the expression "your wool" in the contract, & to point out that the subject-matter to which the contract applied was the wool which pltf. had under his control at the time of the contract, & was not limited to the quantity first mentioned, 2,300 stones, 100 stones more or less; consequently, pltf. was entitled to recover.—*MACDONALD v. LONGBOTTOM* (1860), 1 E. & E. 987; 29 L. J. Q. B. 256; 2 L. T. 606; 6 Jur. N. S. 724; 8 W. R. 614; 120 E. R. 1181, Ex. Ch.

*Annotations*:—*Consd.* Bank of New Zealand v. Simpson, [1900] A. C. 182. *Refd.* Mumford v. Gething (1859), 7 C. B. N. S. 305; Cullen v. O'Meara (1867), 15 W. R. 1174; Newell v. Radford (1867), L. R. 3 C. P. 52; Crane v. Powell (1868), 17 W. R. 161; Heffeld v. Meadows (1869), L. R. 4 C. P. 595; Buxton v. Rust (1872), L. R. 7 Exch. 279; Roden v. London Small Arms Co. (1876), 46 L. J. Q. B. 213; Cunningham v. Dunn (1878), 3 C. P. D. 443; Krell v. Henry, [1903] 2 K. B. 740; G. W. Ry. & Mid. Ry. v. Bristol Corp'n. (1918), 87 L. J. Ch. 414. *Mentd.* McCollin v. Gilpin (1881), 6 Q. B. D. 516; Plant v. Bourne (1897), 76 L. T. 820.

**370. Contract for sale of manure.**—The following agreement was held to be a contract relating to the sale of goods within the exemption in Stamp Act, 1815 (c. 184), Sched., Part 1, Title Agreement: "I do agree to take all the manure at fourpence each horse, a week, for forty-five horses by the year, & to keep it cleared away every week; & likewise to let the few gardeners have a few loads at the same price, & serve them; & to let me have during year 60 loads of straw at £1 9s. per load; begun the year July 23, 1853 & ends July 23, 1855."—*GURR v. SCUDDS* (1855), 11 Exch. 190; 25 L. T. O. S. 130; 3 W. R. 457; 156 E. R. 798.

#### SUB-SECT. 2.—GOODS TO BE ACQUIRED BY SELLER UPON CONTINGENCY.

##### A. In General.

See Sale of Goods Act, 1893 (c. 71), s. 5 (2).

**371. Contract absolute on part of vendor.**—*SPLIDT v. HEATH* (1809), 2 Camp. 57, n.; 170 E. R. 1080, N. P.

**372.**—*SIMOND v. BRADDON*, No. 647, *post*.

**373.**—Where there is an agreement to deliver goods on a condition which, without any default on the part of the vendor, never happens, he will not be liable for a non-delivery; but, where the agreement is absolute, or conditioned on an event which happens, the vendor will be liable for a breach, though without default on his part; for, it is his own heedlessness, if he runs the risk of undertaking to perform an impossibility, when he might have provided against it by his contract.

Defts. contracted to sell to pltf's. 50 cases of East India tallow, at 48s. 6d. per hundredweight, to be paid for by pltf's. in cash fourteen days after finishing the landing thereof; to be delivered by defts. to pltf's. on safe arrival of a certain vessel called the *Countess of Elgin*, then on passage from Calcutta to London:—*Held*: this was an absolute contract to sell & deliver the tallow

provided the ship arrived, & defts. were liable for a breach, notwithstanding that the non-delivery was occasioned by the ship's arrival, through no default on their part, without the tallow on board; & the stipulation as to payment fourteen days after finishing the landing introduced no additional condition.—*HALE v. RAWSON* (1858), 4 C. B. N. S. 85; 27 L. J. C. P. 189; 31 L. T. O. S. 59; 4 Jur. N. S. 363; 6 W. R. 339; 140 E. R. 1013.

**374.**—*A.* contracted to supply to *B.* 1,000 tons of coals, delivered at Rangoon, at 45s. per ton, alongside craft, etc., as might be directed by *B.*; payment, one-half of invoice value by bill at three months, on handing bills of lading & policy of insurance to cover the amount, or in cash, at 25 per cent. discount, at *A.*'s option, & the balance in cash on right delivery at Rangoon. *A.* chartered a ship, & in pursuance of his contract shipped on board 1,166 tons of coals, & delivered to *B.* the bill of lading & a policy of insurance covering half the invoice price, & *B.* paid to *A.* the half invoice price. On the voyage the ship became disabled, & part of the coals were obliged to be thrown overboard; & the master chartered another vessel, & transhipped the residue, 850 tons, on board of her, at 45s. per ton freight to Rangoon. On arrival at Rangoon the master of the latter vessel offered the coals to *B.*'s agent on payment of the 45s. per ton freight. This offer being refused, the master put up the coals for auction, & *B.*'s agent *bond fide* bought them at a price of £1 5s. a ton:—*Held*: the property in the coals passed to *B.* on *A.*'s shipping the coals on board & delivering to *B.* the bills of lading & policy of insurance; & *A.* having done this was entitled to retain the half of the invoice price that had been paid to him; *A.* was bound to have delivered to *B.* at Rangoon so much of the coals as had escaped the sea risk & arrived there; but the offer of the coals at Rangoon on the terms of paying 45s. per ton freight was not a delivery by *A.* according to his contract, consequently *A.* was not entitled to demand from *B.* any part of the residue of the invoice price; & *semble*: *B.* might sue *A.* for the non-delivery at Rangoon, & recover as damages the difference between £1 5s. per ton which *B.* actually paid to get the coals, & the £1 2s. 6d., which *B.* was to have paid under the contract.—*BRITISH & INDIA STEAM NAVIGATION CO. v. DE MATOS, DE MATOS v. BRITISH & INDIA STEAM NAVIGATION CO.* (1864), 4 New Rep. 67; 12 W. R. 560; *sub nom.* CALCUTTA & BURMAH STEAM NAVIGATION CO., LTD. v. DE MATOS, DE MATOS v. CALCUTTA & BURMAH STEAM NAVIGATION CO., LTD., 33 L. J. Q. B. 214; 10 L. T. 246; 2 Mar. L. C. 11, Ex. Ch.

*Annotations*:—*Refd.* Pletts v. Beattie (1896), 65 L. J. M. C. 86; Dupont v. British South Africa Co. (1901), 18 T. L. R. 24; Houlder v. Public Works Comr., Public Works Comr. v. Houlder, [1908] A. C. 276.

**375.**—*BARNETT v. JAVERI & Co.*, No. 396, *post*.

**376. Contract conditional on both sides**—Sale of "all hemp that might be loaded."—*A.* sold to *B.* all the hemp that might be shipped on board certain vessels at Riga, not exceeding 300 tons by *C.* the agent of the concern. *C.* shipped on board of these vessels only 71 tons of hemp on account of *A.*, but upwards of 300 tons on account of other persons:—*Held*: the contract must be confined to such hemp as *C.* should ship as agent to *A.*, & *A.* was not answerable to *B.* for more than the 71 tons.—*HAYWARD v. SCOUGALL* (1809), 2 Camp. 56; 170 E. R. 1080, N. P.

*Annotation*:—*Consd.* Fischel v. Scott (1854), 15 C. B. 69.

**377. Contract conditional on part of vendor**—Sale of cargo—Quantity ascertained from bill of

*Sect. 5.—Subject-matter of the contract: Sub-sect. 2. A.*

—A written contract was made for the of "the cargo" of the "P." "now at Queenstown, as it stands, consisting of about 1,900 quarters Ibraila Indian corn, at the price of 30s. per imperial quarter," cost, freight & insurance to a safe port in the U. K., "the quantity to be taken from the bill of lading, & measure calculated at 220 quarters=100 kilos. Payment cash, on handing shipping documents." The bill of lading expressed that, at Ibraila, were shipped in good condition on board the "P.," bound to Queens-town for orders, 758 kilos. deliverable to Z. or assigns, he or they paying freight according to charterparty. "Quantity & quality unknown to" the master. A few days after the making of the contract, the shipping documents, including this bill of lading, were sent in by the vendor, with an invoice debiting the purchaser with the price of the number of quarters in 758 kilos., at the rate of 100 kilos.=220 quarters, at 30s. per quarter, & crediting him with freight on the same number of quarters at 10s. 3d. The purchaser paid the balance, & ordered the "P." to D., where she delivered her cargo. On the delivery, the actual number of quarters proved to be less than that calculated from the bill of lading. The purchaser paid freight on the actual quantity only, at 10s. 3d. per quarter; & claimed to recover back from the vendor 19s. 9d. per quarter for the short delivery, as an overpayment:—*Held*: the construction of the contract was, that the parties agreed to buy & sell the cargo at a price to be calculated from the quantity stated in the bill of lading, & not to depend upon the actual quantity; & the purchaser took the chance of the actual quantity turning out more, or the risk of its turning out less, than the stated quantity; & consequently that he could not recover for short delivery.—*COVAS v. BINGHAM* (1853), 2 E. & B. 836; 2 C. L. R. 212; 23 L. J. Q. B. 26; 18 J. P. 569; 18 Jur. 596; 118 E. R. 980; *sub nom.* *BINGHAM v. COVAS*, 22 L. T. O. S. 97; 2 W. R. 37.

*Annotations*:—*Distd.* Tamvaco v. Lucas (1859), 1 E. & E. 581. *Consd.* Tully v. Terry (1873), L. R. 8 C. P. 679. *Refd.* Livingston v. Ralli (1855), 25 L. T. O. S. 143; *British & India Steam Navigation Co. v. De Mattos*, *De Mattos v. British India Steam Navigation Co.* (1864), 12 W. R. 560.

378. — Contingency taking place—Liability for breach.]—*HALE v. RAWSON*, No. 373, *ante*.

379. — Failure of contingency—Without default of vendor.]—*HALE v. RAWSON*, No. 373, *ante*.

380. Contingency within control of vendor—Voluntary act of vendor preventing supply of goods—Whether term implied in favour of buyer.]—An implication of a term in a contract ought to be made only where it is necessary in order to give the transaction such efficacy as both parties must have intended it to have, & to prevent such failure of consideration as cannot have been within the contemplation of either party.

Defts., who carried on business as brewers, entered into an agreement in writing, by which they agreed to sell to plffs., & plffs. agreed to buy, all the grains made by defts., at the average of the rates charged each year by certain specified firms, from July 10, 1885, until Sept. 30, 1895. In 1890 defts. sold their business, & in consequence ceased to supply grains to plffs.:—*Held*: a term could

not be implied in the contract to the effect that defts. would not by any voluntary act of their own prevent themselves from continuing the sale of grains to plffs. for the period mentioned.—*HAMLIN & Co. v. WOOD & Co.*, [1891] 2 Q. B. 488; 60 L. J. Q. B. 734; 65 L. T. 286; 40 W. R. 24; 7 T. L. R. 731, O. A.

*Annotations*:—*Consd.* Consolidated Goldfields of South Africa v. Spiegel (1909), 100 L. T. 351; *Biddell v. Clemens Horst Co.*, [1911] 1 K. B. 934; *Guaranty Trust Co. of New York v. Hannay*, [1918] 2 K. B. 623; *Re Comptoir Commercial Anversois & Power*, [1920] 1 K. B. 868. *Refd.* Bunning v. Lyric Theatre (1894), 71 L. T. 396; *White v. Turnbull, Martin* (1898), 78 L. T. 726; *Morell v. New London Discount Co.* (1902), 18 T. L. R. 507; *Ogdens v. Nelson, Ogdens v. Telford*, [1904] 2 K. B. 410; *Douglas v. Baynes*, [1908] A. C. 477; *Lazarus v. Cairn Line of Steamships* (1912), 106 L. T. 378; *Merryweather v. Pearson*, [1914] 3 K. B. 587; *Bruce Marriott v. Houlder Line*, [1917] 1 K. B. 72; *Kensington & Knightsbridge Electric Lighting Co. v. Notting Hill Electric Lighting Co.* (1917), 87 L. J. K. B. 565; *Akt. Olivbank v. Dansk Svoylaye Fabrik*, [1919] 2 K. B. 162; *Brodie v. Cardiff Corpn.*, [1919] A. C. 337; *Armour v. Walford* (London), [1921] 3 K. B. 473; *Warren v. Agdeshman* (1922), 38 T. L. R. 588; *Larrinaga v. Soc. Franco-Americaine Des Phosphates De Medulla* (1923), 92 L. J. K. B. 455; *Transoceanic Soc. Italiana Di Navigazione v. Shipton*, [1923] 1 K. B. 31; *United States Shipping Board v. Duffell, Same v. Durrell, Same v. Butt*, [1923] 2 K. B. 739. *Mentd.* *Krell v. Henry*, [1903] 2 K. B. 740; *Re Royal Aquarium & Summer & Winter Garden Soc.* (1903), 20 T. L. R. 35; *Northern Assce. v. Farnham United-Breweries*, [1912] 2 C. H. 123; *The Devonshire & St. Winifred*, [1913] P. 13; *Porter v. Tottenham U. D. C.*, [1914] 1 K. B. 663; *Re Newman, Raphael's Claim*, [1916] 2 Ch. 309; *Barnes v. City of London Real Property Co.*, *Webster v. Same, Sollas v. Same, Kersey v. Same, Oakley, Sollas v. Same* (1918), 87 L. J. Ch. 601; *Burridge v. Haines* (1918), 62 Sol. Jo. 521; *Re Nott & Cardiff Corpn.*, [1918] 2 K. B. 146; *Turpin v. Victoria Palace*, [1918] 2 K. B. 539; *Cole v. Kelly*, [1920] 2 K. B. 106; *Joachimson v. Swiss Bank Corpn.*, [1921] 3 K. B. 110; *Moriarty v. Regent's Garage & Engineering Co.*, [1921] 1 K. B. 423; *Cookburn v. Smith* (1923), 40 T. L. R. 113; *Kelantan Government v. Duff Development Co.*, [1923] A. C. 395; *Tournier v. National Provincial & Union Bank of England*, [1924] 1 K. B. 461.

*B. Particular Instances.*

*See Sale of Goods Act, 1893 (c. 71), s. 5.*

381. Sale of goods "on arrival"—By particular ship—Ship arriving empty—Without default of vendor.]—If there be a contract for the sale of goods by a particular ship on arrival, this means on the arrival of the goods which the ship is expected to bring, & if the ship arrives empty, without any default on the part of the vendor, he is not liable to the purchaser for the non-delivery of the goods.—*BOYD v. SIFFKIN* (1800), 2 Camp. 326; 170 E. R. 1172, N. P.

382. — — — — —.]—*HAWES v. HUMBLE* (1809), 2 Camp. 327, n.; 170 E. R. 1172, N. P.

*Annotation*:—*Consd.* *Hale v. Rawson* (1858), 27 L. J. C. P. 189.

383. — — — — —.]—*HALE v. RAWSON*, No. 373, *ante*.

384. On particular date—Sale of cargo after wreck of ship.]—The ship was wrecked off the coast of Scotland, but the cargo was saved, & might have been forwarded to the port of London by the given day. The vendors resold the tallow in Scotland, the purchasers did not offer them any indemnity if they would bring the tallow to London:—*Held*: under these circumstances, the vendors were not answerable for the non-delivery of the tallow.—*IDLE v. THORNTON* (1812), 3 Camp. 274; 170 E. R. 1380, N. P.

*Annotation*:—*Refd.* *Thornton v. Jones* (1816), 2 Marsh. 287.

385. — — — — —.]—Late arrival.]—In an action by vendee, for non-delivery of goods:—*Held*: in

PART II. SECT. 5, SUB-SECT. 2.—B.

b. Expression of probability—Does not amount to contract.]—Where in negotiating for the sale of oats by the carload, the seller says, "I am not sure

whether I can procure more than two cars; I undertake to let you have two cars & I may be able to let you have three cars," the buyer is not entitled to bind the seller to the delivery of three cars, & if the buyer attempts to

do so, & the seller dissents, there is no contract even for two cars.—*CUMMINGS GRAIN CO. v. BUTCHER* (1922), 86 D. L. R. 662; 17 Alta. L. R. 122; [1922] 1 W. W. R. 243.—*OAN.*

an agreement "for the delivery of goods on arrival, to be delivered with all convenient speed, but not to exceed a given day," the arrival in time for delivery by that day is a condition precedent; & if they do not so arrive, without default in vendor, the agreement is null.—*ALEWYN v. PRYOR* (1826), Ry. & M. 406; 171 E. R. 1065, N. P.

*Annotation*:—*Reid. Hale v. Rawson* (1858), 4 Jur. N. S. 363.

**386.** — "Ship's name declared as soon as known"—*Short arrival*.]—Under a contract to sell 50 tons of hemp at a price per ton, to be shipped from St. Petersburg or Cronstadt in June or July, & the ship's name declared as soon as known; in case the ship should not arrive before Dec. 31, the contract to be void; the seller is not bound to send all by one ship, & having announced more to be coming by one ship than the fact was, he was at liberty to declare the residue to be coming by other ships.—*THORNTON v. SIMPSON* (1816), 6 Taunt. 556; 2 Marsh. 267; 128 E. R. 1151.

*Annotation*:—*Reid. Borrowman v. Free & Hollis* (1878), 4 Q. B. D. 500.

**387.** Sale of goods "to arrive".—By particular ship—*Arrival on different ship*.]—Defts., by their brokers, entered into a contract for the sale to pltfs., "of 50 tons of palm oil, to arrive per the *Mansfield*, etc. In case of non-arrival, or the vessels not having so much in after delivery of former contracts, this contract to be void." At the time this contract was entered into, defts. had several vessels on the coast of Africa for the purpose of obtaining palm oil, & amongst others the *Mansfield* & the *Watt*. After the date of the contract, the *Mansfield* was loaded with 315 tons of palm oil, & sailed homewards. On her arrival at Cameroons defts.' agent ordered the captain of the *Mansfield* to tranship part of her cargo to the *Watt*, which was the larger vessel. This transshipment was accordingly made *bonâ fide* & without fraud, for the purpose of enabling the *Watt* to proceed home with a full cargo. The *Watt* proceeded on her voyage, & arrived in Liverpool on April 8, 1838, & the *Mansfield* on May 20 following. The *Mansfield*, on her arrival, had on board 235 tons of palm oil, but the contracts made previously to the above contract amounted to 228 tons, leaving only 7 tons applicable to this contract, which were delivered by defts. to pltfs. In an action for the non-delivery of the oil:—*Held*: the arrival of the oil in the *Mansfield* was a condition precedent, & pltfs. were not entitled to the oil brought by the *Watt*; the contract for the 50 tons was entire, & pltfs. were not entitled to the 7 tons brought by the *Mansfield* over what was required to satisfy former contracts.—*LOVATT v. HAMILTON* (1839), 5 M. & W. 639; 151 E. R. 271.

*Annotations*:—*Apld. Johnson v. Macdonald* (1842), 9 M. & W. 600. *Distd. Hale v. Rawson* (1858), 4 Jur. N. S. 363. *Reid. Royal Exchange Assce. v. M'Swiney* (1849), 14 Q. B. 646.

**388.** — — — — —.]—Deft., by a bought & sold note, agreed to sell pltfs. "100 tons of nitrate of soda, at 18s. per hundredweight, to arrive *ex Daniel Grant*, to be taken from the quay at landing weights," etc.; & below the signature of the brokers there was the following memorandum, "Should the vessel be lost, this contract to be void":—*Held*: the contract did not amount to a warranty on the part of the seller, that the nitrate of soda should arrive if the vessel arrived, but to a contract for the sale of goods at a future period, subject to the double condition, of the arrival of the vessel, with the specified cargo on board.—*JOHNSON v. MACDONALD* (1842), 9 M. & W. 600; 12 L. J. Ex. 99; 6 Jur. 264; 152 E. R.

*v. Perrin* (1857), 2 C. B. N. S. 681.  
C. B. N. S. 85.

**389.** — — — — —.]—*Provided the same be shipped for seller's account.*]—By means of bought & sold notes, pltfs. bought of deft. "the cargo of 400 tons, provided the same be shipped for seller's account, of Necrensie rice, more or less, of the average quality, as shipped per *Minna*, to proceed from Akyab to a port in the Channel for orders, at 11s. 6d. per cwt. for Necrensie rice, or at 11s. for Larong, the latter quality not to exceed 50 tons, or else, at the option of buyers, to reject any excess, to be paid for in cash on the arrival of the vessel at the port of call, on delivery of the bills of lading, charterparty & policy of insurance; should the vessel be lost before the arrival at the port of call, this contract to be void":—*Held*: (1) the contract did not disclose an absolute contract of sale or warranty to ship a cargo of rice of the quality mentioned; (2) the buyers were not entitled to the delivery either of the whole cargo or of the Larong rice, because the contract was for an entire cargo which would substantially satisfy the description of Aracan Necrensie rice.—*VERNEDE v. WEBER* (1856), 1 H. & N. 311; 25 L. J. Ex. 326; 27 L. T. O. S. 274; 156 E. R. 1222.

*Annotation*:—*As to* (2) *Consd. Simond v. Braddon* (1857), 2 C. B. N. S. 324

**390.** — — — — —.]—*"Ship now on her way."*]—*SIMOND v. BRADDON*, No. 617, *post*.

**391.** — — — — —.]—A. contracted to sell to B. 1170 "bales" of gambier, "now on passage from Singapore, & expected to arrive in London, viz. per *Ravenscraig*, 805 bales, per *Lady Agnes Duff*, 365 bales":—*Held*: (1) a warranty that the goods were then on passage; (2) evidence was admissible to show, that, by the usage of the trade, a "bale" of gambier was understood to mean a package of a particular description; & the contract was not satisfied by a tender of packages of a totally different size & description. (3) *Qu.*: as to the extent of the vendor's liability on a sale of goods "expected to arrive" by a particular ship, where goods of the description contracted to be sold do arrive, but are consigned to a third party.—*GORRISSON v. PERRIN* (1857), 2 C. B. N. S. 681; 27 L. J. C. P. 29; 29 L. T. O. S. 227; 3 Jur. N. S. 867; 5 W. R. 709; 140 E. R. 583.

*Annotation*:—*As to* (1) *Apld. Corkling v. Massey* (1873), L. R. 8 C. P. 395.

**392.** — — — — —.]—*"Expected to arrive" by particular ship—Consignment to third party.*]—A. contracted to sell to B. 100 hogsheds of Gingelly oil "expected to arrive by the ship *Resolute* from Madras." The *Resolute* arrived with 100 hogsheds of Gingelly oil on board, but it turned out that 34 hogsheds only were consigned to or under the power or control of A. *Semble*, this did not excuse A. for the non-performance of his contract, & it would not be performed by a delivery or tender of the 34 hogsheds over which he had control.—*FISCHEL v. SCOTT* (1854), 15 C. B. 69; 139 E. R. 344; *sub nom. FITCHETT v. SCOTT*, 2 C. L. R. 1774.

*Annotation*:—*Distd. Gorrisson v. Perrin* (1857), 2 C. B. N. S. 681.

*v. PERRIN,*

No. 391, *ante*.

**394.** — — — — —.]—*Rescission of charterparty.*]—Defts.' correspondent at Valparaiso bought on their account of S. & co. 600 tons of nitrate of soda, & on July 16, 1868, they chartered the barque *Precursor* to bring it to England, & they, on the same day, wrote to defts. of this. On the receipt of the advice, defts. on Sept. 8, made a contract, through brokers, with pltf., "We have this day sold to you about 600 tons, more or less, being the entire parcel of nitrate of soda expected to arrive at port of call per *Precursor*, at 12s. 9d.

*Sect. 5.—Subject-matter of the contract: Sub-sect. 2, B.; sub-sects. 3 & 4. Sect. 6: Sub-sects. 1 & 2.]*

per hundredweight. . . . Should any circumstance or accident prevent the shipment of the nitrate, or should the vessel be lost, this contract to be void." In the meantime, on Aug. 13, an earthquake had destroyed the greater part of the nitrate of soda, while lying at the port of lading; & it having been determined by arbitration, pursuant to the contract, that S. & co. were not bound to supply other soda, on Sept. 2, the Valparaíso house had cancelled the charter of the *Precursor*. Afterwards, on learning from defts. that they had sold the nitrate of soda to arrive, but not on what terms, they purchased other 600 tons of nitrate of soda, at above defts.' limit, & obtained a transfer of a charter of the same barque *Precursor*, & shipped the nitrate about Dec. 23, to defts. to enable them to execute their contract if obliged to do so, or to sell at a profit, if free. The *Precursor* arrived in England on May 8, 1869, & pltf. demanded the cargo under the contract of Sept. 8:—*Held*: pltf. was not entitled to the cargo.—*SMITH v. MYERS* (1871), L. R. 7 Q. B. 139; 41 L. J. Q. B. 91; 26 L. T. 103; 20 W. R. 186; 1 Asp. M. L. C. 222, Ex. Ch.

395. — "To be delivered from quay."—A. contracted to sell to B. 500 bales of cotton at a given price, to arrive at Liverpool per ship or ships from Calcutta. The contract contained provisions as to quality, & for arbitration in case of dispute; & then followed, "The cotton to be taken from the quay; customary allowances of tare & draft; & the invoice to be dated from date of delivery of last bale"—*Held*: the clause as to the place of delivery was not a condition precedent, but a mere stipulation in favour of the sellers, & the contract amounted in effect to a contract to deliver the cotton at a reasonable time, & under reasonable circumstances, the article to be at the buyer's risk & charge from the time of its being landed on the quay.—*NEILL v. WHITWORTH* (1866), L. R. 1 C. P. 684; Har. & Ruth. 832; 35 L. J. C. P. 304; 12 Jur. N. S. 761; 14 W. R. 844; *sub nom.* *NIELL v. WHITWORTH*, 14 L. T. 670; 2 Mar. L. C. 352, Ex. Ch.

396. Sale "subject to safe arrival."—Defts. entered into a contract with pltf. for the sale to him of about 4 tons of hematine crystals "subject to safe arrival." Defts. had made a contract for the delivery to themselves of the crystals, which were expected by their vendor to arrive from Alexandria. No ship was named in the contract between pltf. & defts. as that by which the crystals were to arrive. Defts.' vendor not being able to obtain delivery of the crystals was unable to supply them to defts., who in their turn were unable to fulfil their contract with pltf.:—*Held*: under the contract between pltf. & defts. there was an obligation on defts. to ship the goods or to get them so far under their control that they were placed on board some ship; not having done so they were not protected by the words "subject to safe arrival," which meant that provided defts. shipped the goods they were not to be liable for non-delivery consequent upon any accident occurring to the goods in transit & preventing their safe arrival; & defts. were liable to pltf. in an action for damages for non-delivery of the crystals.—*BARNETT v. JAVERI & Co.*, [1916] 2 K. B. 390; 85 L. J. K. B. 1703;

115 L. T. 217; 13 Asp. M. L. C. 424; 22 Com. Cas. 5.

*Annotation*:—*Mentd.* *Lake v. Simmons*, [1926] 1 K. B. 366.

#### SUB-SECT. 3.—SALE OF CHANCE.

397. General rule.]—No doubt a man may buy a chance of obtaining goods (*MARTIN, B.*)—*BUDDLE v. GREEN* (1857), 27 L. J. Ex. 33.

398. Chance of quantity.]—*COVAS v. BINGHAM*, No. 377, *ante*.

#### SUB-SECT. 4.—PRESENT SALE OF FUTURE GOODS.

*See* Sale of Goods Act, 1893 (c. 71), s. 5.

399. Operation as agreement to sell—Necessity for ratification by vendor.]—A grant of goods which are not in existence, or which do not belong to the grantor at the time of executing the deed, is void, unless the grantor ratify the grant by some act done by him with that view, after he has acquired the property therein.—*JUNN v. THORNTON* (1845), 1 C. B. 379; 14 L. J. C. P. 161; 4 L. T. O. S. 417; 9 Jur. 350; 135 E. R. 587.

*Annotations*:—*Consd.* *Hope v. Hayley* (1856), 5 E. & B. 830. *Ald.* *Carr v. Allatt, Allatt v. Carr* (1858), 27 L. J. Ex. 385. *Consd.* *Chiddell v. Galsworthy* (1859), 6 C. B. N. S. 471. *Refd.* *Gale v. Burnell* (1845), 7 Q. B. 850; *Price v. Groom* (1848), 2 Exch. 542; *Congreve v. Evetts* (1854), 10 Exch. 298; *Edmonds v. Best* (1862), 7 L. T. 279; *Holroyd v. Marshall* (1862), 10 H. L. Cas. 191; *Joseph v. Lyons* (1884), 54 L. J. Q. B. 1. *Mentd.* *Flory v. Denny* (1852), 7 Exch. 581; *Martin v. Reid* (1862), 11 C. B. N. S. 730; *Re Harcourt, Danby v. Tucker* (1883), 31 W. R. 578; *Cochrane v. Moore* (1890), 25 Q. B. D. 57.

400. —.]—In an action for not delivering foreign stock, the declaration alleged that pltf. "bargained with deft. to buy, & then bought from him, & deft. then agreed to sell, & then sold to pltf., certain foreign stock, to wit, 28,000 Spanish Active Stock, etc."—*Held*: (1) the words "bought" & "sold" must be construed with reference to the subject-matter of the contract, & as meaning an agreement to buy & sell; & (2) a contract for the sale of stock, Exchequer Bills, & securities of that description, in which the property passes by delivery, differs from a contract for the sale of a specific chattel, inasmuch as a contract for the sale of stock, Exchequer Bills, etc., would be satisfied by the delivery of any stock or bills of the description bargained for, & consequently the contract for sale cannot mean an actual sale, but only a contract to deliver.—*HESELTINE v. SIGGERS* (1848), 1 Exch. 856; 18 L. J. Ex. 166; 154 E. R. 365.

*Annotation*:—*As to* (2) *Refd.* *Goodwin v. Roberts* (1875), L. R. 10 Exch. 337.

#### SECT. 6.—PERISHING OF SPECIFIC GOODS.

##### SUB-SECT. 1.—BEFORE CONTRACT.

*See* Sale of Goods Act, 1893 (c. 71), s. 6.

401. Whether contract void—Cargo sold while at sea.]—A cargo of corn was shipped by A. at Salonica in Feb. 1848, for delivery in London. On May 15 it was sold by H. a factor, who made the sale on a *del credere* commission. The contract described the corn as "of average quality when shipped," & the sale was made at "27s. per quarter

Some of the potatoes at the time of the contract were not dug, & pltf. agreed to deliver them at a certain date. Unknown to pltf. the potatoes had at the date of the contract become unfit

#### PART II. SECT. 5, SUB-SECT. 3.

*a. Character of sale—Onus of proof.*]  
—*RICE v. GUNN* (1884), 4 Q. R. 579.—  
CAN.

#### PART II. SECT. 6, SUB-SECT. 1.

*d. Whether contract void—Goods perished when contract made.*—Pltf. sold defts. 75 tons of table-potatoes.



free on board, & including freight & insurance to a safe port in the United Kingdom, payment at, etc., upon handing shipping documents." In fact the corn had, a short time before the date of the contract, been sold at Tunis, in consequence of getting so heated in the early part of the voyage as to render its being brought to England impossible. The contract in England was entered into in ignorance of this fact. When the English purchaser discovered it, he repudiated the contract. In an action for the price brought against the factor:—*Held*: the contract contemplated that there was an existing something to be sold & bought & capable of transfer, which not being the case at the time of the sale by the factor, he was not liable.—*COUTURIER v. HASTIE* (1856), 5 H. L. Cas. 673; 25 L. J. Ex. 253; 28 L. T. O. S. 240; 2 Jur. N. S. 1241; 10 E. R. 1065, H. L.; *affg.* S. C. *sub nom.* *HASTIE v. COUTURIER* (1853), 9 Exch. 102, Ex. Ch.

*Annotations*:—*Apld.* *Griffith v. Brymer* (1903), 19 T. L. R. 434. *Reid.* *Covas v. Bingham* (1853), 2 E. & B. 836; *Hall v. Conder* (1857), 2 C. B. N. S. 22; *Pritchard v. Merchant's & Tradesman's Mutual Life-Asso. Soc.* (1858), 3 C. B. N. S. 622; *Hare v. Brown* (1859), 5 Jur. N. S. 711; *Ralli v. Universal Marine Insce.* (1862), 4 De G. F. & J. 1; *Jeffreys v. Fair* (1876), 36 L. T. 10; *Jolliffe v. Baker* (1883), 11 Q. B. D. 255. *Mentd.* *Wickham v. Wickham* (1855), 2 K. & J. 478; *Risbourg v. Bruckner* (1858), 30 L. T. O. S. 258; *Reader v. Kingham* (1862), 32 L. J. C. P. 108; *Mallett v. Bateman* (1864), 16 C. B. N. S. 530; *The John Bellamy* (1870), L. R. 3 A. & E. 129; *Fleet v. Murton* (1871), L. R. 7 Q. B. 126; *Mountstephen v. Lakeman* (1871), 25 L. T. 755; *Mollett v. Robinson* (1872), L. R. 7 C. P. 84; *Williams v. North China Insce.* (1876), 1 C. P. D. 757; *Sutton v. Grey*, [1894] 1 Q. B. 285; *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K. B. 778; *Davys v. Buswell*, [1913] 2 K. B. 47; *Gabriel v. Churchill & Sim*, [1914] 3 K. B. 1272.

402. Cargo lost at sea.]—Pltf. a ship-broker & coal merchant at Newport, was, in Dec. last, in negotiation with deft., a merchant at Liverpool, with reference to pltf.'s shipping a cargo of coals on board a vessel at Newport called the *Vectis*, chartered by deft. for a voyage to Lisbon, the charter stipulating it was to be loaded in five clear working days, or demurrage would become payable. The coals were sold to deft. at Liverpool on Dec. 14, at 10s. a ton, by pltf.'s agent there, who sent the order to pltf. by post on the same day, & on the following day, Dec. 15, sent him a telegram as follows: "Please load *Vectis* for Lisbon, now ready at your port for C.," to which pltf. replied that as his stem was at present so heavy he could not load the vessel, & that coals were not then to be got, deft. had better get coals elsewhere. In reply to that deft. wrote urging pltf. to do his best to load the vessel at once in order to save demurrage, & forwarding notice of lay days having commenced. Pltf. answered that it was impossible to load the vessel within the time, & asked for an extension of it, or if coals could be gotten elsewhere, to which on Dec. 19, deft. replied, hoping more time for loading had been procured, or that pltf. had been able to get equally good coal elsewhere at the same price. Pltf. procured the coal at an increased cost of 6d. a ton, & informed deft. thereof, who on Dec. 20 telegraphed to pltf. objecting to pay the extra 6d., & stating that the coals must be loaded at the contract price at once. On the same day pltf. telegraphed to deft., "We have arranged to load the *Vectis* to-night," & on Dec. 21 deft. instructed pltf. by telegram as follows: "Load up *Vectis* immediately & save demurrage, & pay advance

as per charter. Will arrange price afterwards," & by post of the same day he wrote to pltf. that if 6d. a ton extra were now charged he should deduct it from the next cargo loaded for him by the pltf. On Dec. 21 the loading of the vessel was completed, & £46 advanced by pltf. to the captain for deft. on account of freight. On Dec. 22 the bill of lading was signed by the captain, expressing the delivery "to order or to assigns" at Lisbon, which bill was, with the invoice & a bill of exchange for the full price of 10s. 6d. a ton, sent by pltf. to his agent at Liverpool on that day, with instructions to hold it till deft. had "paid the advance & accepted the bill of exchange at 10s. 6d. a ton." Deft. refused to accept the bill of exchange, without an understanding as to the price, as mentioned in his letter of Dec. 21. After some discussion pltf., by post of Dec. 24, agreed to allow the extra 6d., & on Dec. 27 deft. repaid the advance & accepted the bill of exchange. The *Vectis* & her cargo were lost at sea, in the Bristol Channel, on the morning of Dec. 24, & in an action by pltf. to recover the amount of the above acceptance:—*Held*: making absolute a rule to enter the verdict for deft., as the coals had not been shipped in pursuance of any contract between the parties, pltf. could not recover. The contract was to load on board at 10s. a ton, & if, when pltf. charged 6d. a ton extra, & deft. objected to it & said, "load the vessel & we will arrange price afterwards," pltf. had agreed to that proposal, he might have recovered on a *quantum meruit*; but he did not do so. He went on disputing as to the price, & instructed his agent to hold the documents till his terms were accepted by deft., & when at last he agreed to allow the extra 6d., it was too late, the coals had then gone to the bottom. The coals, therefore, were not shipped on board in conformity to any contract, enabling pltf. to maintain the action, & there was an absence of all consideration entitling him to recover on the bill of exchange.—*WILLIAMS v. COHEN* (1871), 25 L. T. 300.

403. — Cargo expected to arrive by particular ship—Voyage rendered impossible.]—*SMITH v. MYERS*, No. 394, ante.

#### SUB-SECT. 2.—AFTER CONTRACT.

See Sale of Goods Act, 1893 (c. 71), ss. 7, 20.

404. Before risk passes—Goods consumed by fire.]—Where turpentine in casks was sold by auction at so much per hundredweight & the casks were to be taken at a certain marked quantity, except the two last, out of which the seller was to fill up the rest before they were delivered to the purchasers; on which account the two last casks were to be sold at uncertain quantities; & a deposit was to be paid by the buyers at the time of the sale, & the remainder within 30 days on the goods being delivered; & the buyers had the option of keeping the goods in the warehouse at the charge of the sellers for those 30 days, after which they were to pay the rent; & the buyers having employed the warehouseman of the seller as their agent, he filled up some of the casks out of the two last, but left the bungs out in order to enable the custom house officer to gauge them; but before he could fill up the rest a fire consumed the whole in the warehouse within the 30 days:—*Held*: the property passed to the buyers in all

for human consumption, although to outward appearance they were in sound condition:—*Held*: although the potatoes had not perished *in specie*, they had perished at the time the

contract was made within the meaning of Sale of Goods Act, 1893, s. 8, & the contract was void.—*RENDELL v. TURNBULL & Co.* (1908), 27 N. Z. L. R. 1067.—N.Z.

#### PART II. SECT. 6, SUB-SECT. 2.

e. After risk has passed.—Before payment made.]—Where goods, the subject of an executory contract of



8.—*Perishing of specific goods: Sub-sect. 2. Sect. 7: Sub-sects. 1 & 2, A.]*

the casks which were filled up, because nothing further remained to be done to them by the seller; for it was the business of the buyers to get them gauged, without which they could not have been removed; & the act of the warehouseman in leaving them unbunged after filling them up, which was for the purpose of the gauging, must be taken to have been done as agent for the buyers, whose concern the gauging was. But the property in the casks not filled up remained in the seller, at whose risk they continued.—*RUGG v. MINETT* (1809), 11 East, 210; 103 E. R. 985.

*Annotations:—*Consd. *Busk v. Davis* (1814), 2 M. & S. 397. *Distd. Tansley v. Turner* (1835), 2 Scott, 238. *Apld. Acraman v. Morrice* (1849), 8 C. B. 449. *Consd. Gilmour v. Supple* (1858), 11 Moo. P. C. 552. *Apld. Campbell v. Mersey Docks & Harbour Board* (1863), 14 C. B. N. S. 412; *Taylor v. Caldwell* (1863), 3 B. & S. 826. *Distd. Elphick v. Barnes* (1880), 6 C. P. D. 321. *Refd. Simmons v. Swift* (1826), 5 B. & C. 857; *Gillett v. Hill* (1834), 3 L. J. Ex. 145; *Spartall v. Benecke* (1850), 10 C. B. 212; *Aldridge v. Johnson* (1857), 7 E. & B. 885; *Turley v. Bates* (1863), 2 H. & C. 200; *Young v. Matthews* (1866), 36 L. J. C. P. 61; *Appleby v. Meyers* (1867), 36 L. J. C. P. 331; *Howell v. Coupland* (1874), L. R. 9 Q. B. 462; *Anderson v. Morice* (1876), 1 App. Cas. 713.

405. — *Transfer of horse upon trial—Death of horse before return.]—*On a bargain for the purchase of a horse, the horse was delivered to deft. upon trial for eight days, the agreed price being £40. If found suitable for the intending buyer's purposes, the bargain was then to be absolute. The horse died, without fault in either party, within the eight days:—*Held*: the intended buyer was not liable for the price.—*ELPHICK v. BARNES* (1880), 5 C. P. D. 321; 49 L. J. Q. B. 698; 44 J. P. 651; 29 W. R. 139.

*Annotations:—*Distd. *Lake v. Simmons* (1926), 95 L. J. K. B. 556. *Refd. Janesch v. Attenborough* (1910), 102 L. T. 606.

406. — *After risk has passed—Goods lost at sea.]—*ALEXANDER v. GARDNER, No. 567, *post*.

407. — *Deft. in London buys of pltf. a ship, which pltf. builds beyond seas. Deft. writes to pltf., ordering him to provide a captain & crew, to load the vessel, & to insure her. Pltf. carries out the order, & the captain & crew sail in the vessel, which is lost on the voyage. Pltf. may recover the price of the vessel under a count for goods sold & delivered.*

The delivery constitutes the cause of action (WILLES, J.).—HAZARD v. HODGES (1859), 32 L. T. O. S. 257; 7 W. R. 204.

408. — *Pltfs. agreed with deft. to ship on board a vessel a cargo of fresh water ice, & to despatch the vessel with all speed to any ordered port in the United Kingdom, "the vendors forwarding bills of lading to the purchaser, & upon receipt thereof, the purchaser takes upon himself all risks & dangers of the seas," & deft. agreed to buy & receive the ice on its arrival, & pay for it in cash on delivery, at the rate of 20s. a ton of 20 hundredweight, weighed on board during delivery. The vessel was lost during the voyage by risks & dangers of the seas, within the meaning of the agreement, & after the receipt by the deft. of the bills of lading. Pltfs. having brought an action against deft. to recover the value of the cargo:—Held: pltfs. were entitled to recover.—CASTLE v. PLAYFORD (1872), L. R. 7 Exch. 98; 41 L. J. Ex. 44; 26 L. T. 315; 20 W. R. 440; 1 Asp. M. L. C. 255, Ex. Ch.*

*Annotations:—*Apld. *Martineau v. Kitching* (1872), L. R.

7 Q. B. 436. *Consd. Anderson v. Morice* (1876), 1 App. Cas. 713. *Refd. Stock v. Inglis* (1881), 52 L. J. Q. B. 80.

409. — *Goods destroyed by fire.]—*MARTINEAU v. KITCHING, No. 424, *post*.

*Failure of supply.]—*See CONTRACT, Vol. XII., pp. 381, 382, Nos. 3149–3152.

## SECT. 7.—THE PRICE.

### SUB-SECT. 1.—IN GENERAL.

See Sale of Goods Act, 1893 (c. 71), s. 8.

*Necessity for statement in memorandum or writing.]—*See Sect. 4, sub-sect. 7, O. (b), v., *ante*.

410. *Part payment in goods.]—*A. agreed to give a horse, warranted sound, in exchange for a horse of B. & a sum of money. The horses were exchanged, but B. refused to pay the money, pretending that A.'s horse was unsound:—*Held*: it might be recovered on an *indebitatus* count for horses sold & delivered.—SHELDON v. COX (1824), 3 B. & C. 420; 5 Dow. & Ry. K. B. 277; 107 E. R. 789.

*Annotation:—*Apld. *Bull v. Parker* (1842), 2 Dowl. N. S. 345.

411. — *Assumpsit.* The declaration alleged, that, in consideration that pltf. would buy of deft. a horse, at & for a "certain price or sum, to wit, the sum of £56 16s." deft. promised that the horse was sound. Breach, that he was unsound. Plea, *non assumpsit*, & a traverse of the unsoundness. At the trial, it was proved that pltf., who was a tailor, agreed to give deft. for the horse £55, & a new pair of breeches, value £1 16s.:—*Held*: on motion to enter nonsuit, there was no variance.—SAXTY v. WILKIN (1843), 11 M. & W. 622; 12 L. J. Ex. 381; 7 Jur. 704; 152 E. R. 954; *sub nom.* SAXBY v. WILKINS, 1 L. T. O. S. 233.

412. *Discount for cash—How calculated.]—*Where goods were sold under a written contract at so much per load, "to be taken by the dock account, & paid for in cash, allowing 2½ per cent. discount within fourteen days from the date; the goods to be taken on board, & the duty deducted"; & the duty was payable by the buyer:—*Held*: the discount was to be calculated on the sum to be received by the seller only, exclusive of the duty.—SMITH v. BLANDY (1825), Ry. & M. 257; 171 E. R. 1013, N. P.

413. — *No cash payments—Bankruptcy of buyer—Whether creditor may prove for full invoice prices.]—*Wholesale traders supplied goods to a retail dealer on the terms that he was to be allowed a discount of 20 per cent. from the invoice prices on payment in cash within a month:—*Held*: cash payments not having been made, proof must be admitted in the bkpcy. of the retail dealer for the full amount of the invoice prices of the goods.—*Re CUMBERLAND, Ex p. WORTHINGTON* (1876), 3 Ch. D. 803; 45 L. J. Bcy. 135; 34 L. T. 951.

*Annotation:—*Refd. *Chambers v. Gunstone* (1897), 76 L. T. 780.

414. *Article to be manufactured of certain material—Better material used—Whether higher price may be demanded.]—*If A. agrees to make an article of certain materials for a stipulated price, but puts in materials of a better kind, he is not at liberty on that account to charge more than the stipulated price, nor can he require the article to be returned, because the buyer will not pay an increased price on account of the better materials.

sale, have passed into the possession of the vendee, without payment being made, & have while in such possession been lost or destroyed through no

fault of the vendor, the vendee is liable for the price, notwithstanding that the property in the goods had not, by the terms of the contract, passed to the

vendee, & that no negligence on his part is shown.—HESSELBAEHR v. BALLANTYNE (1896), 28 O. R. 182; 25 A. R. 36.—CAN.

—*WILMOT v. SMITH* (1828), as reported in 3 O. & P. 453; 172 E. R. 498, N. P.

*Annotations* :—*Mentd.* Sanderson v. Bell (1833), 3 L. J. Ex. 68; Pennell v. Stephens (1849), 7 C. B. 987.

**415. Price stated in memorandum of agreement**  
—*Variation by parol evidence.*—Pltf. by his declaration alleged that by a written agreement defts. bought certain bark of him at £8 per ton, & although pltf. had performed his part of the agreement, & defts. had had the benefit of it & possession of the bark, & had paid to pltf. the deposit and other sums, etc., yet they had not paid the residue of the purchase-money; with the common counts. Defts. pleaded a denial of the agreement, fraud, never indebted, payment, & also as an equitable plea, that pltf. was employed to sell, & did sell, the bark as agent of C., & on his behalf, at the then last year's prices, plus the expenses of carting & ricking the bark in the then present year; & he then represented to defts. that such expenses could not then be correctly ascertained, but that same added to the price averaged between £5 & £6 per ton; & upon such representations of pltf., & at his request, & on his agreeing that defts. should be liable to pay only such prices & expenses when ascertained, defts. were induced to & did make the agreement, & were then requested by pltf. to pay the prices & expenses to C. That after making the agreement defts. discovered that the expenses added to the prices averaged only £5 2s. per ton; & that, before action, they paid to C., who then had notice of the premises, the whole amount due for the bark at the prices, together with the expenses so ascertained as aforesaid, & C. accepted same in full discharge & satisfaction of same, & of all liability of defts. in respect of the bark & expenses; of all which pltf. had notice before action:—*Held*: the real contract between pltf. & defts. was not in writing, & the written memorandum was not signed for the purpose of evidencing any contract, & so defts. were entitled to judgment on *non assumpsit*; if there were a contract in writing intended to bind the parties, it was avoided by fraud, which defts. had not estopped themselves from pleading; under the plea of payment, payment to C. was a defence; & the facts stated in the equitable plea disclosed a good answer to pltf.'s claim; & parol evidence was admissible in support of such plea.—*ROGERS v. HADLEY* (1863), 2 H. & C. 227; 32 L. J. Ex. 241; 9 L. T. 292; 9 Jur. N. S. 898; 11 W. R. 1074; 159 E. R. 94.

*Annotations* :—*Apld.* Bolokow v. Seymour (1864), 17 C. B. N. S. 106; Kempson v. Boyle (1865), 3 H. & C. 763; Clever v. Kirkman (1875), 33 L. T. 672.

## PART II. SECT. 7, SUB-SECT. 1.

**4171. Effect of alteration in rate of exchange.**—*ROSENFELD & Co. (PROPRIETARY), LTD. v. COWELL BROTHERS & Co., LTD.*, [1921] S. A. S. R. 13.—*AUS.*

**1. Meaning of "contract price."**—*CAMPBELL v. EDWARDS* (1876), 24 Gr. 152.—*CAN.*

**g. Meaning of "invoice price."**—A sale of a stock of merchandise at a certain rate on the invoice price means the price charged the vendor when he bought the goods.—*HEALMAN v. DAVID* (1914), 29 W. L. R. 528; 7 W. W. R. 180; 20 D. L. R. 949.—*CAN.*

**h. Rendering account with prices stated.**—The mere rendering an account with prices stated is not ascertaining the amount by the act of the parties.—*MONTGOMERY v. McDONALD* (1883), 1 Man. L. R. 232.—*CAN.*

**k. Fishery agreement.**—Rule to ascertain meaning of customary price.—When an agreement contains a clause that defts. are to pay pltf. the cus-

tomary price for the produce of his voyages at the seal & cod fisheries, the jury in arriving at what are customary prices for the produce referred to, should not be governed either by the highest or the lowest price given at the date of the various transactions.—*DAY v. BARON* (1859), 4 Nfld. L. R. 360.—*NFLD.*

**l.**—"Highest penny given in St. John's".—Where an agreement was made on the Labrador early in Oct., between a fisherman & a planter, that the price to be paid for fish sold was to be equal to the "highest penny given in St. John's".—*Held*: this meant that the price to be paid was the average price paid in St. John's at the date of the making of the agreement.—*OLDFORD v. JOB BROTHERS & Co.* (1899), 8 Nfld. L. R. 269.—*NFLD.*

**m. Ascertainment of price.**—*Evidence to explain writing.*—*HUGHES v. MOORE* (1885), 11 A. R. 669.—*CAN.*

**n. Agreement as to price.**—Whether essential to completion of contract.—A

**416. Purchase by seller from third party.**—*Concealment as to price by purchaser.*—*LANGE v. BARTON* (1891), 7 T. L. R. 451, D. C.

**417. Effect of alteration in rate of exchange.**—*Re HODGSON & Co. & WIGGLESWORTH & Co., LTD.*, [1920] W. N. 198.

**Trade agreement as to minimum price.**—Whether restraint of trade.—*See TRADE & TRADE UNIONS.*

## SUB-SECT. '2.—"TO BE FIXED IN MANNER AGREED."

### A. In General.

*See Sale of Goods Act, 1893 (c. 71), s. 8.*

**418. Price charged to others for similar goods.**—Necessity for notice to buyer.—*HOLMES v. TWIST* (1815), Hob. 51; 80 E. R. 200.

*Annotations* :—*Apld.* Henning's Case (1817), Cro. Jac. 432. *Mentd.* Makin v. Watkinson (1870), L. R. 6 Exch. 25.

**419.**—[On a promise to pay as much for goods as every other pays, pltf. must give notice how much others pay.—*HENNING'S CASE* (1817), Cro. Jac. 432; 79 E. R. 370; *sub nom.* HAUL v. HEMING, 1 Roll. Rep. 285.

*Annotations* :—*Refd.* Vyse v. Wakefield (1840), 6 M. & W. 442. *Mentd.* Reynolds v. Davies (1796), 1 Bos. & P. 625; Murphy v. Hurly, [1922] 1 A. C. 369.

**420.**—[*SALT UNION, LTD. v. DEAKIN* (1895), 11 T. L. R. 343, H. L.]

**421. Price paid to others for similar goods.**—Addition to usual price.—Where the contract declared upon was, that deft. should deliver to pltf. all his tallow at 4s. per stone; & the contract proved was that deft. should deliver it at 4s. per stone, & so much more as pltf. paid to any other person; this was held a fatal variance.—*CHURCHILL v. WILKINS* (1786), 1 Term Rep. 447; 99 E. R. 1189.

**422. Price depending on weight.**—Payment by tun.—Rateable sum for odd hogsheads.—A covenant to pay so much a tun is not broken by refusing to pay a rateable sum for odd hogsheads.—*REN v. BARNES* (1674), Freem. K. B. 379; 89 E. R. 282.

**423.**—*Mistake in weight.*—A trader, having sold some silver articles, sent to & seen by the buyer, at a price calculated at a certain rate, on a certain weight of silver, which was paid, afterwards sought to recover the supposed balance of the price, upon double the weight of silver, alleging a manifest mistake in the weight, & setting up fraud in the buyer in taking advantage of it. Fraud being negatived by the jury, the verdict was entered for deft. &, *semble*: there could be

contract for the sale of goods may be complete although there is a difference between the parties as to the price.—*Re BEHUN (BANKRUPT)* (1869), 20 L. T. 179.—*IR.*

**o.**—[*LAVAGGI v. PIRIE & SONS* (1872), 10 Macph. (Ct. of Sess.) 312; 44 Sc. Jur. 183.—*SCOT.*

**p.**—[An agreement as to the price, or as to the manner in which the price is to be determined, is essential to the completion of a contract of sale.—*COLONIAL GOVERNMENT v. BARKLY WEST BRIDGE Co.* (1903), 25 S. C. 124, 334.—*S. AF.*

**q. Inadequacy of price.**—Whether ground for setting aside contract.—*LATTA v. PARK & Co.* (1865), 3 Macph. (Ct. of Sess.) 508; 37 Sc. Jur. 242.—*SCOT.*

## PART II. SECT. 7, SUB-SECT. 2.—A.

**r. Agreement to pay highest market price when payment demanded.**—A contract to sell wheat & deliver it at

*Sect. 7.—The price: Sub-sect. 2, A., B. & C.; sub-sect. 3.]*

no claim on the ground of implied contract.—*FALCK v. GOODH* (1866), 4 F. & F. 589.

**424. — Destruction of goods.]—**Pltfs., refiners of sugar, sold to deft., a broker, a certain number of "titlers" or sugar loaves then lying in their warehouse. A sold note delivered to the buyer, contained a description of the numbers & marks on the titlers, & also the following terms, viz., "Prompt one month . . . goods at seller's risk for two months." It was the practice to weigh titlers so sold when & not until the brokers or their sub-purchasers came to remove them from the refiner's premises; but an estimated price calculated on their approximate weight was paid on the "prompt" day, & the difference between the sum then paid & the actual price adjusted after the weighing was accomplished. The approximate price of the titlers in question was accordingly paid at prompt. They remained on the premises after the expiration of two months from the sale, & were subsequently destroyed by fire, together with a quantity of unsold sugar. Pltfs. having insured all the contents of their warehouses by floating policies covering goods on the premises, "sold & paid for, but not removed," received the sum insured from the insurance office, but the amount was not enough to compensate them for the loss of their own goods. They had no agreement with their customers to insure sugar sold, but not taken away. An action having been brought by pltfs. against deft. for the price of the sugar sold to him:—*Held*: they were entitled to recover.—*MARTINEAU v. KITCHING* (1872), L. R. 7 Q. B. 436; 41 L. J. Q. B. 227; 26 L. T. 836; 20 W. R. 769.

*Annotation:—Mentd.* The Parchim, [1918] A. C. 157.

**425. — —.]—***CASTLE v. PLAYFORD*, No. 408, *ante*.

**426. Market price—Average price of season.]—***STOVELD v. BREWIN* (1818), 2 B. & Ald. 116; 106 E. R. 309.

*Annotation:—Refd.* Lechmere v. Fletcher (1833), 1 Cr. & M. 623.

**427. — Calculation on actual sales.]—**The "market price" is, in the absence of fraud, the price at which actual sales have been made.

Action for the non-payment of the price of salt under a contract, by which P. was to receive & W. to deliver, 1,500 tons of salt, at 9s. a ton, with a discount of 6d. per ton for cash, within ten days of delivery; but if the market price was lower P. was to have the benefit thereof, & in no case was the price to be above 9s. a ton. The amount, at 6s. per ton less the discount, had been tendered & paid into ct. Upon the day upon which the delivery, pursuant to notice, took place, sales had been made in the morning at 6s.; but none later in the day, & some of the witnesses stated that the price was higher, & that they would not have sold at that price. The judge directed the jury to take these facts into consideration in determining the market price, & they found that 7s. was the price, & a verdict was returned accordingly:—*Held*: the market price was not subsequent prices & speculations as to the prices at which parties would or would not have sold, but the actual transactions on that day, & there was no proof that the sale had been kept back on that day by any act of the parties;

& no fraud was imputable.—*WEBBER v. PRELLER* (1845), 5 L. T. O. S. 346.

**428. — Price charged to ordinary consumer.]—**By a written contract, pltfs. agreed with deft. to make for him a covering for a tent of very large dimensions, the canvas used to be equal to pattern, & of the market value of 11d. per yard, & the making to be charged at 5d. per yard; & it was agreed that if the market value of the canvas should be less than 11d. per yard, the amount, the difference, should be deducted:—*Held*: "market value" meant the price in the market to an ordinary consumer, irrespective of the particular contract.—*ORCHARD v. SIMPSON* (1857), 2 C. B. N. S. 299; 140 E. R. 431.

**429. — Effect of fall in price.]—***BIRCHGROVE STEEL CO., LTD. v. SHAW'S BROW IRON CO.* (1891), 7 T. L. R. 246, H. L.

**430. — Consideration of surrounding circumstances.]—**A London brewing co. demised a public house to a publican, who covenanted to deal exclusively with the lessors for beer, provided they should be willing to supply the same to him at the fair market price. It appeared that the great bulk of the London brewers' trade was done with tied houses; that the London brewers supplied beer at standard prices; that in the case of tied houses discount was allowed at certain recognised rates; but that in the case of free tenants the amount of discount was the subject of special bargain, & that free tenants often obtained a higher rate of discount:—*Held*: the term "market" was to be construed with reference to the surrounding circumstances, & upon the true construction of the proviso the lessee was to be charged the fair market price as applying to tenants of tied houses & was not entitled to discount beyond the recognised rates.—*CHAR-RINGTON & CO., LTD. v. WOODER*, [1914] A. C. 71; 83 L. J. K. B. 220; 110 L. T. 548; 30 T. L. R. 176; 58 Sol. Jo. 152, H. L.

*Annotation:—Refd.* G. W. Ry. & Mid. Ry. v. Bristol Corpn. (1918), 87 L. J. Ch. 414.

**431. Price depending on efficiency of goods.]—***Assumpsit* for goods, a machine, sold & delivered:—*Held*: (1) deft. might show under the general issue, that the machine was manufactured by pltf. for deft., under a condition that if it did not work, nothing should be paid for it; it could not be made to work, & it was useless to deft.; (2) although the machine was not proved to have been returned to pltf., he was not entitled to any damages on the *quantum valebat*, without showing some new implied contract arising from deft.'s dealing with the goods.—*GROUNSELL v. LAMB* (1836), 1 M. & W. 352; 2 Gale, 28; 5 L. J. Ex. 154.

*Annotations:—As to (2) Refd.* Horstfall v. Thomas (1862), 6 L. T. 462. *Generally, Mentd.* Broomfield v. Smith (1836), 1 M. & W. 542.

**432. Price depending on quantity—Sale of timber.]—**Resp. agreed to sell to applts. at an agreed price shares in a saw mills co. which had extensive rights of cutting timber over a large area of ground for long periods of time. The agreement contained a provision to the effect that the vendor was to give a satisfactory guarantee to the purchasers "that the quantity of timber on the different tracts of land as shown by the statement . . . attached hereto . . . is true & accurate," & in the event of the quantity of timber on the said various tracts failing, on verification, to reach the quantity represented in the attached

the buyer's mill within a reasonable time, the seller to receive whatever may be the highest market price at the time when he shall demand pay-

ment, is valid, for it may be ascertained at any time by the method agreed upon.—*MCBRIDE v. SILVERTHORNE* (1854), 11 U. C. R. 545.—CAN.

t. Price to be based on advance on invoice price.—*Necessity for production of invoice.]—PERIARD v. BERGERON* (1912), 47 S. C. R. 289.—CAN.

statement the vendor was to repay to the purchasers the amount of shortage:—*Held*: the word "timber" must be held to mean all timber trees growing on the land which were reasonably fit for use in such a business as that carried on by the co.; & should not be restricted to such trees as were at the date of the agreement capable of being felled & sold at a profit at the then current prices.—*SWIFT v. DAVID* (1912), 107 L. T. 71, P. C.

**433. Price depending on cost of labour.**—Pltfs. entered into a contract with buyers in Calcutta to manufacture & ship machinery by instalments over several months at agreed prices but subject to a stipulation that should the cost of labour or wages increase, there should be a corresponding increase in the purchase price. The buyers were also to open "a confirmed irrevocable credit" in favour of pltfs. with a bank in this country & to pay for each shipment as it took place. In pursuance of this arrangement defts., who were the buyers' bankers in London, wrote to pltfs. stating that they would pay bills drawn on the buyers to the extent of £70,000, the bills to be accompanied by documents & to be received before Apr. 14, 1921, "this to be considered a confirmed irrevocable credit." Pltfs. shipped two instalments under the contract & received payment under the letter of credit. The buyers then found that the invoices included an increase in the purchase price on account of wages & material, & instructed defts. only to pay so much of the next invoices as represented the original prices. Defts. accordingly refused to pay the bill presented on the next shipment & pltfs. then cancelled the contract, claiming damages from defts. as on a repudiation by the buyers:—*Held*: the credit being irrevocable, the refusal of defts. to take & pay for the particular bills on representation of the proper documents constituted a repudiation of the contract as a whole, & pltfs. were entitled to damages so reckoned. The basis of this form of banking facility is that the buyer is taken, as between himself & the banker, to accept the seller's invoices as correct. Any adjustment must be made by way of refund by the seller & not by way of retention by the buyer.—*URQUHART LINDSAY & CO., LTD. v. EASTERN BANK, LTD.*, [1922] 1 K. B. 318; 91 L. J. K. B. 274; 126 L. T. 534; 27 Com. Cas. 124.

*Annotation*:—*Mentd. Prosperity v. Lloyds Bank* (1923), 39 T. L. R. 372.

#### B. Wager Involved.

**434. General rule—Contract void.**—An action was brought for a breach of the following agreement. Pltf. agreed to buy & deft. agreed to sell his horse, Partington, for £200 provided he trotted 18 miles within one hour, within one month; & if the task was not performed, the horse was thereby sold to pltf. for 1s. which pltf. that day paid to deft. At the trial it appeared that the task was not performed, & that deft. had refused to deliver the horse to pltf.; a verdict was found for pltf.:—*Held*: upon a motion to arrest the judgment, this agreement was illegal.—*BROGDEN v. MARRIOTT* (1836), 3 Bing. N. C. 88; 2 Hodg. 136; 2 Scott, 712; 5 L. J. C. P. 302; 132 E. R. 343.

*Annotation*:—*Consd. Carhill v. Carbolic Smoke Ball Co.* (1892), 67 L. T. 837.

#### PART II. SECT. 7, SUB-SECT. 2.—B.

**a. Agreement as to price of mare.—Whether amounting to wager.**—Pltf. & deft. agreed that pltf. should take deft.'s mare in exchange for that of pltf., that deft. should give pltf. the half of the winnings of her first two

racers, or, in case she should be sold before then, deft. should pay pltf. one-third of what she should be sold for:—*Held*: the agreement, being one simply to give an increased price for the mare, upon the occurrence of a state of facts which might add to her value was a legal contract, & not in the nature of a

**435.** —Pltf. & deft., while conversing as to some rags which pltf. proposed to sell & deft. to purchase, disputed as to the price of a former lot of rags, pltf. asserting the price to have been lower than deft. asserted it to have been. They agreed that the question should be referred to M., a spirit merchant, & that whichever party was wrong should pay M. for a gallon of brandy, & that, if pltf. was right, the price of the lot now on sale should be 6s. per hundredweight, but, if deft. was right, 3s. M. decided that pltf. was right. Pltf. sent the rags to deft., but deft. refused to accept them at 6s., offering 5s. To an action for goods bargained & sold, deft. pleaded the facts specially, except as to the reference to M., averring that 6s. was higher & 3s. lower than the value of the rags bargained for, & justified the refusal to accept on the ground that the agreement was made by way of wager, & therefore within Gaming Act, 1845 (c. 109), s. 18:—*Held*: the plea was good, & was supported by the facts, & this, whether or not the fact of the agreement relating to the brandy was taken into consideration.—*ROURKE v. SHORT* (1856), 5 E. & B. 904; 25 L. J. Q. B. 196; 26 L. T. O. S. 235; 2 Jur. N. S. 352; 4 W. R. 247; 119 E. R. 717.

*Annotations*:—*Distd. Wilson v. Cole* (1877), 36 L. T. 703. *Refd. Higginson v. Simpson* (1877), 2 C. P. D. 76.

**436. Gambling in differences.**—*LANCASTER v. TURNER* (J. F.) & Co., No. 462, *post*.

#### C. Alternative Price.

**437. How far contract valid.**—"If the horse suited."—Declaration averring the consideration for the purchase of a horse to be "that the buyer should give a large price, to wit, 100 guineas." Proof, that the buyer was to give "100 guineas & £10 more if the horse suited him":—*Held*: no variance.

A verbal representation by the seller to the buyer, in the course of dealing, that he "may depend upon it the horse is perfectly quiet & free from vice" is a warranty.

That [the representation] amounts to a warranty if made before the bargain takes place. The term warrant or warranty is not necessary (*BAXLEY, J.*).—*CAVE v. COLEMAN* (1828), 3 Man. & Ry. K. B. 2; 7 L. J. O. S. K. B. 25.

*Annotations*:—*Refd. Hopkins v. Tanqueray* (1854), 15 C. B. 130; *Heilbut, Symons v. Buckleton*, [1913] A. C. 30.

**438.** —"If the horse was lucky."—Declaration, "that in consideration, pltf. would buy of deft. a horse, at & for a certain price or sum, to wit, £83, deft. undertook, that the horse was sound." Evidence that the bargain was for 60 guineas, " & if the horse was lucky to pltf., he was to give £5 more, or the buying of another horse":—*Held*: there was no substantial variance between the declaration & the evidence.—*GETHING v. LYNN* (1831), 9 L. J. O. S. K. B. 181.

#### SUB-SECT. 3.—COURSE OF DEALING.

See Sale of Goods Act, 1893 (c. 71), s. 8.

**439. Price not definitely agreed between parties—Implied from course of dealing.**—There may be a complete contract so as to pass the property in goods from the seller to the buyer, although the price has not been definitely agreed on between

wager.—*CROFTON v. COLGAN* (1859), 10 I. C. L. R. 133; 12 Ir. Jur. 36.—*IR.*

#### PART II. SECT. 7, SUB-SECT. 3.

**439 i. Price not definitely agreed between parties—Implied from course of dealing.**—*NORTHERN ELEVATOR CO. v.*

**Sect. 7.—The price: Sub-sects. 3, 4, 5 & 6.**

*v. SWANN* (1864), 17 C. B. N. S. 84;

144 E. R. 34.

**Annotations:—***Distd. Moakes v. Nicolson* (1865), 19 C. B. N. S. 290. *Refd. Seagrave v. Union Marine Insce.* (1866), L. R. 1 C. P. 305; *Williams v. Cohen* (1871), 25 L. T. 300; *Anderson v. Morice* (1876), 1 App. Cas. 713; *The Parchim*, [1918] A. C. 167.

**SUB-SECT. 4.—REASONABLE PRICE.**

*See Sale of Goods Act, 1893 (c. 71), s. 8 (1).*

**440. Presumption against demand of plaintiff.]**—*WALLER v. DALT* (1876), 1 Cas. in Ch. 276; 1 Dick. 8; 1 Eq. Cas. Abr. 90; *Cas. temp. Finch*, 295; 22 E. R. 798.

**441. — Where defendant not guilty of fraud.]**—Where there has been no fraud on the part of deft., the presumption of law is against the demand of pltf.—*CLUNNES v. PEZZEY* (1807), 1 Camp. 8; 170 E. R. 857, N. P.

**Annotation:—***Apld. Lawton v. Sweeney* (1844), 8 Jur. 964.

**442. Undertaking to pay quantum valebant—Whether good count in action of debt.]**—A count that deft., in consideration that pltf. had sold & delivered divers goods, undertook to pay *quantum valebant*, upon demand, with an averment that the goods were worth £20, whereby an action hath accrued to pltf., is not a good count in debt, & cannot be joined in a declaration with counts in debt.—*DALTON v. SMITH* (1805), 2 Smith, K. B. 618.

**Annotations:—***Refd. Gardner v. Bowman* (1834), 4 Tyr. 412; *Compton v. Taylor* (1838), 1 H. & H. 223; *Simpkins v. Pothecary* (1850), 5 Exch. 253. *Mentd. Brill v. Neale* (1819), 3 B. & Ald. 208.

**443. — Evidence of agreed price—Whether displaced by proof of inferiority of goods.]**—*PEGG v. STEAD*, No. 965, *post*.

**444. Latitude as to price.]**—*LAING v. FIDGEON*, No. 765, *post*.

**445. Price not fixed—Executed contract.]**—*ACEBAL v. LEVY*, No. 167, *ante*.

**446. — Executory contract.]**—(1) A memorandum of a contract for the sale & purchase of goods, to satisfy Stat. Frauds, is good though no mention be made of price, provided none be stipulated for; & where the contract is for the sale of goods to be manufactured, & alterations or additions are made in the progress of the work, such alterations or additions need not be made the subject of a distinct contract in writing.

(2) In all cases of executory contracts for the purchase & sale of goods, where the parties are silent as to price, the law will supply the want of an agreement as to price, by inferring that the parties intended to sell & to buy at a reasonable price.—*HOADLY v. M'LAIN* (1834), 10 Bing. 482; 4 Moo. & S. 340; 3 L. J. C. P. 162; 131 E. R. 982.

**Annotations:—***As to (1) Refd. Joyce v. Swann* (1864), 17 C. B. N. S. 84. *As to (2) Refd. Valpy v. Gibson* (1847), 4 C. B. 837. *Generally, Refd. Pontifex v. Wilkinson* (1845), 1 C. B. 75. *Mentd. Malpas v. L. & S. W. Ry.* (1866), L. R. 1 C. P. 336; *Sanderson v. Graves* (1875), L. R. 10 Exch. 234.

**LAKE HURON & MANITOBA MILLING Co.** (1906-7), 9 O. W. R. 139; 13 O. L. R. 349.—CAN.

**PART II. SECT. 7, SUB-SECT. 4.**

**447 i. Price not fixed.]**—When there is no actual agreement as to price or time for payment, the law will supply the deficiency by importing into the bargain a promise by the buyer to pay a reasonable price.—*CHRISTIE v. BURNETT* (1886), 10 O. R. 609.—CAN.

**447 ii. —.]**—*HENDERSON v. R.* (1897), 6 Exch. C. R. 39.—CAN.

**447. .]**—A contract of sale may be complete & binding, though silent as to the price, such silence being equivalent to a stipulation for a reasonable price, & as to the time & mode of payment.—*VALPY v. GIBSON* (1847), 4 C. B. 837; 16 L. J. C. P. 241; 9 L. T. O. S. 434; 11 Jur. 826; 186 E. R. 737.

**Annotations:—***Refd. Re Cook, Ex p. Rosevear China Clay Co.* (1879), 11 Ch. D. 560; *Kendal v. Marshall Stevens* (1883), 11 Q. B. D. 356; *Re Isaacs, Ex p. Miles* (1885), 15 Q. B. D. 39.

**448. Mutual mistake as to price.]**—On the sale of a specific article for a certain price, a dispute afterwards arising as to the amount:—*Held*: if the parties never were *ad idem* as to the price by reason of mutual mistake, there would be an implied contract, the article having been retained so long that it could not be returned in the same condition, to pay its real value.—*WEST v. DE WEZELE* (1865), 4 F. & F. 596, N. P.

**SUB-SECT. 5.—CHANGE OF CUSTOMS OR EXCISE DUTY.**

*See Finance Acts, 1901 (c. 7), s. 10; 1902 (c. 7), s. 7, & generally, REVENUE, pp. 227-232, ante.*

**449. Whether additional duty may be added.]**—Contract for spirits to be paid for by bills at three months from delivery. No opportunity for delivery given by purchaser, till a new duty imposed on spirits by 43 Geo. 3, c. 81. Decided that under these circumstances the distiller was entitled to charge the amount of the additional duty on the spirits.—*HAIG v. NAPIER* (1813), 1 Dow, 255; 3 E. R. 691, H. L.

**450. — Action relating to price pending.]**—Under Finance Act, 1901 (c. 7), s. 10 (1), the seller of goods under a contract made before the new duties on goods were imposed can add the new duty to the contract price of the goods, in the absence of an agreement to the contrary, even though an action relating to the price of the goods was pending at the time when the Act was passed.—*CONWAY BROTHERS & SAVAGE v. MULHERN & Co., LTD.* (1901), 17 T. L. R. 730.

**451. — "Duty paid."]**—By Customs Consolidation Act, 1876 (c. 36), s. 20, as applied by Finance Act, 1900 (c. 7), s. 8, the new excise duty on beer imposed by the latter Act may be added to the contract price of the beer where the contract or agreement for the sale or delivery of the beer duty paid was made before the passing of the Act. An agreement under which the purchaser is bound to buy his beer from a certain brewer, provided the latter is willing to sell it to him duty paid, at a certain price is not a contract for the sale or delivery of the beer within Customs Consolidation Act, 1876 (c. 36), s. 20. The contract for sale in such case is made only when the order for the delivery of beer is given to the brewer in pursuance of the conditional agreement, & if such order was given after the passing of Finance Act, 1900 (c. 7), the brewer is not entitled under sect. 8 to add the new duty to the price payable

*be added.]*—*CANADIAN DRUG Co. v. BOARD OF LIEUTENANT-GOVERNOR IN COUNCIL*, [1925] S. C. R. 23; [1925] 1 D. L. R. 510.—CAN.

**449 ii. —.]**—In a contract for spirits to be paid for by bills at three months from delivery, no opportunity for delivery was given by the purchaser, till a new duty had been imposed:—*Held*: the distiller was entitled to charge the amount of the additional duty.—*HAIG v.* (1813), 1 Dow, 255.—SCOT.

**447 iii. —.]**—*McOUTCHEON v. NORTHERN FUEL Co.* (1906), 4 W. L. R. 57.—CAN.

**447 iv. —.]**—*STUART & Co. v. KENNEDY* (1885), 13 R. (Ct. of Sess.) 221; 23 So. L. R. 149.—SCOT.

**448 i. Mutual mistake as to price.]**—*KIDSTON v. STIRLING & PITCAIRN, LTD.* [1921] 1 W. W. R. 162; 55 D. L. R. 366; 61 S. C. R. 193.—CAN.

**PART II. SECT. 7, SUB-SECT. 5.**

**449 i. Whether additional duty may**



by the purchaser though the conditional agreement was made before it.—**NEWBRIDGE RHONDDA BREWERY CO. v. EVANS** (1902), 86 L. T. 453; 18 T. L. R. 396, D. C.

**452.** ———.]—**CORN PRODUCTS CO., v. FRY & SONS**, [1917] W. N. 224.

*Annotations*:—**Apld.** **AMERICAN COMMERCE CO. v. BOEHM** (1919), 35 T. L. R. 224. **Refd.** **Hartley v. Hymans**, [1920] 3 K. B. 475.

**453.** ———.]—Pltfs. sold to defts. 100 pounds of saccharin to be shipped from New York to a British port at the price of 220s. a pound, c.i.f., "duty paid." Between the date of the contract & delivery of the goods the import duty was increased & pltfs. were obliged to pay the increased duty. In an action by the sellers against the buyers to recover the amount of the increase:—**Held**: the words "duty paid" in the contract did not constitute an agreement that the sellers should not be entitled to recover the amount of the increase, & therefore Finance Act, 1901 (c. 7), s. 10, applied, & pltfs. were entitled to succeed.—**AMERICAN COMMERCE CO., LTD. v. BOEHM (FREDERICK), LTD.** (1919), 35 T. L. R. 224.

#### SUB-SECT. 6.—VALUATION BY THIRD PARTY.

##### A. In General.

See Sale of Goods Act, 1893 (c. 71). s. 9; VALUERS & APPRAISERS.

**454. Condition as to soundness—Allowance on damaged goods.**—A declaration in *assumpsit* stated in the first count that pltfs. were possessed of lands for the residue of three terms, which respectively commenced on Feb. 15, 1785; that they put them up to auction, subject to a condition that the purchaser should take the stock-in-trade at a valuation; that deft. purchased the same, & that the stock was valued at a sum specified; breach, non-payment of that sum. The second count was for lands bargained & sold, & counts for goods sold & delivered; & the money counts were added. The leases under which pltfs. derived title, were dated on the day laid, *habendum* from the day of their date; & the valuation proved, after stating the prices of each article of stock, was indorsed with a memorandum, that certain pans were valued as sound, but should any of them prove broken the first time of boiling, an allowance was to be made thereon, & with that condition the stock was appraised at a certain sum, the same as that laid in the declaration:—**Held**: the statement of the day of commencement of the terms was immaterial; & the valuation might be considered as absolute, as there was no proof of the pans being broken at the time mentioned.—**WELCH v. FISHER** (1818), 8 Taunt. 338; 2 Moore, C. P. 378; 129 E. R. 412.

**455. Whether parties bound by acceptance of valuation.**—Deft. agreed verbally with pltf. to take a house & purchase the fixtures at a valuation to be made by two brokers. An inventory of the furniture & fixtures was accordingly made, described generally as "an inventory of the fixtures, etc.," with the gross amount placed at the foot thereof. In an action for goods sold & delivered, with a count on an account stated:—**Held**: deft. having taken possession of & enjoyed the furniture & fixtures, & paid part of the sum determined by the brokers, to be due for the same, he

was liable on the account stated for the remainder, & could not afterwards object to pltf.'s defective title to the house.—**SALMON v. WATSON** (1819), 4 Moore, C. P. 73.

*Annotation*:—**Mentd.** **Bates v. Townley** (1848), 12 Jur. 606.

**456. Subsequent agreement as to price of part of goods.**—A declaration stated, that by a certain indenture deft. covenanted to pay pltf. £400 in equal moieties on Nov. 11, & May 11, & that it was agreed that the drugs, stock-in-trade, utensils, & shop fixtures in certain premises should be valued by a person to be named by pltf. & deft., & one moiety of the amount paid immediately upon such valuation, & the residue at the expiration of a year. Averment, that the said drugs, etc., were valued by one L., named by pltf. & deft., at £190. Breach, that deft. refused to pay the second moiety of the £400 on May 11, & also the residue of the £190 at the expiration of the year. Pleas, set off for money had & received, money paid, & on an account stated, & that the said drugs, etc., were not valued by a person named by pltf. & deft.; on which issues were joined. It appeared in evidence that L. was agreed upon by pltf. & deft. to value the drugs, stock-in-trade, utensils, & shop fixtures, & that, after the valuation was complete, except as to the drugs, £70 was agreed on by the parties as the value of the drugs, & £50 as the value of a horse & gig belonging to pltf., which sum, together with the rest of the valuation, amounted to £190:—**Held**: the jury were rightly directed that if the horse & gig were part of the stock-in-trade, or were treated as such by the parties, pltf. was entitled to a verdict on the last plea.—**RAWLINSON v. CLARKE** (1846), 15 M. & W. 292; 15 L. J. Ex. 171; 6 L. T. O. S. 396; 153 E. R. 860, Ex. Ch.

**457. Necessity for communication of name of valuer to other party.**—**TEW v. HARRIS**, No. 476, *post*.

**458. Value to be fixed by arbitration, if necessary.**—A. being possessed of certain plant & materials for the construction of a canal & other engineering works in Holland, in Mar. 1853, agreed by parol to sell the same to B., & two persons were sent to the spot to value them. An inventory was accordingly made, & on Mar. 31, A. & B. signed the following memorandum at the foot thereof: "Agreed between B. & myself, £4,509 12s." On May 8, a written contract for the sale of the plant & materials was executed by A. & B., by which it was agreed "that A. should sell, & B. should purchase, all such parts of the plant, materials, & things then on or about the works of the canal, which belonged to A., & that the price to be paid for the same should be the fair amount of the value thereof, such amount to be settled, in case the parties should differ as to the same, by arbitration," in manner therein provided; "& that B. should pay to A. the amount of such price or value within two calendar months after such price or value should have been fixed & determined as aforesaid." B. was let into possession of the plant immediately after Mar. 31, & remained in possession. No arbitration was ever demanded, or any dissatisfaction expressed by B. at the price fixed by the valuers:—**Held**: the event upon which the arbitration clause of the contract of May 8 was to take effect, viz. the parties differing as to the value, never having arisen, A. was entitled, at the expiration of two

#### PART II. SECT. 7, SUB-SECT. 6.—A.

**b. Failure of valuers to appoint umpire—Rescission of contract.**—A contract for purchase of stock in trade at a valuation provided for the appoint-

ment of valuers who before commencing their valuation were to appoint an umpire. The valuers commenced their valuation without appointing an umpire:—**Held**: the appointment of

the umpire was a condition precedent to the valuation, the original agreement fell through from non-compliance of the valuers with the condition precedent, & the purchaser was



**Sect. 7.—The price: Sub-sect. 6, A., B. & C.]**

months from that date, to recover the value agreed on by the memorandum of Mar. 31, on a count for goods sold & delivered.—*CANNAN v. FOWLER* (1853), 14 C. B. 181; 23 L. J. C. P. 48; 2 W. R. 101; 139 E. R. 75; *sub nom.* *CANAAN v. FOWLER*, 2 C. L. R. 43.

**459. What amounts to valuation—Figures left to be added up.]**—By agreement between A. & B. it was agreed that B. should buy of A. certain plant, materials, & tools, "at a valuation to be made by A. & a person to be appointed by B." & that B. should pay for the same by a bill for £150 at two months from the valuation, & by another bill for the balance of the valuation at three months after date. Under this agreement, B. was let into possession, & A. & one J., who represented B., met & proceeded to value, having a list of the articles to be valued, as to all of which, except certain timber, the prices were finally agreed upon; but, as to the timber, the price per foot & the superficial measurement only were agreed upon, the calculation of the cubical contents & the carrying out the amount being left to be filled in by B.'s foreman. A. & J. never met again, & did not agree upon the sum total; but B., after action brought for it, paid the £150:—*Held*: sufficient evidence to warrant the jury in finding that a valuation had been made by A. & J.—*GORDON v. WHITEHOUSE* (1858), 18 C. B. 747; 25 L. J. C. P. 300; 139 E. R. 1564.

*Annotation*:—*Reid*. *Collins v. Collins* (1858), 26 Beav. 306.

**460. Mistake in valuation.]**—Upon the sale by auction of land under the direction of the ct., one of the conditions was that the timber should be taken at a price to be fixed by the auctioneer at the sale, or by valuation, at the option of the purchaser. J. became the purchaser of lot 2, & elected to take the timber at the price stated by the auctioneer. The chief clerk confirmed the sale, & his certificate was filed. It afterwards appeared that by mistake the timber on a portion of the land had not been valued by the auctioneer. An application by the vendors to compel the purchaser to pay the value of the timber thus omitted was refused, with costs.—*GRIFFITHS v. JONES* (1873), L. R. 15 Eq. 279; 42 L. J. Ch. 468; 37 J. P. 357; 21 W. R. 470.

*Annotation*:—*Reid*. *Re Clayton, Smith v. Clayton*, [1920] 1 Ch. 257.

**461. —.]**—In the sale of a grocery & malt business the valuers, by a slip, valued 542 sacks of malt as 542 quarters. The purchaser having accepted bills for the amount of the purchase-money, refused to pay so much thereof as represented the excess caused by the overvaluation of the malt. In an action by the vendor to recover this amount:—*Held*: this was a mere clerical error, & not an erroneous exercise of judgment & pltf. was not entitled to recover.—*GOSDEN v. FUNNELL* (1899), 15 T. L. R. 547.

**462. Goods invoiced back on default of sellers—Closing price declared by trade association—Balance in favour of sellers.]**—A contract for the sale of Japanese peas to be shipped from abroad contained a clause providing that disputes should be referred to arbn.; it also contained a clause, numbered 8 in the contract, providing that if the sellers made default in shipping or declaring shipment the contract should be closed by invoicing back the goods at such price, whether higher or

lower than the contract price, as the London Corn Trade Assocn. should determine; that the said Assocn. should if requested by either party declare the closing price; that this price should be accepted as final by all parties, & that settlement should be made on the basis of that price by net cash not later than a certain date. The sellers failed to ship or tender any goods under the contract. They then applied to the Assocn. to declare a closing price & gave notice to the buyers that they were doing so. The market price had fallen since the date of the contract. The Assocn. declared a closing price at which if the goods were invoiced back to the sellers a balance would be found in their favour. The sellers claimed this balance; the buyers refused to pay it, & the dispute was referred to arbitrators, who awarded, subject to a special case, that the buyers should pay the balance to the sellers:—*Held*: clause 8 applied, notwithstanding that the sellers were the party in default, & they were entitled to the balance in their favour after the goods had been invoiced back to them by the buyers at the closing price properly declared by the Assocn.; the closing price should be fixed with reference to the date on which the buyers received notice of the sellers' inability to perform their contract.

*Qu.*: whether the clause would apply if the sellers' default were voluntary, or if the parties were merely gambling in differences.—*LANCASTER v. TURNER (J. F.) & Co.*, [1924] 2 K. B. 222; 93 L. J. K. B. 1024; 131 L. T. 525; 29 Com. Cas. 207, C. A.

**463. — Date of fixing price.]**—*LANCASTER v. TURNER (J. F.) & Co.*, No. 462, *ante*.

**Distinction between arbitration & valuation generally.]**—*See* ARBITRATION, Vol. II., pp. 319-322, Nos. 51-71.

**B. Valuer's Failure to Act.**

*See* Sale of Goods Act, 1893 (c. 71), s. 9; & generally, VALUERS & APPRAISERS.

**464. General rule—Agreement avoided.]**—*Assumpsit* for the value of goods, which deft. agreed to purchase at the valuation of N. & M. Averments, that N. was ready to value for pltf., but that deft. & M. refused to value for deft.; that pltf. gave notice to deft. that his valuer, N., was ready to meet M., or any other valuer deft. might appoint, at any time within ten days which deft. might fix for making the valuation; that deft. refused to appoint any day for that purpose, & refused to appoint any other valuer, or to take any steps to value the goods or procure them to be valued, according to his agreement, & has ever since refused to value them, or to let them be valued, according to his agreement: whereupon, after the lapse of a month, N. valued them, & the price amounted to, etc.; alleging a breach in not taking the goods & paying such amount:—*Held*: the count was bad; for deft. could not be liable for the price of the goods until they had been valued by both valuers, pursuant to the agreement; at least without a distinct averment that the deft. refused to permit M. to value.—*THURNELL v. BALBIRNIE* (1837), 2 M. & W. 786; *Murp. & H.* 235; 6 L. J. Ex. 255; 1 Jur. 847; 150 E. R. 975. *Annotations*:—*Reid*. *Lowndes v. Stamford* (1852), 18 Q. B. 425; *Scott v. Avery* (1856), 5 H. L. Cas. 811.

**465. —.]**—In an action on an agreement for the sale of goods, at a valuation to be

entitled to recover his deposit paid under the contract.—*FINN v. RAY* (1869), 6 W. W. & A.T. 13.—*AUG.*

c. *Re-survey of lumber—Lumber sold*

& delivered subject to re-survey—*Presumed to be according to provisions of statute.*—*RANKIN v. EMERY* (1838), 2 N. B. R. (Ber.) 507.—*CAN.*

d. *Appointment of interested valuers—Waiver of objection—Whether parties bound by valuation.*—*BLACK v. MORTASHED* (1877), 28 C. P. 259.—*CAN.*

made by A., the issue was, whether a valuation was made by A. It appeared that the goods were in fact valued by B., A.'s clerk:—*Held*: deft. was not bound by it, unless it were shown that it was agreed between the parties that B.'s valuation should be taken as A.'s; & the fact of deft.'s seeing B. valuing, & making no objection until B. told him the amount, was not evidence of such agreement.—*Ess v. TRUSCOTT* (1837), 2 M. & W. 385; *Murp. & H.* 75; 6 L. J. Ex. 144; 1 Jur. 358; 150 E. R. 806.

**466. Failure of mode of valuation—Reference to master.]**—Where there are circumstances under which a mode of valuation agreed upon by the parties fails, the ct. will ascertain the value by a reference to the master.

In a contract for the purchase of timber, time is of the essence of the contract; & if, by difficulties improperly raised by the vendor, the timber is prevented from being felled & carried away at the time limited by the agreement, the ct. will not afterwards enforce the performance of the contract.—*ARKWRIGHT v. STOVELD* (1824), as reported in 3 L. J. O. S. Ch. 49.

**467. Two valuers agreed upon—Refusal of one.]**—*THURNEILL v. BALBIRNIE*, No. 464, *ante*.

**468. Delegation of valuation.]**—*Ess v. TRUSCOTT*, No. 465, *ante*.

**469. Effect on property—Payment of deposit—Payment of balance on completion of valuation.]**—In an agreement between A. & B. whereby A. agreed to let, & B. to take, a certain brewery for a term of years at a yearly rent; it was stipulated that A. should take also the casks & stock of beer, a horse & dray, & the book debts, at a valuation to be estimated by two indifferent persons; " & in consideration of the above grant being fulfilled, A. has paid a deposit of £20 & upon the valuation being complete, payment to be made as under ":—*Held*: the property in the casks, etc., passed to A. by that agreement, though no valuation had been made.—*CHALLON v. HUMMELL* (1849), 14 L. T. O. S. 173.

**470. Disagreement of valuers—Valuation by chief clerk.]**—A. B. agreed to purchase a factory at a certain price, & to take the plant & fixtures at a valuation, the amount to be ascertained by valuers appointed on each side, or by an umpire to be appointed by the valuers before proceeding with the business. The valuers could not agree & had neglected to appoint an umpire. At the instance of the vendor the ct. decreed specific performance, & directed the value of the plant & fixtures to be ascertained by the chief clerk.—*JACKSON v. JACKSON* (1853), 1 Sm. & G. 184; 22 L. J. Ch. 873; 21 L. T. O. S. 98; 1 W. R. 264; 65 E. R. 80.

*Annotation*:—*Reid. Richardson v. Smith* (1870), 5 Ch. App. 648.

**471. Consumption of goods—Quantum meruit.]**—Pltf. entered upon the occupation of a farm under a written agreement, by which he agreed, amongst other things, " to pay £5 sterling for every load of fodder, straw, haum, dung, or turnips which should be sold or carried off the premises, & the same sum for every load of hay or wheat straw sold or carried off the premises, for which there should not be two loads of good dung or other manure, at the option of the landlord to be spent on the premises "; & also " to purchase all the hay, sanfoin & tares now in the yard, also all the dung & manure now on the premises, also all the straw from the crops now stacked or about to be stacked in the yard, paying a fair price for same, to be ascertained by valuers on both sides :—*Held*: the incoming tenant having

consumed the straw, & the valuers named by the parties not having agreed upon the valuation, or appointed an umpire, pltf. was entitled to maintain an action for it as upon a *quantum meruit*.—*CLARKE v. WESTROPE* (1856), 18 C. B. 765; 25 L. J. C. P. 287; 20 J. P. 728; 139 E. R. 1572.

*Annotations*:—*Reid. Re Constable & Cranwick* (1899), 80 L. T. 164. *Mentd. Kellett v. New Mills U. D. C.* (1900), 2 Hudson's B. C., 4th ed. 298.

**472. —Valuation by umpire—Whether in nature of award on arbitration.]**—On the sale of land one of the conditions of sale was that the purchaser should pay for the timber on the land at a valuation, & it was provided for the purpose of such valuation that each party should appoint a valuer, & the valuers thus appointed should, before they proceeded to act, appoint by writing an umpire, & that the two valuers, or, if they disagreed, their umpire, should make the valuation. The two valuers appointed being unable to agree, the umpire made the valuation:—*Held*: such valuation was not in the nature of an award on an arbn., & an application to set it aside must be refused.—*Re CARUS-WILSON & GREENE* (1886), 18 Q. B. D. 7; 56 L. J. Q. B. 530; *sub nom. Re WILSON & GREENE, Re CASTERTON ESTATES*, 55 L. T. 864; 35 W. R. 43; 3 T. L. R. 22, O. A.

*Annotations*:—*Consd. Re Hammond & Waterton* (1890), 62 L. T. 808. *Mentd. Re Carpenter & Bristol Corpn.* (1907), 71 J. P. 417; *Kennedy v. Barrow-in-Furness Corpn.* (1909), 2 Hudson's B. C., 4th ed. 411.

**473. —Valuation determined by arbitration—Abortive reference—Valuation of court.]**—Where an arbn. has become abortive it is the duty of a ct. of law, in working out a contract of which such arbn. was part of the machinery, to supply the defect.

Where in a contract for the sale of goods it was agreed that the purchaser should be entitled to deduct from the price the value of any goods not delivered, such value to be determined by arbn., & the arbitrators appointed were unable to agree, the purchaser was entitled, in an action brought by the vendor to recover the contract price to apply to the ct. to fix the value of the goods not delivered & to deduct it from the price due, without bringing a cross action.—*CAMERON v. CUDDY*, [1914] A. C. 651; 83 L. J. P. C. 70; 110 L. T. 89, P. C.

**474. No implied promise that valuer should act—Remedy against valuer.]**—An agreement to settle disputes between two parties as to the amount to be paid by one of them in respect of the value of goods belonging to, or work done by the other of them, by a reference to two valuers, one to be appointed by each party, does not import any undertaking by the former that the valuer whom he may appoint shall act in the valuation, nor any liability for his not acting. The party is only bound to appoint a valuer on his part; & if the person appointed does not act, the other party is remitted to his original cause of action, & may revoke his submission; or may possibly, if the valuer has undertaken to act & failed in his duty, have a right of action against him; but has no right of action against the party who appointed him.—*COOPER v. SHUTTLEWORTH* (1856), 25 L. J. Ex. 114.

*Annotation*:—*Reid. Clarke v. Westrope* (1856), 18 C. B. 765.

#### C. Valuation Prevented by Party.

See Sale of Goods Act, 1893 (c. 71), s. 9; VALUERS & APPRAISERS.

**475. General rule—Party in default liable.]**—*THURNEILL v. BALBIRNIE*, No. 464, *ante*.

**476. Valuation by other party's valuer alone.]**—*Assumpsit* on an agreement between pltf. & deft.

**Sect. 7.—The price : Sub-sect. 6, C. Sects. 8 & 9.  
Part III. Sect. 1 : Sub-sect. 1.]**

that pltf. should sell & deft. purchase crops at a valuation to be made by two persons, one named by each party, &, if such persons disagreed by a third person to be named by them before entering on the valuation; that each party should appoint a referee by May 31, & if either should neglect to appoint, the referee of the other alone might make a final decision; &, in case either party or his referee should neglect to attend any reference after notice, the party or the referee attending should enter upon the reference *ex p.* & make a final decision; the valuation to be made by June 3. The declaration alleged that on May 31, pltf. appointed a referee, & gave notice thereof to deft. a reasonable time before June 3, but no appointment of which pltf. had notice was made by deft.; & pltf., a reasonable time before June 3, gave deft. notice of the intention of pltf.'s referee to proceed in the valuation on June 2; but deft. did not attend, wherefore pltf.'s referee valued at a sum named; which deft. though requested had not paid. Plea: that pltf. did not, within the time appointed appoint his said referee in manner, etc. It appeared at *Nisi Prius* that, under the above agreement, pltf. did nominate his referee late on May 31, & sent by that night's post a notice thereof to deft., who received it on June 1:—**Held**: the issue on the plea must be found for deft., since the appointment was not complete without notice thereof to the opposite party.—**TEW v. HARRIS** (1847), 11 Q. B. 7; 17 L. J. Q. B. 1; 11 Jur. 947; 116 E. R. 376; *sub nom.* **DEW v. HARRIS**, 10 L. T. O. S. 87.

**477. Specific performance.]—A. & B., being in partnership as distillers, came to an agreement whereby B. was to buy out A., & it was agreed that if B. should, during A.'s life, be desirous of retiring, he should give notice, & A. should then have an option of repurchase, on the terms that within six months after notice by A., the premises, goodwill, stock-in-trade, & all such of the subsisting contracts as A. should be willing to take, should be valued "in the usual way" by two valuers, one to be named by A., the other by B., or by the**

umpire of the two valuers. B. gave notice of his intention to retire; whereupon A. gave notice of his intention to repurchase; & two valuers were appointed; but after the appointment B. refused to allow his valuer to proceed with the valuation:—**Held**: there was no contract between the parties which the ct. could specifically enforce.—**VICKERS v. VICKERS** (1867), L. R. 4 Eq. 527; 36 L. J. Ch. 946.

**Annotations:—****Consd.** **Smith v. Peters** (1875), L. R. 20 Eq. 511. **Refd.** **Richardson v. Smith** (1870), 5 Ch. App. 648; **Loftus v. Roberts** (1902), 18 T. L. R. 532.

**478. —.]—R. agreed with S. for the purchase, at a fixed price, of an estate & certain fixtures. By the contract R. was to take certain furniture, etc., at a price to be ascertained by valuers, to be mutually agreed upon. No valuers were appointed, & S. declined to complete the contract:—**Held**: R. was entitled to have the contract for the purchase of the estate & fixtures specifically performed.—**RICHARDSON v. SMITH** (1870), 5 Ch. App. 648; 39 L. J. Ch. 877; 19 W. R. 81, L. C. & L. J.**

**479. Injunction.]—Where an agreement has been entered into for the sale of a house at a fixed price, & of the fixtures & furniture therein at a valuation by a person named by both parties, & he undertakes the valuation, but is refused permission by the vendor to enter the premises for that purpose, the ct. will make a mandatory order to compel the vendor to allow the entry to enable the valuation to proceed. The ct. has jurisdiction to make any interlocutory order which is reasonably asked as ancillary to the administration of justice at the hearing.—**SMITH v. PETERS** (1875), L. R. 20 Eq. 511; 44 L. J. Ch. 613; 23 W. R. 783. **Annotation:—****Mentd.** **County Hotel & Wine Co. v. L. & N. W. Ry.**, [1918] 2 K. B. 251.**

**SECT. 8.—CONDITIONS AND WARRANTIES.**  
*See Part III., post.*

**SECT. 9.—STAMPS.**  
*See REVENUE, pp. 272, 273, ante.*

## Part III.—Conditions and Warranties.

**SECT. 1.—CONDITIONS AND WARRANTIES  
GENERALLY.**

**SUB-SECT. 1.—CONDITIONS.**

*See Sale of Goods Act, 1893 (c. 71), s. 11.*

**480. Whether stipulation amounts to condition—Dependent on construction of contract.]—A declaration stated that by a certain contract pltf. agreed that they would during a certain term, supply to defts. & that defts. would take from them all the coke defts.' co. should require at L. according to the capacity of certain ovens, provided that the coke should be of the best quality; pltf. on their part engaging that same should be large, & of the best quality, & equal to that made from the best B. coal, & be to the satisfaction of the co.'s inspecting officer for the time being; & agreeing that the co. should have power to refuse to accept coke of inferior quality or small in its pieces; & to purchase what they might elsewhere if pltf. did not supply coke of the best quality, & equal to that above described, & to the satisfaction of the co.'s officer, & to charge pltf. with the excess of**

price beyond the contract price. The declaration then contained an averment, that, during the term, pltf. manufactured & supplied to defts., in the manner provided by the agreement, certain coke which they required at L., which was of the quality required by the agreement, & equal to that made from the B. coal, & large in its pieces & laid as a breach the refusal of defts. to accept the coke:—**Held**: according to the true construction of the agreement, it was a condition precedent to the right of pltf. to insist upon defts.' acceptance of the coke, that it should be to the satisfaction of their inspecting officer; & consequently the declaration which omitted that allegation, was bad in substance.—**GRAFTON v. EASTERN COUNTIES RY. CO.** (1853), 8 Exch. 699; 1 C. L. R. 573. **Annotation:—****Refd.** **Scott v. Liverpool Corp.** (1857–8), 1 Giff. 216.

**481. — With circumstances admissible in evidence.]—KIDSTON & Co. v. MONCEAU IRON-WORKS Co., No. 551, post.**

**482. — Finding of jury as element in decision.]—In an action brought by the vendors**

against their vendees for refusal to accept, evidence was given to show the circumstances under which the contract was made, & that it was of vital importance that the vessel should be in the port named at the time of making the contract. The jury found, that the condition "ship now at Rangoon," had not been fulfilled, & that it was a condition absolutely vital:—*Held*: (1) it was rightly left to the jury to say under what circumstances the contract was made; (2) the words "ship now at Rangoon" amounted to a warranty justifying deft. in saying that there had been a failure of performance of a condition precedent & in refusing to carry out the contract; (3) the finding of the jury was rightly taken as an element in enabling the ct. to say that the words amounted to a condition precedent.—*OPPENHEIM v. FRASER* (1876), 34 L. T. 524; 3 Asp. M. L. C. 146.

*Annotation*:—As to (1) *Reid*, *Re Comptoir Commercial Anversois & Power*, [1920] 1 K. B. 868.

**483. Representation amounting to condition.]—***BANNERMAN v. WHITE*, No. 776, *post*.

**484. Distinguished from warranty.]—**Deft. bought of plifs., at a price named, "413 bales of wool, to arrive *ex Stige*, or any vessel they may be transhipped in. The wool to be guaranteed about similar to samples in the selling broker's possession; & if any dispute arises it shall be decided by the selling brokers, whose decision shall be final." On the arrival of the wool, it turned out not about similar to sample, & the brokers, after protest from deft., awarded that defts. should take it at a certain abatement in the price of different bales:—*Held*: as the contract was for the sale of specific goods, the guarantee was not a condition but only a warranty, & deft. could not reject the wool on account of its inferiority; the brokers had power to award as they had, & deft. was bound to take the wool accordingly.

Generally speaking, when the contract is as to any goods, such a clause is a condition giving to the essence of the contract; but when the contract is as to specific goods, the clause is only collateral. . . . Here there is merely a warranty as distinguished from a condition (*BLACKBURN, J.*).—*HEYWORTH v. HUTCHINSON* (1867), L. R. 2 Q. B. 447; 36 L. J. Q. B. 270.

*Annotations*:—*Reid*, *Azamar v. Casella* (1867), 36 L. J. C. P. 263; *Re Green & Balfour v. Williamson* (1890), 63 L. T. 97.

**485. —.]—***BALDRY v. MARSHALL*, No. 762, *post*.

**486. Warranty amounting to condition.]—***OPPENHEIM v. FRASER*, No. 482, *ante*.

**487. —.]—**The sellers sold to the buyers a quantity of beans in bags per S.S. *Luzo* "afloat" from Portugal, payment in London by cash against documents on arrival of steamship. In fact the vessel had, without the knowledge of either sellers or buyers, arrived & discharged the goods before the date of the contract. The buyers took up the documents & then discovered that the vessel had already arrived & discharged her cargo:—*Held*: the word "afloat" was used in reference to the goods & not to the ship, & was intended to be a condition & not a mere warranty, & the buyers were entitled to reject the goods & to recover the money which they had paid for them.—*BENABU & CO. v. PRODUCE BROKERS CO., LTD.* (1921), 37 T. L. R. 851; *sub nom. Re BENABU & Co., SELLERS & PRODUCE BROKERS CO., LTD.*, 26 Com. Cas. 335, C. A.

**488. —.]—***BERG (V.) & SONS v. LANDAUER*, No. 885, *ante*.

**489. Statutory conditions for protection of buyer—Whether strict performance essential.]—**17 Geo. 3, c. 42, which requires bricks for sale to be

of certain dimensions, & gives a penalty for the breach of that regulation, being passed to protect the buyer against the fraud of the seller; if bricks be sold & delivered under the statutable size unknown to the buyer, the seller cannot recover the value of them.—*LAW v. HODSON* (1809), 11 East, 300; 2 Camp. 147; 103 E. R. 1019.

*Annotations*:—*Apld.* *Langton v. Hughes* (1813), 1 M. & S. 593; *Little v. Poole* (1829), 9 B. & C. 192. *Expld.* *Brown v. Duncan* (1829), 10 B. & C. 93. *Consd.* *Forster v. Taylor* (1834), 5 B. & Ad. 887. *Apld.* *Cundell v. Dawson* (1847), 4 C. B. 376; *Melliss v. Shirley L. B.* (1885), 16 Q. B. D. 446. *Reid*, *Tyson v. Thomas* (1825), M'Cle. & Yo. 119; *Cope v. Rowlands* (1836), 6 L. J. Ex. 63; *Swan v. Bank of Scotland* (1836), 10 Bl. 627; *Smith v. Mawhood* (1845), 14 M. & W. 452; *Taylor v. Crowland Gas & Coke Co.* (1854), 10 Exch. 293; *Anderson v. Daniel*, [1924] 1 K. B. 138. *Mentd.* *M'Callan v. Mortimer* (1842), 9 M. & W. 636.

**490. —.]—**Where an Act of Parliament has been passed to prevent the committing of frauds in a particular trade, the omitting to comply with those regulations will prevent the party who omits from recovering in an action founded upon the transaction in which the omission has been made, although it be not proved that any fraud has been committed; & although the party against whom the action is brought, has had the full benefit of his contract.—*LITTLE v. POOLE* (1829), 9 B. & C. 192; 7 L. J. O. S. K. B. 158; 109 E. R. 71.

*Annotations*:—*Consd.* *Forster v. Taylor* (1834), 5 B. & Ad. 887. *Apld.* *Cundell v. Dawson* (1847), 4 C. B. 376. *Consd.* *Anderson v. Daniel*, [1924] 1 K. B. 138. *Reid*, *Brown v. Duncan* (1829), 10 B. & C. 93; *Smith v. Mawhood* (1845), 14 M. & W. 452. *Mentd.* *M'Callan v. Mortimer* (1842), 9 M. & W. 636.

**491. —.]—**The mere omission to comply with excise regulations, to which a particular penalty is annexed, will not render the sale of goods, subject to those regulations, void; therefore, where the permit misstated the strength of spirits sold, it being required by 6 Geo. 4, c. 80, s. 117, that the permit accompanying any spirits should express the true strength thereof, pltf. was held entitled to recover, notwithstanding.—*WETHERELL v. JONES* (1832), 3 B. & Ad. 221; 1 L. J. K. B. 130; 110 E. R. 82.

*Annotations*:—*Consd.* *Forster v. Taylor* (1834), 5 B. & Ad. 887. *Apld.* *Bailey v. Harris* (1849), 12 Q. B. 905. *Reid*, *Cope v. Rowlands* (1836), 2 M. & W. 149; *Cundell v. Dawson* (1847), 4 C. B. 376; *Taylor v. Crowland Gas & Coke Co.* (1854), 10 Exch. 293. *Mentd.* *Barton v. Muir* (1874), L. R. 6 P. C. 134; *Scott v. Brown, Doering, McNab, Slaughter & May v. Brown, Doering, McNab*, [1892] 2 Q. B. 724; *Kregor v. Hollins* (1913), 109 L. T. 22; *Brightman v. Tate*, [1919] 1 K. B. 463.

**492. —.]—**Where a statute contains regulations for the protection of buyers against the fraud of sellers, a seller cannot recover for the price of goods sold in contravention of the regulations, although the statute does not in terms prohibit such a sale, but imposes a penalty upon the seller.

Where butter was sold in firkins not branded according to 36 Geo. 3, c. 86, & 38 Geo. 3, c. 73, "to prevent abuses & frauds in the packing, weight, & sale of butter," which require that makers of vessels for the packing of butter shall brand them with their names under a pecuniary penalty, & that sellers of butter shall, under a further penalty, use vessels so branded, & brand their own names:—*Held*: an action for the price could not be maintained.

*Secus*, in the case of a breach of a mere revenue regulation which is enforced by a penalty.—*FORSTER v. TAYLOR* (1834), 5 B. & Ad. 887; 110 E. R. 1019; *sub nom. FOSTER v. TAYLOR*, 3 Nev. & M. K. B. 244; 3 L. J. K. B. 137.

*Annotations*:—*Consd.* *Cope v. Rowlands* (1836), 2 M. & W. 149. *Reid*, *Brooker v. Wood* (1834), 3 Nev. & M. K. B. 96; *Fergusson v. Worman* (1838), 1 Arn. 418; *Cundell v. Dawson* (1847), 4 C. B. 376; *Stevens v. Gouley* (1859), 7 C. B. N. S. 99. *Mentd.* *Shearwood v. Hay, Wills v.*

**Sect. 1.—Conditions and warranties generally: Sub-sects. 1 & 2, A.]**

*Langridge* (1836), 5 Ad. & El. 383; *Palk v. Force* (1848), 17 L. J. Q. B. 399; *Waugh v. Morris* (1873), 28 L. T. 265; *Brightman v. Tate*, [1919] 1 K. B. 463.

**493.** —[—]—When a statute for the purpose of protecting the buyers, prescribes regulations to be followed in the sale & delivery of an article, the vendor cannot recover the price of such article sold & delivered by him without observing the regulations.

To debt for goods sold & delivered, debt. pleaded in substance that the goods were quantities of coals sold & delivered by him to plffs., respectively exceeding 500 lb. & respectively delivered within the city of London, in divers, to wit, two carts, without delivering, before any such quantities of coals were unloaded, a ticket signed by plffs. according to the form of the statute; & that debt. did not purchase the same at the coal market:—*Held*: the statute being passed for the protection of the purchasers of coal, the plea was an answer to the action.—*CUNDELL v. DAWSON* (1847), 4 C. B. 376; 17 L. J. C. P. 311; 9 L. T. O. S. 173; 11 Jur. 634; 136 E. R. 552.

*Annotations*:—*Apld.* *Anderson v. Daniel*, [1924] 1 K. B. 138. *Refd.* *Ritchie v. Smith* (1848), 18 L. J. C. P. 9. *Mentd.* *Pilgrim v. Southampton & Dorchester Ry.* (1849), 13 Jur. 515; *Ramsden v. Lupton* (1873), 43 L. J. Q. B. 17; *Brightman v. Tate*, [1919] 1 K. B. 463.

**494.** —[—]—Sweet spirits of nitre are not "spirits" for the removal of which a permit is required by Excise Licences Act, 1825 (c. 80), s. 115, & Excise Permit Act, 1831 (c. 16), ss. 10, 11. Nor are they within Excise Licences Act, 1825 (c. 80), ss. 6, 7, by which penalties are imposed for distilling spirits without a licence, & the spirits are forfeited & may be seized, etc., or within Excise Management Act, 1827 (c. 53), s. 32, which enacts forfeiture of excisable goods deposited in any place with intent to defraud the revenue. Assuming that, by any of the above enactments, the spirits or compound are liable to forfeiture, & the maker to a penalty, he may nevertheless, except where they have actually been lost to the purchaser by seizure, maintain an action against a purchaser for the price; for the statutes do not avoid the contract. If debt. in such action pleads that, by reason of the spirits having been so illegally distilled or deposited, the sweet spirits of nitre were seized while in his possession, & an information laid against him in the Exchequer, where they were afterwards condemned, such plea does not amount to the general issue, but, admitting a sale, shows only a failure of consideration.—*BAILEY v. HARRIS* (1849), 12 Q. B. 905; 13 L. J. Q. B. 115; 12 L. T. O. S. 553; 13 Jur. 341; 116 E. R. 1109.

**495. Waiver of performance of condition.]**—A contract provided for the sale of rosewood for shipment in 1903, to be delivered at Hull in instalments during that year, cash payable against bill of lading. While the first consignment of rosewood was on the sea, the buyers repudiated the contract & refused to accept any rosewood under it upon the ground that the seller had committed a breach of a collateral oral agreement not to supply rosewood to any other person in the trade during 1903. When the bill of lading for the first consignment was tendered to the buyers they refused to accept it or to pay for the rosewood comprised in it; the rosewood was therefore sold by the seller as against the buyers, & the seller claimed as damages from the buyers for their refusal to accept the

consignment the difference between the contract price & the price at which it was sold as against the contract. The second consignment, consisting of the balance of the rosewood, was likewise refused by the buyers on the same ground & sold as against them. It subsequently came to the knowledge of the buyers that a portion of the rosewood in the first consignment did not answer the description of the quality of rosewood in the contract, & it was admitted that there was some inferiority in a portion that would be compensated for by an allowance of about 6 per cent. on the value of the consignment. The second consignment was in accordance with the contract. The seller having sued the buyers for damages for not accepting the rosewood, the judge at the trial found as a fact that the collateral oral agreement relied upon by the buyers had never been entered into:—*Held*: the original repudiation of the contract by the buyers was wrongful & by refusing to take delivery of the consignments on arrival on the ground that they had already repudiated the entire contract the buyers had waived the performance of conditions precedent on the part of the sellers, who were entitled to damages based upon the difference between the contract price of the rosewood & the price at which it had been sold by them as against the contract.—*BRAITHWAITE v. FOREIGN HARDWOOD CO.*, [1905] 2 K. B. 543; 74 L. J. K. B. 688; 92 L. T. 637; 21 T. L. R. 413; 10 Asp. M. L. C. 52; 10 Com. Cas. 189, C. A.

*Annotations*:—*Apld.* *Taylor v. Oakes Roncoroni* (1922), 127 L. T. 267. *Consd.* *British & Beningtons v. N. W. Cachar Tea Co.*, [1923] A. C. 48. *Refd.* *Colley v. Overseas Exporters*, [1921] 3 K. B. 302. *Mentd.* *McKenna v. City Life Assce.* (1919), 88 L. J. K. B. 1223; *Acties Nord-Ostero Rederiet v. Casper Edgar* (1923), 28 Com. Cas. 222.

**SUB-SECT. 2.—WARRANTIES.**

**A. In General.**

*See* Sale of Goods Act, 1893 (c. 71), s. 11.

**496. Warranty imports liability.]**—*ANON.* (1507), *Keil*. 91; 72 E. R. 254.

*Annotations*:—*Refd.* *Barr v. Gibson* (1838), 1 Horn & H. 70; *Burnby v. Bollett* (1847), 16 M. & W. 645.

**497.** —[—]—Trespass on the case for selling a jewel, affirming it to be a bezar stone, *ubi revera* it was not a bezar stone, will not lie unless it be alleged that debt. knew it was not a bezars, or that he warranted it was a bezar.—*CHANDELOR v. LOPUS* (1603), Cro. Jac. 4; 79 E. R. 3; *sub nom.* *LOPUS v. CHANDLER*, Dyer, 75, n., Ex. Ch.

*Annotations*:—*Consd.* *Heilbutt, Symons v. Buckleton*, [1913] A. C. 30. *Refd.* *Gray v. Cox* (1824), 1 C. & P. 491; *Jones v. Bright* (1829), 6 Bing. 533; *Orinrod v. Huth* (1845), 14 L. J. Ex. 366; *Atkinson v. Pocock* (1848), 12 Jur. 60; *Hall v. Conder* (1857), 2 C. B. N. S. 22; *Smith v. Chadwick* (1884), 9 App. Cas. 187.

**498.** —[—]—In an action on the case in tort for a breach of a warranty of goods, the *scienter* need not be charged, nor if charged need it be proved.—*WILLIAMSON v. ALLISON* (1802), 2 East, 446; 102 E. R. 439.

*Annotations*:—*Refd.* *Shearm v. Burnard* (1839), 10 Ad. & El. 593; *Cornfoot v. Fowkes* (1840), 6 M. & W. 358; *Fuller v. Wilson* (1842), 3 Q. B. 58; *Morley v. Attenborough* (1849), 3 Exch. 500. *Mentd.* *Turner v. Eyles* (1803), 3 Bos. & P. 456; *Bailey v. Harris* (1849), 13 Jur. 341; *Legge v. Tucker* (1856), 1 H. & N. 500; *Goldrei, Foucard v. Sinclair & Russian Chamber of Commerce in London*, [1918] 1 K. B. 180.

**499.** —[—]—In the case of a representation, to render liable the party making it, the facts stated must be untrue to his knowledge; but in the case

**PART III. SECT. 1, SUB-SECT. 2.—A.**

**496 I. Warranty imports liability.]**—A seller who gives an express warranty with the article sold must supply an article which complies with the war-

ranty.—*MAENNEL v. GARAGE CONTINENTAL, LTD.*, [1910] App. D. 137.—S. AF.

**1. Extension of warranty.—By implication.—Express warranty.—War-**

**ranty of parts extended to warranty as to whole.]**—*NORTH-WEST THRESHER CO. v. ANDREWS (Alta.)* (1908), 8 W. L. R. 827.—CAN.

**2. Evidence of warranty.—Express**



of a warranty, he is liable whether they are within his knowledge or not (TINDAL, C.J.).—BUDD v. FAIRMANER (1831), 5 C. & P. 78; 172 E. R. 885, N. P.; *subsequent proceedings*, 8 Bing. 48.

500. —.]—In an action by a tradesman against the manufacturers of an iron safe, for the breach of an alleged warranty that it was strong enough to resist all attempts that might be thereafter made to force it open, it having in fact been broken open by burglars more than six years after the sale & delivery, & there being evidence that it was broken open easily, & that it was far less strong & secure than it ought to have been:—*Held*: the warranty, as declared upon & set up at the trial, was an absolute warranty of perfect security for all time to come, was one so extensive, even if it would be valid, that it required cogent evidence of express warranty to that extent, & was not sustained by proof of mere representations that the safe would be strong enough to resist burglars. *Semble*: even assuming that such a warranty had been given, though it had certainly been broken, the statute ran from the time of the delivery of the safe, not from the burglary.

The question, however, will be upon the whole of the evidence whether the warranty set up was given. The warranty set up is one which is to last as long as the safe itself shall endure, which may endure from generation to generation for a hundred years. It is a warranty which is to be co-existent & continuing during the whole of that period or during all that time is to impose an unlimited liability upon the seller from which he can never divest himself. Is it likely that any one in his senses would take upon himself such a responsibility? (COCKBURN, C.J.).

It is undoubtedly true that there may be a warranty without the use of the word "warrant"; but then there must be words used tantamount to it & such as men of business would recognise as imparting a warranty. . . . A warranty imports an absolute liability on an undertaking. . . . It is not because the seller represented that this safe was secure against burglars or used other eulogistic language about it . . . that therefore he is to be held liable as for a warranty (COCKBURN, C.J.).—WALKER v. MILNER (1866), 4 F. & F. 745.

501. — *General or qualified.*—WOOD v. SMITH, No. 529, *post*.

502. Necessity for word "warrant" or "warranty."—CAVE v. COLEMAN, No. 437, *ante*.

503. —.]—A. sent his horse to Tattersall's for sale by public auction where he was to be sold without a warranty. On the day prior to the intended sale, meeting B. at the stable, & seeing him in the act of examining the horse's legs, A. said, "You have nothing to look for: I assure you he is perfectly sound in every respect"; whereupon B. replied, "If you say so, I am perfectly satisfied," & upon the faith of the representation so made to him by A., which was admitted to have been made in perfect good faith, became the purchaser:—*Held*: there was no evidence of warranty to go to a jury, the representation made by A., on the day preceding the auction forming no part of the contract of sale.

There is no necessity that the word warrant or promise should occur in the bargain. . . . Nor is it necessary that the statement or representation should be simultaneous with the close of the bargain: if it be part of the contract it matters

not what period of the negotiation it is made (JERVIS, C.J.).

The fact of that conversation passing between pltf. & deft. at the time when it was known to both that the sale was to take place by public competition on the following day, affords to my mind a very strong reason for thinking that deft. could not have intended what he then said to be imported as a warranty into the transaction (MAULE, J.).—HOPKINS v. TANQUERAY (1854), 15 C. B. 130; 2 C. L. R. 842; 23 L. J. C. P. 162; 23 L. T. O. S. 144; 18 Jur. 608; 2 W. R. 475; 139 E. R. 369.

*Annotations*:—*Reid*, Sayers v. London & Birmingham Flint Glass & Alkali Co. (1858), 27 L. J. Ex. 294; Carter v. Crick (1859), 28 L. J. Ex. 238; Stucley v. Baily (1862), 1 H. & C. 405.

504. —.]—Pltf., having heard that deft. had some barley to sell, went to his counting-house, when his agent produced a sample which he said was "seed barley," offered to deft. at 39s., & if pltf. would take it at 40s. he might have it. Pltf. looked at the barley & said it was a good sample of seed barley, & agreed to buy it. At pltf.'s request deft. wrote to the person who had offered it to him saying that he would accept it, & asking what sort it was as it would do well for seed. Pltf. afterwards sold it under a warranty in writing as "Chevalier seed barley." It turned out that it was "barley bigg," a species of barley unfit for malting purposes; & the person to whom pltf. had sold it recovered damages against him for the breach of warranty:—*Held*: there was no warranty by deft. that the barley was "seed barley"; the contract was satisfied by the delivery of barley fit for sowing; & if the term "seed barley" meant barley fit for malting purposes, that ought to be shown by clear & irresistible evidence.

I do not doubt the proposition contended for on behalf of pltf., that a statement at a sale may be a warranty although the word "warrant" is not used. If a person asks a dealer for a particular article, & he produces something which he says is the particular article, that amounts to a warranty. Here there is no warranty: both parties say that the barley is seed barley (BRAMWELL, B.).—CARTER v. CRICK (1859), 4 H. & N. 412; 28 L. J. Ex. 238; 33 L. T. O. S. 166; 7 W. R. 507; 157 E. R. 899.

505. — Words tantamount thereto—Recognised by business men.—WALKER v. MILNER, No. 500, *ante*.

506. Breach of contract with warranty—Whether warranty extends to subsequent sale of same goods.—If the first contract with warranty be broken off, the warranty will not extend to a subsequent sale.—ANON. (1721), 1 Stra. 414; 93 E. R. 605.

507. Collected from more than one document—Advertisement & contract of sale.—An action of deceit does not lie against a person making an untrue representation to another, on the faith of which the hearer acts & thereby incurs damage, if the party making such representation did not know it to be untrue. The owners of a ship circulated advertisements of sale beginning with a description of the ship, which stated her to be copper fastened; after which was a notice, that the hull, masts, yards, & rigging were to be taken with all faults. Under this was printed the word "inventory" which was followed by a list of the

warranty—Admissibility of parol evidence.—PAGE v. BUCHANAN (1879), 2 N. S. W. S. C. R. N. S. 102.—AUS.

g. Question of fact.—The question of whether there is any par-

ticular case of warranty or not is one of fact, & not of law.—DEMPSTER & WALSH v. SIMPSON (1904), 7 W. A. L. R. 103.—AUS.

h. Intention of parties.—An

implied warranty is founded on the presumed intentions of the parties.—HILL v. RICE LEWIS & SON, LTD. (1913), 28 O. L. R. 366; 4 O. W. N. 953; 12 D. L. R. 588.—CAN.



**Sect. 1.—Conditions and warranties generally: Subsect. 2, A. & B.]**

ship's stores & tackle; & there was then a further announcement that the vessel & her stores were to be taken with all faults, & without allowance for weight, length, quality, quantity or any defect whatever. The owners afterwards executed a written contract of sale not stating the vessel to be copper fastened but containing this clause: "On payment of the purchase-money the said brig with what belongs to her shall be delivered according to the inventory which has been exhibited; but the said inventory shall be made good as to quantity only; & the said brig together with her stores, shall be taken with all faults in the condition they now lie without any allowance for weight, length, quality or any defect, whatsoever":—*Held*: assuming that the advertisement could, by words of reference, be incorporated with the contract of sale, the word "inventory" in the contract referred only to the list of stores, etc., & not to the prior part of the advertisement; & therefore, on the two documents taken together, no warranty appeared that the ship was copper fastened.—*FREEMAN v. BAKER* (1833), 5 B. & Ad. 797; 2 Nev. & M. K. B. 446; 3 L. J. K. B. 17; 110 E. R. 985.

*Annotations*.—*Distd.* Taylor v. Bullen (1850), 5 Exch. 779. *Refd.* Gibson v. D'Este (1843), 2 Y. & C. Ch. Cas. 542.

**508. Express statement—Forming part of contract—Though collateral thereto.]—CHANTER v. HOPKINS, No. 753, post.**

**509. Extension of warranty—By implication—Express warranty.]—**Upon a contract for the sale of goods, with a particular express warranty, the ct. will not extend such warranty by implication.

The declaration stated a bargain for the sale by defts. to pltf. of a certain cargo, to wit, the cargo of Indian corn then shipped at Orfano, on board the *Ottoman*, at a certain price, including freight & insurance to Cork, Liverpool, or London, & that it was agreed that the quality of the said Indian corn was equal to the average of the shipments of that article in the season of 1847, & that the said Indian corn had been shipped in good & merchantable condition; & alleged for breach, that the corn was not, at the time of shipment, or at any other time, in good & merchantable condition, or in a fit & proper condition for the performance of the voyage from Orfano to Cork, etc. The judge left it to the jury to say whether the corn was, at the time of shipment, in a good & merchantable condition for a foreign voyage:—*Held*: a misdirection; inasmuch as it was extending by implication the express warranty contained in the contract.—*DICKSON v. ZIZINIA* (1851), 10 C. B. 602; 20 L. J. C. P. 73; 16 L. T. O. S. 366; 15 Jur. 359; 138 E. R. 238.

*Annotations*.—*Refd.* Covas v. Blingham (1853), 2 E. & B. 836; Bigge v. Parkinson (1862), 8 Jur. N. S. 1014.

**510. ———.]—PINDER v. BUTTON** (1862), 1 New Rep. 21; 7 L. T. 269; 11 W. R. 25.

**511. Evidence of warranty—Express warranty—Statements in invoice or prospectus.]—**When a

man purchases a patented article, with a known title, there is no implied warranty that it will answer any particular purpose; but it is for the jury whether there was an express warranty, & the mere fact that in printed invoices or prospectuses the invention is described as effecting an object, is not in itself conclusive evidence of a warranty.—*PRIDEAUX v. M'MURRAY* (1860), 2 F. & F. 225.

**512. ———Admissibility of antecedent or subsequent negotiations.]—**Under a contract in writing which contained no mention of the particular purpose for which they were required, the pltf. bought "the 24/40 h.p. Fiat omnibus" they had inspected & "six 24/40 h.p. Fiat omnibus chassis" at an agreed price. The articles when delivered were not fit to perform the work required of them. In an action for damages:—*Held*: this was not a contract for the sale of a specified article under its patent or trade name, & there was an implied condition that the goods should be reasonably fit for the purpose for which they were required within Sale of Goods Act, 1893 (c. 71), s. 14 (1), & also they should be of merchantable quality within sub-sect. 2 of the same sect., & consequently the pltf. were entitled to recover damages for breach of the contract.

The proviso at the end of sect. 14 (1) assumes the absence of any express assurance by the seller & deals only with the case of express or implied information by the buyer of the purpose for which he requires the article, so framed as to show that he relied on the seller's skill or judgment, but the seller is not bound to refrain from carrying out his order for a particular article because it is ill adapted for the purpose mentioned in the order, provided the article has in fact a patent or trade name under which it can be ordered.

The condition implied by sect. 14 (2) that the goods are of merchantable quality applies to all goods bought from the seller who deals in goods of that description whether they are sold under a patent or trade name or otherwise.

When the contract is expressed in a formal document or in a letter of offer & a letter of acceptance, no antecedent or subsequent negotiations are admissible to construe such a contract (*FARWELL, L.J.*).

The phrase ["merchantable quality"] in sect. 14 (2) is, in my opinion, used as meaning that the article is of such quality & in such condition that a reasonable man acting reasonably would after a full examination accept it under the circumstances of the case in performance of his offer to buy that article whether he buys for his own use or to sell again (*FARWELL, L.J.*).—*BRISTOL TRAMWAYS, ETC., CARRIAGE CO., LTD. v. FIAT MOTORS, LTD.*, [1910] 2 K. B. 831; 79 L. J. K. B. 1107; 103 L. T. 443; 26 T. L. R. 629, C. A.

*Annotations*.—*Consd.* Niblett v. Confectioners' Materials Co., [1921] 3 K. B. 387. *Refd.* Sanday v. British & Foreign Marine Insce., [1915] 2 K. B. 781; Sumner, Pearmain v. Webb (1921), 91 L. J. K. B. 228; Manchester Liners v. Rea, [1922] 2 A. C. 74.

**513. Distinguished from conditions.]—HEY-WORTH v. HUTCHINSON, No. 484, ante.**

**513 i. Distinguished from conditions.]—**A rebuilt engine is a second-hand engine & the representation that an engine was rebuilt is not a condition or sale but a warranty, for the breach of which the vendors are liable in damages.—*NEW HAMBURG MFG. CO. v. WEBB* (1911), 18 O. W. R. 216; 2 O. W. N. 588; 23 O. L. R. 44.—*CAN.*

**k. Construction of warranty—Matters for consideration—Time of sale & surrounding circumstances.]—**Pltf. brought an action against deft. claiming damages for breach of warranty &

misrepresentation on the sale of two second-hand motor cars. Pltf. set up that deft. had warranted or represented that the cars sold were in good working order. The price paid for the cars was a low one:—*Held*: the warranty or representation must be construed in the light of the circumstances in which it was given & which existed at the time of sale.—*SHAW v. WHEELER* (1919), 22 W. A. L. R. 15.—*AUS.*

**l. ———Inclined against person giving warranty.]—**Guarantees are to be construed reasonably, according to the

intent of the parties, & the more strongly against those giving them.—*GREENWAY v. GARDINER*, 20 C. L. T. 68.—*CAN.*

**m. ———.]—JENKINS v. KENT**, [1922] N. Z. L. R. 832.—*N.Z.*

**n. Parol warranty—Validity—Where inconsistent with written warranty.]—***COCKSHUTT PLOW CO. v. MILLS* (1905), 7 Terr. L. R. 397; 2 W. L. R. 355.—*CAN.*

**o. ———Exclusion by written warranty.]—**A sales order for a tractor provided that there was no warranty

**514. Warranty limited in time—Sale of provisions.]—***BARRE JOHNSTON & Co. v. OLDHAM* (1895), 11 T. L. R. 401, P. C.

**—Warranty as to animals.]—See ANIMALS** Vol. II., pp. 267, 270, 271, Nos. 456–458, 481–484.

### *B. Whether Representation Amounts to Warranty.*

*See Sale of Goods Act, 1893 (c. 71), s. 11.*

**515. Intention of parties.]—**Case for falsely affirming the goods to be his own when they were the proper goods of another without saying *sciens* they were the goods of another good.—*CROSSE v. GARDNER* (1888), Carth. 90; Comb. 142; Holt, K. B. 5; 3 Mod. Rep. 261; 1 Show. 68; 90 E. R. 656.

**Annotations.]—***Apld.* *Medina v. Stoughton* (1700), 1 Ld. Raym. 593. *Apprvd.* *Pasley v. Freeman* (1789), 3 Term Rep. 51. *Consd.* *Adamson v. Jarvis* (1827), 4 Bing. 66. *Refd.* *Collins v. Evans* (1844), 5 Q. B. 820; *Derry v. Peck* (1889), 14 App. Cas. 337; *De Lassalle v. Guildford*, [1901] 2 K. B. 215; *Heilbut, Symons v. Buckleton*, [1913] A. C. 30; *Guaranty Trust Co. of New York v. Hannay*, [1918] 2 K. B. 623.

**516. —.**—Where seller has the possession of chattels, the bare affirming them to be his make a warranty; otherwise if out of possession.—*MEDINA v. STOUGHTON* (1700), 1 Salk. 210; Holt, K. B. 208; 1 Ld. Raym. 593; 91 E. R. 188.

**Annotations.]—***Apprvd.* *Pasley v. Freeman* (1789), 3 Term Rep. 51. *Consd.* *Adamson v. Jarvis* (1827), 4 Bing. 66. *Refd.* *Dobell v. Stevens* (1825), 3 L. J. O. S. K. B. 89; *Collins v. Evans* (1844), 5 Q. B. 820; *Morley v. Attenborough* (1849), 3 Exch. 500; *Sims v. Marryatt* (1851), 17 Q. B. D. 281; *Eichholtz v. Bannister* (1864), 17 C. B. N. S. 708; *De Lassalle v. Guildford*, [1901] 2 K. B. 215; *Heilbut, Symons v. Buckleton*, [1913] A. C. 30; *Guaranty Trust Co. of New York v. Hannay*, [1918] 2 K. B. 623. *Mentd.* *Godson v. Good* (1816), 2 Marsh. 299.

**517. — According to evidence.]—**An affirmation at the time of a sale is a warranty provided it appear on evidence to have been so intended (*BULLER, J.*).—*PASLEY v. FREEMAN* (1789), 3 Term Rep. 51; 100 E. R. 450.

**Annotations.]—***Consd.* *Adamson v. Jarvis* (1827), 5 L. J. O. S. C. P. 68; *Lunbridge v. Levy* (1837), 2 M. & W. 519; *Morley v. Attenborough* (1849), 3 Exch. 500; *Eichholtz v. Bannister* (1864), 17 C. B. N. S. 708; *De Lassalle v. Guildford*, [1901] 2 K. B. 215. *Apprvd.* *Heilbut, Symons v. Buckleton*, [1913] A. C. 30. *Consd.* *Guaranty Trust Co. of New York v. Hannay*, [1918] 2 K. B. 623. *Refd.* *Evans v. Bicknell* (1801), 6 Ves. 174; *Eyre v. Dunsford* (1801), 1 East, 318; *Haycraft v. Creasy* (1801), 2 East, 92; *Clifford v. Brooke* (1806), 13 Ves. 131; *Hamar v. Alexander* (1806), 2 Bos. & P. N. R. 241; *Foster v. Charles* (1830), 4 Moo. & P. 61; *Foster v. Charles* (1830), 4 Moo. & P. 741; *Lyde v. Barnard* (1836), 1 M. & W. 101; *Pilmore v. Hood* (1838), 6 Scott, 827; *Cornfoot v. Fowke* (1840), 6 M. & W. 358; *Pontifex v. Bignold* (1841), 9 Dowl. 860; *Collins v. Evans* (1844), 5 Q. B. 820; *Wilde v. Gibson* (1848), 1 H. L. Cas. 605; *Bushby v. Ellis* (1853), 17 Beav. 279; *Slim v. Croucher* (1860), 1 De G. F. & J. 518; *Wright v. Leonard* (1861), 11 C. B. N. S. 258; *Re Ward* (1862), 31 Beav. 1; *Ramshire v. Bolton* (1869), L. R. 8 Eq. 294; *Schroeder v. Mendl* (1877), 37 L. T. 452; *Joliffe v. Baker* (1883), 11 Q. B. D. 255; *Smith v. Chadwick* (1884), 9 App. Cas. 187; *Derry v. Peck* (1889), 14 App. Cas. 337; *Banbury v. Bank of Montreal*, [1918] A. C. 626. *Mentd.* *Burrowes v. Lock* (1805), 10 Ves. 470; *Ex p. Carr* (1814), 3 Ves. & B. 108; *Nash v. Palmer* (1816), 5 M. & S. 374; *Ames v. Millward* (1818), 2 Moore, C. P. 713; *Bromage v. Prosser* (1825), 4 B. & C. 247;

other than the one in writing & the written warranty provided to the same effect:—*Held*: effect should not be given to a verbal warranty.—*MAGER v. BAIRD RANCHING CO.*, [1921] 1 W. W. R. 311; 57 D. L. R. 283.—*CAN.*

### PART III. SECT. 1, SUB-SECT. 2.—B.

**517 i. Intention of parties—According to evidence.]—***IRVINE v. GODARD* (1841), 3 N. B. R. (1 Kerr) 364.—*CAN.*

**517 ii. —.**—*TISDALE v. CONNELL* (1841), 1 Kerr, 401.—*CAN.*

**517 iii. —.**—*FEERAN v. McLEAN* (1854), 4 Nfld. L. R. 42.—*NFLD.*

**517 iv. —.**—*BAKER v. FAWKES* (1874), 35 U. C. R. 302.—*CAN.*

*Shrewsbury v. Blount* (1841), 2 Scott, N. R. 588; *Taylor v. Ashton* (1843), 11 M. & W. 401; *Money v. Jordan* (1852), 15 Beav. 372; *Shortridge v. Bosanquet* (1852), 16 Jur. 919; *Tatton v. Wade* (1856), 4 W. R. 548; *Robson v. Devon* (1857), 29 L. T. O. S. 300; *Childers v. Wooller* (1860), 2 E. & E. 287; *Bentley v. Mackay* (1862), 31 Beav. 143; *Re Overend, Gurney, Ex p. Oakes & Peck* (1867), L. R. 3 Eq. 576; *Hyde v. Bulmer* (1868), 18 L. T. 293; *R. v. Warburton* (1870), 35 J. P. 116; *Re London & Leeds Bank, Ex p. Carling, Carling v. London & Leeds Bank* (1887), 56 L. J. Ch. 321; *Re Dangars Trusts* (1889), 58 L. J. Ch. 315; *Wilkinson v. Downton*, [1897] 2 Q. B. 57; *Allen v. Flood*, [1898] A. C. 1; *Tallerman v. Dowling Radiant Heat Co.*, [1900] 1 Ch. 1; *Cackett v. Keswick*, [1902] 2 Ch. 456; *Cavalier v. Pope* (1905), 74 L. J. K. B. 857; *Nash v. Calthorpe*, [1905] 2 Ch. 237; *Nocton v. Ashburton*, [1914] A. C. 932; *Hulton v. Hulton*, [1917] 1 K. B. 813; *Janvier v. Sweeney*, [1919] 2 K. B. 316.

**518. —.**—*—*—*POWER v. BARHAM*, No. 863, *post*.

**519. —.**—*—*—In an action for the case of false representations on the sale of a ship, whereby she was classed lower in Lloyd's books than she would have been had she been built of the materials described. Such representations having been made by an agent without any express authority from deft.:—*Held*: the judge was warranted in leaving it to the jury to infer from the subsequent conduct of deft., *ex gr.* from his not having repudiated the warranty when apprised of it, that he was privy to, or impliedly assented to the misrepresentations of his agent.—*WRIGHT v. CROOKES* (1840), 1 Scott, N. R. 685, Ex. Ch.

**520. —.**—*—*—Where it is sought to import a warranty into a contract of sale contained in letters which are ambiguous in their terms, it is competent to the party sought to be charged to give evidence of all the surrounding facts & circumstances, for the purpose of showing that a warranty was not contemplated by the parties.—*STUCLEY v. BAILY* (1862), 1 H. & C. 405; 31 L. J. Ex. 483; 10 W. R. 720; 153 E. R. 943.

**521. —.**—*—*—Deft. received an order from a correspondent at Bremen to purchase for him bar iron of a description known there as S. & H. crown iron. Upon inquiry, he found that the firm of Snowden & Hopkins, whose mark that was, had ceased to exist, & had been succeeded by a firm of Hopkins & co., pltf.: & he accordingly, through a broker, bought of pltf. 67 tons of iron, which was described in the bought & sold notes as S. & H., crown, common bars. The iron when tendered was found to bear the mark of the new firm H. & co., with a crown, & was rejected by deft. In an action for refusing to accept the iron, the jury found that the mark S. & H. was not a material part of the bargain, & that the article tendered was substantially what deft. bargained for:—*Held*: construing the contract by the surrounding circumstances, the mark S. & H. might, if necessary, be rejected as *falsa demonstratio*, & the contract was complied with by the tender of iron marked H. & co.—*HOPKINS v. HITCHCOCK* (1863), 14 C. B. N. S. 65; 2 New Rep. 32; 32

**517 v. —.**—*—*—*BENNETT v. TRE- GENT* (1875), 24 C. P. 565.—*CAN.*

**517 vi. —.**—*—*—*WURZBURG v. ANDREWS* (1896), 28 N. S. R. 387.—*CAN.*

**517 vii. —.**—*—*—An affirmation at the time of the sale is a warranty, provided it appears on evidence to be so intended, which intention is to be deduced from the whole of the evidence.—*GARDNER v. MERKER* (1919), 43 O. L. R. 411; 44 D. L. R. 217.—*CAN.*

**517 viii. —.**—*—*—*DESMARAIS v. FAWCETT* (1924), 18 Sask. L. R. 165; [1924] 1 W. W. R. 1035.—*CAN.*

**517 ix. —.**—*—*—An affirmation at the time of the sale of goods is a warranty, provided it appear on

evidence to be so intended.—*UHLE v. KROEGER* (Man.), [1928] 1 D. L. R. 97; [1927] 3 W. W. R. 636.—*CAN.*

**p. — Whether displaced by stipulation for inspection.]—**An affirmation at the time of, or during the negotiations for sale, is a warranty, if it was so intended by both parties to the contract. A stipulation for inspection does not necessarily displace the contention that a warranty exists.—*THOMAS v. NELSON* (1920), 20 S. R. N. S. W. 579; 37 N. S. W. N. 165.—*AUS.*

**q. — Marking goods of particular quality.]—**Where a person manufacturing flour, marks it as of a particular quality, that amounts to a

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L. J. C. P. 154; 8 L. T. 204; 9 Jur. N. S. 896; 11 W. R. 597; 143 E. R. 369.

522. ———.]—WALKER v. MILNER, No. 500, *ante*.

523. ———.]—To the name of a mare in a printed catalogue of horses to be sold by auction, were appended the words, in foal to Warlock. Other mares in the same catalogue were described as having been served by or stunted to certain horses:—*Held*: looking to the expressions used with respect to the other mares & to the nature of the fact represented, the words in question must be taken as intended by the parties to amount to a warranty.—GEE v. LUCAS (1867), 16 L. T. 357.

524. ———.]—Deft., living at Cardiff, on Nov. 9, 1874, wrote to pltf., living in London, offering to sell him a secondhand locomotive engine, in "good working order," for £385, & asking if pltf. would get it inspected, & see if he could take it, to which pltf., on Nov. 10, replied, saying, "Tell me who are the makers, what material are the fire box & tubes made of, & how old is the engine." Deft.'s answer of Nov. 12 was as follows: "E. & co. are the makers of the locomotive, age about thirteen & a half years, fire box & tubes are copper. Can you let some one inspect her?" In reply, to which pltf., on Nov. 14, wrote as follows: "If you can assure me that the loco. is in good working order I will, on the faith of that, send an engineer down to look at it." Deft. having on Nov. 16 written, saying "the engine is now in good order," pltf. thereupon sent an engineer to Halifax, where the engine was, to inspect & give him an estimate of the value, with particulars of the size, & diameter of the cylinder & wheels, & their condition. The engineer inspected the engine, & in the course of his examination he cleared away the soot & smoke from one of the tubes, & finding it to be of brass, he took for granted that all of them were of that material, & carried his examination in that respect no farther. He then sent his report, giving a detailed description of the engine to pltf., stating, amongst other particulars, "copper fire box & brass tubes," & specifying the repairs necessary to be done. Upon this pltf., on Nov. 27, wrote to deft. saying, "The condition of the engine, & all things considered, I cannot offer you more than £300 for it, & if you like to accept that I will take the engine." That offer deft. accepted, & the bargain was thereupon concluded between them. Upon taking the engine to pieces some months afterwards, pltf. found that only five of the boiler tubes were of brass, the remaining one hundred & thirty-one being of iron, & thereupon, on the strength of deft.'s representation, in his letter of Nov. 12, that the tubes were copper, he claimed compensation from deft. for the difference in value between the two metals, which deft., denying his liability, refused to make. Pltf. then brought an action, at the trial of which a verdict was formally entered for him, with leave to deft. to move to enter the verdict on the ground that on the true construction of the correspondence, deft. did not warrant as alleged, & that the representation therein contained did not enter into or form part of the subsequent contract:—*Held*: (1) deft.'s

letter of Nov. 12 amounted to an express warranty by deft., on the faith of which pltf. acted in concluding the bargain, that the tubes of the engine were of brass or copper; (2) the subsequent inspection by pltf.'s engineer, which was intended only to apply to the ascertaining the engine's working condition & state of repairs, & not to the material of the tubes, did not do away with or in any way affect such previous warranty.—COWDY v. THOMAS (1876), 36 L. T. 22.

525. ———.]—Assertion by seller of fact unknown to purchaser.]—It was laid down by BULLER, J. . . . in *Pasley v. Freeman*, No. 517, *ante*: "It was held . . . in *Crosse v. Gardner*, No. 515, *ante*, & *Mudina v. Stoughton*, No. 516, *ante*, that an affirmation at the time of sale is a warranty provided it appears on evidence to have been so intended." In determining whether it was so intended a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge & on which the buyer may be expected also to have an opinion & to exercise his judgment. In the former case it is a warranty in the latter not (A. L. SMITH, M.R.).—DE LASSALLE v. GUILDFORD, [1901] 2 K. B. 215; 70 L. J. K. B. 533; 84 L. T. 549; 49 W. R. 467; 17 T. L. R. 384, C. A. *Annotations*:—*Dbtd. Heilbut, Symons v. Buckleton*, [1913] A. C. 30. *Refd. Lloyd v. Sturgeon Falls Pulp Co.* (1901), 85 L. T. 162; *Milch v. Coburn* (1910), 27 T. L. R. 170; *Collins v. Hopkins*, [1923] 2 K. B. 617.

526. ———.]—The question whether an affirmation made by the vendor at the time of sale constitutes a warranty depends on the intention of the parties to be deduced from the whole of the evidence, & the circumstance that the vendor assumes to assert a fact of which the purchaser is ignorant, though valuable as evidence of intention, is not conclusive of the question.—HEILBUT, SYMONS & Co. v. BUCKLETON, [1913] A. C. 30; 82 L. J. K. B. 245; 107 L. T. 769; 20 Mans. 54, H. L.

*Annotations*:—*Apld. Harrison v. Knowles & Foster*, [1918] 1 K. B. 608. *Refd. Guaranty Trust Co. of New York v. Hannay*, [1918] 2 K. B. 623; *Niblett v. Confectioners' Materials Co.*, [1921] 3 K. B. 387; *Collins v. Hopkins*, [1923] 2 K. B. 617; *Jacobs v. Batavia & General Plantations Trust*, [1924] 2 Ch. 329.

527. ———.]—Defts. being desirous of selling two steamships to the pltf.s, gave to pltf.s particulars in writing of the ships which stated (*inter alia*) that the dead weight capacity of each ship was 460 tons. The particulars also contained words not accountable for errors in description. Pltf.s, relying upon the particulars agreed to buy the ships, & a memorandum of the contract, which did not in terms refer to the particulars, was signed by the parties on Dec. 9, 1915. The ships were delivered to & accepted by pltf.s, & it was subsequently discovered that the dead-weight capacity of each ship was only 360 tons. In an action by pltf.s to recover damages for a breach of a condition of the contract, & alternatively for breach of warranty:—*Held*: on the evidence that the statement in the particular of the ships as to the dead-weight capacity which was made *bona fide* was not part of the contract, & defts. were not liable.

It is a question of intention whether a representation amounts to a warranty. . . . In my

warranty of its being of such quality:—*Held*: in this case the evidence of representations made by the seller at the time of sale were sufficient to warrant the jury in finding an express warranty.—CHRISHOLM v. PROUDFOOT (1856), 15 U. C. R. 203.—CAN.

r. ———.]—Statement relied upon by purchaser.]—TAYLOR v. POIRIER (1908), 8 W. L. R. 949; 1 Sask. L. R. 204.—CAN.

t. ———.]—Every affirmation as to the character of goods made at

the time of the sale thereof is a warranty, provided it was so intended & was relied upon by the purchaser.—WINTERBURN v. BOON (1913), 23 W. L. R. 556; 3 W. W. R. 1068.—CAN.

opinion the particulars formed no part of the contract between the parties (SCRUTTON, L.J.).—*HARRISON v. KNOWLES & FOSTER*, [1918] 1 K. B. 608; 87 L. J. K. B. 680; 118 L. T. 566; 34 T. L. R. 235; 14 Asp. M. L. C. 249; 23 Com. Cas. 282, O. A.

**528. Time of making statement—Materiality—Simultaneously with conclusion of bargain.]**—In an action on the case, a declaration stating that pltf. bought such wines of deft., & deft., in consideration thereof, then & there warranted them to be merchantable, is good, after verdict; for it shall be intended that the warranty & the contract were made at the same time.—*MEW v. RUSSEL* (1883), 2 Show. 284; 89 E. R. 942.

**529. ———.]**—The general rule is, that whatever a seller represents at the time of a sale is a warranty. A warranty may be either general or qualified.—*WOOD v. SMITH* (1829), 4 C. & P. 45; 5 Man. & Ry. K. B. 124; 8 L. J. O. S. K. B. 50; 172 E. R. 600.

**530. ———.]**—Count stating that, in consideration that pltf., through placing confidence in defts. that they were then acting fairly by pltf. in then recommending him to purchase certain hops at a certain price, purchased of defts. on their said recommendation the said hops at the said price, defts. promised pltf. that they were not abusing his confidence in recommending him to purchase the hops at the said price. Averment that pltf., relying, etc., did then through placing confidence, etc., as before, purchase of defts. on their said recommendation the said hops at the said price, whereof, etc., notice. Breach, that they were abusing his confidence, the hops not being worth the price:—*Held*: the count sufficiently disclosed that the promise was part of the transaction, contemporaneous with the sale; & the consideration was sufficient & the count good.—*WEST v. JACKSON* (1851), 16 Q. B. 280; 20 L. J. Q. B. 240; 16 L. T. O. S. 302; 15 Jur. 990; 117 E. R. 886.

**531. ———.]**—*HOPKINS v. TANQUERAY*, No. 503, *ante*.

**532. ——— Before conclusion of bargain.]**—*CAVE v. COLEMAN*, No. 437, *ante*.

**533. ——— After conclusion of bargain.]**—The declaration stated that heretofore, to wit, on Sept. 29, 1840, in consideration that pltf. at the request of deft. had bought of deft. a certain horse, at a certain price, to wit, £30, deft. promised pltf. that the horse was sound & free from vice:—*Held*: the promise appeared to have been made in respect of a precedent executed consideration; it must be taken to have been an express promise, but that no express promise on such a considera-

tion, though executed at request, could extend beyond the promise which the law would imply while the consideration was executory; at the time of sale the only implied promise was to deliver the horse on request, & after the sale therefore there was no consideration for the subsequent express promise of warranty.—*ROSCORLA v. THOMAS* (1842), 3 Q. B. 234; 2 Gal. & Dav. 508; 11 L. J. Q. B. 214; 6 Jur. 929; 114 E. R. 496.

*Annotations.*—*Reff. Kaye v. Dutton* (1844), 2 Dow. & L. 291; *Tanner v. Moore* (1846), 9 Q. B. 1; *Earle v. Oliver* (1848), 2 Exch. 71; *Elderton v. Emmens* (1848), 6 C. B. 160; *Stindt v. Roberts* (1848), 2 Saund. & C. 212; *Atkinson v. Stephens* (1852), 7 Exch. 567; *Arts v. Orchard* (1860), 6 H. & N. 160. *Mentd. Kennedy v. Broun* (1863), 9 Jur. N. S. 119.

**534. ——— At private inspection previous to public sale.]**—*HOPKINS v. TANQUERAY*, No. 503, *ante*.

**535. Statement accepted by buyer as warranty.]**—Although a person may disclaim against making a warranty of a horse, yet, if he give him a character for a particular quality, as by saying, that he is quiet in harness, & do it in such a manner as reasonably to make an impression on the mind of the buyer, that he is generally quiet in harness, he will be bound by that representation; & if it is not true, an action will lie to recover back the price of the horse.—*HORT v. NEWRY* (LORD) (1823), 1 L. J. O. S. K. B. 237.

**536. Affirmation to stranger—In [hearing of buyer.]**—If a person hearing a representation as to goods being made to a stranger, & afterwards buys the goods, no such representation being made to him at the time, this is not evidence of a warranty.—*HENSHAW v. MORTON* (1847), 8 L. T. O. S. 393.

**537. Both parties agreeing as to statement—Quality of seed.]**—*CARTER v. CRICK*, No. 504, *ante*.

**538. Words of commendation.]**—*WALKER v. MILNER*, No. 500, *ante*.

**539. ———.]**—*OSBORN v. HART*, No. 721, *post*.

### C. Approval by Third Person of Warranted Goods.

**540. Whether approval conclusive of performance of warranty.]**—*Assumpsit* on a contract for sale & delivery by deft. to pltf. of iron rails, to be inspected & certified as then agreed upon between the parties, & to be equal in quality to any rails made in Staffordshire; charging, as breach, that certain rails so delivered by deft. were not equal, etc. Plea, that, by the agreement, the rails were to be inspected & certified as in the count mentioned, viz., to be inspected before delivery by an agent of pltf., who was to be at

**528 i. Time of making statement—Materiality—Simultaneously with conclusion of bargain.]**—*MALCOLM v. CROSS* (1898), 25 R. (Ct. of Sess.) 1089; 35 Sc. L. R. 794.—*SCOT*.

**538 i. Words of commendation.]**—More expressions of commendation by the seller are not representations or warranties.—*ROBERTSON v. MORRIS* (Alta.) (1908), 1 Alta. L. R. 493; 8 W. L. R. 611.—*CAN*.

**538 ii. ———.]**—*ALLIS-CHALMERS-BULLOCK v. WALKER* (1910), 15 W. L. R. 337; 21 Man. L. R. 770.—*CAN*.

**538 iii. ———.]**—*HUTCHISON v. OXENBOULD* (1873), 1 N. Z. Jur. 48.—*N.Z.*

**538 iv. ———.]**—The statement by a vendor of hops to a purchaser, that they are "splendid hops," is merely commendation, & not an express warranty.—*ZOHRAH & NEWMAN v. FULLER* (1884), 3 N. Z. L. R. 210 (S. C.).—*N.Z.*

**a. Estimates—Of quantity.]**—*REILLY*

*v. FINLAY* (1900), 21 N. S. W. L. R. (L.) 100; 16 N. S. W. W. N. 218.—*AUS.*

**b. ———.]**—*PENINSULAR SUGAR CO., LTD. v. HOWLETT*, [1926] 1 D. L. R. 397; [1926] S. C. R. 18.—*CAN*.

**c. ———.]**—Where goods are identified with reference to independent circumstances, & the quantity is named with the qualification of "about" or "more or less," or words of like import, the contract of sale applies to the specific goods, & the naming of the quantity is not regarded as a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it.—*ELLIOTT v. MCKILLIP* (1902), 19 S. C. 350.—*S. AF.*

**d. ——— Of capacity.]**—*LATTER v. BROGDEN* (1879), O. B. & F. 116.—*N.Z.*

**e. Representations as to price paid by vendor.]**—Representations by a

vendor as to the price he paid for an article should be regarded as merely "dealer's talk." *Caveat emptor* applies.—*YOUNG v. McMILLAN* (1894), 40 N. S. R. 52.—*CAN*.

**f. Statement of opinion—By person not in possession of goods.]**—*LILLDAL v. MEOTA RURAL MUNICIPALITY NO. 468*, [1920] 2 W. W. R. 336; 52 D. L. R. 74; 13 Sask. L. R. 254.—*CAN*.

**g. Whether subject-matter of sale material—Sale of engine—Representation as to cost of production of steam.]**—*ROBEY & CO., LTD. v. STEIN & CO.* (1900), 3 F. (Ct. of Sess.) 278; 38 Sc. L. R. 201; 8 S. L. T. 345.—*SCOT*.

### PART III. SECT. 1, SUB-SECT. 2.—C.

**h. Whether approval conclusive of performance of warranty—Approval of interested party.]**—*BROWN v. ALLAN*, Cass. Dig. 2nd ed. 146.—*CAN*.

**k. ———.]**—The maxim that "no man shall be a judge in his own

*Sect. 1.—Conditions and warranties generally: Sub-sect. 2. C., D. & E.; sub-sect. 3. Sect. 2: Sub-sects. 1 & 2.]*

liberty to approve & accept for plffs., as he should think fit, any of the rails, & to certify as he should think fit, to pltf. respecting the same; & that the rails in question were inspected before delivery, & were thereupon approved & accepted, in performance of the agreement, for plffs., by G., their agent, appointed in pursuance of the agreement:—*Held*: a bad plea, as giving no complete answer to the declaration.—*BIRD v. SMITH* (1848), 12 Q. B. 786; 17 L. J. Q. B. 309; 12 L. T. O. S. 104; 12 Jur. 916; 116 E. R. 1065.

*Annotation*:—*Refd.* Weedon v. Woodbridge (1849), 13 Jur. 627.

541. —[—]—The proper construction of an agreement to make a machine "for cutting glue pieces according to drawing, etc., strong & sound workmanship, to the approval of A." is, that the approval of A. is to be as to the strength & workmanship of the machine, not as to its efficiency for cutting glue pieces.—*RIPLEY v. LORDAN* (1860), 2 L. T. 154; 6 Jur. N. S. 1078.

542. —[—]—*COWDY v. THOMAS*, No. 524, *ante*.

543. —[—]—Appls. having committed a breach of contract made by their agents with respect, in regard to delivery to a railway co. of teakwood sleepers reasonably fit for its purposes relied, in defence to an action for damages, on a provision contained therein that the passing by appls. at the port of shipment "is as usual final as regards both measurements & quality," & pleaded that the sleepers in question had been so passed in the impartial & honest exercise of their judgment by two experts employed by them for that purpose:—*Held*: the passing relied on was not within the meaning of the contract. There had been no decision by the experts that the sleepers were in conformity with the contract but merely that they were fit to be sent out as their employers' manufacture.—*BOMBAY BURMAH TRADING CORPN., LTD. v. AGA MAHOMED KHALEEL SHIRAZEE* (1911), L. R. 38 Ind. App. 169, P. C.

544. Approval condition precedent to acceptance of goods.—*GRAFTON v. EASTERN COUNTIES RY. Co.*, No. 480, *ante*.

#### *D. General Warranty and Patent Defects.*

545. Whether buyer protected.]—On an agreement to carry goods at so much per hundred-weight an action will not lie for falsely affirming that they contained a less quantity of hundred-weights than in fact they weighed; for pltf. might have inquired into the truth of the assertion.—*BAYLY v. MERREL* (1615), Cro. Jac. 386; 79 E. R. 331; *sub nom.* *BAILY v. MERRELL*, 3 Bulst. 94.

*Annotations*:—*Consd.* Pasley v. Freeman (1789), 3 Term Rep. 51. *Distd.* Brass v. Maitland (1856), 6 E. & B. 470. *Refd.* Smith v. Chadwick (1884), 9 App. Cas. 187; Nash v. Calthorpe, [1905] 2 Ch. 237. *Mentd.* Derry v. Peek (1889), 14 App. Cas. 337.

546. —[—]—In a contract of sale, even in the case of an express warranty, defects patent & known to the buyer must be taken to be excluded from the warranty. The rule appears to me, *a fortiori*, applicable in the case of an implied

cause" does not apply where both parties agree to abide by the decision of an interested third party.—*SECRETARY OF STATE FOR INDIA v. ARATHOON* (1879), 1 L. R. 5 Mad. 173.—*IND.*

544 i. Approval condition precedent to acceptance of goods.—*PALMER v. NORMAN* (1921), 21 S. R. N. S. W. 809; 38 N. S. W. W. N. 282.—*AUS.*

544 ii. —[—]—*AITCHESON v. COOK*

(1875), 37 U. C. R. 490.—*CAN.*

#### **PART III. SECT. 1, SUB-SECT. 2.—D.**

545 i. Whether buyer protected.]—The seller does not impliedly warrant the articles sold to be free from patent defects, & apart from express or implied warranty, is not liable to remit part of the purchase price, or compensate the purchaser for damages

warranty (*COCKBURN, C.J.*).—*BURGES v. WICKHAM* (1863), 3 B. & S. 669; 33 L. J. Q. B. 17; 8 L. T. 47; 10 Jur. N. S. 92; 11 W. R. 902; 1 Mar. L. C. 303; 122 E. R. 251.

*Annotations*:—*Refd.* Turnbull v. Janson (1877), 36 L. T. 635. *Mentd.* Olapham v. Langton (1864), 5 B. & S. 729; Roadhead v. Mid. Ry. (1867), L. R. 2 Q. B. 412; Williams v. Ayers (1877), 3 App. Cas. 133; The Vortigern, [1899] 1 L. 140; Cantieri Meccanico Brindisino v. Janson (1912), 81 L. J. K. B. 850.

—Sale of horses.]—*See* *ANIMALS*, Vol. II., pp. 261, 262, Nos. 402–406.

#### *E. Authority to Warrant.*

. *See* *AGENCY*, Vol. I., pp. 380–382, 606, Nos. 845–865, 2354, 2355.

#### **SUB-SECT. 3.—BREACH OF CONDITIONS AND WARRANTIES.**

*See* Sect. 19, *post*.

#### **SECT. 2.—STIPULATIONS AS TO TIME.**

##### **SUB-SECT. 1.—IN GENERAL.**

*See* Sale of Goods Act, 1893 (c. 71), s. 10 (1), (2).

547. Whether time essence of contract—Contract for purchase of timber—To be felled.]—*ARK-WRIGHT v. STOVELD*, No. 466, *ante*.

548. —[—]—In absence of stipulation.]—*MARTINDALE v. SMITH*, No. 555, *post*.

549. —[—]—Intention of parties—As disclosed in terms of contract.]—*THAMES SACK & BAG CO., LTD. v. KNOWLES & CO., LTD.*, No. 560, *post*.

550. Punctual delivery of bills of lading to purchaser.]—*SANDERS v. MACLEAN*, No. 557, *post*.

551. Specification to be given within certain time—"Beginning of May"—Given between twelfth & fifteenth thereof.]—Whether or not a term of a contract is a condition precedent must be collected from the provisions of the instrument creating the contract & the circumstances legally admissible in evidence with reference to which it is to be construed.

Defts. agreed to sell & deliver to plffs. 1,000 tons of iron. By the sale note it was provided: "Delivered . . . cost & freight Japan, direct port, specification to be given in the beginning of May. Time of shipping May & June from Antwerp. It was known by both parties that the specification had to be sent from Japan, & in fact, the specification was given in various parts between May 12 & 15. All the iron could be manufactured by defts. in eight days, & opportunities of shipment in May & June were frequent from Antwerp to Japan:—*Held*: "specification to be given in the beginning of May" was not a condition precedent, a breach of which entitled defts. to repudiate the contract, but, even if it was, the giving of the specification between May 12 & 15 was sufficient compliance.—*KIDSTON & Co. v. MONCEAU IRONWORKS Co.* (1902), 86 L. T. 556; 18 T. L. R. 320; 7 Com. Cas. 82.

552. Dating of bills of lading—To be considered evidence of shipment—Shipment within specified time—Bills dated later.]—A contract for the sale

suffered by him, owing to the existence of such defects.—*MULLER v. HOBBS* (1904), 21 S. C. 669.—*S. AF.*

#### **PART III. SECT. 2, SUB-SECT. 1.**

1. Whether time essence of contract—Intention of parties.]—Where in a contract a definite time had been fixed for completion, the ct. will consider whether the true intention of the parties at the



of beans, made in the form adopted by the London Corn Trade Assocn., contained the clause, "Shipment made or to be made, & bill or bills of lading dated or to be dated during Dec. 1909 &/or Jan. 1910." It also contained the clause: "Bill of lading to be considered proof of date of shipment in the absence of evidence to the contrary":—*Held*: the stipulation that the bills of lading were to be dated during Dec. 1909, &/or Jan. 1910, was a condition of the contract, & therefore the buyers were entitled to reject the beans where they were shipped in Jan. 1910, but the bill of lading tendered was dated Feb. 1910.—*Re* GENERAL TRADING CO. & VAN STOLK'S COMMISSIEHANDEL (1911), 16 Com. Cas. 95.

*Annotations*:—*Apld.* *Aron v. Comptoir Wegimont*, [1921] 3 K. B. 435. *Refd.* *Hansson v. Hamel & Horley*, [1922] 2 A. C. 36.

**553. Delivery of notice of appropriation.**—*Resps.* in Rotterdam contracted to buy from *appls.* in Hamburg 6,000 tons of South Russian wheat, the conditions of the contract providing that notice of appropriation with ship's name & date of bill of lading should be given by the shippers to the buyers within seven days from date of bill of lading & that provisional invoice with ship's name & date of bill of lading should be sent by the shippers' London house to the buyers within three days from the arrival of the documents in London. The sellers shipped the wheat at Novorossisk, & within the seven days the sellers sent to the buyers a telegram & confirming letter, which the sellers alleged to be a notice of appropriation, but neither document stated the date of the bill of lading. On the same day the sellers posted to the buyers a provisional invoice which gave the date of the bill of lading, but the provisional invoice was not received by the buyers until after the expiry of the seven days. The buyers contended that there had been no tender in conformity with the contract, & it was found by the appeal committee in an *arbn.* that there had been no good notice of appropriation in the telegram & confirming letter & that the provisional invoice was not intended as a notice of appropriation & that it was a recognised custom that notice of appropriation & provisional invoice should be separate documents, & that therefore the buyers were under no liability to the sellers:—*Held*: even if the provisional invoice constituted a notice of appropriation, yet, as it was not received by the buyers within the contract time, the sellers had not satisfied the contract, & as the custom was not unreasonable & was not inconsistent with the contract, the provisional invoice was not a notice of appropriation, & the award of the appeal committee must be upheld.—*COMPAGNIE CONTINENTALE D' IMPORTATION v. HANDELSVERTRETUNG DER UNION DER S.S.R. IN DEUTSCHLAND* (1927), 44 T. L. R. 10.

#### SUB-SECT. 2.—PAYMENT.

*See* Sale of Goods Act, 1893 (c. 71), s. 10 (1), (2).

**554. Whether time essence of the contract.**—*R.* agreed to supply *W.* with straw, to be delivered at *W.*'s premises, at the rate of three loads in a fortnight, during specified time; & *W.* agreed "to pay *R.* 33s. per load for each load of straw so

delivered on his premises" during the above period. After the straw had been supplied for some time *W.* refused to pay for the last load delivered, & insisted on always keeping one payment in arrear:—*Held*: according to the true effect of the agreement each load was to be paid for on delivery, & on *W.*'s refusal so to pay for them, *R.* was not bound to send any more.—*WITHERS v. REYNOLDS* (1831), 2 B. & Ad. 882; 1 L. J. K. B. 30; 109 E. R. 1370.

*Annotations*:—*Distd.* *Clarke v. Burn* (1866), 14 L. T. 439. *Apld.* *Re Edwards, Ex p. Chalmers* (1872), 42 L. J. Bcy. 2; *Bloomer v. Bernstein* (1874), L. R. 9 C. P. 588; *Freeth v. Burr* (1874), L. R. 9 C. P. 208. *Consd.* *Mersey Steel & Iron Co. v. Naylor, Benzon* (1884), 9 App. Cas. 434. *Refd.* *Franklin v. Miller* (1836), 4 Ad. & El. 599; *Zulueta v. Miller* (1846), 2 C. B. 895; *Bradford v. Williams* (1872), L. R. 7 Exch. 259; *Simpson v. Crippin* (1872), 27 L. T. 546; *Corcoran v. Proser* (1873), 22 W. R. 222; *Rhymney Ry. v. Brecon & Merthyr Tydfil Junction Ry.* (1900), 69 L. J. Ch. 813; *Martin v. Stout*, [1925] A. C. 359. *Mentd.* *Prickett v. Badger* (1856), 1 C. B. N. S. 296; *Unwin v. Clarke* (1866), L. R. 1 Q. B. 417; *Luker v. Dennis* (1877), 7 Ch. D. 227; *Cornwall v. Henson*, [1900] 2 Ch. 298; *Emery Co. v. Wells*, [1906] A. C. 515; *Re Itubel Bronze & Metal Co. & Vos*, [1918] 1 K. B. 315.

**555.** —.]—*Deft.* sold *pltf.* stacks of oats, then on *deft.*'s ground, under a written agreement, by which *pltf.* was to have liberty to leave the stacks on the ground for four months, & was to pay for them in twelve weeks from the agreement. *Deft.*, at the end of the twelve weeks, called on *pltf.* to pay, which he did not do. After the expiration of the twelve weeks, *pltf.* tendered payment, which *deft.* refused to accept. Afterwards *deft.* sold the stacks, which had remained on his ground. In an action of trover, plea, not possessed:—*Held*: *pltf.* was entitled to recover.

For the sale of a specific chattel on credit, though that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the vendor a right of action for the price . . . but that default of payment does not rescind the contract. . . . In sale of chattels, time is not of the essence of the contract unless it is made so by express agreement (*LORD DENMAN, C.J.*).—*MARTINDALE v. SMITH* (1841), 1 Q. B. 389; 1 Gal. & Dav. 1; 10 L. J. Q. B. 155; 5 Jur. 932; 113 E. R. 1181.

*Annotations*:—*Apld.* *Chinery v. Viall* (1860), 5 H. & N. 288. *Refd.* *Page v. Cowasjee Eduljee* (1866), L. R. 1 P. C. 127; *Cohen v. Roche*, [1927] 1 K. B. 169.

**556.** —.]—*LOCKETT v. NICKLIN*, No. 343, ante.

**557.** —.]—Where by the terms of the contract of sale of goods to be shipped payment is to be made in exchange for bills of lading of each shipment the purchaser is bound to pay when a duly indorsed bill of lading, effectual to pass the property in the goods, is tendered to him, although the bill of lading be drawn in triplicate, & all the three are not then tendered or accounted for; & if he refuses to accept & pay, he does so at his own risk as to whether it may turn out to be the fact or not that the bill of lading tendered was an effectual one, or whether there was another of the set which had been so dealt with as to defeat the title of the purchaser as indorsee of the one tendered.

The seller of such goods should make every reasonable exertion to forward the bills of lading to the purchaser as soon as possible after the shipment, but there is no implied condition in such a

time of contracting was to fix a reasonable time or to determine the time essential to the contract.—*BERGL & Co. v. TROTT BROTHERS* (1903), 24 N. L. R. 503.—*S. AF.*

#### PART III. SECT. 2, SUB-SECT. 2.

m. *Whether time essence of contract*—

*Express term of contract.*—*WHELAN v. COUCH, COUCH v. WHELAN* (1878), 26 Gr. 74.—*CAN.*

n. — *Jurisdiction of court.*—Sale of Goods Ordinance, s. 12 (1), does not mean that the ct. is entitled to inquire into the general circumstances of the case & to decide that in such circum-

stances the time for payment ought to be of the essence or that it would be a natural thing for the parties so to agree, but it means that the ct. must discover from the terms of the contract whether the parties did really agree, at least impliedly, that time should be essential.—*HAYDEN v. RUDD* (1922), 66 D. L. R.



**Sect. 2.—Stipulations as to time: Sub-sects. 2 & 3.]**

contract that the bills of lading shall be delivered to the purchaser in time for him to send them forward so as to be at the port of delivery, either before the arrival of the vessel with the goods or before charges are incurred there in respect of them. —**SANDERS v. MACLEAN** (1883), 11 Q. B. D. 327; 52 L. J. Q. B. 481; 49 L. T. 462; 31 W. R. 698; 5 Asp. M. L. C. 160, C. A.

**Annotations:—***Consd.* **Biddell v. Clemens Horst Co.**, [1911] 1 K. B. 934; *Orient Co. v. Brekke & Howlid*, [1913] 1 K. B. 531. *Reid.* **Cederberg v. Borries, Craig** (1885), 2 T. L. R. 201; *Cahn v. Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q. B. 643; *Landauer v. Claven & Speeding*, [1912] 2 K. B. 94; *Arnhold Karberg v. Blythe, Green, Jourdain, Theodor Schneider v. Burgott & Newsam*, [1916] 1 K. B. 495; *Sharpe v. Nosawa*, [1917] 2 K. B. 814; *Guaranty Trust Co. of New York v. Hannay*, [1918] 2 K. B. 623; *Manbre Saccharine Co. v. Corn Products Co.*, [1919] 1 K. B. 198. *Mentd.* **Glasgow Assee. Corp'n. v. Symondson** (1911), 104 L. T. 254.

**558.** —.]—*Resps.* bought from applt. co. 5,000 tons of steel of the co.'s make, to be delivered 1,000 tons monthly, commencing Jan. 1881, payment within three days after receipt of shipping documents. In Jan. the co. delivered part only of that month's instalment, & in the beginning of Feb. made a further delivery. On Feb. 2, shortly before payment for these deliveries became due, a petition was presented to wind up the co. *Resps.* *bonâ fide*, under the erroneous advice of their solr. that they could not without leave of the ct. safely pay pending the petition, objected to make the payments then due unless the co. obtained the sanction of the ct., which they asked the co. to obtain. On Feb. 10 the co. informed *resps.* that they should consider the refusal to pay as a breach of contract, releasing the co. from any further obligations. On Feb. 15 an order was made to wind up the co. by the ct. A correspondence ensued between *resps.* & the liquidator, in which *resps.* claimed damages for failure to deliver the Jan. instalment, & a right to deduct those damages from any payments then due; & said that they always had been & still were ready to accept such deliveries & make such payments as ought to be accepted & made under the contract, subject to the right of set-off. The liquidator made no further deliveries, & brought an action in the name of the co. for the price of the steel delivered. *Resps.* counterclaimed for damages for breaches of contract for non-delivery:—*Held*: upon the true construction of the contract, payment for a previous delivery was not a condition precedent to the right to claim the next delivery; the *resps.* had not, by postponing payment under erroneous advice, acted so as to show an intention to repudiate the contract, or so as to release the co. from further performance. —**MERSEY STEEL & IRON CO. v. NAYLOR, BENZON & Co.** (1884), 9 App. Cas. 454; 53 L. J. Q. B. 497; 51 L. T. 637; 32 W. R. 980, H. L.

**Annotations:—***Consd.* **Soc. Générale de Paris v. Milders** (1883), 49 L. T. 55; *Booth v. Bowron* (1892), 8 T. L. R. 641; *Dickinson v. Fanshawe* (1892), 8 T. L. R. 271; *Ebbw Vale Steel, Iron & Coal Co. v. Blaina Iron & Tinplate Co.* (1901), 6 Com. Cas. 33; *Rhymney Ry. v. Brecon & Merthyr Tydfil Junction Ry.* (1905), 69 L. J. Ch. 813; *Payzu v. Saunders*, [1919] 2 K. B. 581. *Reid.* **Gueret v. Audouy** (1893), 62 L. J. Q. B. 633; *Cornwall v. Henson*, [1900] 2 Ch. 298; *Millar's Karri & Jarrah Co.* (1902) v. *Weddel, Turner* (1908), 100 L. T. 128; *Biddell v. Clemens Horst* (1910), 103 L. T. 661; *Dennis v. Tunnard & Moore* (1911), 56 Sol. Jo. 162; *Velthardt & Hall v. Rylands*

(1917), 116 L. T. 706; *Ertel Bieher v. Rio Tinto Co., Dynamit Act. v. Same*, *Vereingte Konigs & Laurahütte Act. v. Same*, [1918] A. C. 260; *Morris v. Baron*, [1918] A. C. 1; *Bank Line v. Capel*, [1919] A. C. 435; *Bradley v. Newsom*, [1919] A. C. 16; *Martin v. Stout*, [1925] A. C. 359. *Mentd.* **Eberle's Hotels & Restaurant Co. v. Jonas** (1887), 18 Q. B. D. 459; *Pratt v. Inman* (1889), 43 Ch. D. 175; *Sovereign Life Assee. v. Dodd*, [1892] 1 Q. B. 405; *Christie v. Taunton, Delmard, Lane, Re Taunton, Delmard, Lane*, [1893] 2 Ch. 175; *Re Hett, Maylor* (1894), 10 T. L. R. 412; *Re Auriferous Properties* (No. 2), [1898] 2 Ch. 428; *Re Daintrey, Ex p. Mant*, [1900] 1 Q. B. 546; *General Billposting Co. v. Atkinson*, [1909] A. C. 118; *Inverkip S.S. Co. v. Bunge*, [1917] 2 K. B. 193; *Re Rubel Bronze & Metal Co. & Vos.*, [1918] 1 K. B. 315; *Re Lavey, Ex p. The Trustee*, [1920] 1 K. B. 674; *Ruffy-Arnell, etc., Co. v. R.*, [1922] 1 K. B. 599; *Tyldesley U. D. C. v. Leigh R. D. C.* (1925), 23 L. G. R. 243; *Re City Life Assee.*, [1926] Ch. 191.

**559.** —.]—By a contract for the sale of steel timplate bars to be delivered over a period of three months, payment to be made in cash in fourteen days after delivery, it was provided that all payments should be made on due date as a condition precedent to future deliveries. The purchasers having made default in payment on due date:—*Held*: the vendors were justified in unconditionally refusing to make any further deliveries. —**EBBW VALE STEEL, IRON & COAL CO., LTD. v. BLAINA IRON & TINPLATE CO., LTD.** (1901), 6 Com. Cas. 33, C. A.

**560.** —.]—In an agreement for the sale of goods the question whether time is of the essence of the contract will depend on the intention of the parties as disclosed in the terms thereof.

"Ascertained goods," within Sale of Goods Act, 1893 (c. 71), s. 52, are goods the individuality of which has in some way been found out at the time of the contract.

By a sold note dated Sept. 12, 1916, the sellers sold to the buyers ten bales of Hessian bags, all conditions according to the "spot," which meant that the goods were available & ready for delivery—contract form of a certain trade assocn., terms net cash against delivery order on or before Sept. 19, 1916, delivery prompt, rent & insurance free to Sept. 19, 1916. On the same day, but after the sold note was given, the sellers sent to the buyers an invoice for the goods which gave the specific marks & numbers of the bales as 10.30 ex 6782/6806, & stated that the sale was "ex wharf, London." On Sept. 19, no cheque for payment having been received, the sellers wrote to the buyers cancelling the contract. On Sept. 20 the buyers tendered the price, which was refused. On a reference to arbn., it was decided as a fact, so far as it was a question of fact & not of law, that it was a recognised custom in the trade that if the sellers tendered to the buyer an invoice giving specific marks & numbers of the goods, such goods were specifically appropriated to the contract, & were ready for delivery against payment, that if the price was tendered within a reasonable time before notice of resale, the buyer was entitled to delivery of the goods against payment, & that, no such notice having been given, the contract stood. On an award stated in the form of a special case:—*Held*: (1) time was of the essence of the contract to make payment & take delivery, the buyers were in default, & the sellers were entitled to cancel the contract; (2) in any event, the buyers were not entitled to specific performance of the contract, as the goods were not "ascertained" within Sale of Goods Act, 1893 (c. 71), s. 52.—

618; 17 Alta. L. R. 452; [1922] 1 W. W. R. 884.—**CAN.**

*Payment & delivery to be concurrent.* —**MOONEY v. LIPKA** (Sask.), [1926] 4 D. L. R. 647; [1926] 3 W. W. R. 391.—**CAN.**

*p.* — *Waiver by extension of time.* —**BULDEO DASS v. HOWE** (1880), 1 L. R. 6 Cal. 64; 6 C. L. R. 582.—**IND.**

*q.* — *Effect of contract that an act should be*

completed by a fixed date, an extension of the time does not operate as an absolute waiver of that condition, but only substitutes the extended time for the original time. —**STERN & Co. v. MURRAY**, [1908] T. S. 324.—**S. AF.**

THAMES SACK & BAG CO., LTD. v. KNOWLES & CO., LTD. (1918), 88 L. J. K. B. 585; 119 L. T. 287.

Annotation:—As to (2) *Distd. Re Wait*, [1926] Ch. 962.

Payment generally.]—See Part VI., Sect. 4, *post*.

#### SUB-SECT. 3.—SHIPMENT.

See Sale of Goods Act, 1893 (c. 71), s. 10 (1).

561. Whether time essence of contract—Cargo “shipped as per bill of lading”—Goods not all shipped before bill of lading given—Shipment complete at date of contract.]—A. contracted to sell to B. a specific cargo of wheat, described in the bought & sold note as “shipped per *Diletta Mimbella*, as per bill of lading dated Sept. or Oct.,” & which was all on board at the date of the contract:—*Held*: this did not necessarily entitle the buyer to rescind the contract on its turning out that all the wheat was not shipped before the bill of lading was given.—GATTORNO v. ADAMS (1862), 12 C. B. N. S. 560; 142 R. R. 1262.

Annotations:—*Refd.* British Columbia Saw-Mill Co. v. Nettleship (1865), L. R. 3 C. P. 499. *Mentd.* Lloyd v. Guibert (1865), L. R. 1 Q. B. 115.

562. — Shipment in part before time—Whether compliance with condition.]—Defts. employed pltf. as brokers to buy cotton, & received from them this note signed by them as brokers “bought by order & for account of Messrs. Shand & co. at, etc., the following cotton 500 bales June &/or July shipment.” Pltf. had no principal, & in performance of their contract with defts. tendered cotton which they were selling on their own account, of which defts. were ignorant & this cotton, being of May shipment, was refused. Within a reasonable time pltf. tendered other cotton, also on their own account, of June & July shipment, & this cotton also was refused by defts.:—*Held*: assuming a contract of purchase & sale between pltf. & defts., pltf. were not, by declaring cotton of May shipment, estopped from declaring other cotton of June or July shipment in performance of their contract.—TETLEY v. SHAND (1871), 25 L. T. 658; 20 W. R. 206.

Annotation:—*Refd.* Borrowman v. Free & Hollis (1878), 4 Q. B. D. 500.

563. —.]—Deft. contracted for the purchase of a large quantity of Danubian maize “fair average quality of the season & port of shipment when shipped. To be shipped from Danube, etc., by three or more first class vessels. For shipment in June &/or July, 1869, old style, seller’s option,” etc.

In fulfilment of the contract on the part of the seller two cargoes of maize were tendered to deft., the bills of lading for which were dated respectively June 4 & 5, 1869. The loading of these two cargoes was commenced respectively on May 12 & 16, & completed on June 4 & 6; somewhat more than half of each cargo having been put on board in May. There was evidence that grain shipped in May was more likely to damage by heating than grain shipped in June.

It was left to the jury to say whether in their opinion the cargoes in question were “June shipments” in the ordinary business sense of the term; & they found that they were. The judge was of the same opinion, & directed a verdict for pltf.:—*Held*: the conclusion was right.—ALEXANDER

v. VANDERZEE (1872), L. R. 7 C. P. 530; 20 W. R. 871, Ex. Ch.

Annotations:—*Apld.* Ashforth v. Redford (1873), L. R. 9 C. P. 20. *Distd.* Bowes v. Shand (1877), 2 App. Cas. 455; *Sutro v. Hellbut*, Symons (1916), 86 L. J. K. B. 330.

564.

Usage of trade.]—(1) Two contracts each for the sale of 300 tons of rice were made in London. The first contract, which the second exactly followed, was for 300 tons “of Madras rice, to be shipped at Madras, or coast for this port, during the months of Mar. &/or Apr. 1874, per *Rajah of Cochin*. The 600 tons filled 8,200 bags. The vessel arrived at Madras in Feb., & on Feb. 23, 1,780 bags were put on board, & on Feb. 24, a like number; on Feb. 28, 3,560 bags were put on board, & bills of lading were given for those amounts on the days mentioned. A bill of lading for the remaining 1,080 bags was given on Mar. 3, but all, except 50 bags, had been put on board before that day. In an action for refusing to accept the rice, the defence was that it had not been shipped during the months of Mar. &/or Apr.:—*Held*: the contract had not been complied with; its words must be construed in their plain & ordinary sense; evidence of any usage in the particular trade must, to affect their meaning, be very clear & consistent, & such evidence not having been given in this case, pltf. could not recover on the contract.

(2) If an article sold is described, the description amounts to a warranty or a condition precedent that it shall be an article of the kind described (LORD BLACKBURN).

If you contract to sell peas, you cannot oblige a party to take beans. If the description of the article tendered is different in any respect it is not the article bargained for, & the other party is not bound to take it (LORD BLACKBURN).—BOWES v. SHAND (1877), 2 App. Cas. 455; 46 L. J. Q. B. 561; 36 L. T. 857; 25 W. R. 730; 5 Asp. M. L. C. 461, II. L.; *reversg.* S. C. *sub nom.* SHAND v. BOWES, 2 Q. B. D. 112, C. A.; *restd.* (1876), 1 Q. B. D. 470.

Annotations:—As to (1) *Apld.* *Re* General Trading Co. & Van Stolk’s Commissiehandel (1911), 16 Com. Cas. 95. *Consd.* *Re* Sutro & Hellbut, Symons, [1917] 2 K. B. 348; *Aron v. Comptoir Wegimont*, [1921] 3 K. B. 435. *Refd.* *Re* Goodbody & Balfour & Williamson (1899), 5 Com. Cas. 59; *Hartley v. Hymans*, [1920] 3 K. B. 475; *Diamond Alkali Export Corp. v. Bourgeois*, [1921] 3 K. B. 443. As to (2) *Consd.* *Nelson v. Nelson Line (Liverpool)* (No. 3), *Re* Nelson & Nelson Line (Liverpool) (1907), 77 L. J. K. B. 97; *Manbre Saccharine Co. v. Corn Products Co.*, [1919] 1 K. B. 198; *Fisher, Reeves v. Armour*, [1920] 2 K. B. 329; *Taylor v. Bank of Athens, Pinnock v. Same* (1922), 91 L. J. K. B. 776. *Refd.* *The Annie Johnson*, *The Kronprinzessin Margareta*, [1918] P. 154. *Generally, Mentd.* *West Ham Union Grdns. v. St. Matthew, Bethnal Green*, [1896] A. C. 477.

565. — Shipment in part within time—Under two contracts—Partial fulfilment of second contract.]—Deft. entered into two contracts, each of which was for the purchase from pltf. of 4,500 quarters of Russian oats, more or less, “shipment by steamer or steamers during Feb. Should ice at loading port prevent shipment within stipulated time, shipment to be made immediately after re-opening of the navigation.” Pltf. shipped on board one steamer 4,511 quarters to answer the first contract, & 1,139 quarters to answer in part the second contract. Pltf. also shipped on board another steamer a sufficient quantity of oats to complete the second contract. The shipment on the first steamer was made in time; that on the second steamer was made too late:—*Held*: deft. was bound to accept the 1,139 quarters in part fulfilment of

#### PART III. SECT. 2, SUB-SECT. 3.

r. Whether time essence of contract—Shipment in part within time.]—GIBBS BRIGHT & Co. v. ROWAN (1887), 13 V. L. R. 621.—AUS.

t. —.]—A purchase of sugar was made from merchants in Java “for Aug. shipment.” One-fourth part of the whole quantity sold was not shipped till Sept. It was not proved that there

was any materiality or virtue in shipment during Aug.:—*Held*: there had been a non-observance of the plain terms of the contract, such as would entitle the purchasers to rescind it.—

*Sect. 2.—Stipulations as to time: Sub-sects. 4 & 5.]*

WOOD (1851), 16 Q. B. 638; 16 L. T. O. S. 486; 15 Jur. 1123; 117 E. R. 1025.

*Annotation:—Mentd.* Hudson v. Hill (1874), 43 L. J. C. P. 273.

577. —. —.]—NEILL v. WHITWORTH, No. 395, *ante*.

578. —. —.]—PATON & SONS v. PAYNE & CO. (1897), 35 Sc. L. R. 112, H. L.

*Annotation:—Refd.* Hartley v. Hymans, [1920] 3 K. B. 475.

579. —. —.]—THAMES SACK & BAG CO., LTD. v. KNOWLES & CO., LTD., No. 560, *ante*.

580. —. —.]—(1) Under a contract for the sale of goods to be delivered within a certain period of time the buyer's right to require delivery within that period may be waived even after that period has expired; but it would seem that, where the contract is within Sale of Goods Act, 1893 (c. 71), s. 4, the waiver must be evidenced by writing.

(2) Where, after the expiration of the period of delivery fixed by a contract for the sale of goods, the buyer by his letters & conduct leads the seller to entertain the belief that the contract still subsists & to act upon that belief at serious expense to himself, a new agreement may be implied that the period for delivery is extended & that delivery may take place within a reasonable time of which notice is to be given by the buyer to the seller.

By a contract coming within Sale of Goods Act, 1893 (c. 71), s. 4, & duly made in writing, pltf. agreed to sell to deft. 11,000 lb. of cotton yarn, delivery to begin in Sept. 1918, & to be at the rate of 1,100 lb. per week, failure to deliver within the stipulated time to render the contract liable to cancellation by the deft., & incomplete deliveries not to be taken into account. Delivery should have been completed by Nov. 15, 1918. Pltf. delivered no yarn till Oct. 20, 1918, when he delivered 550 lb., & thereafter on various dates from the end of Nov. 1918, to the end of Feb. 1919, he delivered seven further quantities averaging upward of 500 lb. each. During all this period & the early part of Mar. 1919, deft. by his letters complained of the delay & asked for better deliveries, but thereby led pltf. to entertain the belief that the contract still subsisted, & to act upon that belief at expense to himself. On Mar. 13, 1919, deft., having given no previous notice requiring delivery in any reasonable time, wrote to pltf. cancelling the order, & he thereupon refused to take any further quantity of the yarn. Pltf. brought an action against deft. for damages for refusing to take the remainder of the yarn:—*Held*: although time was of the essence of the contract with respect to delivery which should, *prima facie*, have been completed by Nov. 15,

1918, yet deft. by his letters, though written after that date, had waived his right to insist that the period for delivery terminated on that date; deft. was also thereby estopped from alleging that that period terminated on that date; the letters between the parties implied a new agreement that delivery might be made within an extended & reasonable period, of which notice was to be given by deft. to pltf., & as deft. had given no such notice, no period had been fixed within which pltf. should make delivery; & in these circumstances deft. had no right to cancel on Mar. 13, 1919, & pltf. was entitled to damages to be assessed as at that date.—*HARTLEY v. HYMANS*, [1920] 3 K. B. 475; 90 L. J. K. B. 14; 124 L. T. 31; 36 T. L. R. 805; 25 Com. Cas. 365.

*Annotation:—As to* (1) *Consd.* Levey v. Goldberg, [1922] 1 K. B. 688.

581. — *Delivery within particular year.*—By a written contract dated Nov. 26, 1917, resp. firm sold to applt. firm 864 bales of dhotis as specified to be manufactured by named mills, with whom the sellers had contracted for a larger number of bales. The contract provided that the goods "are to be taken delivery of as & when the same may be received from the mills; delivery to be caused to be given in full by Dec. 31, 1918." The sellers delivered only part of the goods, owing to the mills failing to manufacture or deliver to them the balance:—*Held*: the buyers were entitled to recover damages from the sellers; the stipulation as to delivery quoted above did not limit the goods to be delivered to those supplied by the mills in 1918, nor did they make delivery by the mills a condition precedent, & the sellers were not relieved of their obligation by frustration of the contract or by any implied condition.—*HURNANDRAI FULCHAND v. PRAGDAS BUDHSEN* (1922), L. R. 50 Ind. App. 9, P. C.

582. *Delivery on arrival*—Not to exceed given day.]—*ALEWYN v. PRYOR*, No. 385, *ante*.

583. *Evidence of trade usage—Admissibility—Meaning of "during next two months."*—A contract was entered into between pltf. & defts., on June 17, 1872, whereby the latter agreed to supply the former with a certain quantity of puddled iron, "for immediate delivery, or say during the next two months." Defts. did not deliver any iron in June or July, but on Aug. 15 they sent a small portion of iron to pltf., & on Aug. 21 pltf., acting on the notion that under the contract the time for delivery had expired on Aug. 17, wrote to defts., that as the time for delivery had expired, they would receive no more iron, & they afterwards commenced the present action for breach of contract in not delivering the iron on or before Aug. 17.

At the trial the judge received evidence that in

default having been made deft. was entitled to rescind the contract.—*RATNER BROTHERS v. PORTER* (Sask.) (1911), 1 W. W. R. 236.—*CAN.*

m. — *Purchaser to call for delivery—Failure to instruct in time.*—*SHERIORS v. HUGHES* (1918), 42 O. L. R. 608; 14 O. W. N. 121; 43 D. L. R. 297.—*CAN.*

n. —. —. —.]—Where it was distinctly a term of the contract that delivery must be taken in one week, but the purchasers did not notify the vendor of the time & place for delivery until 12 or 13 days:—*Held*: time was of the essence & the vendor was justified in refusing delivery.—*LASHBY v. WALSH* (Sask.) [1920] 1 W. W. R. 1027.—*CAN.*

o. —. —. —.]—*MAYNE v. WATTLE EXTRACT CO., LTD.* (1920), 41 N. L. R. 88.—*S. AF.*

p. — *Where provision for breach—*

*Option to cancel on delay—Delivery by instalments.*—*DOMINION RADIATOR CO., LTD. v. STEEL CO. OF CANADA, LTD.*, [1919] 3 W. W. R. 41; 48 D. L. R. 350 P. C.—*CAN.*

q. —. —. —.]—*Liquidated damages.*—Where parties agree that a breach of the provision as to time of completion is to be compensated by damages, as where there is a stipulation that the contractor is to forfeit a certain sum for each day occupied beyond the time fixed, the provision ceases to be a condition going to the essence of the contract.—*MCGREGOR v. GOLDEN UNITED GOLD-DREDGING CO., LTD.* (1902), 21 N. Z. L. R. 178.—*N.Z.*

r. — *In absence of express stipulation.*—*LEROY PLOW CO. v. CLARK (J.) & SON* (N. B.) (1921), 65 D. L. R. 370.—*CAN.*

t. — *Delivery after breach by*

*purchaser.*—*IMPERIAL LUMBER CO. v. CLEMES & FLUET* (Alta.) (1921), 62 D. L. R. 715.—*CAN.*

a. — *Time important under general conditions.*—*MADDEN v. MCCALLUM* (Alta.), [1923] 3 D. L. R. 41; [1923] 2 W. W. R. 302.—*CAN.*

b. — *Intention of parties.*—Where, in a contract of sale, a definite time has been fixed for delivery, the ct. will consider whether the true intention of the parties at the time of contracting was to fix a reasonable time, or to determine the time as essential to the contract.—*BERGL & CO. v. TROTT BROTHERS* (1903), 24 N. L. R. 503.—*S. AF.*

c. — *Goods for urgent delivery on particular day.*—*NOITE BROTHERS v. KRAMER* (1906), 3 Buch. A. C. 69.—*S. AF.*

d. *Evidence of trade usage—Meaning*

the iron trade a usage or custom prevails whereby the entire months of July & Aug. would be included in the terms "during the next two months":—*Held*: the evidence was properly admissible.—*BISSELL v. BEARD* (1873), 28 L. T. 740.

**584. Excuse for non-observance of condition—Industrial disturbance.**—By a contract in writing dated Feb. 21, 1912, defts. agreed to build a steamer for, & deliver her to pltf. on or before Feb. 28, 1913. The contract contained the following exceptions clause:—"If the steamer is not delivered entirely ready to purchaser at the above-mentioned time, the builders hereby agree to pay to the purchaser for liquidated damages, & not by way of penalty, the sum of £10 sterling for each day of delay & in deduction of the price stipulated in this contract, being excepted only the cause of *force majeure*, &/or strikes of workmen of the building yard where the vessel is being built, of the workshops where the machinery is being made, or at the works where steel is being manufactured, for the steamer, or any works of any subcontractor."

As a result of the universal coal strike of 1912 the works from which defts. obtained their materials for other ships they were building got behindhand; the ship in turn to be built before pltf.'s occupied the berth that was intended to be occupied by pltf.'s much longer than otherwise she would have done, & consequently pltf.'s steamer was late in being laid down. The steamer having been delivered after the contract date, pltf. claimed damages:—*Held*: (1) the general dislocation of the business of defts. & of those from whom they obtained materials operating indirectly on the completion of pltf.'s steamer, by preventing the completion of the vessel prior in turn, constituted a case of *force majeure* within the meaning of the exceptions clause & therefore excused defts. in respect of the delay so caused; (2) delay due to breakdown of machinery was, but delay due to bad weather was not, covered by the exception of *force majeure*.—*MATSOUKIS v. PRIESTMAN & Co.*, [1915] 1 K. B. 681; 84 L. J. K. B. 967; 113 L. T. 48; 13 Asp. M. L. C. 68; 20 Com. Cas. 252.

*Annotation*:—*As to* (2) *Distd.* *Lebeaupin v. Crispin*, [1920] 2 K. B. 714.

**585. — Bad weather.**—*MATSOUKIS v. PRIESTMAN & Co.*, No. 584, *ante*.

**586. — Breakdown of machinery.**—*MATSOUKIS v. PRIESTMAN & Co.*, No. 584, *ante*.

**587. — Failure of business.**—*HURNANDRAI FULCHAND v. PRAGDAS BUDHSEN*, No. 581, *ante*.

**588. Implied extension of time—From conduct of parties.**—*HARTLEY v. HYMANS*, No. 580, *ante*.

#### SUB-SECT. 5.—CLEARANCE.

*See Sale of Goods Act, 1893* (c. 71), s. 10 (1) (2).

**589. Whether time essence of contract—Non-clearance of goods from auction rooms.**—In an action for the non-delivery of goods, it appeared that defts., who were auctioneers, issued printed catalogues, headed "Great Western Railway Co. Catalogue of unclaimed property, etc., which will be sold by auction by Messrs. H. & E., defts., on Tuesday, Nov. 7, & following day. By order of

the directors of the above co., etc." The catalogue contained, amongst others, the following conditions: "The lots to be cleared away, within three days after the sale at the purchaser's expense, etc. If any deficiency shall arise, or from any cause the auctioneer shall be unable to deliver any lot or portion of a lot, then in such case the purchaser shall accept compensation. Upon failure of complying with the above conditions, the money deposited in part payment shall be forfeited. All lots unclaimed within the time aforesaid shall be resold by public or private sale without further notice, & the deficiency made good by the defaulter." Pltf. attended the sale, received a catalogue, bought one of the lots, & paid a deposit. He did not fetch the goods away on Saturday, the last of the three days for clearing, but went for them on the Monday following, when he was told by one of defts. that the lot had been delivered to another person. There was evidence that the lot was seen on Saturday morning in defts.' possession, as if ready for delivery, & that it was usual to delay the delivery of large lots like it till the smaller lots had been delivered. Pltf. having been nonsuited:—*Held*: the condition as to clearing the lot within three days was not a condition precedent to pltf.'s right to claim delivery.—*WOOLFE v. HORNE* (1877), 2 Q. B. D. 355; 46 L. J. Q. B. 534; 36 L. T. 705; 41 J. P. 501; 25 W. R. 728.

*Annotations*:—*Reffd.* *Wood v. Baxter* (1883), 49 L. T. 45; *Rambow v. Howkins*, [1904] 2 K. B. 322; *Manley v. Berkett*, [1912] 2 K. B. 329; *Page v. Sully* (1918), 63 Sol. Jo. 55; *Benton v. Campbell, Parker*, [1925] 2 K. B. 410.

**590. — Alleged impossibility—Perishable goods.**—The general rule is that in a mercantile contract time is of the essence of the contract. In this case it is particularly so, for potatoes are a perishable commodity. The seller cannot leave them in the farmer's hands until they become rotten. It is obvious, then, that in such a contract the time of taking is most material. The purchasers, therefore, not having taken the potatoes before Christmas, failed to perform their part. . . . Pltfs. said that they could not send the boat on account of the frost, but as they had undertaken to send it they could not set up an excuse for not doing so. There was, therefore, a failure on their part to perform the contract, & they are not entitled to maintain the action (*LORD ESHER, M.R.*).—*SHARP v. CHRISTMAS* (1892), 8 T. L. R. 687, C. A.

*Annotation*:—*Consd.* *Hartley v. Hymans*, [1920] 3 K. B. 475.

**591. Vessel to obtain clearance before named date—Certificate of clearance obtained—Though loading not completed.**—Wheat was sold for shipment at Galveston, in the United States, by a specified vessel for Havre, "clearance" to be not later than May 31. A certificate of clearance was obtained on May 28. Part only of the cargo was then on board, the rest being alongside ready to be loaded. The loading was not completed until June 2, when the vessel sailed. By the statute of the United States the master must furnish a manifest of the cargo "on board, whereupon the collector shall grant a clearance." It was, however, customary to grant a clearance before the completion of loading, & such a clearance was valid & effective for all purposes, & entitled the vessel to sail immediately:—*Held*: the vessel

of "as soon as possible."—*BONNER-WORTH Co. v. GEDDES BROTHERS* (1921), 64 D. L. R. 257; 50 O. T. R. 196.—*CAN.*

**c. Implied extension of time—From conduct of parties—Improper rejection of instalment.**—*SCOTCHES & Co., LTD.*

*v. DODS KNITTING Co., LTD.* (1922), 52 O. L. R. 475.—*CAN.*

**f. — Change of goods at request of purchaser.**—*WILSON v. CARLTON SERVICES, LTD.*, [1921] E. D. L. 368.—*S. AF.*

#### PART III. SECT. 2, SUB-SECT. 5.

**g. Whether time essence of contract—Clearance of timber.**—*WOOD & ENGLISH v. NIMPKISH LAKE LOGGING Co.* (1926), 36 B. C. R. 337.—*CAN.*

**Sect. 2.—Stipulations as to time: Sub-sect. 5. Sect. 3: Sub-sect. 1.]**

had obtained a "clearance" within the meaning of the contract, when the certificate of clearance was granted.—**THALMANN v. TEXAS STAR FLOUR MILLS** (1900), 82 L. T. 833; 16 T. L. R. 460; 9 Asp. M. L. C. 87; 5 Com. Cas. 321, C. A.

**SECT. 3.—IMPLIED UNDERTAKINGS AS TO TITLE AND QUIET POSSESSION.**

**SUB-SECT. 1.—TITLE.**

See Sale of Goods Act, 1893 (c. 71), s. 12 (1).

**592. Whether condition as to good title implied—Before Sale of Goods Act, 1893 (c. 71).]**—If a vendor falsely affirm the goods to be his, knowing them to be a stranger's, an action lies for the deceit, though the goods are not reclaimed.—**FURNIS v. LEICESTER** (1618), Cro. Jac. 474; 79 E. R. 404.

**Annotations:—***Refd.* **Cross v. Gardner** (1688), 1 Show. 68; **Pasley v. Freeman** (1789), 3 Term Rep. 51; **Morley v. Attenborough** (1849), 12 L. T. O. S. 532.

**593. ———.]—CROSSE v. GARDNER**, No. 515, ante.

**594. ———.]—An action lies against a person for knowingly selling goods to which he has no title.—TURNER v. BRENT** (1698), 12 Mod. Rep. 245; 88 E. R. 1295.

**595. ———.]—MEDINA v. STOUGHTON**, No. 516, ante.

**596. ———.]—If a person sell goods, & warrant them to the vendee against all persons, it may be assigned as a breach of the covenant, that the vendor, at the time of the sale, had neither the possession nor the property of them.—HACKETT v. GLOVER** (1713), 10 Mod. Rep. 142; 88 E. R. 665.

**597. ——— Title of sheriff.]—The law raises an implied promise in a sheriff selling goods taken in execution, that he does not know that he is destitute of title to the goods. To an action founded on the implied promise that the vendor of goods did not know his title to them was bad, it is no defence that the vendor was a sheriff's auctioneer, & desired pltf. to give him a written notice not to pay over the proceeds, & that pltf. having omitted to give such notice deft. paid over.—PETO v. BLADES** (1814), 5 Taunt. 657; 128 E. R. 849.

**Annotation:—***Refd.* **Baylis v. London (Bp.)**, [1913] 1 Ch. 127.

**598. ——— Purchase of bargain at sheriff's sale.]—Assumpsit by purchaser against vendor of goods, on an alleged warranty that vendor had title to sell; count for money had & received. Plea: non assumpsit. Deft. at a sheriff's sale bought the goods from the sheriff for £18; pltf., who was also at the sale, bought deft.'s bargain of him for £5, & paid him the £23. Deft. paid the sheriff the £18, & the sheriff began to deliver the goods to pltf.; but they were then claimed as not being the property of the execution debtor, & were recovered by the true owner:—Held: there was no implied warranty by pltf. that he had title, nor any failure of consideration; pltf. having paid £23 to deft., not for the goods, but for the right which deft. had acquired by his purchase; & this consideration had not failed.—CHAPMAN v. SPELLER** (1850), 14 Q. B. 621; 19

L. J. Q. B. 239; 15 L. T. O. S. 158; 14 Jur. 652; 117 E. R. 240.

**Annotations:—***Distd.* **Eichholz v. Bannister** (1864), 17 C. B. N. S. 708. *Refd.* **Baguley v. Hawley** (1867), L. R. 2 C. P. 625.

**599. ——— Sale at auction.]—Where pltf., an auctioneer, sold goods under order of deft., who had no right to dispose of them, & the true owner afterwards recovered against pltf.; a declaration in case, which alleged that deft. being possessed of the goods, represented to pltf. that he was entitled to dispose of them; that pltf. in consequence, at deft.'s request, sold them by auction, & after deducting certain charges for his trouble, paid the residue of the proceeds to deft.; that deft. deceived pltf. in this, that he was not at the time of the sale entitled to dispose of the goods; that the true owner afterwards recovered the value of pltf., & that deft. refused to reimburse him:—Held: sufficient after verdict.—ADAMSON v. JARVIS** (1827), 4 Bing. 66; 12 Moore, C. P. 241; 5 L. J. O. S. C. P. 68; 130 E. R. 693.

**Annotations:—***Consd.* **Betts v. Gibbins** (1834), 2 Ad. & El. 57; **Birmingham & District Land Co. v. L. & N. W. Ry.** (1886), 56 L. J. Ch. 956. *Distd.* **Halbroun v. International Horse Agency & Exchange**, [1903] 1 K. B. 270. *Refd.* **Ormrod v. Huth** (1845), 5 L. T. O. S. 268; **Elliot v. Von Glehn** (1849), 13 Q. B. 632; **Morley v. Attenborough** (1849), 18 L. J. Ex. 148; **Robson v. Devon** (1857), 5 W. R. 724; **Dugdale v. Lovering** (1875), L. R. 10 C. P. 196; **Barker v. Furlong**, [1891] 2 Ch. 172; **Leslie v. Reliable Advertising & Addressing Agency**, [1915] 1 K. B. 652. *Mentd.* **Palmer v. Wick & Pulteneytown Steam Shipping Co.**, [1894] A. C. 318; **The Englishman, The Australia**, [1895] P. 212; **Burrows v. Rhodes**, [1899] 1 Q. B. 816; **London Assoc. for Protection of Trade v. Greenlanders**, [1916] 2 A. C. 15; **Weid-Bundell v. Stephens**, [1920] A. C. 956.

**600. ——— Purchase of bargain at auction.]—A boiler, set in brickwork, & capable, if taken to pieces, of being removed without injury to the premises, had been seized & sold, under a distress for a poor rate due from the occupier, & bought at a public auction by deft., & resold by him to pltf. at an advanced price, with notice of the circumstances under which deft. had bought it, pltf. to remove it at their own expense. The mtgees. of the premises upon which the boiler stood having prevented pltf. from carrying it away, pltf. brought an action against deft., relying upon an alleged implied warranty that he had good title to the boiler, & that they should be permitted to remove it:—Held: there was no evidence to justify the jury in finding a warranty as alleged.—BAGULEY v. HAWLEY** (1867), L. R. 2 C. P. 625; 36 L. J. C. P. 328; 17 L. T. 116.

**601. ——— Sale by pretended executor.]—To an action for goods sold, deft. pleaded, as to the sum of £17 15s., parcel, etc., that the same became due from him to pltf. as the price of goods sold, which before & at the time of the sale were part of the estate of A., then lately deceased, who died intestate; that pltf., pretending to be the exor. of A., & not being exor. or administrator, nor having any right or title to the goods, sold the said goods to deft., who believed pltf. to be such exor.; that, after the sale, & before the payment of the said sum of £17 15s. to pltf., to wit, on Dec. 13, 1841, letters of administration of the goods, etc., of A., were granted to G., which G. afterwards, & before the payment of the sum of £17 15s. to wit, on, etc., gave notice of his appointment as such administrator to deft., & requested deft. to pay him the sum of £17 15s.; whereupon deft. did then pay to G. the sum of £17 15s.:—Held: although**

**PART III. SECT. 3, SUB-SECT. 1.**

**h. Whether condition as to good title implied.]—On a contract for the sale of property by which the vendor gives the purchaser to understand that he is the**

owner of the property there is an implied warranty of the vendor's title to the property.—**BUTT v. McDONALD** (1896), 7 Q. L. J. 68.—**AUS.**

**k. ———.]—Pltf. sold to deft. a quan-**

tity of scrap iron which was received by deft. believing it to be the property of pltf., but which proved to be the property of G., by whom it was claimed & to whom it was delivered:—Held:



the plea was informal, in omitting to state that the money was paid before action brought, or before plea pleaded, nevertheless it was substantially a good defence, & therefore, *pltf.* was not entitled to judgment *non obstante veredicto*.—*ALLEN v. HOPKINS* (1844), 13 M. & W. 94; 13 L. J. Ex. 316; 3 L. T. O. S. 204; 153 E. R. 39.

*Annotations*.—*Refd.* Walker v. Mellon (1847) 2 Car. & Kir. 346; Morley v. Attenborough (1849), 3 Exch. 500. *Mentd.* Cobbett v. Grey (1850), 4 Exch. 729; Carlisle v. Whaley (1867), L. R. 2 H. L. 391.

#### 602. Sale of unredeemed pledge.]—

(1) There is no implied warranty of title in the contract of sale of a personal chattel; & in the absence of fraud, a vendor is not liable for a defect of title, unless there be an express warranty, or an equivalent to it, by declaration or conduct.

A warranty may be inferred from usage of trade, or from the nature of the trade being such as to lead to the conclusion that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys, as against all persons; as where articles are bought in a shop professedly carried on for the sale of goods.

A pawnbroker, who sells a chattel as a forfeited pledge, merely undertakes that the subject of the sale is a pledge, & irredeemable, & that he is not cognisant of any defect of title to it.

(2) *Semble*: although, on the sale of a personal chattel, there is no implied warranty of title, so that the vendor would not be liable for a breach of it to unliquidated damages, yet the purchaser may recover back his money as on a consideration that failed, if it be shown that it was the understanding of both parties that the bargain should be put an end to if the purchaser should not have a good title.—*MORLEY v. ATTENBOROUGH* (1849), 3 Exch. 500; 18 L. J. Ex. 148; 12 L. T. O. S. 532; 13 J. P. 427; 13 Jur. 282; 154 E. R. 943.

*Annotations*.—*As to* (1) *Consd.* Sims v. Marryat (1851), 17 Q. B. 281; Collen v. Wright (1857), 8 E. & B. 647; Hall v. Conder (1857), 2 C. B. N. S. 22. *Appl.* Emmerton v. Matthews (1862), 7 H. & N. 586; Eichholz v. Bannister (1864), 17 C. B. N. S. 708; Baguley v. Hawley (1867), L. R. 2 C. P. 625. *Foll.* Richardson v. Crosbie (1876), Turner on Pawnbrokers' Act, 1872, 3rd ed. 66, n. *Consd.* Wood v. Baxter (1883), 49 L. T. 45; Raphael v. Burt (1884), Cab. & El. 325; Benton v. Campbell, Parker, [1925] 2 K. B. 410. *Refd.* Bandy v. Cartwright (1853), 8 Exch. 913; Smith v. Neale (1857), 2 C. B. N. S. 67. *Generally, Refd.* Buddle v. Green (1857), 27 L. J. Ex. 33. *Mentd.* Aiken v. Short (1856), 1 H. & N. 210; Baylis v. London (Imp.), [1913] 1 Ch. 127; *Re* Thellusson, *Ex p.* Abdy (1919), 88 L. J. K. B. 1210.

603. ———.]—*RICHARDSON v. CROSBIE* (1876), Turner on Pawnbrokers' Act, 1872, 3rd ed. 66, n.

*Annotation*.—*Refd.* Calipe v. Thomson (1902), 66 J. P. 313.

604. ———.]—*Sale of fixtures—On assignment of lease.*]—On a contract for the transfer by a lessee of "all his interest in a house, with the fixtures, etc., as held by him," for an entire sum, an action for falsely warranting the fixtures to be the lessee's, held to be maintainable, on evidence that *deft.*, at the time of the agreement, handed *pltf.* an inventory of them; & afterwards, being taxed with selling them, said he "thought they were his."—*SNELL v. BICKLEY* (1860), 2 F. & F. 56, N. P.

605. ———.]—*Sale in open shop or warehouse.*]—In the case of goods sold in an open shop or warehouse, there is an implied warranty on the part of the seller that he is the owner of the goods, & if it turns out otherwise, as, where the goods are claimed by the true owner, from whom they have

been stolen, the buyer may recover back the price as money paid upon a consideration which has failed.—*EICHHOLZ v. BANNISTER* (1864), 17 C. B. N. S. 708; 5 New Rep. 87; 34 L. J. C. P. 105; 11 Jur. N. S. 15; 13 W. R. 96; 144 E. R. 284; *sub nom.* EICOLTZ v. BANNISTER, 12 L. T. 76.

*Annotations*.—*Distd.* Baguley v. Hawley (1867), L. R. 2 C. P. 625. *Consd.* Raphael v. Burt (1884), Cab. & El. 325. *Refd.* Wood v. Baxter (1883), 49 L. T. 45; R. v. Sampson (1885), 62 L. T. 772; Benton v. Campbell, Parker, [1925] 2 K. B. 410.

606. ———.]—*Sale of bonds.*]—The Govt. of the United States in 1865 issued bonds payable to bearer, redeemable at the pleasure of the Govt., after 1870, & payable, at all events, in 1885. When the Govt. wished to redeem any of these bonds, they gave notice to holders by public notification that they would be paid on presentation. After such notice, the bonds notified were called "Called Bonds." These bonds are dealt in England for the purpose of making remittances to America. The course of business is for the seller to supply the buyer with bonds or coupons of railway cos., etc., payable in America at an agreed price, no particular bonds or coupons being specified. It was proved that whenever default was made in payment of the coupons in America, the seller returned the money paid for them, but no evidence was given of any case in which payment of a bond had been refused.

A. sold to B. in accordance with the above course of business certain "Called Bonds," which had been originally stolen from American holders, & payment to B. of the bonds was refused by the American Govt.:—*Held*: there was an implied warranty of title on the sale by A. to B., & B. was entitled to recover from A. the price paid.—*RAPHAEL & SONS v. BURT & Co.* (1884), Cab. & El. 325.

607. ———.]—On the sale of any article the vendor impliedly warrants that it is his to sell.—*EDWARDS v. PEARSON* (1890), 6 T. L. R. 220, C. A.

608. ———.]—*Since Sale of Goods Act, 1893 (c. 71).*]—*Pltf.* bought a motor car from *deft.* & used it for several months. It then appeared that *deft.* had had no title to it, & *pltf.* was compelled to surrender it to the true owner. *Pltf.* sued *deft.* to recover back the purchase-money that he had paid as on a total failure of consideration:—*Held*: notwithstanding that he had had the use of the car the consideration had totally failed, & he was entitled to get the purchase-money back. The use of the car that he had had was no part of the consideration that he had contracted for, which was the property in & lawful possession of the car, whereas what he got was an unlawful possession which exposed him to the risk of an action at the suit of the true owner.

There is no doubt that what the buyer had a right to get was the property in the case, for above Act expressly provides that in every contract of sale there is an implied condition that the seller has a right to sell (*ATKIN, L.J.*).—*ROWLAND v. DIVALL*, [1923] 2 K. B. 500; 92 L. J. K. B. 1041; 129 L. T. 757; 67 Sol. Jo. 703, C. A.

609. ———.]—*Sale of patented article—Validity of patent.*]—A patentee sold a machine made in pursuance of his patent to X.; the machine was held by the Ct. of Appeal to be an infringement of a prior patent belonging to a third

*pltf.* having sold as owner impliedly warranted that he had title to the goods.—*MCFATRIDGE v. ROBB* (1892), 24 N. S. R. (12 L. & G.) 506.—*CAN.*

*LINK v. HUNTER* (1868), 27 U. C. R. 187.—*CAN.*

*m.* ———.]—*BROWN v. COOK-BURN* (1876), 37 U. C. R. 592.—*CAN.*

1. ———.]—*Sale of standing timber.*]—

*n.* ———.]—*Intention of vendor.*]—

A permit issued under the authority of the minister of the interior, under which the purchaser has the right within a year to cut, from the Crown domain, a million feet of lumber, is a contract for the sale of personal



**Sect. 3.—Implied undertakings as to title and quiet possession:** Sub-sects. 1, 2 & 3. **Sect. 4:** Sub-sects. 1 & 2, A.]

person. In an action to recover the price of the machine, X. pleaded that on the sale of the machine there was an implied warranty that the patent was valid, & that he would be able to use the machine. He counterclaimed for the sum which he had to pay for a licence to use the machine, & for damages:—*Held*: in the sale of a patented article there was no such implied warranty, & pltf. was entitled to recover the price of the machine.—*MONFORTS v. MARSDEN* (1895), 12 R. P. C. 266.

*Annotation*:—*Overd. Niblett v. Confectioners' Materials Co.*, [1921] 3 K. B. 387.

**610. ——— Infringement of trade marks.**—(1) A firm who dealt in confectioners' materials agreed in writing to sell condensed milk in tins & of a certain standard at a price including insurance & freight from New York to London. Payment was to be made in cash on receipt of the shipping documents. The buyers received the documents & paid the price. The goods arrived bearing a name or brand which was an infringement of the registered trade mark of certain manufacturers of condensed milk, at whose instance the comrs. of customs detained the goods. The buyers were obliged to remove the name or brand in order to get possession of the goods & could only sell them at a loss without any distinctive mark. In an action by the buyers against the sellers for breach of warranty:—*Held*: defts. had broken the implied condition in Sale of Goods Act, 1893 (c. 71), s. 12 (1), that they had a right to sell the goods; they had broken the implied condition in Sale of Goods Act, 1893 (c. 71), s. 14 (2), that the goods should be of merchantable quality; they had also broken the implied warranty in Sale of Goods Act, 1893 (c. 71), s. 12 (2), that the buyers should have & enjoy quiet possession of the goods.

(2) Defts. alleged that the contract of sale was an oral contract & that one of its terms was that they might deliver milk of several brands one of which was the infringing brand:—*Held*: assuming this to be a term of the contract it was not a circumstance showing a different intention so as to negative the implied condition & warranty in Sale of Goods Act, 1893 (c. 71), s. 12.—*NIBLETT v. CONFECTIONERS' MATERIALS Co.*, [1921] 3 K. B. 387; 90 L. J. K. B. 984; 125 L. T. 552; 37 T. L. R. 653, C. A.

*Annotation*:—*As to* (1) *Expld. & Distd. Sumner, Permain v. Webb*, [1922] 1 K. B. 55.

**611. ——— Circumstance contradicting implied condition.**—*NIBLETT v. CONFECTIONERS' MATERIALS Co.*, No. 610, *ante*.

**612. ——— Sale at auction—Invalid distress.**—Deft., an auctioneer, sold by auction to pltf. a piano which had been seized under a distress warrant for rent in arrear. The warrant was invalid & the piano was claimed from pltf. by the

true owner, & was delivered up to him. In an action by pltf. against deft.:—*Held*: there was no implied warranty of title on the part of deft.—*PAYNE v. ELSDEN* (1900), 17 T. L. R. 161.

— **Sale of animal.**—*See* ANIMALS, Vol. II., pp. 262, 263, Nos. 412–414.

#### SUB-SECT. 2.—QUIET POSSESSION.

*See* Sale of Goods Act, 1893 (c. 71), s. 12 (2).

**613. Whether warranty implied—Before Sale of Goods Act, 1893 (c. 71).**—In covenant for quiet enjoyment of 20 tons of copperas, a breach, *quod non potuit gaudere*, etc. is not good, without showing a lawful disturbance.—*CHANTFLOWER v. PRIESTLY & WATERHOUSE* (1603), Cro. Eliz. 914; 78 E. R. 1135.

**614. ——— Sale of patented article—Infringement of trade mark.**—*NIBLETT v. CONFECTIONERS' MATERIALS Co.*, No. 610, *ante*.

**615. ——— Contrary intention excluding warranty.**—*NIBLETT v. CONFECTIONERS' MATERIALS Co.*, No. 610, *ante*.

#### SUB-SECT. 3.—FREEDOM FROM INCUMBRANCES.

*See* Sale of Goods Act, 1893 (c. 71), s. 12 (3).

#### SECT. 4.—SALES BY DESCRIPTION.

##### SUB-SECT. 1.—WHAT CONSTITUTES SALE BY DESCRIPTION.

*See* Sale of Goods Act, 1893 (c. 71), s. 13.

**616. General rule.**—The expression "contract for the sale of goods by description," in Sale of Goods Act, 1893 (c. 71), s. 13, applies to all cases where the buyer has not seen the goods, but relies solely on the description given by the seller.

Pltf. agreed to sell & deft. to buy a reaping machine, which deft. had never seen, & which pltf. stated to have been new the previous year, & to have been used to cut only 50 or 60 acres. The machine was delivered, & shortly afterwards deft. wrote complaining that it did not correspond with pltf.'s statements. After some further correspondence deft. returned the machine. In an action to recover the price:—*Held*: there was a contract for the sale of goods by description, within Sale of Goods Act, 1893 (c. 71), s. 13, & therefore, by sect. 13, there was an implied condition that the goods should correspond with the description, there had been no acceptance of the machine by deft., within sect. 35, the property had not passed to deft., within sect. 17, & pltf. was not entitled to recover.—*VARLEY v. WHIPP*, [1900] 1 Q. B. 513; 69 L. J. Q. B. 333; 48 W. R. 363; 44 Sol. Jo. 263.

*Annotations*:—*Reid. Harrison v. Knowles & Foster*, [1917] 2 K. B. 606; *Thornett & Fehr v. Beers*, [1919] 1 K. B. 486.

chattels, & such a sale ordinarily implies a warranty of title on the part of the vendor; but if it appears from the facts & circumstances that the vendor did not intend to assert ownership, but only to transfer such interest as he had in the thing sold, there is no warranty.—*ST. CATHARINES MILLING & LUMBER Co. v. R.* (1890), 2 Exch. C. R. 202.—*CAN.*

*o.*—*Knowledge of defect on part of purchaser.*—*TURRIFF v. McHUGH* (1889), 1 Terr. L. R. 186.—*CAN.*

#### PART III. SECT. 3, SUB-SECT. 2.

**p. Whether warranty implied.**—The

vendor guarantees that the vendee shall have undisturbed possession of the thing bought.—*FITZGERALD v. LUCK* (1839), 1 Legge, 118.—*AUS.*

#### PART III. SECT. 4, SUB-SECT. 1.

**616 i. General rule.**—*J. I. CASE THRESHING MACHINE Co. v. FEE* (1909), 10 W. L. R. 70; 2 Sask. L. R. 38.—*CAN.*

**616 ii.**—*There may be a sale of specific goods by description either express or implied. Where any statement made about them amounts to a warranty only, or to a mere repre-*

sentation, the goods, if specific, are not sold by description: but if the goods are described as being of a particular kind, & if the facts show that the buyer relied upon the description, then the description is of the essence of the contract, & the sale is one by description, with the implied condition that the goods sold shall answer the description; & if they do not, the purchaser may reject them.—*BOYS v. RICE* (1908), 27 N. Z. L. R. 1038.—*N.Z.*

**616 iii.**—*BANNERMAN v. BARLOW* (1908), 7 W. L. R. 859.—*CAN.*

**q. Sale by written contract—Sample**

617. Question for jury.]—*ALLAN v. LAKE*, No. 658, *post*.

618. Sale by written contract—Without reference to sample—Exhibition of sample at time of sale immaterial.]—Where goods are sold by a written contract, which contains a description of their quality, without referring to any sample, if the goods do not correspond with that description, it is not material for the vendor to show that they correspond with a sample exhibited at the time of sale to the purchaser, who was well skilled in the commodity, this not being a sale by sample, but by the description in the written contract.—*TYE v. FYNMORE* (1813), 3 Camp. 462; 170 E. R. 1446, N. P.

619. Sale of beer of particular brand.]—*WREN v. HOLT*, No. 782, *post*.

620. Bulk inspected by buyer.]—*ATTWATER v. KINNES* (1906), cited in Benjamin on Sale, 6th ed., 702, H. L.

621. Sale of goods packed in cases.]—By a contract for the sale of a quantity of cases of Australian canned fruits the goods were stated as being in cases containing thirty tins each, payment to be per dozen tins. The sellers tendered the whole quantity ordered, but about one-half of the cases contained twenty-four tins only; the remainder contained thirty tins. The buyers refused on this ground to take delivery & the dispute was referred to arb'n. The umpire found that there was no difference in the market value of the goods whether packed twenty-four or thirty tins in a case, & that the goods tendered were a good delivery:—*Held*: the sale was a sale of goods by description & as the goods contracted to be sold were mixed with goods of a different description the buyers were entitled under Sale of Goods Act, 1893 (c. 71), s. 30 (3), to reject the whole consignment.—*Re MOORE & Co. & LANDAUER & Co.*, [1921] 2 K. B. 519; *sub nom.* *MOORE & Co. v. LANDAUER & Co.*, 90 L. J. K. B. 731; 125 L. T. 372; 37 T. L. R. 452; 26 Com. Cas. 267, C. A.

*Annotations*:—*Reftd.* *Ballantine v. Cramp & Bosman* (1923), 129 L. T. 502; *Barker (Junior) v. Agius* (1927), 43 T. L. R. 751.

622. Bales of goods bearing particular numbers—Whether numbers import warranty.]—Defts. contracted to purchase from pl'tfs. 92 bales of long cloth under a Gujrati contract. The material portion of the translation whereof was as follows: "Bales 15 Pieces No. 732, lbs. 5-14; Bales 29 Pieces No. 736, lbs. 6-11; Bales 10 Pieces No. 139, lbs. 7-4; Bales 38 Pieces No. 141, lbs. 7-10. Total bales 92, ninety-two, of the Hinganghat Rekchand Mills under manufacture. Delivery thereof is to be taken from Aug. to Oct. 1918, as the same may arrive manufactured. These goods are sold to you on the terms of the contract of the merchant from whom we have purchased. No objection shall be taken if these goods arrive late or early by a month. Rate thereof per pound is Rs. 2, 3 annas. 'Shahi' (allowance) is at Re. 1 per bale."

In respect of the bales numbered in the contract 139-141, delivery orders were tendered by pl'tfs. in which the bales appeared numbered 739-741, pl'tfs. explaining, in answer to def't.'s objections,

*exhibited at time of sale.*—*SHARP v. THOMSON*, [1915] V. L. R. 629.—*AUS.*

*R.* ———.]—*RADOVSKY v. CREEDEN & AVERY, LTD.*, [1920] 3 W. W. R. 234; 52 D. L. R. 618; 27 B. C. R. 303.—*CAN.*

*t.* ———.]—*Analysis of sample taken.*—*S. A. OIL & FAT INDUSTRIES, LTD. v. PARK RYNIE WHALING CO.*,

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PART III. SECT. 4, SUB-SECT. 2.—A.

623 i. *General rule—Condition implied.*—*MAGEE v. STREET* (1848), 1 All. 242.—*CAN.*

623 ii. ———.]—*HALLISEY v. MURGRAVE* (1909), 7 E. L. R. 527.—*CAN.*

that the figures inserted in the contract were so inserted by reason of a clerical error & that the goods tendered were in fact the contract goods. Defts., however, refused to accept the goods:—*Held*: the evidence showed that the numbers on the bales gave no warranty or indication of quality or description.—*RAMJIWAN NIVETIA v. BHIKAJI (H.) & Co.* (1924), 1 L. R. 48 Bom. 519, P. C.

#### SUB-SECT. 2.—IMPLIED CONDITION THAT GOODS CORRESPOND WITH DESCRIPTION.

##### A. In General.

*See* Sale of Goods Act, 1893 (c. 71), s. 13.

623. *General rule—Condition implied.*—A. sold to B. for £95 two pictures, representing them as a couple of Poussins, they were, in fact, not originals, but very excellent copies; B. did not offer to return them:—*Held*: if the jury thought that B. believed, from the representation of A., that they were originals, he was not bound to pay the price agreed upon; but, as he kept them, he was liable to pay such sum as the jury might consider to be the value.—*LOMI v. TUCKER* (1829), 4 C. & P. 15; 172 E. R. 586.

624. ———.]—By deed poll, dated Oct. 21, 1836, def't. sold & assigned, etc., to pl'tf. all that ship or vessel called, etc., with her masts, tackle, & appurtenances, & covenanted that he had then good right, full power, & lawful authority, to sell & assign the premises to pl'tf. To a declaration on this covenant, assigning as breaches, (a) that at the time of making the deed poll, the ship was wholly lost & destroyed, & was incapable of being assigned, etc.; (b) that def't. had not at that time good right, etc. to assign her; def't. pleaded, that the ship was not, at the time of making the deed poll, wholly lost & destroyed, etc.; & that def't. had good right to assign her. It appeared in evidence, that at the time of the sale the ship was on a foreign voyage, that, on Oct. 13 she went aground in a storm on the coast of the Prince of Wales's Island, & was left by the crew, who, however, had access to her afterwards; that she lay aground 5 feet above water on one side, & with her masts standing, till the 24th, when the captain called a survey, & by the surveyor's advice, sold her; that her bulk ends were strained, but that if there had been facilities at hand, & it had been a different season of the year, she might have been got off & repaired; & that she had sustained no more damage on Oct. 21 than when she first took the ground:—*Held*: the covenant of def't., that he had power to transfer her as a ship, was not broken.

In the bargain & sale of an existing chattel, by which the property passes, the law does not, in the absence of fraud, imply any warranty of the good quality or condition of the chattel so sold. The simple bargain & sale, therefore, of the ship does not imply any contract that it is then seaworthy, or in a serviceable condition; & the express covenant that def't. had full power to bargain & sell in the manner before-mentioned, does not create any further obligation in this respect. But the bargain & sale of chattel, as

623 iii. ———.]—*KIRKPATRICK v. GOWAN* (1875), 1 I. R. 9 C. L. 521.—*IR.*

623 iv. ———.]—*DICKSON & Co. v. KINCAID* (1808), 15 Fac. Coll. 57.—*SCOT.*

623 v. ———.]—*JAFFE & RITCHIE* (1860), 23 Dunl. (Ct. of Sess.) 242; 33 Sc. Jur. 107.—*SCOT.*

*Sect. 4.—Sales by description: Sub-sect. 2, A. & B.]*

being of a particular description, does imply a contract that the article sold is of that description (PARKE, B.).—*BARR v. GIBSON* (1838), 3 M. & W. 390; 1 Horn & H. 70; 7 L. J. Ex. 124; 150 E. R. 1196.

*Annotations:—*Refd. *Hunter v. Parker* (1840), 7 M. & W. 322; *Strickland v. Turner* (1852), 7 Exch. 208; *Hastie v. Couturier* (1853), 9 Exch. 102; *Jones v. Just* (1868), L. R. 3 Q. B. 197; *Harrison v. Knowles & Foster*, [1917] 2 K. B. 606.

625. —.—.]—*PETERS v. DOBSON* (1846), 8 L. T. O. S. 145.

626. —.—.]—In an action for a breach of warranty upon the sale of Huntingdon elms & English elms, it appeared that there were two descriptions of trees, of very different value, one called Huntingdon elms & English elms simply, & the other Seedling Huntingdons, etc. Those delivered by deft. were of the latter sort; & the jury were asked, upon all the evidence, whether the sale by deft. was of Huntingdon & English elms or of seedlings, & were told to find a verdict for pltf. if they found the former, for deft., if they found the latter, upon *non assumpsit*, & for pltf. upon an issue denying the breach:—*Held*: no misdirection.—*BATES v. RIVERS* (1847), 10 L. T. O. S. 264.

627. —.—.]—*ALLAN v. LAKE*, No. 658, *post*.

628. —.—.]—Where an unstamped bill of exchange purporting to be drawn at Sierra Leone, but really drawn in London, was sold, though without knowledge of the defect on the part of the vendor:—*Held*: there was an implied warranty that it was a foreign bill, & the purchaser was entitled to recover back the money paid for it.—*GOMPERTZ v. BARTLETT* (1853), 2 E. & B. 849; 2 C. L. R. 395; 23 L. J. Q. B. 65; 22 L. T. O. S. 99; 18 Jur. 266; 2 W. R. 43; 118 E. R. 985.

*Annotations:—*Consd. *Hall v. Conder* (1857), 2 C. B. N. S. 22. *Distd.* *Kennedy v. Panama, etc., Mail Co.* (1867), L. R. 2 Q. B. 580. *Refd.* *Gurney v. Womersley* (1854), 4 E. & B. 133; *Aiken v. Short* (1856), 1 H. & N. 210; *Pooley v. Brown* (1862), 11 C. B. N. S. 566; *Azamar v. Casella* (1867), L. R. 2 C. P. 677; *Leeds Bank v. Walker* (1883), 11 Q. B. D. 84; *Raphael v. Burt* (1884), Cab. & Kl. 325; *Re Addlestone Linoleum Co.* (1887), 37 Ch. D. 191. *Mentd.* *Jolliffe v. Baker* (1883), 11 Q. B. D. 255.

629. —.—.]—Upon a sale, not by sample, & without warranty, of merchandise which the buyer has no opportunity of inspecting, it is an implied condition that the article shall fairly & reasonably answer the description in the contract. Thus, where A. bought of B. a cargo of Calcutta linseed, tale quale:—*Held*: the contract was not satisfied by the delivery of linseed, though coming from Calcutta, which contained so large an admixture of other inferior seeds as to have lost its distinctive character of Calcutta linseed.

The jury have in substance found that the linseed in question was so mixed with seeds of a different & inferior description as to have lost its distinctive character & prevent its passing in the market by the commercial name of Calcutta linseed. The purchaser had a right to expect, not a perfect article, but an article which would be saleable in the market as Calcutta linseed. If he got an article so adulterated as not reasonably to answer that description, he did not get what he bargained for (WILLES, J.).—*WIELER v. SCHILIZI* (1856), 17 C. B. 619; 25 L. J. C. P. 89; 139 E. R. 1219; *sub nom.* *WHEELER v. SCHILIZI*, 4 W. R. 209.

*Annotations:—*Consd. *Jones v. Just* (1868), L. R. 3 Q. B. 197; *Randall v. Newson* (1877), 2 Q. B. D. 102. *Refd.* *Josling v. Kingsford* (1863), 13 C. B. N. S. 447; *Brathwaite v. Foreign Hardwood Co.*, [1905] 2 K. B. 543; *Wallis & Wells v. Pratt & Haines* (1910), 79 L. J. K. B. 1013.

630.

—.—.]—In an action for the price of coal sold as Haswell Wallsend without any warranty of quality or size:—*Held*: the only question was whether they were that kind of coal.

—*TAYLOR v. DALTON* (1862), 3 F. & F. 263;

631. —.—.]—A contract for the sale of oxalic acid is not complied with by the delivery of an article which the jury find not in commercial language to come properly within the description of oxalic acid, even where the seller is not the manufacturer of the article, & at the time of contracting expressly declines all responsibility as to the quality, & the buyer has had an opportunity of inspecting it, & no fraud is suggested.—*JOSLING v. KINGSFORD* (1863), 13 C. B. N. S. 447; 1 New Rep. 328; 32 L. J. C. P. 94; 7 L. T. 790; 9 Jur. N. S. 947; 11 W. R. 377; 143 E. R. 177.

*Annotations:—*Apld. *Rook v. Hopley* (1878), 3 Ex. D. 209. *Refd.* *Jones v. Just* (1868), L. R. 3 Q. B. 197; *Mody v. Gregson* (1868), L. R. 4 Exch. 49; *Randall v. Newson* (1877), 2 Q. B. D. 102; *Bostock v. Nicholson*, [1904] 1 K. B. 725; *Wallis & Wells v. Pratt & Haynes*, [1910] 2 K. B. 1003.

632.

—.—.]—On a sale of goods to arrive by a particular ship, the contract being for the sale of a specific thing which the purchaser has no opportunity of examining, there is an implied warranty that the goods when shipped should be reasonably merchantable, & the question whether they were so is a question for the jury.

The maxim *caveat emptor* does not apply to a sale of goods where the buyer has no opportunity of inspection. Pltfs., at Liverpool, entered into a contract with deft. for the purchase of a quantity of Manila hemp, to arrive from Singapore by certain ships. The ships arrived, & the hemp was delivered to pltfs. & paid for; on examination of the bales it was found that they had been wetted through with salt water, & afterwards unpacked & dried, & then repacked & shipped at Singapore. The hemp was not damaged to such an extent as to make it lose its character of hemp, but it was not merchantable. Deft. did not know of the state in which the hemp had been shipped at Singapore. Pltfs. sold the hemp by auction as Manila hemp with all faults, & it realised 75 per cent. of the price which similar hemp would have fetched if undamaged:—*Held*: there was an implied warranty on the part of deft. to supply Manila hemp of the particular quality of which the bales consisted in a merchantable condition; & pltfs. were entitled, as damages, to the difference between what the hemp was worth when it arrived & what the same hemp would have realised had it been shipped in a state in which it ought to have been shipped.—*JONES v. JUST* (1868), L. R. 3 Q. B. 197; 9 B. & S. 141; 37 L. J. Q. B. 89; 18 L. T. 208; 16 W. R. 643.

*Annotations:—*Consd. *Randall v. Newson* (1877), 2 Q. B. D. 102; *Wilson v. Finch Hatton* (1877), 2 Ex. D. 336; *Hall v. Burke* (1886), 3 T. L. R. 165. *Apprvd.* *Drummond v. Van Ingen* (1887), 12 App. Cas. 284. *N.F.* *Thorntett & Fehr v. Beers*, [1919] 1 K. B. 486. *Refd.* *Mody v. Gregson* (1868), L. R. 4 Exch. 49; *Smith v. Baker & Death* (1878), 40 L. T. 261; *Johnson v. Raylton* (1881), 7 Q. B. D. 438; *Jones v. Padgett* (1890), 24 Q. B. D. 650; *Gillespie v. Cheney, Eggar* (1896), 1 Com. Cas. 373; *Hunt v. Richardson*, [1916] 2 K. B. 446; *Manchester Liners v. Rea*, [1922] 2 A. C. 74.

633. —.—.]—*OSBORN v. HART*, No. 721, *post*.

634. —.—.]—*BOWES v. SHAND*, No. 564, *ante*.

635. —.—.]—*VARLEY v. WHIPP*, No. 616, *ante*.

636. Sample exhibited at time of sale.]—*TYE v. FYNMORE*, No. 618, *ante*.

637. —.—.]—It being usual in the sale by auction of drugs, if they are sea damaged, to express it in the broker's catalogue, & drugs which

are repacked, or the packages of which are discoloured by sea water, bearing an inferior price, although not damaged, defts., who had purchased some sea damaged pimento, repacked it, & advertised it in catalogues, which did not notice that it was sea damaged or repacked, but referred it to be viewed, with little facility, however, of viewing it: they exhibited impartial samples of the quality, & sold it by auction:—*Held*: this was equivalent to a sale of the goods, as & for goods that were not sea damaged, & an action lay for the fraud. Though the declaration stated also that it was sold as & for pimento of good quality & condition, whereas the samples showed that it was dusty and of inferior quality, yet the jury having found for plffs., the ct. refused to set aside the verdict.—*JONES v. BOWDEN* (1813), 4 Taunt. 847; 128 E. R. 565.

*Annotation*:—*Consd. Curtis v. Peek* (1864), 13 W. R. 230.

638. —[—]*GARDINER v. GRAY*, No. 790, *post*.

639. —[—]*NICHOL v. GODRS*, No. 818, *post*.

640. —[—]*An action may be maintained by a seed merchant against seed brokers for falsely warranting turnip seed to be rape seed, although it was sold by sample & was of greater value than turnip seed; pltf. having sustained actual loss & injury in his business, having resold it as rape seed & having had to compensate his customers.*—*LOVE-GROVE v. FISHER* (1860), 2 F. & F. 128.

641. —[—]*JOSLING v. KINGSFORD*, No. 631, *ante*.

642. *Instalment contract—Each instalment must correspond with description.*—By a contract dated Dec. 8, 1920, pltf. sold to defts. about 2,500 carcasses of frozen meat weight under 72 lb., average not to exceed 60 lb. Each month's or steamer's contract was to be considered a separate contract, & payment was to be made against documents on arrival of steamer. Pltfs. shipped the carcasses on two vessels, *The W.*, which arrived on Aug. 14, 1921, & *The P. C.*, which arrived in Oct., 1921. *The W.* contained 1092 carcasses of average weight of 62.81 lb. The average weight of the carcasses on *The P. C.* was 53.43 lb. The average weight of the whole quantity shipped was under 60 lb. Defts. rejected the carcasses shipped on *The W.* on the ground that their average weight was over 60 lb., & pltfs. brought an action for damages:—*Held*: defts. were entitled to reject *The W.* shipment. The words average not to exceed 60 lb. constituted part of the description of the goods. The contract was in substance an instalment contract under Sale of Goods Act, 1893 (c. 71), s. 31, as to which each instalment must conform to the description.—*BALLANTINE & CO. v. CRAMP & BOSMAN* (1923), 129 L. T. 502; 16 Asp. M. L. C. 224.

#### *B. Effect of Clause Limiting Seller's Liability.*

643. *Sale "with all faults."*—Where an advertisement for the sale of a ship described her as "a copper-fastened vessel," adding, that the vessel was to be taken with all faults, without any allowance for any defects whatsoever, & it appeared that she was only partially copper-fastened:—*Held*: notwithstanding the words "with all faults, etc." the vendor was liable for the breach of the warranty.—*SHEPHERD v. KAIN* (1821), 5 B. & Ald. 240; 106 E. R. 1180.

*Annotations*:—*Distd. Taylor v. Bullen* (1850), 5 Exch. 779. *Appld. Cowdy v. Thomas* (1876), 36 L. T. 22. *Refd. Budd v. Fairmaner* (1831), 5 C. & P. 78; *Freeman v. Baker* (1833), 5 B. & Ald. 797; *Barr v. Gibson* (1838), 3 M. & W. 390. *Mentd. Hart v. Windsor* (1844), 13 L. J. Ex. 129.

644. —[—]*Deft., being the owner of a ship, advertised its sale, describing it as "The fine teak-built barque Intrepid. A.1, & well adapted*

*for a passenger ship."* Pltf., having read the advertisement, negotiated for its purchase, & a contract was signed by pltf. & deft., whereby the former agreed to buy & the latter to sell "the barque *Intrepid*, as she now lies in the St. Katherine Dock, agreeable to the inventory annexed." The inventory commenced by describing the ship in the same terms as the advertisement: under that was the word "Inventory," which was followed by a list of the ship's stores & tackle; & in the margin, opposite to this list, deft. signed his name. The document concluded thus: "The vessel & her stores to be taken with all faults as they now lie, without any allowance for deficiency in length, weight, quantity, quality, or any defect or error whatever." The vessel proved not to be teak-built, nor of class A.1, nor adapted for a passenger ship:—*Held*: there was no warranty of the vessel.—*TAYLOR v. BULLEN* (1850), 5 Exch. 779; 20 L. J. Ex. 21; 16 L. T. O. S. 154; 155 E. R. 341.

*Annotation*:—*Refd. Harrison v. Knowles & Foster*, [1917] 2 K. B. 696.

645. —[—]*It is a condition precedent to pltfs.' right to recover that the eggs should be Galician eggs. The eggs not being Galician eggs, deft. is under no obligation to accept or pay for them. . . . Even if the misrepresentation is a perfectly innocent one, it goes to the substance of the whole consideration for the agreement of deft., & therefore, justified the refusal of deft. to accept or pay for the 110 cases. . . . Notwithstanding the absence of fraud the stipulation "with all faults," does not cover or apply to a case where the complaint of the purchaser was the non-fulfilment of a condition precedent in not tendering or delivering the articles or the goods of the kind or description contracted for. In such a case the purchaser's complaint would be, not that the goods tendered were faulty, but, whether faulty or not, they were not those he bought. Again, such a stipulation will not cover a case where the goods tendered, although they might be of the nationality stipulated for, have, at the time appointed for delivery, by reason of decay or other damage become worthless, having entirely lost their distinctive character as merchantable commodities but "with all faults" does cover & disentitle the purchaser to reject any number of faulty eggs, so long as there remains a sufficient number of good ones corresponding with the sample to represent a merchantable bulk diminished as it might be by such faulty or worthless ones* (*HAWKINS, J.*).—*PETERS & CO. v. PIANNER* (1895), 11 T. L. R. 169.

646. *Provision for month's trial—Contract for supply of railway engines.*—Pltfs. agreed with defts. to manufacture for them certain locomotive engines, under the following contract: "Each engine & tender to be subject to a performance of a distance of 1,000 miles, with proper loads; during which trial Messrs. S. & co., pltfs., are to be liable to any breakage which may occur, if arising from defective materials or workmanship; but they are not to be responsible for nor liable to the repair of any breakage or damage, whether resulting from collision, neglect, or mismanagement of any of the co.'s servants, or any other circumstances, save & except defective materials or workmanship. The performance to which each engine is to be subjected, to take place within one month from the day on which the engine is reported ready to start; in default of which, Messrs. S. & co. shall forthwith be released from any responsibility in respect of the said engine; the balance to be paid on the satisfactory completion of the trial, & release of Messrs. S. & co.

**Sect. 4.—Sales by description: Sub-sect. 2, B. & C.**  
**(a) & (b).]**

from further responsibility in respect of such engine." It was also agreed, that the fire boxes should be made of copper of the thickness of 7-16ths of an inch, & they were accordingly so made; & that the best materials & workmanship were to be used. The engines were accordingly delivered to defts., & performed the distance of 1,000 miles within the month of trial, but nine months afterwards the fire box of one of them burst, when it was discovered that the copper had been considerably reduced in thickness. In an action against defts. for the balance due from them:—*Held*: they could not give evidence of an inherent defect in the copper, no fraud being alleged, since, by the terms of the contract, the month's trial, if satisfactory, was to release pltf's. from all responsibility in respect of bad materials & bad workmanship.—*SHARP v. GREAT WESTERN RY. Co.* (1841), 9 M. & W. 7; 2 Ry. & Can. Cas. 722; 11 L. J. Ex. 17; 152 E. R. 4.

**647. Allowance clause.**—A. agreed to sell to B. "a cargo of Arracan rice per *Severn*, now on her way to Akyab, via Australia; the cargo to consist of fair average Nicranzi rice, the price of which is to be 11s. 6d. per hundredweight, with a fair allowance for Larong or any other inferior description of rice, if any, but the seller engaged to deliver what is shipped on his account & in conformity with his invoice. The buyer to have the option, agreeably with the terms of the charterparty, of discharging the rice at any good & safe port in the United Kingdom, or on the continent between Havre & Hamburg, both inclusive. This contract to be void provided the above vessel makes the intermediate voyage between Akyab & Calcutta agreeably with the conditions of the charterparty. Payment to be made in cash on the arrival of the vessel at port of call, in full, less freight, at invoice net weights, etc., on handing the buyer bills of lading & charterparty, with the policies of insurance, indorsed to buyer, for full value, which are to be effected in London, with particular average in the usual way, free under 3 per cent. Should the vessel be lost, this contract to be null & void":—*Held*: a warranty on the part of A. to deliver a cargo consisting of "fair average Nicranzi rice" provided neither of the events occurred in which the contract was to be void.—*SIMOND v. BRADDON* (1857), 2 C. B. N. S. 324; 26 L. J. C. P. 198; 3 Jur. N. S. 719; 5 W. R. 594; 140 E. R. 441.

**648.** —]—Defts., through brokers, bought of pltf. "the following cotton, viz. <sup>D.C.</sup><sub>C.</sub> 128 bales, at 25d. per lb., expected to arrive in London per *Cheviot* from Madras. The cotton guaranteed equal to sealed sample in our, the brokers', possession. Should the quality prove inferior to the guarantee, a fair allowance to be made." The sample was of "Long-staple Salem" cotton. The 128 bales marked <sup>D.C.</sup><sub>C.</sub> which arrived by the *Cheviot* contained Western "Madras" cotton. Upon a special case, in which it was stated that there were at the time of the contract different kinds of Madras cotton known in the market, & divided into certain classes & divisions; that the

cotton tendered was not "Long-staple Salem," but a particularly good sample of Western Madras; that "the cotton was therefore not in accordance with the sample"; & that "Western Madras cotton is inferior to Long-staple Salem, & requires machinery for its manufacture different from that which is used for 'Long-staple Salem'":—*Held*: the cotton tendered was not that which defts. bargained for, & they were not bound to accept it with an allowance; for, the allowance clause had reference only to inferiority of quality, & not to difference of kind.—*AZEMAR v. CASELLA* (1867), L. R. 2 C. P. 677; 36 L. J. C. P. 263; 16 L. T. 571; 15 W. R. 998, Ex. Ch.

*Annotation*:—*Refd.* *Smith v. Hughes* (1871), 19 W. R. 1059.

**649. — Condition for notice on receipt of goods.**—In a contract for sale of goods, where the vendor has stipulated with the purchaser that no allowance shall be made for imperfections unless notice be given by first post after receipt of the goods, the stipulation is a general one, & applies to all defects or imperfections whether latent or patent.—*GORTON v. MACINTOSH* (1882), 31 W. R. 232, D. C.

*Annotation*:—*Refd.* *Wimble v. Lillico* (London) (1922), 38 T. L. R. 296.

**650. Express disclaimer of warranty.**—*JOSLING v. KINGSFORD*, No. 631, *ante*.

**651. —**—]—*REYNOLDS v. WRENCH* (1888), 23 L. J. N. C. 27.

**652. —**—]—*HOWCROFT & WATKINS v. PERKINS* (1900), 16 T. L. R. 217.

*Annotation*:—*Consd.* *Wallis & Wells v. Pratt & Haines* (1910), 102 L. T. 108.

**653. — Construction of clause.**—A written contract was made for the sale of "Chilean partly decorticated cotton cake containing approximately 40 per cent. protein & 10 per cent. oil, but no guarantee of quality or analysis is given. The cake to be in sound merchantable condition at time of shipment." The greater part was Chilean partly decorticated cotton cake but was not in sound merchantable condition at the time of shipment & contained only 32.28 per cent. protein & 7.78 per cent. oil. The goods were already afloat when they were sold:—*Held*: the words as to no guarantee did not apply to the words that followed them & therefore the buyers were entitled to damages because the goods were not in good condition at the time of shipment, & the words as to the percentages were words of description within Sale of Goods Act, 1893 (c. 71), s. 13, under which there was an implied condition that the goods must comply with the description & as the variation in percentage was substantial the clause as to no guarantee did not apply & the buyers were entitled to further damages because of the variation from the contract description.—*WIMBLE, SONS & Co. v. LILLICO & SON* (LONDON) (1922), 38 T. L. R. 296.  
*Annotation*:—*Apprvd.* *Baldrey v. Marshall* (1924), 94 L. J. K. B. 208.

**654. — As to latent defects.**—*PINNOCK BROTHERS v. LEWIS & PEAT, LTD.*, No. 1029, *post*.  
**Effect of arbitration clause.**—*See* Part III., Sect. 19, sub-sect. 2, F., *post*.

**C. Meaning of Words of Description.**

**(a) In General.**

**655. "Scott & co.'s" pork.**—A contract to sell mess pork of Scott & co., held to mean mess

(of Sess.) 533; 25 Sc. L. R. 374.—*SCOT*.

**PART III. SECT. 4, SUB-SECT. 2.—**  
**C. (a).**

**a. "In good order & condition."**  
 —*RAINE v. HUGNALL*, [1908] S. R. Q. 120.—*AUS*.

**PART III. SECT. 4, SUB-SECT. 2.—B.**

**6501. Express disclaimer of warranty.**—Where goods are sold by description on a written contract containing a non-warranty clause, there is, nevertheless, an implied condition that the goods shall correspond

to the description. — *PLANTJE v.* 3 W.

[1918] N. Z. L. R. 311.—*N.Z.*

**6503.** —]—*SMITH & SON v. WAITE, NASH & Co.* (1888), 15 R. (Ct.



pork manufactured by Scott & co.—*POWELL v. HORTON* (1836), 2 Bing. N. C. 668; 2 Hodg. 12; 3 Scott, 110; 5 L. J. C. P. 204; 132 E. R. 257.

656. "White military gloves."—*CLARK v. DENT* (1843), 1 L. T. O. S. 230.

657. "Smoke consuming" furnace.]—*CHALTER v. HOPKINS* (1846), cited 2 Car. & Kir. at p. 268.

Annotation:—*Reid. Parsons v. Saxter* (1846), 2 Car. & Kir. 266.

658. "Of the same stock"—Turnip seed.]—Deft., by his agent, sold pltf's. a parcel of turnip seed, & gave the following sold note: "Mr. T. C. R." (deft.'s agent). "Sold to Messrs. B. & co." (pltf's.) "for Mr. C. L." (deft.), "14 quarters Skirving's swedes, at 17s. per bushel." Deft.'s agent afterwards sold pltf's. a second parcel of turnip seed, stating that it was "of the same stock" as the first parcel. No sold note was given; the invoices described it as "24½ quarters of turnips":—*Held*: as to the first parcel, the jury was properly directed that the description of it in the sold note amounted to a warranty that it was Skirving's swedes; as to the second parcel, the statement of def't.'s agent that it was "of the same stock" as the first, on the subsequent sale to pltf's, was evidence for the jury of a warranty that the second parcel also was Skirving's swedes.

Where a vendor gives a description of the properties of an article, it is a question for the jury whether such description is a mere commendation of the article, or a direct representation that he sells it as being the particular article described (*EARLE, J.*).—*ALLAN v. LAKE* (1852), 18 Q. B. 560; 118 E. R. 212.

Annotation:—*Mentd. King v. Accumulative Life Fund & General Assce.* (1857), 6 W. R. 12.

659. "Fair average quality"—Pitch pine timber.]—*JONES v. CLARKE*, No. 668, *post*.

660. "Guaranteed analysis"—Guano.]—*TOWERSON v. ASPATRIA AGRICULTURAL CO-OPERATIVE SOCIETY, LTD.*, No. 796, *post*.

661. "Reasonably free from stone & shale"—Coal.]—Under an agreement dated Oct. 20, 1903, made between applt. coal co. & resp. steel co., each theretofore well acquainted with the business of the other, & the character of the coal won, the former contracted to supply to the latter, on terms & conditions which were specified in great detail, "all the coal that the steel co. may require for use in its works as hereinafter described," with the specific requirement that "all coal furnished shall be freshly mined & of the grade known as run-of-mine, reasonably free from stone & shale, & shall be supplied from such seams then being worked by the coal co. as the steel co. may designate." Other provisions imposed on the steel co. the obligation to purchase all their coal from the coal co. if the latter were ready to supply it, & gave the latter a preferential right to repurchase any excess delivery at less than the cost price. On Nov. 9, 1906, the coal co. notified the steel co. that the contract was at an end owing to their refusal to accept the coal furnished & to be furnished thereunder.

In a suit for a declaration that the coal co. had no power to rescind, for specific performance, or in the alternative for damages, the trial judge found, & their lordships approved the finding—(a) that the coal rejected was unfit for use by the steel co. for its metallurgical purposes, *i.e.*, the manufacture of steel, owing to the large

quantity of sulphur it contained; (b) that it was not reasonably free from stone & shale:—*Held*: (1) on the true construction of the contract, "reasonably free from stone & shale" was irrespective of the method by which that result was obtained, & could not be so restricted as to mean as free from stone & shale as it could be made by reasonable & proper picking, & nothing more; (2) the above obligation to supply related to coal suitable in character for pltf's. works to the extent that the same could be obtained by the reasonable & proper working of their mines. Those works were enumerated in great detail, not, as the terms of the contract & surrounding circumstances showed, for the purpose of measuring the quantity required, but of specifying precisely the uses to which the coal was to be put; & the provision as to repurchase was inexplicable in the case of unsuitable coal.—*DOMINION COAL CO., LTD. v. DOMINION IRON & STEEL CO., LTD. & NATIONAL TRUST CO., LTD.*, [1909] A. C. 293; 78 L. J. P. C. 115; 100 L. T. 245; 25 T. L. R. 309, P. C.

662. "Ex store"—Goods stored in lighters.]—Two firms agreed the one to sell & the other to buy certain cases of tinned meat "ex store Rotterdam." The goods had arrived in Rotterdam some months previously consigned to the seller's agents, & had been landed on to a quay, but owing to the congested state of the port there was no room for them in any warehouse & they had to be stored in lighters, where they were at & after the date of the contract:—*Held*: goods so stored could not be correctly described as sold "ex store," & the buyers were entitled to repudiate the contract.—*FISHER, REEVES & CO. v. ARMOUR & CO.*, [1920] 3 K. B. 614; 90 L. J. K. B. 172; 124 L. T. 122; 36 T. L. R. 800; 64 Sol. Jo. 698; 15 Asp. M. L. C. 91; 26 Com. Cas. 46, C. A.

663. "1920-1921 production"—Pit props.]—*RONAASEN (E. A.) & SON v. EVANS & REID (PITPROPS), LTD.* (1923), 155 L. T. Jo. 322.

Meaning of particular trade terms.]—*See, generally, CUSTOM & USAGES, Vol. XVII., pp. 54 et seq.*

#### (b) Admissibility of Evidence.

*See, generally, DEEDS, Vol. XVII., pp. 325-327, Nos. 1359-1387.*

664. Evidence of trade custom—"Foreign refined rape oil."—*NICHOL v. GODTS*, No. 818, *post*.

665. — Description in broker's catalogue.]—At the trial of an action for not accepting goods, described in a colonial broker's catalogue, def't.'s counsel put the catalogue into the hands of a witness, & without laying foundation for the question by asking whether there was any usage, asked at once whether, from the catalogue, it would be inferred by custom that the goods were sound & in their original packages:—*Held*: the question in that form was inadmissible.—*CURTIS v. PEEK* (1864), 29 J. P. 70; 13 W. R. 230, Ex. Ch.

666. — "Long white" wool.]—On a contract for delivery in this country of a raw material, the produce of a foreign country, & described by certain epithets, in themselves indefinite, as "long," or "white," the buyer is *prima facie* entitled to delivery of the article which passes in the market under that designation; & if the

b. "Stone spar such as potters use."—*BAKER v. LYMAN* (1876), 38 U. C. R. 498.—*CAN.*

c. "Car load of hogs."—*HANLEY v. CANADIAN PACKING CO.* (1894), 21

A. R. 119.—*CAN.*

d. "Tallow."—A contract for "tallow" is fulfilled by the delivery of the fat of sheep, goats, & other animals besides oxen.—*MAHOMED*

*IBRAHIM v. LAUDER* (1864), Cor. 42.—*IND.*

e. "No. 1 export."—*JACOBS v. SCOTT & CO.* (1899), 2 F. (Ct. of Sess.) (H. L.) 70.—*SCOT.*



*Sect. 4.—Sales by description: Sub-sect. 2, C. (b) & D.; sub-sect. 3. Sect. 5: Sub-sect. 1.]*

epithet has acquired in the trade a definite meaning, as, the usual or average length or quality, then the buyer is entitled to an article of such equal or average length or quality; & it is no sufficient excuse for not delivering it, that it is a fair average of the growth of the year. Assuming the meaning of such a contract to be for the jury, the question will be whether it meant an article of a certain, definite quality, with reference to length, colour, or the like, or merely the average growth of the year, & if the contract in its terms, according to their ordinary meaning, imports the former, it is for the seller to adduce evidence to show that they are understood in the latter sense.—*FRITH v. MITCHELL* (1865), 4 F. & F. 464, N. P.

667. — “Pure butter.”]—I cannot believe the parties ever intended that the butter to be supplied should be in the simple state that it left the churn, for the purchaser expected that some preservative would be added so that it should keep good while exposed for sale in her shop. I should myself have had no hesitation in finding that this was pure butter within the meaning of the warranty, but that is a question of fact for the judge & not us to decide. I think that he went wrong in refusing to take into consideration evidence that this expression “pure butter” had a meaning as used between pltf. & defts. in trade apart from its natural meaning (*BIGHAM, J.*).—*ROOSE v. PERRY & Co.* (1900), 44 Sol. Jo. 503, D. C.

—.]—*See, generally, CUSTOM & USAGES, Vol. XVII., pp. 40–50, Nos. 444–553.*

668. Evidence to explain contract—Pitch pine timber—Fair average quality.]—Pltf. sold to deft., “deliverable in London, *ex Ion*, from Savannah, 400 loads of pitch pine timber, at etc., the timber warranted of fair average quality, to be taken of fair average of the cargo.” Evidence was given that pitch pine timber is an article which comes from several parts in Central America, & that pitch pine timber from Darien has more heart in it, being better butted & with fewer holes than that from Savannah:—*Held*: the evidence was admissible to explain the contract, & upon this evidence the contract must be construed as for timber of a fair average of Savannah pitch pine timber.—*JONES v. CLARKE* (1858), 2 H. & N. 725; 27 L. J. Ex. 165.

#### *D. What Constitutes Corresponding with Description.*

669. Character of article must not be altered.]—*WIELER v. SCHILIZZI*, No. 629, *ante*.

670. Description must be substantially satisfied.]—*VERNEDE v. WEBER*, No. 389, *ante*.

671. —.]—*EASTERBROOK v. GIBB* (1887), 3 T. L. R. 401, C. A.

#### **PART III. SECT. 4, SUB-SECT. 2.—D.**

1. Character of article must not be altered.—*Second-hand delivered for new engine.*]—The difference between a new & a second-hand engine is a difference of kind, & the delivery of the latter cannot be a compliance with an order for the former. It is not merely a difference of quality against which the purchaser must protect himself by obtaining a warranty.—*HART-PARR Co. v. JONES*, [1917] 2 W. W. R. 888.—*CAN.*

670 i. Description must be substantially satisfied.]—*MILLER v. GOURIPORE Co., LTD.* (1871). 8 B. L. R. 285.—*IND.*

g. — New motor car slightly repaired—Restoration to original perfect

state.]—The fact that an otherwise new motor car suffers a slight accident to a structural part, which has been promptly repaired so as to restore the car to its originally perfect state, does not prevent the machine from substantially fulfilling the condition that it is a “new” car, & such substantial fulfilment only is necessary.—*LEE v. CHAPIN Co., LTD.* (1915), 9 Alta. L. R. 74; 9 W. W. R. 228; 32 W. L. R. 509; 25 D. L. R. 299.—*CAN.*

h. — Engine described in good running order—Repairs required on delivery.]—*ROBERTS & Co. v. YULE* (1890), 23 R. (Ct. of Sess.) 855; 33 Sc. L. R. 667; 4 S. L. T. 83.—*SCOT.*

k. Article different in any respect — Mixture of fall & spring wheat—In

672. Article different in any respect.]—*BOWES v. SHAND*, No. 564, *ante*.

673. Difference in mode of packing—Affecting quality & description of goods sold.]—Pltf. bought of defts. rice for shipment to America, described as “best Siam rice in double bags.” The bags meant were gunny bags. Defts. delivered rice in single cotton bags, which were thicker & closer made than the gunny bags, & the rice arrived in America in perfect condition, but pltf. refused to accept it because it was not in double bags. It was proved that in New York rice in double bags was more saleable than rice in single bags, & that double bags were considered as essential for transit to the west:—*Held*: the mode of packing affected the quality & description of the thing sold, & therefore pltf. was entitled to reject the rice.—*MAKIN v. LONDON RICE MILL Co., LTD.* (1869), 20 L. T. 705; 17 W. R. 768.

*Annotations*:—*Consd. Heilbutt v. Hickson* (1872), 41 L. J. C. P. 228. *Reid. Re Moore & Landauer*, [1921] 2 K. B. 519.

674. Misdescription as to part.]—*Re MOORE & Co. & LANDAUER & Co.*, No. 621, *ante*.

675. Goods not bearing manufacturer's label—Contract for particular brand.]—When goods are sold as being of a particular brand, the undertaking is that they will bear the label of the manufacturer which is put on the goods of that brand in the ordinary course of business, & there is no obligation on the purchaser to accept goods which do not bear the label, even though the goods have been made by that particular manufacturer.—*SCALIARIS v. OFVERBERG (E.) & Co.* (1921), 37 T. L. R. 307, C. A.

#### **SUB-SECT. 3.—IMPLIED CONDITION AS TO MERCHANTABILITY QUALITY.**

*See Sect. 5, sub-sect. 3, post.*

#### **SECT. 5.—IMPLIED TERMS AS TO QUALITY OR FITNESS.**

##### **SUB-SECT. 1.—GENERAL RULE—CAVEAT EMPTOR.**

676. When rule applies—Sale of specific article.]—*CHANDELOR v. LOPUS*, No. 497, *ante*.

677. —.]—*BARR v. GIBSON*, No. 624, *ante*.

678. —.]—*CHANTER v. HOPKINS*, No. 753, *post*.

679. —.]—With regard to the sale of ascertained chattels, it has been held that there is not any implied warranty of either title or quality, unless there are some circumstances beyond the mere fact of a sale, from which it may be implied (*WILLIAMS, J.*).—*HALL v. CONDER* (1857), 2 C. B. N. S. 22; 26 L. J. C. P. 138; 20 L. T. O. S. 108; 3 Jur. N. S. 386; 5 W. R. 491;

of spring wheat.]—*WETENHALL v. BRACKMAN-KER MILLING Co.* (1909), 10 W. L. R. 100.—*CAN.*

1. — Adding machine—Necessity for extra mental processes not described.]—*AMERICAN CAN Co. v. STEWART* (1915), 50 I. L. T. 132.—*IR.*

675 i. Goods not bearing manufacturer's label—Contract for particular brand.]—*HEDSTROM v. TORONTO CAR WHEEL Co.* (1883), 8 A. R. 627.—*CAN.*

675 ii. —.]—*BERTRAM & Co. v. MASSEY MANUFACTURING Co.* (1888), 15 O. R. 516.—*CAN.*

m. Onus of proof.]—Where there is a concluded contract to purchase an article from a description & delivery has been given or tendered the onus

140 E. R. 318; *subsequent proceedings*, 2 C. B. N. S. 53, Ex. Ch.

67; *Smith v. Neale* (1857), 2 C. B. N. S. 67; *Smith v. Scott* (1859), 6 C. B. N. S. 771; *Elecholtz v. Bannister* (1864), 17 C. B. N. S. 708; *Smith v. Buckingham* (1870), 21 L. T. 819. *Mentd.* *Bessimer v. Wright* (1858), 31 L. T. O. S. 213; *Trotman v. Wood* (1864), 16 C. B. N. S. 479.

680. — — — — —.]—*TURNER v. MUCKLOW*, No. 746, *post*.

681. — — — — —.]—*When buyer had opportunity of examination.*—*EMMERTON v. MATHEWS*, No. 712, *post*.

682. — — — — —.]—I take the true rule to be, that where a specific article is offered for sale, without express warranty, or without circumstances from which the law will imply a warranty—as where, for instance, an article is ordered for a specific purpose—and the buyer has full opportunity of inspecting & forming his own judgment, if he chooses to act on his own judgment, the rule *caveat emptor* applies (*COCKBURN, C.J.*).—*SMITH v. HUGHES* (1871), L. R. 6 Q. B. 597; 40 L. J. Q. B. 221; 25 L. T. 329; 19 W. R. 1059.

*Annotations.*—*Refd.* *Pope & Pearson v. Buenos Ayres New Gas Co.* (1892), 8 T. L. R. 758. *Mentd.* *Ewing & Lawson v. Hanbury* (1900), 16 T. L. R. 140; *Scott v. Coulson*, [1903] 1 Ch. 453; *Lovell & Christinas v. Wall* (1911), 104 L. T. 85; *Pocahontas Fuel Co. (Incorporated) v. Ambatielos* (1922), 27 Com. Cas. 148.

683. — — — — —.]—*OSBORN v. HART*, No. 721, *post*.

684. — — — — —.]—Where the owner of a vessel has an opportunity of examining goods shipped on board of her, no warranty on the part of the owner of the goods can be implied that they are fit to be carried on the voyage.—*ACATOS v. BURNS* (1878), 3 Ex. D. 282; 47 L. J. Q. B. 566; 26 W. R. 624, C. A.

*Annotations.*—*Consd.* *Bamfield v. Goole & Sheffield Transport Co.*, [1910] 2 K. B. 94; *G. N. Ry. v. L. E. P. Transport & Depository*, [1922] 2 K. B. 742. *Apld.* *Transoceanica Soc. Italiana di Navigazione v. Shipton*, [1923] 1 K. B. 31. *Refd.* *Blacker v. Lake & Elliott* (1912), 106 L. T. 533. *Mentd.* *Atlantic Mutual Insce. Co. v. Huth* (1880), 16 Ch. D. 474; *Prager v. Blatspiel Stamp & Heacock*, [1924] 1 K. B. 566.

685. — — — — —.]—*Written contract containing no representation.*—If a representation be made before a sale of the quality of the thing sold, with full opportunity for the purchaser to inspect &

examine the truth of the representation, & a contract of sale be afterwards reduced into writing, in which that representation is not embodied, no action for a deceit lies against the vendor on the ground that the article sold is not answerable to that representation.—*PICKERING v. DOWSON* (1813), 4 Taunt. 779; 128 E. R. 537.

*Annotations.*—*Apld.* *Kain v. Old* (1824), 2 B. & C. 627. *Expld.* *Small v. Attwood* (1831), You. 407. *Refd.* *Dobell v. Stevens* (1825), 5 Dow. & Ry. K. B. 490; *Freeman v. Baker* (1833), 5 B. & Ad. 797; *Cornfoot v. Fowke* (1840), 6 M. & W. 358; *Taylor v. Bullen* (1850), 16 L. T. O. S. 154.

686. — — — — —.]—*Where buyer has no opportunity to inspect.*—*GARDINER v. GRAY*, No. 790, *post*.

687. — — — — —.]—*Patent defect.*—If it be a defect known to the manufacturer, & which cannot be seen on inspection, then he would be bound to point it out to the purchaser; but if it be a patent defect, & one of which the purchaser is as good a judge as the maker, the latter is not bound to point it out, & in that sense the maxim *caveat emptor* applies, as much to the case of a person having an article made for him, as to the purchaser of a thing already in existence.—*HORSFALL v. THOMAS* (1862), 1 H. & C. 90; 2 F. & F. 785; 31 L. J. Ex. 322; 6 L. T. 462; 8 Jur. N. S. 721; 10 W. R. 650; 158 E. R. 813.

*Annotations.*—*Dtd.* *Smith v. Hughes* (1871), L. R. 6 Q. B. 597. *Apld.* *Carlsh v. Salt*, [1906] 1 Ch. 335. *Consd.* *Shepherd v. Croft*, [1911] 1 Ch. 521.

688. — — — — —.]—*JONES v. JUST*, No. 632, *ante*.

689. — — — — —.]—*Where purchaser satisfied without requiring warranty.—If no fraud.*—Where cotton was sold by sample, upon a representation that the bulk corresponded with the sample, but no warranty was taken by the purchaser, & the bulk of the cotton turned out to be of inferior quality, & to have been falsely packed, though not by the seller.—*Held*: an action on the case for a false & fraudulent representation was not maintainable, without showing that such representation was false to the knowledge of the seller, or that he acted fraudulently or against good faith in making it.

The rule which is to be derived from all the cases appears to us to be, that where, upon the sale of goods, the purchaser is satisfied without requiring

is on the purchaser to show that the article does not come up to the warranty.—*DOUGLAS v. MAONAMARA* (1918), 39 N. L. R. 407.—S. AF.

#### PART III. SECT. 5, SUB-SECT. 1.

681 i. *When rule applies.—Sale of specific article.—When buyer had opportunity of examination.*—*FRASER v. SALTER* (1869), 7 N. S. R. 424.—CAN.

681 ii. — — — — —.]—*Pltf.*, being engaged in building a vessel, transferred her, while on the stocks, to deft. by bill of sale, & at the same time gave him a lease of the building yard. The vessel was completed by deft., & was delivered to him & he signed an agreement to pay for her. There was no warranty required or given & no proof of any fraud or misrepresentation on the part of pltf.:—*Held*: as deft. had had the fullest opportunity of inspecting the vessel while in process of completion, & of exercising his own judgment upon her, the maxim *caveat emptor* applied.—*BRUNDIGE v. DELANEY* (1870), 8 N. S. R. (2 G. & O.) 62.—CAN.

681 iii. — — — — —.]—*Pltf.* bought 138 barrels of apples from deft. the letter saying they would be found to be "a good lot." Some of the barrels were opened & the contents examined by pltf., & he might, if he chose, have inferior in quality:—*Held*: as the

sale was not by sample, & pltf. had not been deterred by any act or conduct of deft. from making a full inspection of all the barrels, deft. was not liable on any warranty, express or implied, & the maxim *caveat emptor* applied.—*BORTHWICK v. YOUNG* (1886), 12 A. R. 671.—CAN.

681 iv. — — — — —.]—Where goods are in *casu*, & in a position to be inspected by the buyers, & there being no fraud on the part of the sellers, the maxim *caveat emptor* applies, even though the defect was latent, & could not be discovered on examination.—*HIGGINS v. CLISH* (1901), 34 N. S. R. 135.—CAN.

681 v. — — — — —.]—*ISLAND COLD STORAGE CO. v. MUTH* (P. E. I.) (1922), 70 D. L. R. 449.—CAN.

681 vi. — — — — —.]—*CANADIAN WESTERN COOPERAGE, LTD. v. VERNON GROWERS, LTD.* (1923), 32 B. C. R. 29; [1923] 1 W. W. R. 631.—CAN.

681 vii. — — — — —.]—Where a purchaser has an opportunity of inspecting goods of which the vendor is not the grower or manufacturer, there is no implied warranty on the part of the vendor, except in the case of fraud.—*ZOHRAH & NEWMAN v. FULLER* (1884), 3 N. Z. L. R. 210 (S. C.).—N.Z.

686 i. — — — — —.]—*Where buyer has no opportunity to inspect.*—*EDGAR v. CANADIAN OIL CO.* (1864), 23 U. C. R. 333.—CAN.

686 ii. — — — — —.]—*On a sale of goods when the buyer has no opportunity of inspection, the maxim caveat emptor does not apply.*—*MOORE v. GOODERHAM & WORTS, LTD.* (1887), 14 O. R. 451.—CAN.

686 iii. — — — — —.]—*ETTER v. CANADIAN CAR CO.* (1922), 55 N. S. R. 258.—CAN.

n. — — — — —.]—*Where trade usage.—Description of goods by auctioneer.*—*LANGLEY v. COLBECK & CO.* (1896), 14 N. Z. L. R. 540.—N.Z.

o. — — — — —.]—*Application to sub-purchaser.*—*THOMPSON v. NELLIS* (1855), 4 C. P. 399.—CAN.

—*Exercise of judgment by buyer.*—*sued for damages for breach of an implied warranty, upon the sale of flax by deft. to them, that the flax was fit for seed.—Held*: the action failed, because pltf. purchased the flax on their own judgment.—*ORDWAY v. OLSEN* (1911), 18 W. L. R. 171; 4 Sask. L. R. 343.—CAN.

q. — — — — —.]—*Goods examined by buyer.*—Where the buyer has seen & examined the goods, the rule is "*caveat emptor*" the subject once approved being held unexceptionable, unless fraud shall be proved against the seller.—*MUIR v. GIBB* (1840), 2 Dunl. (Ct. of Sess.) 1227; 15 Fac. Coll. 1313.—SCOT.

r. — — — — —.]—*Latent defects.*—A seller is presumed to warrant that at the time

**Sect. 5.—Implied terms as to quality or fitness: Sub-sects. 1 & 2, A.]**

a warranty, which is a matter for his own consideration, he cannot recover upon a mere representation of the quality of the seller, unless he can show that the representation was bottomed in fraud. If, indeed, the representation was false to the knowledge of the party making it, this would in general be conclusive evidence of fraud; but if the representation was honestly made, & believed at the time to be true by the party making it, though not true in point of fact, we think this does not amount to fraud in law, but that the rule of *caveat emptor* applies, & the representation itself does not furnish a ground of action (TINDAL, C.J.).—ORMROD v. HUTH (1845), 14 M. & W. 651; 14 L. J. Ex. 366; 5 L. T. O. S. 268; 153 E. R. 636, Ex. Ch.

**Annotations:—**Consd. Morley v. Attenborough (1849), 3 Exch. 500. **Apld.** Thom v. Bigland (1853), 8 Exch. 725. **Distd.** Osborn v. Hart (1871), 23 L. T. 851. **Refd.** Collen v. Wright (1857), 7 F. & B. 301; Hall v. Conder (1857), 2 C. B. N. S. 22; Udell v. Atherton (1861), 7 H. & N. 172; Jolliffe v. Baker (1883), 11 Q. B. D. 255. **Mentd.** Collins v. Cave (1859), 4 H. & N. 225; Rogers v. Hadley (1861), 7 Jur. N. S. 733; Dickson v. Router's Telegraph Co. (1877), 2 C. P. D. 62.

**690. — Executory contracts.]**—It may be that the judge is correct in saying that, on a sale of personal property, the maxim of *caveat emptor* does by the law of England apply; but if so there are many exceptions stated in the judgment which well nigh eat up the rule. Executory contracts are said to be excepted; so are sales in retail shops, or where there is a usage of trade: so that there may be difficulty in finding cases to which the rule would practically apply (LORD CAMPBELL, C.J.).—SIMS v. MARRYAT (1851), 17 Q. B. 281; 20 L. J. Q. B. 454; 117 E. R. 1287.

**Annotation:—**Refd. Eichholtz v. Bannister (1864), 17 C. B. N. S. 708.

**691. — Sales in retail shops.]** — SIMS v. MARRYAT, No. 690, *ante*.

**692. — Where trade usage.]** — SIMS v. MARRYAT, No. 690, *ante*.

**SUB-SECT. 2.—FITNESS FOR PARTICULAR PURPOSE.**

**A. In General.**

See Sale of Goods Act, 1893 (c. 71), s. 14 (1).

**693. General rule—Condition of fitness implied.]**—(1) If a person sells a commodity for a specific purpose & with knowledge at the time of sale that it was to be applied to that purpose he must be understood in point of law to warrant that the commodity so sold should be reasonably fit & proper for the service for which it was sold (ABBOTT, C.J.).

(2) Allowing that a person who sells a commodity for a specific purpose shall be taken, by law, to undertake that it was reasonably fit & proper for that purpose, yet pltf's. have not, in

this case, declared on that implied warranty; as the declaration states, in general terms, that defts. undertook that the copper in question should be good, substantial, & serviceable. Now we are all of opinion, that a warranty to that extent, & in those unqualified terms, could not be implied by law out of the circumstances attending the sale of an article like this, of which the defects were equally unknown to both parties at the time of the sale (ABBOTT, C.J.).—GRAY v. COX (1825), 4 B. & C. 108; 1 C. & P. 672; 6 Dow. & Ry. K. B. 200; 107 E. R. 999.

**Annotations:—**As to (1) **Consd.** Jones v. Bright (1829), 5 Bing. 533; Chalmers v. Harding (1868), 17 L. T. 571. **Refd.** Gower v. Von Dadelzen (1837), 4 Scott, 453; Chanter v. Hopkins (1838), 8 L. J. Ex. 14; Brown v. Edgington (1841), Drinkwater, 106; Shepherd v. Pybus (1842), 3 Man. & G. 868; Camac v. Warriner (1845), 1 C. B. 356; Randall v. Newson (1877), 2 Q. B. D. 102. **Generally, Mentd.** Peacock v. Harris (1836), 5 Ad. & El. 449; Jolliffe v. Mundy (1838), 1 Horn & H. 413.

**694. — —.]**—On the sale of an article for a specific purpose there is a warranty by the vendor that it is reasonably fit for the purpose, & there is no exception as to latent undiscoverable defects.

The limitation as to latent defects introduced by *Readhead v. Midland Ry. Co.* (1867), L. R. 4 Q. B. 379, does not apply to the sale of a chattel. Pltf. ordered & bought of deft., a coach builder, a pole for pltf.'s carriage. The pole broke in use & the horses became frightened & were injured. In an action for the damage, the jury found that the pole was not reasonably fit for the carriage, but that deft. had been guilty of no negligence:—**Held:** pltf. was entitled to recover the value of the pole, & also for damage to the horses, if the jury, on a second trial, should be of opinion that the injury to the horses was the natural consequence of the defect in the pole.—RANDALL v. NEWSON (1877), 2 Q. B. D. 102; 46 L. J. Q. B. 259; 36 L. T. 164; 25 W. R. 313, C. A.

**Annotations:—****Apld.** Smith v. Baker & Death (1878), 40 L. T. 261; Frost v. Aylesbury Dairy Co., [1905] 1 K. B. 608. **Consd.** Sumner Permain v. Webb, [1922] 1 K. B. 55. **Refd.** Hyman v. Nye (1881), 6 Q. B. D. 685; Vogan v. Oulton (1898), 79 L. T. 384; Preist v. Last (1903), 89 L. T. 33; Maclean v. Segar, [1917] 2 K. B. 325.

**695. — —.]**—When there is a specific thing there is no implied contract that it shall be reasonably fit for the purpose for which it is hired or is to be used. That is the leading distinction between a contract to supply a thing which is to be made, & which is not specific, & a contract with regard to a specific thing. In the one case you take the thing as it is, in the other the person who is to supply it is bound to supply a thing reasonably fit for the purpose for which it is made (BRETT, L.J.).—ROBERTSON v. AMAZON TUG & LIGHTERAGE Co. (1881), 7 Q. B. D. 598; 51 L. J. Q. B. 68; 46 L. T. 146; 30 W. R. 308; 4 Asp. M. L. C. 496, C. A.

**Annotations:—**Refd. The West Cock, [1911] P. 208. **Mentd.** The Glenmorven, [1913] P. 141; Point Anne Quarries v. The M. F. Whalen (1922), 39 T. L. R. 37.

of sale the thing sold is free from all latent defects.—GOLDBLATT v. SWENEY, [1918] C. P. D. 320.—S. AF. t. — —.]—HARDY v. FAIRBANKS (1847), James, 432.—CAN.

imply a warranty that the article sold shall be free from latent defects unknown to the seller, & without fraud on his part.—**Held:** therefore, upon a sale of garden seeds, there was no implied warranty that the seeds were fresh or otherwise good & fit for growing, & that they would grow, but merely that the packages contained such seeds as the labels indicated, & to a sale of this kind the maxim

*caveat emptor* must apply.—SNEELGROVE v. BRUCE (1866), 16 C. P. 561.—CAN.

b. — — *Defect known to vendor—Liability of vendor for collateral damage.]*—The rule *caveat emptor* only protects the vendor against damages resulting to him by decrease in the actual value of the articles sold, but where there is collateral damage to person or property of the purchaser occasioned by a defect in the article sold, which is known to the vendor, the rule *caveat emptor* will not protect him.—URCH v. STRATHCONA HORSE REPOSITORY (1909), 2 Alta. L. R. 183; 10 W. L. R. 475.—CAN.

c. Reasonable disclosure

*nature of goods by vendor.]*—Where a vendor does not disclose everything, but sufficient to put a cautious purchaser on his guard, the latter must exercise his own judgment.—BRAND v. WIGHT (1813), Hume, 697.—SCOT.

**PART III. SECT. 5, SUB-SECT. 2.—A.**

**693 i. General rule—Condition of fitness implied.]**—There is an implied warranty by a manufacturer of goods for a particular purpose, that they are fit for that purpose.—WILLIAM HAMILTON MANUFACTURING Co. v. VICTORIA LUMBER & MANUFACTURING Co. (1895), 4 B. C. R. 101; *Revsd.* 28 S. C. R. 96.—CAN.

**696. Application of rule—Where latent undiscoverable defects.]**—GRAY v. COX, No. 693, *ante*.

**697. — Sale of carriage pole.]**—RAN-DALL v. NEWSON, No. 694, *ante*.

**698. — Manufactured article.]**—JONES v. BRIGHT, No. 766, *post*.

**699. — ]**—HYDRAULIC ENGINEERING Co., LTD. v. SPENCER & SONS (1886), 2 T. L. R. 554, C. A.

**700. — Barge.]**—Upon the sale of a barge by the builder, a warranty that it is reasonably fit for use is implied, notwithstanding the written agreement of sale is silent as to any warranty. But if the vendee in declaring upon such warranty assigns a breach in the barge not being reasonably fit for use, the breach is not supported by evidence that the barge was not fit for a special purpose for which the builder knew that it was designed. *Qu.*: whether, upon such a sale, a warranty is implied, that the barge is fit for the purpose for which it is known by the builder to be purchased.—SHEPHERD v. PYBUS (1842), 3 Man. & G. 868; 4 Scott, M. R. 434; 11 L. J. C. P. 101; 133 E. R. 1390.

*Annotations*.—*Refd.* Burnby v. Bollett (1847), 16 M. & W. 644; Morley v. Attenborough (1848), 13 Jur. 282; Mallan v. Radloff (1864), 17 C. B. N. S. 589; Jones v. Just (1868), L. R. 3 Q. B. 197; Bristol Tramways, etc. Carriage Co. v. Fiat Motors, [1910] 2 K. B. 831; Manchester Liners v. Rea, [1922] 2 A. C. 74. *Mentd.* Hart v. Windsor (1843), 12 M. & W. 68.

**701. — Printing machine.]**—Pltf., who was the patentee of a two-colour printing machine, obtained from deft. an order for one of his machines upon the following terms, proposed by himself: "I undertake to make you a two-colour printing machine on my patent principle," etc., describing the particulars of it. Deft. had seen one of the machines upon pltf.'s premises, but not in action. The machine put up by pltf. on deft.'s premises was found to be of no use for the purpose for which it was designed. Upon the trial of an action for the price, the judge directed the jury that if the machine was a known ascertained article, & deft. had specifically ordered it, deft. must pay for it whether it answered his purpose or not; but if it was not a known ascertained article, & pltf. undertook to supply such a machine, he could not recover the price of it unless it was reasonably fit for the purpose for which it was designed; & he left it to the jury to say whether the machine in question was constructed according to the patent principle, & also whether it was reasonably fit for the purpose for which it had been ordered:—*Held*: the jury were rightly directed.—OLLIVANT v. BAYLEY (1843), 5 Q. B. 288; 114 E. R. 1257; *sub nom.* OLIPHANT v. BAYLEY, Dav. & Mer. 373; 13 L. J. Q. B. 34; 7 Jur. 1130.

*Annotations*.—*Refd.* Camac v. Warriner (1845), 1 C. B. 355; Parson v. Sexton (1847), 4 C. B. 899; Pott v. Flather (1847), 11 Jur. 735; Mallan v. Radloff (1864), 17 C. B. N. S. 589; Jones v. Just (1868), L. R. 3 Q. B. 197; Baldrey v. Marshall (1924), 94 L. J. K. B. 208.

**702. Furniture.]**—Pltf. being about to furnish a house, deft. agreed to manufacture certain furniture for him; the furniture was sent in & paid for, & subsequently part of it was found defective, & the wood not well seasoned. In an action for breach of this contract, alleging that deft. agreed to make & deliver certain furniture that should be fit & proper to furnish pltf.'s house:—*Held*: the proper question for the jury was, whether or not the furniture was reasonably

fit for the purpose for which it was ordered, reference being had to pltf.'s station; & if pltf. gave a price, which was a fair price, for well-seasoned goods, it would be a breach of contract on which deft. would be liable, if he did not send in well-seasoned goods, although the price had been paid, & a space of six weeks had elapsed before pltf. made any complaint on the subject.

If you order goods to be made by the manufacturer, there is an undertaking on the part of the manufacturer that they shall be reasonably fit for the purpose for which they are ordered. Pltf. gave a fair price, & gave deft. an order to execute according to that price. This has nothing to do with bargaining for specific goods, where the law says there is no warranty. If this order was to be executed by deft. as an upholsterer or manufacturer of furniture for the price of well-seasoned goods, if he did not send well seasoned goods, it was a breach of his contract. The law says that the goods ought to be reasonably fit for the purpose for which they are ordered according to the price paid for them, & as these were not articles ready manufactured, but to be made, we think the verdict ought to stand (PARKIE, B.).—LEWIS v. BUCKLAND (1846), 1 New Pract. Cas. 585; 8 L. T. O. S. 191.

**703. — Sheep wash.]**—In an action by a farmer against a chemist for vending a sheep wash which killed his sheep, the evidence being that it was used according to deft.'s directions, & that the sheep died from the absorption of arsenic contained in it, although it was also shown that the same mixture had been sold by deft. for many years, & used with impunity, the jury were directed that they might find for pltf. upon this evidence; & they having done so, their verdict was sustained.

In such a case the manufacturer warrants that the mixture is reasonably fit for use (WILLES, J.).—BLACK v. ELLIOT (1859), 1 F. & F. 595; 33 L. T. O. S. 228.

**704. — Soap frames.]**—MALLAN v. RADLOFF, No. 751, *post*.

**705. — Hair wash.]**—Pltfs., J. & his wife E., by their declaration alleged that deft., in the course of his business, professed to sell a chemical compound made of ingredients known only to him, & by him represented to be fit to be used for a hair wash, without causing injury to the person using it, & to have been carefully compounded by him; that pltf., J., thereupon bought of deft. a bottle of this hair wash to be used by pltf., E., as deft. then knew, & on the terms that it could be safely so used, & had been carefully compounded. Breach, that deft. had so negligently & unskilfully conducted himself in preparing & selling the hair wash, that by reason thereof it was unfit to be used for washing the hair, whereby pltf. E., who used it for that purpose, was injured:—*Held*: the declaration disclosed a good cause of action.—GEORGE v. SKIVINGTON (1869), L. R. 5 Exch. 1; 39 L. J. Ex. 8; 21 L. T. 495; 18 W. R. 118.

*Annotations*.—*N.F.* Blacker v. Lake & Elliot (1912), 106 L. T. 533. *Refd.* Cunningham v. G. N. Ry. (1883), 49 L. T. 392; Heaven v. Pender (1883), 11 Q. B. D. 503; Cann v. Willson (1888), 39 Ch. D. 39; Clarke v. Army & Navy Co-op. Soc., [1903] 1 K. B. 155; Earl v. Lubbock (1904), 74 L. J. K. B. 121; Bates v. Batey (1913), 82 L. J. K. B. 963; White v. Steadman, [1913] 3 K. B. 340. *Mentd.* Francis v. Cockrell (1870), L. R. 5 Q. B. 501; Cavalier v. Pope, [1906] A. C. 428.

**6961. Application of rule—Where latent undiscoverable defects.]**—SAYRE & Co. v. RHODES, CURRY & Co. (1909), 39 N. B. R. 150.—CAN.

**d. — Manufactured article—En-**

—HART-PARR Co. v. EBERLE (Sask.) (1910), 13 W. L. R. 263; *affd.* 15 W. L. R. 564.—CAN.

**e. — Threshing machine.]**—CUSHMAN MOTOR WORKS v. LAING,

[1921] 2 W. W. R. 206; 56 D. L. R. 697; 60 S. C. R. 649.—CAN.

**f. — Casks for shipment.]**—PALMER v. COHEN (1862), 1 Hyde, 123.

is he liable, though the market is within the city of London, to an action upon 14 & 15 Vict. c. xci, s. 52.

The undoubted general law is, that, in the absence of all fraud, if a specific article be sold, the buyer having an opportunity of examining & selecting, the rule *caveat emptor* applies (POLLOCK, C.B.).—*EMMERTON v. MATHEWS* (1862), 7 H. & N. 586; 31 L. J. Ex. 139; 5 L. T. 681; 26 J. P. 566; 8 Jur. N. S. 61; 10 W. R. 346; 158 E. R. 604. Annotations:—*Fold*, *Smith v. Baker & Death* (1878), 40 L. T. 261. *Refd.* *Turner v. Mucklow* (1862), 6 L. T. 690; *Jones v. Just* (1868), L. R. 3 Q. B. 197; *Beer v. Walker* (1877), 25 W. R. 880; *Ward v. Burnett* (1877), 36 L. T. 511; *Ward v. Hobbs* (1877), 2 Q. B. D. 331; *Wren v. Holt* (1903), 72 L. J. K. B. 340.

713. [\_\_\_\_\_]—A salesman who sells in a public market meat which has no defect discoverable by an ordinary inspection, but which is afterwards found to be unfit for human food, to a purchaser who selects it himself, does not impliedly warrant that the meat is good, & is not liable to refund the price to the purchaser.—SMITH v. BAKER, SON & DEATH (1878), 40 L. T. 261. D. C.

*Annotation* :—**Refd.** Wren v. Holt (1903), 72 L. J. K. B. 340.

714. ——— Rabbits.] = R., a. wholesale

714. \_\_\_\_\_ Rabbits.] = B., a wholesale provision dealer in London contracted to send

provision dealer in London, contracted to send weekly from London by railway to W., a retail tradesman at Brighton, a quantity of Ostend rabbits, the cost of the railway carriage as well as the price of the rabbits being paid by W.:—*Held*: there was an implied warranty by B., that the rabbits should be fit for human food, not only when delivered at the railway station in London, but when in the ordinary course of transit they should reach W. at Brighton, & until he should have had there a reasonable opportunity of dealing with them in the usual course of business.—*BEER v. WALKER* (1877), 46 L. J. Q. B. 677; 37 L. T. 278; 41 J. P. 728; 25 W. R. 880.

**Refd.** *Smith v. Baker & Deeth* (1878), 40 L. T. 261;  
*Burrows v. Smith* (1894), 10 T. L. R. 246.

715. — — — [Partridges.] — On a sale of partridges there is an implied warranty that the birds are fit for food.—BURROWS v. SMITH (1894), 10 T. L. R. 246.

716. — **Product of earth — Coal.**] — Where the product of the earth is the subject of a contract, the law will not raise any such implied warranty as that which follows on the sale of manufactured articles.

The owner of a coal mine, knowing A. to be the chairman of a steam navigation co., placed in his hands a printed paper containing certain statements regarding the character of coals of such mine, & highly commended his coals in general terms. In an action on a contract that the coals were fit for steam navigation:—*Held*: the paper ought not to be incorporated into the terms of the contract as it was only a representation of the general character of the coal mine, & did not amount to any contract that the particular coals then sold partook of that character.—*PACIFIC STEAM NAVIGATION CO. v. LEWIS* (1846), 8 L. T. O. S. 319; *subsequent proceedings* (1847), 16 M. & W. 783.

717. — — — — —.]—DOMINION COAL CO.,  
LTD. v. DOMINION IRON & STEEL CO., LTD. &  
NATIONAL TRUST CO., LTD., No. 661, *ante*.

718. — — Limestone.]—Pltfs., who were the owners of limestone quarries, had for some

710. — **Article of food.**]—Where a person sells an article over the counter, he impliedly represents that it is unadulterated.—**FITZPATRICK v. KELLY** (1873), L. R. 8 Q. B. 337; 42 L. J. M. C. 132; 28 L. T. 558; 38 J. P. 55; 21 W. R. 681.

**Annotations:—***Reid v. Pope* (1874), L. R. 9 C. P. 499; *Roberts v. Egerton* (1874), 30 L. T. 633; *Dyke v. Gower*, [1892] 1 Q. B. 220; *Sherras v. De Rutzen*, [1895] 1 Q. B. 918.

711. — — Troop stores.] — BIGGE v. PARKINSON, No. 908, *post*.

**712. ——— Meat sold in public market.]—** A salesman who sells, in a public market, meat which is afterwards found to be unfit for human food, but which he had no means of knowing, or reason to suspect, was other than good & wholesome meat, is not liable to an action upon an implied warranty, or for money had & received : nor

7101. — *Article of food.*—SIMS  
PACKING CO., LTD. v. CORKUM &  
RITCHEY, LTD. (N. S.) (1920), 53 D. L. R.  
415.—CAN.

*For use in steel works.*—DOMINION STEEL CO. v. DOMINION COAL CO., C. R., [1909] A. C. 64; 6 E. L. R. 187; [1909] A. C. 293; 100 L. T. 245.—CAN.

market—Cheese—Whether reasonable fitness or first quality implied.]—GERMAN BAY CO-OPERATIVE DAIRY CO., LTD. v. SCOTT (1901), 20 N. Z. L. R. 475.—N.Z.



years before Dec. 1881, supplied limestone to defts., who owned iron smelting works, from a certain quarry. This quarry was known to be a second-grade quarry in which were beds of limestone of varying quality. In Dec. 1881, defts. agreed to obtain from the quarry & from no other place, so long as plffs. should supply the same, all the limestone they should from time to time require for the smelting & other purposes of their works, & plffs. agreed to supply from the quarry all the limestone so required by defts.:—*Held*: plffs. were bound to supply limestone reasonably fit for use in defts.' works, which were known to be iron smelting works, & in determining what was reasonable fitness the fact that the limestone was to come from a particular quarry, which was known to be a second-grade quarry, & from which defts. had for some years before the date of the contract taken limestone, must be taken into consideration.—*STRONGITHARM v. NORTH LONSDALE IRON & STEEL CO., LTD.* (1905), 21 T. L. R. 357, C. A.

**719. — Purchase for export to special market.—Whisky.**—A co. of merchants ordered, & a co. of distillers agreed to furnish, a cargo of whisky to be coloured like rum for the African market. It was stipulated that the colouring matter should be harmless. The stipulation was disregarded. The whisky produced effects alarming & startling though not shown to be actually deleterious. It consequently proved unmarketable:—*Held*: the distillers were liable in damages.

The article has been sold for a specified purpose; & the seller must be considered to warrant that it is fit for that purpose (*LORD CAIRNS, C.*).—*MACFARLANE v. TAYLOR* (1868), L. R. 1 Sc. & Div. 245; 18 L. T. 214, H. L.

**720. — Hay.**—J., a horse dealer in Canada, agreed by contract in writing to supply the Glasgow Tramway co. with 2,100 tons of hay. The hay was described in the contract as "Cut Canadian Timothy hay," subject to the qualification that "small quantities of clover mixed in hay not be objected to."

To carry out part of this contract J. contracted with S. & Co., hay dealers in Canada, for the supply of 900 tons of hay. Under this contract, which was in writing, the hay was to be delivered in Glasgow, & was described as "good sound Canadian hay," with the explanation, "good sound Canadian hay is understood to mean No. 1 export hay of fair average quality."

S. & co. on the instructions of J., tendered delivery of the hay in Glasgow to the Glasgow Tramway co., who rejected the greater part of the hay as disconform to their contract with J. J. then, founding on this rejection, brought an action against S. & co. for damages for breach of their contract with him:—*Held*: it was an implied condition of the contract between J. & S. & co. that the hay to be supplied as "No. 1 export hay" should be of the standard required by the Glasgow market, & as the hay rejected did not answer to that description, it had rightly been rejected.—*JACOBS v. SCOTT & Co.* (1899), 2 F. (Ct. of Sess.) (H. L.) 70.

*Annotation*:—*Reid. Manchester Liners v. Rea*, [1922] 2 A. C. 74.

**721. — Sale of wine fit to be laid down.**—S., deft.'s traveller, agreed, without sample, to sell to pltf. a pipe of superior port wine, fit to be laid down. The wine was afterwards bottled by deft., & when delivered to pltf. was described in the invoice as superior old port. The wine

afterwards proved to be sour, owing to there being a deficiency of spirit at the time of bottling:—*Held*: deft. did absolutely contract to sell wine fit to be laid down, & was bound to supply wine suitable for that purpose; there was evidence for the jury that deft. had warranted the wine to be fit to be laid down; as words of commendation do not amount to a warranty, the general rule of law is that the *maxim caveat emptor* applies to the sale of specific goods whenever the buyer has an opportunity of inspecting the chattel sold.—*OSBORN v. HART* (1871), 23 L. T. 851; 19 W. R. 331.

**722. — Supply of power for machine.**—Defts., who were the lessees of a factory, demised to plffs. a room therein & agreed to supply to them power of an engine for working a machine in the room demised at a yearly rent of £100. The engine was under the control & in the possession of defts. While the engine was working the machine, owing to a defect in the governor, it went too fast, with the result that part of the machine in plffs.' room became heated & broke, & killed a workman employed by plffs. Plffs., having paid the widow compensation under Workmen's Compensation Act, 1897, sued defts. to recover the amount so paid. The jury found that defts. had not supplied power which was reasonably fit for the purpose of working the machine:—*Held*: apart from the demise of the room, there was a contract by defts. to supply to plffs. power for working the machine; this was a contract of purchase & sale; there was therefore an obligation to supply power reasonably fit for the purpose; & plffs. were entitled to recover.—*BENTLEY BROTHERS v. METCALFE & Co.*, [1906] 2 K. B. 548; 75 L. J. K. B. 891; 95 L. T. 590; 22 T. L. R. 676, C. A.

**723. — Supply of mineral waters.**—Pltf. retailed mineral waters, the supplies of which she received from deft. who was a mineral water manufacturer. Pltf. was charged by deft. three shillings per dozen for the mineral waters, & one penny in respect of each bottle, the penny being refunded on the bottle being returned, but not otherwise:—*Held*: even if the bottles containing the mineral waters were not sold but only hired by deft. to pltf., they were nevertheless "supplied under a contract of sale" within Sale of Goods Act, 1893 (c. 71), s. 14, & therefore that there was an implied condition that they, as well as their contents, should be reasonably fit for the purpose for which they were required by pltf.; therefore where a bottle so supplied by deft. to pltf. was not reasonably fit, & in consequence thereof, it burst & injured pltf., she was entitled to recover damages from deft.—*GEDDLING v. MARSH*, [1920] 1 K. B. 668; 89 L. J. K. B. 526; 122 L. T. 775; 36 T. L. R. 337, D. C.

**724. — Infected fur.**—Where goods are sold under an implied warranty, & then resold several times, & damage is suffered by the ultimate purchaser in breach of the warranty by reason of a latent defect or vice in the goods which could only be discovered by the ultimate purchaser or consumer, the damages recoverable against the original vendor include not only the amount paid in damages to the ultimate purchaser, but also all costs reasonably incurred by all sub-vendors in respect of claims by their sub-vendees.—*KASLER & COHEN v. SLAVOUSKI*, [1928] 1 K. B. 78; 96 L. J. K. B. 850; 137 L. T. 641.

*Annotation*:—*Mentd. Slavovski v. La Pelleterie De Roubaix Soc. Anon.* (1927), 137 L. T. 615.

**k. — Sale of seed.**—*CARLSTADT DEVELOPMENT CO. v. ALBERTA PACIFIC ELEVATOR CO.* (1912), 21 W. L. R. 433;

4 Alta. L. R. 366; 2 W. W. R. 404; 7 D. L. R. 200.—*CAN.*

1. —.—*HARDIE v. AUSTIN &*

*M'ASLAN* (1870), 8 Macph. (Ct. of Sess.) 798; 42 Sc. Jur. 450.—*SCOT.*



**Sect. 5.—Implied terms as to quality or fitness: Sub-sect. 2, B. (a) & (b).]**

**B. When Condition Implied.**

**(a) Purpose Made Known to Seller.**

See Sale of Goods Act, 1893 (c. 71), s. 14 (1).

**725. Necessity for purpose to be made known.]—**Seed crushers, who sold their refuse oil cake to graziers, without describing it as fit for the food of cattle, nor even knowing that it was bought as such:—*Held*: not liable, on an implied warranty that it was so, for the consequences of their being fed with it.—*JACKSON v. HARRISON* (1862), 2 F. & F. 782, N. P.

*Annotation*:—*Apld.* *Turner v. Mucklow* (1862), 6 L. T. 690.

**726. —.]—**A woollen merchant ordered from a woollen manufacturer piece dyed indigo blue cloth by sample, & being also a tailor, made the cloth supplied into liveries. The cloth was unfit for this purpose & the liveries were consequently returned. The manufacturer did not know the merchant was also a tailor, nor the purpose for which the cloth was to be used. There was evidence that the cloth was fit for caps, boots, & carriage linings. In an action by the merchant to recover damages for breach of contract, the jury were directed to find a verdict for the manufacturer if the cloth was merchantable as supplied to a woollen merchant:—*Held*: the direction was right, since an implied warranty that an article is fit for a particular purpose only arises when the purpose for which the goods are supplied is known to the manufacturer; & in the absence of evidence that a particular use of an article is so usual as to affect the manufacturer with knowledge of the purpose for which it is required, there is no implied warranty that the article is fit for every ordinary purpose for which an article of the description is used.—*JONES v. PADGETT* (1890), 24 Q. B. D. 650; 59 L. J. Q. B. 261; 62 L. T. 934; 38 W. R. 782, D. C.

**727. What constitutes making purpose known—Question of fact.]—**(1) The particular purpose for which an article purchased is required may, under Sale of Goods Act, 1893 (c. 71), s. 14, be made known to the seller by the recognised description by which the article is purchased.

(2) The question whether, on a sale of goods the buyer made known to the seller the purpose for which the goods were required so as to show that he relied on the seller's skill of judgment is one of fact depending on the circumstances of the particular case. *Pltf.*, a draper, went to the shop of *deft.*, a retail chemist, & asked for a "hot water bottle." An article was shown to him as such. He inquired whether it would stand boiling water, & *deft.* told him that it was meant

for hot water, but would not stand boiling water. He then purchased it. Some days afterwards the bottle, while in use by *pltf.'s* wife, burst, & she was in consequence scalded. *Pltf.* sued *deft.* as for breach of a warranty that the bottle was fit for use as a hot water bottle. The jury found at the trial that it was not, when sold, fit for that purpose, & that this was the cause of its bursting. The judge to whom power was given by consent to draw any inferences of fact, if necessary, on further consideration, found that *pltf.* had, when purchasing the bottle, made known to *deft.* the particular purpose for which it was required, so as to show that he relied on the skill & knowledge of *deft.*; & held that the case therefore came within Sale of Goods Act, 1893 (c. 71), s. 14 (1), & there was, consequently, an implied warranty that the bottle was fit for the purpose of holding hot water, of which there had been a breach. He therefore gave judgment for *pltf.*:—*Held*: the facts justified the conclusion arrived at by the judge.—*PREIST v. LAST*, [1903] 2 K. B. 148; 72 L. J. K. B. 657; 89 L. T. 33; 51 W. R. 678; 19 T. L. R. 527; 47 Sol. Jo. 566, C. A.

*Annotations*:—As to (1) *Apld.* *Frost v. Aylesbury Dairy Co.*, [1905] 1 K. B. 608. As to (2) *Consd.* *Manchester Liners v. Itea*, [1922] 2 A. C. 74.

**728. — Antecedent negotiations—Sale of "material."]**—In Apr. & July, 1843, B. purchased of A. a certain material called oropholithe, of which A. was the patentee. The portion purchased in Apr. was described in the invoice as "roofing," & was put on a building belonging to B. by A.'s workmen. That supplied in July was described as "material," & was put on by B.'s workmen. There had been a previous purchase in Oct. 1842, which had been described as "flooring," & was so applied, & as to which money was paid into ct. In an action upon a bill of exchange given by B. in payment of the above goods, B. pleaded that he accepted the bill in consideration of goods called Oropholithe, which A. had warranted "fit for the roofing of buildings," but which proved to be useless. At the trial B. proved that, in Sept. 1843, his agent had a conversation with A.'s agent about roofing certain premises he was building with the patent article; on which occasion the latter gave the former a prospectus, which described it as fit for external roofing. The judge ruled that there was no evidence to be left to the jury in support of the plea:—*Held*: the direction was right, inasmuch as there was no evidence to show that the contract for the goods subsequently supplied was made with reference to the treaty for roofing, which took place in Sept. 1842; or, at all events, nothing to show that the "material" sold in

**PART III. SECT. 5, SUB-SECT. 2.—**  
**B. (a)**

**m. General rule.]—***BIGELOW v. BOXALL* (1876), 38 U. C. R. 452.—*CAN.*  
**n. —.]—***MORROW v. WATEROUS* (1885), 24 N. B. R. 442.—*CAN.*

**o. —.]—***NEW HAMBURG MANUFACTURING Co. v. SHIELDS* (Man.) (1906), 4 W. L. R. 307.—*CAN.*

**p. —.]—***DOMINION PAPER BOX CO., LTD. v. CROWN TAILORING CO., LTD.* (1918), 42 O. L. R. 249; 43 D. L. R. 557.—*CAN.*

**q. —.]—**If goods are ordered of a manufacturer for a particular purpose known to the vendor there is an implied warranty that they shall be fit for such a purpose, but if an article of a definite nature is ordered the manufacturer warrants no more than that the article supplied is as fit as any answering the description in

the order.—*HALL & Co. v. KEARNS* (1893), 10 S. C. 152.—*S. AF.*

**r. What constitutes making purpose known—Sale by recognised description—Omission of description from subsequent orders.]—***STRAITON OIL CO., LTD. v. SANDERSON* (1882), 9 R. (Ct. of Sess.) 929; 19 Sc. L. R. 700.—*SCOT.*

**t. — Two grades of coal shipped & used together—Notice of purpose of one grade only.]—***WESTERN FUEL CO. v. RAINY RIVER PULP & PAPER CO.* (B. C.), [1919] 1 W. W. R. 323.—*CAN.*

**a. — Servant of vendor sent to instruct in working engine.]—***CHAPIN & Co. v. MATTHEWS* (1915), 32 W. L. R. 663; 9 W. W. R. 301; 24 D. L. R. 457; 9 Alta. L. R. 209.—*CAN.*

**b. Application of rule—Sale of motor boat—For timber cruising.]—***HUTCHISON v. JOHNSTON* (B. C.) (1908), 8 W. L. R. 251.—*CAN.*

**c. — Sale of crabs for human consumption.]—***WALLIS v. RUSSELL*, [1902] 2 I. R. 585.—*IR.*

**d. Presumption of knowledge—Of use for purpose similar to that notified—Sale of engine to farmer—Use for all farm purposes presumed.]—**If a vendor sells an engine to a farmer knowing that the farmer is buying it for use on his own farm, although ploughing may have been the only work specifically mentioned, the vendor must be deemed to have contemplated that it would be used for any & every farming operation which farmers having engines usually carry on by means of their engines.—*ADVANCE RUMELY THRESHER CO. INCORPORATED v. WHALEY* (Sask.), [1920] 2 W. W. R. 325; 52 D. L. R. 169; 13 Sask. L. R. 239.—*CAN.*

**e. Notice of purpose on ordering goods by trade description—Right to**

July, 1843, was sold for roofing rather than flooring; & the plea failing as to part, failed altogether.—*CAMAC v. WARRINER* (1845), 1 C. B. 356; 4 L. T. O. S. 397; 9 Jur. 162; 135 E. R. 577.

**729.** ——— **Admissibility of evidence.**—*GILLESPIE BROTHERS & Co. v. CHENEY, EGGAR & Co.*, No. 759, *post*.

**730.** ——— **Sale by recognised description—Beer.**—Deft. sold pltf. two bottles of what purported to be Bass's ale. One bottle in fact contained an irritant poison & pltf.'s health was injured by drinking some of it. At the trial the jury found there was no negligence on the part of deft.:—*Held*: nevertheless, deft. was liable.—*DAVIS v. MILLER* (1894), 10 T. L. R. 286.

**731.** ——— **Hot water bottle.**—*PREIST v. LAST*, No. 727, *ante*.

**732.** ——— **Bath bun.**—*CHAPRONIERE v. MASON* (1905), 21 T. L. R. 633, C. A.

**733.** ——— **Milk.**—Defts., who were milk dealers, supplied pltf. with milk which was consumed by himself & his family. A book in which the daily supply was entered was interleaved with a printed notice of the precautions taken by defts. to supply milk pure & unadulterated & free from the germs of disease. The milk supplied contained germs of typhoid fever, & pltf.'s wife was infected thereby & died. The existence of the germs could only be discovered by prolonged investigation. In an action, upon an implied warranty under Sale of Goods Act, 1893 (c. 71), s. 14 (1), to recover the expenses to which pltf. had been put by the illness & death of his wife:—*Held*: the purpose for which the milk was supplied was sufficiently made known to the sellers by its description; there was evidence that the buyer relied on the seller's skill, & there was an implied condition under Sale of Goods Act, 1893 (c. 71), that the milk was reasonably fit for consumption, although the defect was not discoverable at the time of the sale.—*FROST v. AYLESBURY DAIRY CO.*, [1905] 1 K. B. 608; 74 L. J. K. B. 386; 92 L. T. 527; 53 W. R. 354; 21 T. L. R. 300; 49 Sol. Jo. 312, C. A.

*Annotations*:—*Consd.* *Jackson v. Watson*, [1909] 2 K. B. 193. *Refd.* *Manchester Liners v. Rea*, [1922] 2 A. C. 74

#### (b) Reliance on Seller's Skill or Judgment.

See Sale of Goods Act, 1893 (c. 71), s. 14 (1).

**734.** **Necessity for—Not limited to manufacturer.**—*BROWN v. EDGINGTON*, No. 910, *post*.

**735.** ——— **Although a vendor is informed of**

the purpose for which a material is required, yet if the vendee inspects it, its unsoundness or unfitness for the purpose, in the absence of any express warranty, is no defence to an action for the full price.—*FITZGERALD v. IVESON* (1858), 1 F. & F. 410, N. P.

**736.** ——— **—**—*RICE v. FRISWELL* (1900), 44 Sol. Jo. 197, D. C.

**737.** ——— **—**—*PREIST v. LAST*, No. 727, *ante*.

**738.** ——— **—**—*NEWBURY v. PEROWNE* (1908), 72 J. P. Jo. 302.

**739.** ——— **—**—*SUMNER PERMAIN & Co. v. WEBB & Co.*, No. 788, *post*.

**740.** **Proof of reliance—Admissibility of evidence—Antecedent negotiations.**—*GILLESPIE BROTHERS & Co. v. CHENEY, EGGAR & Co.*, No. 759, *post*.

**741.** ——— **Presumption in case of article of food.**—*CHAPRONIERE v. MASON* (1905), 21 T. L. R. 633, C. A.

**742.** ——— **—**—*FROST v. AYLESBURY DAIRY CO.*, No. 733, *ante*.

**743.** ——— **Purchase from motor manufacturers—Statement that vehicles required for heavy traffic.**—*BRISTOL TRAMWAYS, ETC. CARRIAGE CO., LTD. v. FIAT MOTORS, LTD.*, No. 512, *ante*.

**744.** ——— **Presumption where special purpose disclosed to seller.**—Where goods are ordered for a special purpose & that purpose is disclosed to the seller, so that in accepting the order he undertakes to supply goods which are suitable for the object required, such a contract is sufficient to establish that the buyer has shown that he relies on the seller's skill & judgment, within Sale of Goods Act, 1893 (c. 71), s. 14 (1); there is therefore an implied warranty on the part of the seller that the goods supplied under the contract shall be reasonably fit for that purpose, & the fact that the buyer knew at the date of the contract that the seller's sources of supply were limited does not negative that implication. On Oct. 8, 1919, pltf's., who were shipowners of Manchester, ordered from defts., coal merchants of Liverpool, 500 tons of South Wales coal for their steamship *M.* at Partington on the Manchester Canal, & this order was accepted by defts. In the autumn of 1919, to the knowledge of pltf's., the coal supply was in the hands of the Coal Controller, who restricted the supply for bunkering purposes to South Wales coal carried by sea, & a railway strike prevented the loading of vessels in South Wales, so that the only available supply was coal in stock at Partington, which was wholly inadequate, & on vessels then at sea. At

reject unsuitable goods though conforming to description.—*IMPORTED HARDWOODS, LTD. v. ROBERTSON & HACKETT (C. & D.) Co.*, [1925] 4 D. L. R. 650.—*CAN.*

**1. Sale with opportunity of inspection.**—In a sale of a specific ascertained article, by one who is not a producer or manufacturer, for a particular purpose, known to the vendor at the time of sale, there is no implied warranty on the part of the vendor that the article is reasonably fit for the purpose for which it is intended, if the vendee has inspected, or has had the opportunity of inspecting it, before purchasing.—*JORDAN v. LEONARD* (1904), 36 N. B. R. 518.—*CAN.*

#### PART III. SECT. 5, SUB-SECT. 2.—**B. (b).**

**g. General rule.**—*NEW HAMBURG MANUFACTURING CO. v. SHIELDS* (1906), 16 Man. L. R. 212.—*CAN.*

**h.** ——— **—**—Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to that the buyer relies on the

seller's skill or judgment, & the goods are of a description which it is in the source of the seller's business to supply, whether he be the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for such purpose.—*SPENCER v. NEW-FOUNDLAND CLOTHING CO.* (1911), 9 Nfld. L. R. 505.—*NFLD.*

**734 i. Necessity for—Not limited to manufacturer.**—*HOPKINS v. JANNISON*

**734 ii.** ——— **—**—*WINSLOW v. JENSON (Alta.)*, [1920] 3 W. W. R. 856.—*CAN.*

**734 iii.** ——— **—**—*CALGARY IRON WORKS, LTD. v. BREWSTER TRANSPORT CO., LTD.*, [1925] 4 D. L. R. 393; [1925] 3 W. W. R. 486.—*CAN.*

**734 iv.** ——— **—**—*CARVILLE v. DUFFY* (1912), 46 I. L. T. Jo. 124.—*IR.*

**734 v.** ——— **—**—Deft. bought from pltf. & his partner a second-hand separator, & inspected it before he bought. Deft. alleged an express warranty by pltf.'s partner that "the

machine had been doing better work than a new machine." Deft. asked for a trial or a guarantee, but pltf. refused to give either.—*Held*: deft. did not rely upon the skill or judgment of the pltf.'s partner, & therefore, there was no implied condition, under Sale of Goods Ordinance, s. 16 (1), that the goods should be reasonably fit for the particular purpose for which they were required.—*THOMSON v. BELL* (1910), 14 W. L. R. 272; 3 Sask. L. R. 170.—*CAN.*

**734 vi.** ——— **—**—*HENNINGSSEN PRODUCE CO. v. POGGIOLLI* (1913), 23 W. L. R. 871; 11 D. L. R. 182; 4 W. W. R. 179; 6 Alta. L. R. 138.—*CAN.*

**734 vii.** ——— **—**—*WILLIAMSON v. MACPHERSON & Co.* (1904), 6 F. (Ct. of Sess.) 863.—*SCOT.*

**740 i. Proof of reliance—Admissibility of evidence—Antecedent negotiations.**—*CRICHTON & STEVENSON v. LOVE*, [1908] S. C. 818; 45 Sc. L. R. 600; 16 S. L. T. 7.—*SCOT.*

**k.** ——— **Intention of parties.**—*CANADIAN GAS POWER & LAUNCHES v.*

**Sect. 5.—Implied terms as to quality or fitness: Sub-sect. 2, B. (b), (c) & (d) i. & ii.]**

the date of the contract a collier with a cargo of South Wales coal was diverted to Manchester by the Coal Controller, & the coal supplied to pl'tfs. came from this vessel. The coal was unsuitable for pl'tfs.' steamer, & as a consequence she had to return to port. In an action by pl'tfs. for damages for breach of the warranty implied by the contract as to the character of the goods:—*Held*: the circumstances were not such as to rebut the implication of a warranty that the coal should be reasonably fit for the purpose for which it was bought, & pl'tfs. were entitled to judgment.—**MANCHESTER LINERS, LTD. v. REA, LTD.**, [1922] 2 A. C. 74; 91 L. J. K. B. 504; 127 L. T. 405; 38 T. L. R. 526; 66 Sol. Jo. 421; 27 Com. Cas. 274, H. L.

**Purchase of article under trade name—Motor car.]—See Nos. 760–762, post.**

**Application of maxim caveat emptor.]—See Sub-sect. 5, ante.**

**(c) Goods Supplied in course of Seller's Business.**

*See* Sale of Goods Act, 1893 (c. 71), s. 14 (1).

**745. Sale of meat by farmer.]—A.**, a farmer, bought, in the public market of a country town, from **B.**, a butcher keeping a stall there, the carcase of a dead pig for consumption, & left it hanging up, intending to return after completing other business, & take it away. In his absence **C.**, a farmer, on seeing & wishing to buy it, was referred to **A.** as the owner, & subsequently, on the same day, bought it of **A.**, the original buyer, without any warranty. It did not appear that any secret defect in it was known to any of the parties. It turned out unsound & unfit for human consumption:—*Held*: no warranty of soundness was implied by law between the farmers **A.** & **C.**—**BURNBY v. BOLLETT** (1847), 16 M. & W. 644; 17 L. J. Ex. 190; 9 L. T. O. S. 176; 11 J. P. 790; 11 Jur. 827; 153 E. R. 1348.

**Annotations:—Consd.** *Emmerton v. Mathews* (1862), 7 H. & N. 586; *Turner v. Mucklow* (1862), 8 Jur. N. S. 870. *Expld.* *Wren v. Holt* (1903), 72 L. J. K. B. 340. *Refd.* *Moreley v. Attenborough* (1848), 13 Jur. 282; *Dickson v. Zizania* (1851), 20 L. J. C. P. 73; *Collen v. Wright* (1857), 8 E. & B. 647; *Smith v. Baker & Death* (1878), 40 L. T. 261; *Hewett v. Hattersley*, [1912] 3 K. B. 35.

**746. Sale of refuse by dyers.]—Pl'tfs.**, calico printers, used madder roots in their business for dyeing purposes, & the refuse, or "spent madder," as it was called, after it had gone through pl'tfs.' processes was thrown out into heaps. By the application of a patented chemical process, this "spent madder" was convertible into a commodity called "garancine" which contained a greater or less quantity of colouring matter, according to the state & quality of the "spent madder" itself, & was used as a dyeing material. Deft. who was a maker of "garancine" bargained by letter with pl'tf. for the purchase of a quantity of their "spent

madder" which he did not inspect before delivery, & indeed it appeared that the precise quality of the "spent madder" could not be ascertained until it had been made into garancine & tested by trial in dyeing. Upon a portion of the "spent madder" being converted by def't. into "garancine" in the usual way, it was found that the garancine produced was of very inferior quality, & an unmarketable article, owing, as def't. alleged, to the inferior quality or bad condition of the "spent madder." Deft. thereupon repudiated the bargain. On an action to recover the price, the judge directed the jury that if the article supplied fairly & reasonably answered the description of "spent madder," there was no implied warranty of a particular quality, or of fitness for any particular use, & the jury found a verdict accordingly for pl'tfs.:—*Held*: the judge rightly directed the jury, & there was no implied warranty on the sale of the article in question by pl'tfs. to def't. It was immaterial that def't. bought it for a particular purpose, because the vendors did not, as def't. knew, make it for that purpose, but in the course of their own business, for their own purposes. They merely sold a refuse article of manufacture called "spent madder," & that was what def't. purchased, & what the jury found that he purchased; & the vendors entered into no special bargain of the kind contended for, & the principle of implied warranty does not apply to the sale of a refuse article which has done its duty.

Where the sale between the parties is the sale of a specific article no warranty attaches, & the maxim *caveat emptor* applies (**MARTIN, B.**).—**TURNER v. MUCKLOW** (1862), 6 L. T. 690; 8 Jur. N. S. 870; 10 W. R. 668.

**Annotation:—Distd.** *Jones v. Just* (1868), L. R. 3 Q. B. 197.

**747. Sale of tar by gas company.]—The contract** was between a gas co. & a person who purchased tar from them. The co. did not profess to manufacture tar as the subject-matter of their trade, nor did they profess to sell it as a mercantile thing which was the subject of purchase & sale in the ordinary way in trade. They did not describe it in the contract simply as tar. They made gas, & as a result of the manufacture tar was produced. Defts. agreed to purchase all the tar, not used or sold at retail prices, produced at the Ipswich Gasworks, the tar that resulted from the manufacture of gas for five years. There is no obligation under that contract that the co. will manufacture gas in the same way for the five years; not that the tar will be fit for distillation, even though the gas co. knows of the purpose for which it is bought. . . . There is no guarantee that the tar will be of any quality, nor that it will be fit for distillation, or merchantable tar as being the subject of purchase & sale in the market, but only that it will be the tar produced in the gasworks (**LORD ESHER, M.R.**).—**IPSWICH GASLIGHT CO. v. KING (W. B.) & Co.** (1886), 3 T. L. R. 100, C. A.

**ORR BROTHERS** (1911), 23 O. W. R. 315.—**CAN.**

**1. Extent of reliance—Question of fact.]—BOWDEN BROTHERS & Co., LTD. v. LITTLE** (1907), 4 C. L. R. 1364.—**AUS.**

**PART III. SECT. 5, SUB-SECT. 2.—B. (c).**

**m. General rule.]—A person manufacturing an article in his own particular line must be taken impliedly to warrant that the article shall be made in a proper & workmanlike manner, & be fit for doing what was expected of it.**—**GRANT v. CADWELL** (1851), 8 U. C. R. 161.—**CAN.**

**n. —.]—BUNNEL v. WHITLAW** (1856), 14 U. C. R. 241.—**CAN.**

**o. —.]—WILLIAM HAMILTON MANUFACTURING CO. v. VICTORIA LUMBER & MANUFACTURING CO.** (1895), 4 B. C. R. 101.—**CAN.**

**p. —.]—NEW HAMBURG MANUFACTURING CO. v. SHIELDS** (1906), 4 W. L. R. 307; 16 Man. L. R. 212.—**CAN.**

**q. Sale of tractor by vendors of agricultural machinery.]—SYKES v. DRUMMOND & DYORETSKY**, [1925] W. A. L. R. 126.—**AUS.**

**r. Sale of irrigation pump by agricultural machinery company.]—NEW-**

**MAN v. INTERNATIONAL HARVESTER CO.** (Alta.) (1918), 37 D. L. R. 766.—**CAN.**

**t. Sale of motor vehicle by manufacturers—Through accredited agent—Necessity for strict proof of agency.]—LINKLATER v. McLAUGHLIN MOTOR CAR CO., LTD.** (Sask.), [1923] 3 D. L. R. 215; [1923] 2 W. W. R. 803.—**CAN.**

**a. —.]—SPOURLE v. TRIUMPH CYCLE CO., LTD.**, [1927] N. I. 83.—**IR.**

**b. Sale of distillery grains by distillers—Whether implied warranty of fitness for feeding cattle.]—WILSON v. DUNVILLE** (1879), 4 L. R. Ir. 249.—**IR.**

(d) *Sale of Specific Article.*i. *In General.*

**748. General rule—No warranty implied.]—**LEWIS v. BUCKLAND, No. 702, *ante*.

**749. ———.]—**ROBERTSON v. AMAZON TUG & LIGHTERAGE CO., No. 695, *ante*.

**750. Sale by person not manufacturer or producer—Subject-matter used in purchaser's business.]—**On the sale of an article used in certain manufacture by a person not the manufacturer or original producer, & who sells it by sample, the purchaser carrying on a particular manufacture in which the article is used, *semble*: (1) there is no implied warranty that the article is fit to be used in that manufacture, even although the sample was found to be so; & the only undertaking is that the sample was fairly taken from the bulk; (2) it is no defence in an action for the price, that a portion of the bulk turned out wholly unfit for the manufacture, for *non constat* that the bulk generally will be so, or that even if it is so, the sample was unfairly taken.—**SAYERS v. LONDON & BIRMINGHAM FLINT GLASS & ALKALI CO.** (1858), 27 L. J. Ex. 294.

**751. Component parts inspected by buyer—Soap frames.]—**(1) A., after inspection of the separate parts, bought of B. soap frames which were by the contract warranted to be "new frames, with all nuts & bolts complete & perfect." In an action for a breach of this warranty, the declaration alleged that pltf. warranted the frames to be fit for the purpose of making soap; & at the trial it was proved, & found by the jury, that, though new, & having the proper number of nuts & bolts, the frames were not reasonably fit for the purpose of making soap:—*Held*: the evidence sustained the declaration. *Qu*: (2) upon the sale of an ascertained article, a known machine, the component parts of which have been inspected by the buyer, whether there is any implied warranty that the thing is fit for the purpose for which it professes to have been constructed.—**MALLAN v. RADLOFF** (1864), 17 C. B. N. S. 588; 5 New Rep. 54; 11 L. T. 381; 10 Jur. N. S. 1132; 13 W. R. 139; 144 E. R. 236.

**752. Article manufactured according to plan—Sawing machine.]—**HALL v. BURKE, No. 709, *ante*.  
**Application of maxim caveat emptor.]—**See Subsect. 1, *ante*.

ii. *Under Patent or Trade Name.*

See Sale of Goods Act, 1893 (c. 71), s. 14 (1).

**753. General rule—No implied warranty.]—**(1) Deft. sent to pltf., the patentee of an invention known as "Chanter's smoke-consuming furnace," the following written order:—"Send me your patent hopper & apparatus, to fit up my brewing copper with your smoke-consuming furnace. Patent right £15 15s.; ironwork not to exceed £5 5s.; engineer's time fixing 7s. 6d. per day." Pltf. accordingly put up on deft.'s premises one

of his patent furnaces, but it was found not to be of any use for the purposes of a brewery, & was returned to pltf.:—*Held*: no fraud being imputed to pltf., there was not an implied warranty on his part that the furnace supplied should be fit for the purposes of a brewery; but deft. having defined by the order the particular machine to be supplied, pltf. performed his part of the contract by supplying that machine, & was entitled to recover the whole £15 5s., the price of the patent right.

(2) A warranty is an express statement by a party to a contract of something or other for which he undertakes, & which is a part of that contract, though collateral to the express object of it. But in many instances it has happened that where a party only makes an agreement to sell an article, but in the contract inserts a description of it, that description has been called a warranty. It is much more natural to consider the conduct of pltf. in the present case as amounting to a non-completion of his agreement, than to construe this order & his partial compliance with it as amounting to a warranty on his part. If a man agree to sell to another an article described as peas & instead of peas he sends beans to the purchaser; or if a man undertakes to sell copper for sheathing a ship, & send an article of a different description in its place; these are not instances of breaches of warranties, but amount merely to a non-performance of the respective contracts (LORD ABINGER, C.B.).—**CHANTER v. HOPKINS** (1838), 4 M. & W. 399; 1 Horn & H. 377; 8 L. J. Ex. 14; 3 Jur. 58; 150 E. R. 1484.

*Annotations:—As to (1) Consd.* Shepherd v. Pybus (1842), 3 Man. & G. 868. *Apld.* Oliphant v. Bayley (1843), 13 L. J. Q. B. 34. *Consd.* Pacific Steam Navigation Co. v. Lewis (1847), 16 M. & W. 783; Parsons v. Sexton (1847), 4 C. B. 899; Hall v. Conder (1857), 2 C. B. N. S. 22. *Apld.* Prideaux v. Bunnett (1857), 1 C. B. N. S. 613. *Distd.* Ridpley v. Lordan (1860), 2 L. T. 154. *Consd.* Turner v. Mucklow (1862), 6 L. T. 690; Baldry v. Marshall, [1925] 1 K. B. 260. *Refd.* Camac v. Warriner (1845), 1 C. B. 356; Pott v. Flather (1847), 11 Jur. 735; Emmerton v. Mathews (1862), 7 H. & N. 586; Jones v. Just (1868), L. R. 3 Q. B. 197; Bristol Tramways, etc. Carriage Co. v. Fiat Motors, [1910] 2 K. B. 831; Manchester Liners v. Rea, [1922] 2 A. C. 74. *As to (2) Apld.* Stucley v. Bally (1862), 1 H. & C. 405. *Apprvd.* Azémar v. Casello (1867), L. R. 2 C. P. 677. *Apld.* Chalmers v. Harding (1868), 17 L. T. 571. *Consd.* Lloyd v. Sturgeon Falls Pulp Co. (1901), 85 L. T. 162; Watts v. Stevens, [1906] 2 K. B. 323. *Refd.* Osborn v. Hart (1871), 23 L. T. 851; R. v. Middleton (1873), L. R. 2 C. C. R. 38. *Generally, Refd.* Bannerman v. White (1861), 31 L. J. C. P. 28. *Mentd.* Hedhead v. Mid. Ry. (1869), 9 B. & S. 519.

**754. ———.]—**OLLIVANT v. BAYLEY, No. 701, *ante*.

**755. ———.]—**Deft. sent to pltf., the patentee of an invention called "Prideaux's Patent Self-Closing Valve," & who carried on business under the name of "The Smoke Prevention Co.," the following written order, "Please prepare us a smoke-prevention valve," giving the dimensions of the furnace door to which it was to be applied. Pltf. accordingly sent deft. one of his patent self-closing valves, but it was found not to

PART III. SECT. 5, SUB-SECT. 2.—  
B. (d) i.

**c. Sale by person not manufacturer or producer.]—**Where a dealer contracts to supply a known & defined article, though for a particular purpose, there is no implied warranty that it shall answer such purpose.—**WILSON v. DUNVILLE** (1879), 4 L. R. Ir. 249.—**IR.**

**d. ——— Inspection by buyer.]—**IMPERIAL BANK OF CANADA v. KIEVELL (Sask.) (1909), 12 W. L. R. 308.—**CAN.**

**e. ———.]—**There is no implied warranty of fitness of a specific ascertained article not manufactured by the seller sold for a specific purpose if the buyer has inspected the article before purchase.—**ROBERTSON v.**

**NORTON** (1916), 43 N. B. R. 49.—**CAN.**  
**1. Sale of wheat—Whether implied warranty of fitness for human consumption.]—**Where wheat is sold there is no implied warranty that it is fit for human consumption.—**CHAMPION v. CELLIERS & Co., LTD.**, [1904] T. S. 788.—**S. AF.**

PART III. SECT. 5, SUB-SECT. 2.—  
B. (d) ii.

**753 i. General rule—No implied warranty.]—**SPURR v. ALBERT MINING CO. (1871), N. B. Dig. 181.—**CAN.**

**753 ii. ———.]—**ELLIOTT v. BROWN (1900), 13 W. L. R. 690; 3 Sask. L. R. 238.—**CAN.**

**753 iii. ———.]—**FROST & WOOD

**Co. v. EBERT** (1906), 7 Terr. L. R. 293; 3 W. L. R. 69.—**CAN.**

**753 iv. ———.]—**WILLIAMSON v. ROVER CYCLE CO., [1901] 2 I. R. 615.—**IR.**

**753 v. ———.]—**ROWAN v. COATS IRON & STEEL CO. (1885), 12 R. (Cl. of Sess.) 395; 22 Sc. L. R. 296.—**SCOT.**

**753 vi. ———.]—**PAUL & Co. v. GLASGOW CORPN. (1900), 3 F. (Cl. of Sess.) 119.—**SCOT.**

**753 vii. ———.]—**BURNS v. CHAMBERS (J.) & SON, LTD., [1921] N. Z. L. R. 916.—**N.Z.**

**g. Article unfit by reason of size—No defect in trade article itself.]—**PATERSON v. NEWMAN (1908), 28 N. Z. L. R. 218.—**N.Z.**

**Sect. 5.—Implied terms as to quality or fitness: Sub-sect. 2, B. (d) *ii.*, & C.; sub-sect. 3, A.]**

be of any use for the purpose for which it was designed. No fraud was imputed to pltf., but deft., on being sued for the price of the article, relied on the statements contained in a circular which had been sent to him by pltf., to the effect that the patent article would consume smoke & effect a considerable saving in fuel, as amounting to a warranty that it should be fit for the purpose to which it was to be applied:—*Held*: no such warranty could be implied; but, deft. having defined by the order the particular machine to be supplied, pltf. performed his part of the contract by supplying that machine, & was entitled to recover the price.—*PRIDEAUX v. BUNNETT* (1857), 1 C. B. N. S. 613; 140 E. R. 252.

*Annotation*:—*Consd.* *Baldry v. Marshall*, [1925] 1 K. B. 260.

756. ———.]—*PRIDEAUX v. M'MURRAY*, No. 511, *ante*.

757. ———.]—Pltf., a farmer, having by letter inquired of deft., an agent for the sale of agricultural machines, the lowest price for which he could furnish a corn machine, deft. replied by letter as follows: "I happen to have a very good second hand Wood's reaper, which I can offer you at £16 10s. It belonged to a gentleman who has retired from farming; he paid me £35 for it a little time ago; it has only cut about fifty acres, & it is not one penny the worse, in fact you would hardly know it from a new one. I inclose drawings. I have sold more than thirty of these machines in this part, all of which are doing well, so that I can confidently recommend it. I do not recommend it for cutting meadow grass, but it will cut wheat, barley, oats, clover, French grass, etc., or any grain crop efficiently." In an action to recover damages for breach of warranty, the machine having failed to perform the desired work:—*Held*: the above letter did not amount to a warranty or a contract that the particular machine would do the specified work, but was mere representation & a description of Wood's patent reapers generally.—*CHALMERS v. HARDING* (1868), 17 L. T. 571.

758. ———.]—*BRISTOL TRAMWAYS, ETC. CARRIAGE CO., LTD. v. FIAT MOTORS, LTD.*, No. 512, *ante*.

759. **What constitutes sale under patent or trade name—Sale of coals under particular description.**—Coals were supplied under a written contract of sale containing no mention of the particular purpose for which they were required, though prior to the making of such contract the buyers made known that purpose to the sellers, who were coal agents, & relied on their skill & judgment. In an action for damages for breach of warranty by the sellers:—*Held*: (1) evidence of what took place between the parties prior to the making of the contract was admissible to raise the implication of the condition specified in Sale of Goods Act, 1893 (c. 71), s. 14, & therefore, by virtue of that sect. a warranty or condition by the sellers that the coals were reasonably fit for the purpose for which they were required must be implied; (2) a contract

for the sale of coals under a particular description known in the coal trade was not "a contract for the sale of a specified article under its patent or other trade name" within the meaning of the proviso to sect. 14 of the Act.—*GILLESPIE BROTHERS & CO. v. CHENEY, EGGAR & CO.*, [1896] 2 Q. B. 59; 65 L. J. Q. B. 552; 12 T. L. R. 274; 40 Sol. Jo. 354; 1 Com. Cas. 373.

*Annotations*:—*As to* (1) *Consd.* *Manchester Liners v. Rea*, [1922] 2 A. C. 74. *As to* (2) *Consd.* *Sumner, Permain v. Webb* (1921), 91 L. J. K. B. 228.

760. ———.]—**Sale of motor car of particular manufacture—Reliance on seller's skill & judgment.**—*RICE v. FRISWELL* (1900), 44 Sol. Jo. 197, D. C.

761. ———.]—*BRISTOL TRAMWAYS, ETC. CARRIAGE CO., LTD. v. FIAT MOTORS, LTD.*, No. 512, *ante*.

762. ———.]—Pltf., being desirous of buying a motor car, applied to defts., motor car dealers, & told them that he wanted a comfortable car which was suitable for touring purposes. Defts. said they thought that a "Bugatti car," a type of car in which they specialised, would meet those requirements, & showed him a specimen. Pltf. then gave defts. an order for "an eight cylinder Bugatti car" on the terms that defts. should guarantee the car for twelve months against defects of manufacture, it being stipulated by defts. that that guarantee "expressly excludes any other guarantee or warranty, statutory or otherwise." An eight cylinder Bugatti car was delivered to pltf. in pursuance of the order, but proved to be uncomfortable & unsuited for touring purposes. Pltf. claimed to reject the car, & sued to recover back the purchase-money which he had paid:—*Held*: (1) the requirement that the car should be comfortable & suitable for touring purposes was a condition & not a warranty, & on the principle of *Wallis, Son & Wells v. Pratt & Haynes*, No. 996, *post*, the implication of that condition was not excluded by the terms of the contract; (2) the mere fact that an article is sold under its trade name, in the sense that the trade name forms part of the description of the thing sold, does not necessarily bring the case within the proviso to Sale of Goods Act, 1893 (c. 71), s. 14 (1), so as to exclude the implication of the condition of fitness. If the buyer, while asking to be supplied with an article of a named make, indicates to the seller that he relies on his skill & judgment for its being fit for a particular named purpose, he does not buy it "under its trade name" within the meaning of the proviso; & the ct., being satisfied upon the facts that pltf. relied on defts.' skill & judgment, held that the proviso did not apply.—*BALDRY v. MARSHALL*, [1925] 1 K. B. 260; 94 L. J. K. B. 208; 132 L. T. 326, C. A.

**False trade description.**—*See* TRADE MARKS, TRADE NAMES, & DESIGNS.

**C. What Constitutes Fitness.**

763. **Question for jury.**—*LEWIS v. BUCKLAND*, No. 702, *ante*.

764. **What must be taken into consideration—Buyer's knowledge of source of supply.**—*STRONGI-*

**PART III. SECT. 5, SUB-SECT. 2.—C.**

**h. What must be taken into consideration—Reasonably good usage.**—*JOHNSTON v. MOORE* (1901), 34 N. S. R. 85.—*CAN.*

**k. Proof of unfitness—Onus of proof.**—*GRANT'S SPRING BREWERY CO., LTD. v. LEONARD (E.) & SONS, LTD., LEONARD (E.) & SONS, LTD. v. GRANT'S SPRING BREWERY CO., LTD.* (1915), 9 O. W. N. 56; 34 O. L. R. 429.—*CAN.*

**l. ———. Necessity for—Goods fit for purpose but containing foreign substance.**—*DUKE v. JACKSON*, [1921] S. C. 362; 58 Sc. L. R. 299; [1921] 1 S. L. T. 190.—*SCOT.*

**m. Reason for unfitness—Necessity for proof of.**—*LENNOX v. GOOLD SHARPLEY & MUIR CO., LTD.* (1912), 21 W. L. R. 918; 5 Sask. L. R. 228; 5 D. L. R. 836; 2 W. W. R. 829.—*CAN.*

**n. When fitness presumed—Failure to give statutory notice of defect.**—Where the purchaser of a tractor, after working it for three weeks, expressed satisfaction & failed to give any notice such as provided in the statutory warranties under Act Respecting the Sale of Farm Implements, irrespective of which the purchase has been made, the ct. conclusively assumed that the machine fulfilled the statutory warranty as to performing its work.—*PETERSON*



**THARM v. NORTH LONSDALE IRON & STEEL CO., LTD.,**  
No. 718, *ante*.

SUB-SECT. 3.—MERCHANTABLE QUALITY.

A. In General

*See* Sale of Goods Act, 1893 (c. 71), s. 14 (2).

**765. General rule.**—In every contract to furnish manufactured goods, however low the price, it is an implied term that the goods shall be merchantable.

A contract to furnish goods, with a certain latitude as to the price, as saddles at 24s. to 26s. may be described as a contract to furnish them at a reasonable price.—**LAING v. FIDGEON** (1815), 4 Camp. 169; 6 Taunt. 108; 128 E. R. 974.

*Annotations*.—**Apld.** **Jones v. Bright** (1829), 5 Bing. 533; **Bristol Tramways, etc. Carriage Co. v. Fiat Motors**, [1910] 2 K. B. 831. **Refd.** **Gower v. Von Dadelszen** (1837), 4 Scott. 453; **Shepherd v. Pybus** (1842), 3 Man. & G. 868; **Bigge v. Parkinson** (1862), 7 H. & N. 955; **Jones v. Just** (1868), L. R. 3 Q. B. 107; **Randall v. Newson** (1877), 2 Q. B. D. 102; **Niblett v. Confectioners' Materials Co.** (1921), 90 L. J. K. B. 984.

**766.** —]—**Pltf.** purchased from the warehouse of deft., the manufacturer, copper for sheathing a ship. Deft., who knew the object for which the copper was wanted, said, "I will supply you well." The copper, in consequence of some intrinsic defect, the cause of which was not proved, having lasted only four months, instead of four years, the average duration of such an article. In an action on the case in the nature of deceit:—**Held**: **pltf.** was entitled to damages.

If a man sells an article, he thereby warrants that it is merchantable, that it is fit for some purpose. . . . If he sells it for a particular purpose, he thereby warrants it fit for that purpose (**BEST, C.J.**).—**JONES v. BRIGHT** (1829), 5 Bing. 533; **Dan. & Ll.** 304; 3 **Mo. & P.** 155; 7 L. J. O. S. C. P. 213; 130 E. R. 1167.

*Annotations*.—**Distd.** **Gower v. Von Dadelszen** (1837), 4 Scott. 453. **Consd.** **Chanter v. Hopkins** (1838), 4 M. & W. 399. **Apld.** **Brown v. Edgington** (1841), 2 Man. & G. 279. **Consd.** **Turner v. Mucklow** (1862), 6 L. T. 690. **Distd.** **Jones v. Padgett** (1890), 24 Q. B. D. 650. **Refd.** **Shepherd v. Pybus** (1842), 3 Man. & G. 868; **Pettman v. Kebble** (1850), 9 C. B. 701; **Mallan v. Radloff** (1864), 17 C. B. N. S. 589; **Readhead v. Mid. Ry.** (1867), L. R. 2 Q. B. 412; **Jones v. Just** (1868), L. R. 3 Q. B. 107; **Randall v. Newson** (1877), 2 Q. B. D. 102; **Drummond v. Van Ingen** (1887), 12 App. Cas. 284; **Manchester Liners v. Rea**, [1922] 2 A. C. 74. **Mentd.** **Thom v. Bigland** (1853), 21 L. T. O. S. 62; **R. v. Mid. Ry.** (1867), 31 J. P. 661.

**767.** —]—**SHEPHERD v. PYBUS**, No. 700, *ante*.

**768.** —]—**CATO, MILLER & Co. v. GIBSON & SON** (1856), 3 L. T. 217.

**769.** —]—**Defts.**, manufacturers, contracted to supply to **pltf.** a quantity of grey shirtings according to sample, each piece to weigh 7 lbs. Goods were delivered & accepted according to sample & of the agreed weight; but it was afterwards discovered that the weight was made up by introducing into the fabric 15 per cent. of china clay, which rendered the goods unmerchantable. The presence of the china clay could not be discovered by an ordinary examination of the sample. In an action against **defts.** for breach of an implied warranty of merchantable quality:—**Held**: (1) in the absence of a sample, a warranty

of a merchantable quality would have been implied; (2) the selling by sample excluded that implied warranty only with respect to such matters as could be judged of by the sample, & the action was therefore maintainable.—**MODY v. GREGSON** (1868), L. R. 4 Exch. 49; 38 L. J. Ex. 12; 19 L. T. 458; 17 W. R. 176, Ex. Ch.

*Annotations*.—**As to** (2) **Apprvd.** **Drummond v. Van Ingen** (1887), 12 App. Cas. 284. **Generally.** **Mentd.** **Gorton v. Macintosh** (1882), 31 W. R. 232; **Haines, Batchelor v. Farningher** (1885), 2 T. L. R. 107; **Sleigh v. Tyser**, [1900] 2 Q. B. 333.

**770.** —]—**JONES v. JUST**, No. 632, *ante*.

**771.** —]—**BRISTOL TRAMWAYS, ETC. CARRIAGE CO., LTD. v. FIAT MOTORS, LTD.**, No. 512, *ante*.

**772. Application of rule**—**Sale of commodity for resale**—**Contract for supply of beer to publican.**—

An agreement between a brewer & a publican, that the publican shall take all his beer of the brewer, cannot be enforced unless the brewer supply the publican with good beer, such as ought to give satisfaction to his customers. In an action on this agreement the quality of the beer cannot be proved by showing what sort of a commodity the brewer furnished to other publicans during the same period.—**HOLCOMBE v. HEWSON** (1810), 2 Camp. 391; 170 E. R. 1194, N. P.

*Annotation*.—**Refd.** **Manchester Brewery Co. v. Coombs** (1900), 82 L. T. 347.

**773.** —]—**Deft.**, a brewer, let to **pltf.** a public-house, on the terms, among others, that **pltf.** should purchase of **deft.** all the malt liquor consumed on the premises: provided that, in case of any breach of that agreement, **pltf.** should forfeit, as liquidated damages, the sum of £50, secured by the promissory note of **pltf.** **Deft.** indorsed over the note for value; & **pltf.**, having been compelled to pay it, entered a plaint in the county ct. against **deft.**, & stated in the summons & particulars that "the cause of action was money paid for the use of **deft.** to the indorsees of the note, for which he never received from **deft.** any value or consideration." At the trial before a jury it appeared that, on **pltf.**'s taking possession of the premises in Oct. 1849, he commenced ordering beer from **deft.**, & continued to do so until Feb. 1850. **Pltf.** proposed to prove that the beer supplied by **deft.** subsequently to Christmas, 1849, was unmarketable. This evidence was objected to, but received by the judge. **Deft.** submitted that there was no case for the jury, & that **pltf.** must be nonsuited. **Pltf.** refused to be nonsuited: & the judge left it to the jury to say whether the liquor supplied by **deft.** was of a marketable quality; & they found a verdict for **pltf.**:—**Held**: under 13 & 14 Vict. c. 61, ss. 14, 15, the Ct. of Appeal is not confined to the precise questions submitted to them, but may decide upon the whole case as stated; & therefore, looking at the summing up in this case, it was erroneous; for the circumstances of **deft.** having on one or two occasions supplied **pltf.** with bad beer, did not authorise him to avoid the contract, but he should have returned the beer, & if better were not sent instead of it, he might, on the particular occasion, procure some elsewhere; & if **deft.** continued to send bad beer, he might sue him on the implied contract that he would supply beer reasonably

**v. BRUCE** (Man.), [1920] 2 W. W. R. 900.—**CAN.**

PART III. SECT. 5, SUB-SECT. 3.—A.

**765 i. General rule.**—Where goods of a specific denomination are sold, & not shown to be in esse or capable of inspection, there is an implied warranty that they are of merchantable quality.—**THOMAS v. MARKS** (1884), 10 V. L. R. (Law) 217.—**AUS.**

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**765 ii.** —]—Under a contract to supply goods of a specified description which the buyer has no opportunity of inspecting, the goods must not only, in fact, answer the specific description, but must be saleable or merchantable under that description.—**MOORE v. GOODERNAM** (1887), 14 O. R. 451.—**CAN.**

**765 iii.** —]—Upon the sale of goods of a specific description, which the

purchaser has no opportunity of examining before the sale, the goods must not only answer that specific description, but must be merchantable under that description.—**WRIGHT v. NELSON**, [1917] 2 W. W. R. 708; 11 Alta. L. R. 567; 35 D. L. R. 603.—**CAN.**

**765 iv.** —]—**JOHN MACDONALD & Co., LTD. v. PRINCES MANUFACTURING Co., LTD.**, [1926] 1 D. L. R. 718; [1926] S. C. R. 472.—**CAN.**



*Sect. 5.—Implied terms as to quality or fitness: Sub-sect. 3, A., B. & C.; sub-sect. 4. Sect. 6: Sub-sect. 1.]*

**fit to be drunk.**—*STANCLIFFE v. CLARKE* (1852), 7 Exch. 439; 2 Saund. & M. 13; 21 L. J. Ex. 129; 16 J. P. 425; 155 E. R. 1020.

*Annotation.*—*Mentd.* Kirby v. Williamson (1852), 19 L. T. O. S. 203.

**774.** — — — — —.] — In Dec. 1873, J. demised the Milton Arms public-house to C. In Mar. 1874, plffs. demised the Sutton Arms public-house to C. & H., & the lessees covenanted with plffs. to purchase from them all the beer which should be consumed upon the Sutton Arms, & also upon the Milton Arms, during the residue of the respective terms, plff. covenanting with C. & H. to supply all beer required for the Sutton Arms & Milton Arms, such beer to be of a certain quality & of a certain price. In May, 1874, C. assigned the Milton Arms to deft. with notice of the covenant. In June, 1874, deft. mortgaged the Milton Arms to plffs. to secure a loan, & in consideration thereof covenanted to purchase of plffs. all beer which should be brought by him upon the Milton Arms:—*Held*: deft., as an assign with notice, was bound in equity by the covenant in the lease, but that such covenant was conditional on the fulfilment of plff.'s covenant, & the covenant in the mtge. was conditional on the fulfilment of an implied covenant to supply good beer, & therefore, evidence to show a breach of the actual or implied covenants on plff.'s part was admissible.—*LUKER v. DENNIS* (1877), 7 Ch. D. 227; 47 L. J. Ch. 174; 37 L. T. 827; 26 W. R. 167.

*Annotations.*—*Mentd.* Wolverhampton Corpn. v. Bilston Comrs., [1891] 1 Ch. 315; Wilkes v. Spooner, [1911] 2 K. B. 473; L. C. C. v. Allen, [1914] 3 K. B. 642.

**775.** — — — — —.] — **Food or drink.**—In action for the price of goods as sold which have been sent by a carrier, there must be evidence either that they were ordered or received. On the sale of any commodity to the resold as an eatable or drinkable, plff. cannot recover if it is utterly uneatable or undrinkable, & so unsaleable.—*HARMAN v. BENNETT* (1858), 1 F. & F. 400, N. P.

**776.** — — — — —.] — **Hops.**—Deft., a hop merchant, entered into a contract with plff., who was a hop grower, for the purchase of hops by sample. Inasmuch as deft. could not sell hops to his customers if sulphur had been used in their growth, he inquired of plff. at the time of making such contract if sulphur had been so used, & plff. stated that it had not, & thereupon the contract was made. Plff. knew of the objection by hop merchants to sulphured hops, & deft. would not have bought the hops if he had been aware that sulphur had, in fact, been used:—*Held*: the contract was conditional on sulphur not having been used in the growth of the hops; & if sulphur had been so used, deft. was at liberty to reject the hops, although they corresponded with the sample by which they

had been sold.—*BANNERMAN v. WHITE* (1861), 10 C. B. N. S. 844; 31 L. J. C. P. 28; 4 L. T. 740; 8 Jur. N. S. 282; 9 W. R. 784; 142 E. R. 685.

*Annotations.*—*Apld.* Wallis & Wells v. Pratt & Haynes, [1910] 2 K. B. 1003. *Refd.* Behn v. Burners (1863), 2 New Rep. 184; Azemar v. Casella (1867), 36 L. J. C. P. 124. *Mentd.* Cannon v. Rands (1870), 23 L. T. 817.

**777.** — — — — —.] — **Provisions.**—*BEER v. WALKER*, No. 714, *ante*.

**778.** — — — — —.] — **Contract of exchange—By person other than dealer—Return of wine by customer.**—Where a customer who had bought a quantity of burgundy of excellent quality from a wine merchant, some time after procured him to exchange a portion of it for wine of a different description:—*Held*: there was no implied warranty on the part of the customer as to the state of the wine at the time of the exchange, & although it had then become quite sour, the wine merchant had no remedy, without proof that the other knew its deteriorated condition & intended to practice a fraud.—*LA NEUVILLE v. NOURSE* (1813), 3 Camp. 351; 170 E. R. 1407, N. P.

**779.** — — — — —.] — **Specimen shown at time of sale.**—*GARDINER v. GRAY*, No. 790, *post*.

**780.** — — — — —.] — **Receptacles for goods—Casks for oil.**—Plffs. declared on a contract for the sale to defts. of "a certain cargo of good merchantable Gallipoli oil, then being the cargo of the vessel *Fortuna*, the cargo consisting of L. R. 240 casks, containing 901 salmes & 9 pignatelles, at £54 per imperial ton." Defts. pleaded that the casks containing the oil in the agreement & declaration mentioned were not well seasoned & proper casks for the purpose of containing good merchantable Gallipoli oil, according to the terms & within the true intent & meaning of the agreement in the declaration mentioned, but, on the contrary, were badly seasoned & unfit & improper casks for the purpose of containing such oil:—*Held*: bad, the subject-matter of the contract being the oil, not the casks, & the defective state the casks at most going only to a part of the consideration.—*GOWER v. VON DEDALZEN* (1837), 3 Bing. N. C. 717; 3 Hodg. 94; 4 Scott, 453; 6 L. J. C. P. 198; 1 Jur. 285; 132 E. R. 587.

**781.** — — — — —.] — **Description partly relied on—Goods seen but not examined.**—*THORNETT & FEHR v. BEERS & SON*, No. 783, *post*.

**What constitutes sale by description.**—*See Sect. 4, sub-sect. 1, ante*.

#### *B. Effect of Examination by Buyer.*

*See Sale of Goods Act, 1893 (c. 71), s. 14 (2).*

**782.** **Whether condition excluded—Defect not discoverable on examination.**—Deft. kept a beer-house in which the beer supplied to customers, for consumption on the premises, was that of a particular firm of brewers only. This fact was known to plff., who frequented the beerhouse for the purpose of buying the beer of that firm. The beer

**779 i.** *Application of rule.—Specimen shown at time of sale.*—*WILLIAMSON v. MACPHERSON & CO.* (1904), 6 F. (Ct. of Sess.) 863.—*SCOT*.

**o.** — **Sale of food.**—Where an article of food is purchased by description, the purchaser is entitled to have a merchantable article of that description.—*SPENCE v. DUFFIELD* (1870), 1 V. R. (Law) 49.—*AUS*.

**p.** — **Sale of logs.**—A contract to deliver a quantity of logs does not necessarily mean "merchantable logs," but may mean such logs as are actually got in the part of the country where the parties live, & in construing the contract, the surrounding circumstances, & the fact that merchantable logs could

not be got in that part of the country, may be taken into consideration.—*DOLLARD v. POTTS* (1866), 6 All. 443.—*CAN*.

**q.** **Whether warranty excluded by trade usage.**—*MOSS, LTD. v. ANDERSEN* (1914), 33 N. Z. L. R. 808.—*N.Z.*

**r.** **Quality implied from price paid.**—The sale of a commodity at a fair market price, implies a warranty on the part of the seller that the article is of a corresponding quality.—*PATERSON v. DICKSON* (1860), 12 Dunl. (Ct. of Sess.) 502; 22 Sc. Jur. 147.—*SCOT*.

#### **PART III. SECT. 5, SUB-SECT. 3.—B.**

**782 i.** **Whether condition excluded—Defect not discoverable on examination.**]

—*JORGENSEN v. HARRIS BROTHERS* (1912), 14 W. A. L. R. 180.—*AUS*.

**782 ii.** — — — — —.] — *BEECHAM (H.) & CO. PROPRIETARY, LTD. v. FRANCIS HOWARD & CO. PROPRIETARY, LTD.*, [1921] V. L. R. 428.—*AUS*.

**782 iii.** — — — — —.] — Neither inspection of the sample nor of the bulk, so far as concerns defects not discoverable on reasonable inspection, excludes such implied warranty.—*JOHN MACDONALD & CO., LTD. v. PRINCESS MANUFACTURING CO., LTD.*, [1926] 1 D. L. R. 718; [1926] S. C. R. 472.—*CAN*.

**t.** — **Where opportunity for inspection.**—*McFARLANE v. HALL* (1882), 18 S. A. L. R. 126.—*AUS*.

**a.** — — — — —.] — **Where th**

contained arsenic, by reason of which the health of pltf. was injured. In an action to recover damages for breach of warranty:—*Held*: the beer had been bought by description within Sale of Goods Act, 1893 (c. 71), s. 14 (2), & as examination by the buyer would not have revealed the defect, deft. was liable on an implied warranty that the beer was of a merchantable quality.—*WREN v. HOLT*, [1903] 1 K. B. 610; 72 L. J. K. B. 340; 88 L. T. 282; 67 J. P. 191; 51 W. R. 435; *sub nom.* *HOLT v. WREN*, 19 T. L. R. 292, C. A.

*Annotation*:—*Reid*, R. v. Manchester Local Profitteering Committee, *Ex p.* L. & Y. Ry. (1920), 89 L. J. K. B. 1089.

**783. What constitutes "examination"—Packages seen but not opened.**—Defts., who were desirous of purchasing a quantity of vegetable glue from pltf., who dealt in that commodity, went, by arrangement with pltf., to the warehouse where the glue, which was in barrels, was stored, for the purpose of inspecting it. Every facility was offered defts. for inspection; but, being pressed for time, they did not have any of the barrels opened, & merely looked at the outside of the barrels. Defts. purchased the glue, & after it was delivered they alleged that it was not of merchantable quality:—*Held*: defts. had "examined the goods" within the proviso to the Sale of Goods Act, 1893 (c. 71), s. 14 (2), & consequently, there was no implied condition that the glue was of merchantable quality.—*THORNETT & FEHR v. BEERS & SON*, [1919] 1 K. B. 486; 88 L. J. K. B. 684; 120 L. T. 570; 24 Com. Cas. 133.

#### C. What Constitutes Merchantable Quality.

**784. Question for jury.**—*JONES v. JUST*, No. 632, *ante*.

**785. Fitness for some purpose.**—*JONES v. BRIGHT*, No. 766, *ante*.

**786. Must satisfy reasonable man.**—*BRISTOL TRAMWAYS, ETC. CARRIAGE CO., LTD. v. FIAT MOTORS, LTD.*, No. 512, *ante*.

**787. Part of goods only merchantable.**—An English dealer ordered from a foreign manufacturer a large number of motor horns of different descriptions & prices, "delivery as required." The horns were delivered in several instalments. The buyer, after accepting the first instalment, rejected the later instalments on the ground that the goods were not of merchantable quality. In an action for the price of the goods the official referee found that a large proportion of the horns were dented & badly polished owing to defective packing & careless workmanship, but that they could easily have been made merchantable at a trifling cost, & he declined to hold that the consignment as a whole was unmerchantable & gave judgment for the seller with an allowance to the buyer in respect of the defective goods:—*Held*: (1) upon the construction of the contract, the acceptance of the

first instalment did not preclude the buyer from rejecting the later instalments; (2) the buyer was justified in rejecting the later instalments as unmerchantable.—*JACKSON v. ROTAX MOTOR & CYCLE CO.*, [1910] 2 K. B. 937; 80 L. J. K. B. 38; 103 L. T. 411, C. A.

*Annotations*:—*As to* (1) *Reid*, *Longbottom v. Bass, Walker*, [1922] W. N. 245; *Pocahontas Fuel Co. (Incorporated) v. Ambatielos* (1922), 27 Com. Cas. 148; *Ballantine v. Cramp & Bosman* (1923), 129 L. T. 502. *As to* (2) *Reid*, *Manbre Saccharine Co. v. Corn Products Co.*, [1919] 1 K. B. 198.

**788. Goods sold for importation—Quality not referable to state of law of country of importation.**—Pltf., a firm in Argentina, purchased from defts., for importation into Argentina, a tonic water, of which defts. were manufacturers & which they had been supplying to pltf. in Argentina for many years. As the water was ultimately found to contain salicylic acid, it could not legally be sold in Argentina, & the Argentine authorities ordered it to be destroyed or sent out of the country. In an action for damages for breach of a condition alleged to be implied by Sale of Goods Act, 1893 (c. 71), s. 14, as to the fitness of the goods for importation into Argentina, & as to their being of merchantable quality:—*Held*: (1) as pltf. had not shown that they relied on defts.' skill or judgment on the question whether the goods could be legally sold in Argentina, there was no implied condition as to fitness for the particular purpose of importation; (2) the words merchantable quality in Sale of Goods Act, 1893 (c. 71), s. 14, had no reference to the state of the law of the country to which the goods were sent, & therefore the action failed.—*SUMNER, PERMAIN & CO. v. WEBB & CO.*, [1922] 1 K. B. 55; 91 L. J. K. B. 228; 126 L. T. 294; 38 T. L. R. 45; 66 Sol. Jo. W. R. 17; 27 Com. Cas. 105, C. A.

#### SUB-SECT. 4.—EXCLUSION BY EXPRESS WARRANTY.

*See Sect. 18, post.*

#### SECT. 6.—SALE BY SAMPLE.

##### SUB-SECT. 1.—WHAT CONSTITUTES SALE BY SAMPLE.

*See Sale of Goods Act, 1893 (c. 71), s. 15 (1).*

**789. Exhibition of sample—Goods sold by written contract—With description of quality.**—*TYE v. FYNMORE*, No. 618, *ante*.

**790.** — — — — —]—Where before or at the time of sale a specimen of the goods is exhibited to the buyer, if there be a written contract which merely describes the goods as of a particular denomination, this is not a sale by sample, but there is an implied warranty that they shall be

had an opportunity before the purchase of examining a specific quantity of hemlock bark purchased by him:—*Held*: there was no implied warranty on the part of the seller that it was merchantable hemlock bark.—*PETERS v. HAMILTON* (1879), 19 N. B. R. (3 P. & B.) 284.—CAN.

**b.** — — — — — *Acceptance without inspection.*—*WHITE & CO., LTD. v. DONKIN* (1914), 27 W. L. R. 789; 6 W. W. R. 508; 16 D. L. R. 446.—CAN.

**c.** — — — — —]—In an action for goods sold & delivered deft. relied upon an implied warranty as to quality. The evidence showed that, before purchasing, deft. inspected the goods, & in buying relied upon his own judgment. The jury having found against the plea of warranty, the ct. refused to

disturb their finding.—*LAURIE v. CROUCHER* (1891), 23 N. S. R. 293.—CAN.

**d.** *Examination by third party—By consent of vendor & purchaser.*—*DE CEW v. CLARK* (1868), 19 C. P. 155.—CAN.

#### PART III. SECT. 5, SUB-SECT. 3.—C.

**787 i. Part of goods only merchantable.**—*SILBERT SHARP & BISHOP, LTD. v. GEO. WILLS & CO., LTD.*, [1919] S. A. L. R. 114.—AUS.

**e. Whether quality includes condition.**—*PAREKHILL v. MCCABE* (Ont.) (1922), 70 D. L. R. 868.—CAN.

**f. Trifling repair necessary—Computing scale with broken dial glass.**]

—A computing scale is not of "merchantable quality" under Sale of Goods Act, R. S. S., 1920, c. 197, s. 16 (2), where the piece of glass covering the dial is broken, even though the glass can be replaced for 30 cents.—*INTERNATIONAL BUSINESS MACHINES CO., LTD. v. SICHERRAN*, [1925] 1 D. L. R. 864; [1925] 1 W. W. R. 405; 19 Sask. L. R. 214.—CAN.

#### PART III. SECT. 6, SUB-SECT. 1.

**g. General rule.**—To constitute a sale by sample, in the legal sense of that term, the parties must have contracted with reference to a sample, & with a mutual understanding that the sample furnished to the eye a description of the quality of the goods & that the bulk must conform to the

**Sect. 6.—Sale by sample: Sub-sects. 1 & 2, A.**

of a merchantable quality of the denomination mentioned in the contract.

Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply (LORD ELLENBOROUGH).—GARDINER v. GRAY (1815), 4 Camp. 144; 171 E. R. 46.

**Annotations:—***Apld.* Jones v. Bright (1829), 5 Bing. 533; Powell v. Horton (1836), 2 Bing. N. C. 668; Jones v. Just (1868), L. R. 3 Q. B. 197. *Consd.* Randall v. Newson (1877), 2 Q. B. D. 102; Sumner Permain v. Webb, [1922] 1 K. B. 55. *Refd.* Budd v. Fairmanner (1831), 1 L. J. C. P. 16; Shepherd v. Pybus (1842), 3 Man. & G. 868; Josling v. Kingsford (1863), 13 C. B. N. S. 447; Mody v. Gregson (1868), L. R. 4 Exch. 49; Bristol Tramways, etc. Carriage Co. v. Fiat Motors, [1910] 2 K. B. 831; Thorntott & Fehr v. Beers (1919), 120 L. T. 570; Niblett v. Confectioners' Materials Co. (1921), 90 L. J. K. B. 984.

**791. ——— Sample not referred to.]—**Where upon a sale of goods, the seller produces a sample & represents that the bulk is of equal quality, if there be a sale note which does not refer to the sample this is not a sale by sample; & if the goods turn out to be of inferior quality the purchaser's remedy is by an action on the case for a deceitful representation.—MEYER v. EVERTH (1814), 4 Camp. 22; 171 E. R. 8.

**Annotations:—***Consd.* Allan v. Lake (1852), 18 Q. B. 560. *Refd.* Sharland v. Leifchild (1847), 4 C. B. 529.

**792. ——— Usage of tobacco trade.]—**In an action for the price of tobacco sold, evidence is admissible to show that by the established usage of the tobacco trade, all sales are by sample, although not so expressed in the bought & sold notes.—SYERS v. JONAS (1848), 2 Exch. 111; 154 E. R. 426.

**Annotations:—***Expld.* Spartali v. Beecke (1850), 10 C. B. 212. *Distd.* Philipps v. Briard (1856), 1 H. & N. 21. *Consd.* Graves v. Legg (1857), 5 W. R. 597. *Apld.* Field v. Lellan (1861), 6 H. & N. 617. *Consd.* Azemar v. Casella (1867), L. R. 2 C. P. 431. *Refd.* Brown v. Byrne (1854), 3 E. & B. 703; Cuthbert v. Cumming (1855), 24 L. J. Ex. 198; Gods v. Rose (1855), 4 W. R. 129; Harnor v. Groves (1855), 15 C. B. 667.

**793. ———]**—GINNER v. KING (1890), 7 T. L. R. 140, C. A.

**794. Whether invoice forms part of contract.]—**In an action on a warranty of goods alleged to have been sold by sample:—*Held*: an invoice which was delivered with the goods, formed no part of the contract, but was merely a memorandum of the goods so delivered, & the sum to be paid.—SWINTON v. THOMPSON (1846), 7 L. T. O. S. 66.

**795. Express condition in contract—Bulk to be equal to sample & analysis.]—**In June A. employed a broker to buy for him from B. some guano, then lying in C.'s warehouse. In contemplation of the purchase, a sample was taken & an analysis made of the guano, but no contract was then entered into. In Nov. following, A.'s broker, on behalf of A., entered into a written contract with B. for the purchase at a certain price, of some guano, then about to arrive by the ship S. By the terms of the contract the guano was to be equal to sample & analysis of the guano in C.'s warehouse:—*Held*: the written contract of Nov. had reference to the sample & analysis of June, & not to a sample & analysis to be made of the guano in C.'s warehouse in the state in which it was in Nov.—CLARK v. SCHWARTZ (1853), 22 L. T. O. S. 88; 2 W. R. 16.

sample.—WAWRYK v. MCKENZIE CO., LTD., [1921] 2 W. W. R. 951.—CAN.

**b. Exhibition of sample —What amounts to—**Part of goods displayed with opportunity of inspection of bulk.]—Two or three bundles of forage were placed on the ground at the back of a wagon with a load of forage on it for

sale on the public market. The forage on the wagon was open to inspection by intending purchasers:—*Held*: the sale was not one by sample; the placing of two or three bundles of forage at the back of the wagon amounted to no more than puffing or commendation by acts & conduct.—

**796.**

**Guaranteed analysis.]—**

On Jan. 13 defts. wrote to pltf. inquiring the terms on which he would supply them with Peruvian guano, & adding "a sample, with guaranteed analysis, to accompany your offer." On Jan. 23 pltf. replied by letter as follows: "I shall be glad to do the best I can for you; I may say that my guano contains 18 per cent. of ammonia; this is the highest analysis this year." On Feb. 1 pltf. forwarded three samples of guano to defts., with a letter, offering them to defts. at certain prices, viz., "No. 1 at £14 2s. 6d.; No. 2 at £13 10s.; & No. 3 at £12 5s. per ton"; & in the same letter he inclosed a copy of a printed analysis, headed, "Analysis of Government Peruvian Guano, *ex Mindano*, now landing at Whitehaven," & said he could "send three more in a day or two." This analysis pltf. described as "the mean of three eminent chemists, who were furnished with an average sample of the bulk of the cargo." It set out the specific proportion per 100 of the various constituent parts, & at its foot was the following note: "containing nitrogen, 14.31—equal to ammonia, 17.37," & it was signed by pltf. On Feb. 4 defts. wrote informing pltf. that they agreed to accept his tender, "according to the conditions named" in his letter; & on Mar. 8 they wrote an order to pltf. for a quantity of "the best Peruvian guano, No. 1, price £14 2s. 6d., delivered, conditions & analysis as per yours of Feb. 1." The guano was delivered according to order; & after the bulk had been broken, defts. had a sample of it analysed by their own analytical chemist, when it was found to contain much less ammonia than mentioned in the analysis sent by pltf., whereupon defts. claimed a deduction from the price, which pltf. refused to allow:—*Held*: the correspondence contained not merely a guarantee that the bulk was equal to the sample, but also a guarantee that the analysis, at the time it was made, fairly represented & was a fair analysis of the bulk of the cargo out of which the goods were supplied.—TOWERSON v. ASPATRIA AGRICULTURAL CO-OPERATIVE SOCIETY, LTD. (1872), 27 L. T. 276, Ex. Ch.

**797. Mistake in sample.]—**Declaration for non-delivery of 100 chests of tea *ex* the ship S., sold by deft. to pltf. at a fixed price, with the usual averments that pltf. was always ready & willing, etc., & that all conditions precedent were fulfilled. Equitable plea, that the tea was bought & sold upon a sample which defts. believed to be a sample of the said tea *ex* the said ship, & that by the said contract defts. agreed that the tea in the said 100 chests should be equal to the said sample; that the said sample was not a sample at all of the said 100 chests, but was a sample of a totally different tea; & that defts. afterwards discovered that there had been a mistake respecting the said sample, & forthwith, & before pltf. had in any respect altered his position on account of the said contract having been made, gave notice of such mistake to pltf., & that defts. would, on account of the said mistake, treat the contract as void; & the contract was entered into solely through the mistaken belief of both parties that the said sample was a sample of 100 chests, & would not have been entered into but for the said mistake:—*Held*: the plea was bad, because it failed to show that a

WILMOT v. SUTHERLAND, [1914] C. P. D. 873.—S. AF.

**797 i. Mistake in sample.]—**MEGAW v. MOLLOY (1878), 2 L. R. Ir. 530.—IR.

**k. Proof of sale by sample—Admissibility of oral evidence—To vary**

ct. of equity would have granted a simple relief in favour of defts. against their liability to deliver the tea *ex* the ship *S*.—*SCOTT v. LITTLEDALE* (1858), 8 E. & B. 815; 27 L. J. Q. B. 201; 4 Jur. N. S. 849; 120 E. R. 304.

*Annotation* :—*Consd.* Smith v. Hughes (1871), L. R. 6 Q. B. 597.

**798. Sale of spirit—Sample given on request.**—*MARKWELL v. PARKER* (1859), 1 F. & F. 634.

**799. Sample taken from damaged goods—Bill of lading disclosing damage—Brokers' duty to disclose.**—Brokers acting for owners, the shippers of cocoa lying in warehouse at Liverpool, acted also as brokers to the purchaser of a number of bags of this cocoa. The brokers had been informed by the shippers that there was a note on the bill of lading: bags in bad condition, stained & damp cocoa mouldy. The brokers employed a firm of experts to examine the cocoa, & they reported that some of the mouldy cocoa being removed, the rest would be a merchantable article. Upon this the brokers sent a sample of the cocoa to the purchasers, & the contract was concluded:—*Held*: the sale was one by sample, & the brokers acting honestly were only under a duty of communicating such facts as reasonable men would think material in the ordinary course of business, & in the circumstances, were not under an obligation to inform the purchasers of the note on the bill of lading.—*PAYNE v. LEWIS & PEAT* (1917), 61 Sol. Jo. 507.

#### SUB-SECT. 2.—IMPLIED CONDITIONS.

##### A. Bulk Corresponding with Sample.

See Sale of Goods Act, 1893 (c. 71), s. 15 (2) (a).

**800. When warranty implied.**—To an action by the indorsee against the drawer of a bill of exchange, deft. pleaded that the bill was given in payment of the price of 17 pockets of hops sold by pltf. to deft., as hops of a certain grower, & answering certain samples, to be delivered by pltf. to deft. within a reasonable time; that, although a reasonable time had elapsed, pltf. had not delivered to deft. any hops answering the samples, or any hops whatsoever; & that there was no consideration for the bill except as aforesaid. Replication, *de injuria*. It appeared that pltf. had delivered to deft. 17 pockets of hops, but inferior to the samples:—*Held*: the general allegation in the plea that pltf. had not delivered any hops whatever, was immaterial, & might be rejected; & without it, the plea showed a total failure of consideration, & was an answer to the action; if pltf. relied on deft.'s acceptance of the inferior hops, he ought to have replied it.—*WELLS v. HOPKINS* (1839), 5 M. & W. 7; 2 Horn & H. 11; 3 Jur. 797; 151 E. R. 3.

*Annotations* :—*Reff.* Wallis & Wells v. Pratt & Haines (1910), 79 L. J. K. B. 1013. *Mentd.* Davis v. Chapman (1841), 10 L. J. C. P. 156.

**801.**—*HAINES, BATCHELOR & CO. v. FIRMINGER* (1885), 2 T. L. R. 107.

*memorandum of sale.*—In an action against the vendee of goods bought at auction for not accepting delivery thereof, evidence is admissible to show that samples were exhibited at the time of sale, & that the auctioneer declared that the sale was one by sample, although the note or memorandum of sale entered in the auctioneer's books is silent on the point.—*LAZARUS v. LUHNING* (circa 1861), Mac. 64.—N.Z.

#### PART III. SECT. 6, SUB-SECT. 2.—A.

**800 i. When warranty implied.**—In the case of contract for sale by sample,

conditions are implied: (1) that the bulk shall correspond with the sample in quality; (2) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample; (3) that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.—*JOHN HALLAM, LTD. v. BAINTON* (1919), 45 O. L. R. 483; 16 O. W. N. 205; 48 D. L. R. 120.—CAN.

1. — *Sample of wine handed round at auction.*—*MOLAN v. CAMPBELL*, 2 J. R. N. S. 44.—N.Z.

**802.**—*JOHNSON v. GASKAIN* (1891), 8 T. L. R. 70, D. C.

**803. — Sale “per sample.”**—Declaration stated that deft. bargained for & bought of pltf. a quantity of E. I. rice, according to the conditions of sale of the E. I. co., to be put up at the next E. I. co.'s sale by the proprietors, if required, at a certain price there mentioned. The proof was, that, besides these conditions, the rice was sold per sample. This is no variance; the words “per sample” not being a description of the commodity sold, but a collateral engagement that it shall be of a particular quality. The rice did not correspond with the sample; but deft., after seeing fresh samples inferior in quality to the original purchase sample, put it up at the E. I. co.'s sale, at a limited price; & no bidding taking place to that extent, he bought it in:—*Held*: he could not afterwards repudiate the contract.—*PARKER v. PALMER* (1821), 4 B. & Ald. 387; 106 E. R. 978.

*Annotations* :—*Consd.* Sharland v. Leifchild (1847), 4 C. B. 529; Syers v. Jonas (1848), 2 Exch. 111. *Distd.* Weedon v. Woodbridge (1850), 13 Q. B. 470. *Reff.* Steveling v. Dutton (1846), 3 C. B. 331; Heilbutt v. Hickson (1872), L. R. 7 C. P. 438; Hardy (London) v. Hillerns & Fowler, [1923] 1 K. B. 658.

**804. —**—A written contract for the sale of goods “as per sample, weighing, etc., as per sample bag,” imports a warranty that the goods shall be equal in quality & description to the sample referred to.—*ENGLAND v. KINGSFORD* (1850), 16 L. T. O. S. 125.

**805. — Goods “accepted on report & samples.”**—A contract for the sale in London of a cargo of Taganrog wheat then lying afloat at Queenstown, in Ireland, contained the following provisions: “In case of any dispute, this contract not to be void; it being agreed by buyers & sellers to leave the same to two London corn factors mutually chosen, or their umpire, & to be bound by their decision. The above cargo is accepted on the report & samples of Messrs. Scott & co. of Queenstown”:—*Held*: this latter stipulation amounted to a warranty that the bulk was equal to the report & samples; & was not merely a representation that the report was the genuine report of Scott & co., & the samples taken by them.—*RUSSELL v. NICOLOPULO* (1860), 8 C. B. N. S. 362; 2 L. T. 185; 8 W. R. 415; 141 E. R. 1206.

##### B. Inspection of Bulk by Buyer.

See Sale of Goods Act, 1893 (c. 71), ss. 15 (2) (b), 34, 35.

**806. Time for inspection—Before payment.**—In the sale of certain lots of goods by auction, the conditions of sale prefixed to the auctioneer's catalogue were, among others, that the goods were to be paid for before delivery, & to be cleared off the premises by a certain day:—*Held*: in the absence of evidence of a specific stipulation to that effect, the law would not imply a custom that the purchaser should inspect & measure the

m. *What constitutes correspondence with sample—Goods substantially the same.*—*DEMPTER v. LEWIS* (1903), 23 C. L. T. 179; 33 S. C. R. 292.—CAN.

n. — *Delivery of different brand but same quality.*—*HAMILTON, ROSS & CO. v. BAM & CO.* (1844), 2 Men. 144.—S. AF.

o. *Onus of proof.*—In a sale of goods by sample, the onus is on the party alleging that the goods are not equal to sample.—*ISHERA YARN MILLS CO., LTD. v. SYBE HAJEE ABDOL CURREEM* (1863), Bourke, 276.—IND.

*Sect. 6.—Sale by sample: Sub-sect. 2, B. & C.; sub-sect. 3, A.]*

goods knocked down to him before he paid for them; & the words of the catalogue "before delivery" meant before delivery for any purpose, whether to measure or to clear away. *Secus*, where the goods are bought by sample, in which case the purchaser has a right before payment to see that the bulk corresponds with the sample.—*PETTITT v. MITCHELL* (1842), 4 Man. & G. 819; 5 Scott, N. R. 721; 12 L. J. C. P. 9; 6 Jur. 1016; 184 E. R. 337.

*Annotation:—Distd. Isherwood v. Whitmore* (1843), 11 M. & W. 347.

**807. — Day of sale—Sale of corn—Liverpool trade usage.]—**A custom of the Liverpool corn market, that, when corn is sold by sample, if the buyer does not, on the day the corn is sold, examine the bulk & reject it, he cannot afterwards reject it, or refuse to pay the whole price:—*Held*: to be a reasonable custom.

*Semble*: an article sold by sample cannot in any case be rejected as not corresponding with the sample, except within a reasonable time.—*SANDERS v. JAMESON* (1848), 2 Car. & Kir. 557, N. P.

**808. — Reasonable time.]—SANDERS v. JAMESON**, No. 807, *ante*.

**809. Inspection refused—Repudiation of contract.]—**The buyer of a parcel of wheat, by sample, has a right to inspect the whole in bulk, at any proper & convenient time; & if the seller refuses to show it, the buyer may rescind the contract.—*LORYMER v. SMITH* (1822), 1 B. & C. 1; 1 L. J. O. S. K. B. 7; 107 E. R. 1; *sub nom.* *LORIMER v. SMITH*, 2 Dow. & Ry. K. B. 23.

*Annotations:—Distd. Pettitt v. Mitchell* (1842), 4 Man. & G. 819. *Reid. Hibblewhite v. McMorine* (1839), 5 M. & W. 462.

**810. Exclusion of implied condition—Agreement that goods to be paid for on delivery.]—***POLENGHI BROTHERS v. DRIED MILK CO., LTD.*, No. 833, *post*.

*C. Freedom from Defect Rendering Goods Unmerchantable.*

*See Sale of Goods Act, 1893 (c. 71), s. 15 (2) (c).*

**811. How far merchantableness implied—Sale of hops—Defect unknown to seller.]—**Upon a sale of hops by the sample, with a warranty that the bulk of the commodity answered the sample, the law does not raise an implied warranty that the commodity should be merchantable; though a fair merchantable price were given; & therefore if there be a latent defect then existing in it,

unknown to the seller, & without fraud on his part, but arising from the fraud of the grower from whom he purchased, such seller is not answerable, though the goods turned out to be unmerchantable.—*PARKINSON v. LEE* (1802), 2 East, 314; 102 E. R. 389.

*Annotations:—Distd. Jones v. Bright* (1829), 5 Bing. 533. *Consd. Budd v. Fairman* (1831), 8 Bing. 48. *Expld. Shepherd v. Pybus* (1842), 3 Man. & G. 868. *Consd. Jones v. Just* (1868), L. R. 3 Q. B. 197. *Distd. Mody v. Gregson* (1868), L. R. 4 Exch. 49. *Distd. Randall v. Newson* (1877), 2 Q. B. D. 102. *Apld. Smith v. Baker & Death* (1878), 40 L. T. 261. *Reid. Barr v. Gibson* (1838), 1 Horn & H. 70; *Sutton v. Temple* (1843), 12 M. & W. 52; *Morley v. Attenborough* (1848), 13 Jur. 282; *Gompertz v. Bartlett* (1853), 18 Jur. 266; *Emmerton v. Mathews* (1862), 7 H. & N. 586. *Mentd. Wilde v. Gibson* (1848), 12 Jur. 527.

**812. — Defect not discoverable from sample—With ordinary diligence—Manufactured goods designated by trade description.]—***MODY v. GREGSON*, No. 769, *ante*.

**813. — — — — —.]—**Cloth merchants ordered of cloth manufacturers worsted coatings which were to be in quality & weight equal to samples previously furnished by the manufacturers to the merchants. The object of the merchants was, as the manufacturers knew, to sell the coatings to clothiers or tailors. The coatings supplied corresponded in every particular with the samples, but owing to a certain defect were unmerchantable for purposes for which goods of the same general class had previously been used in the trade. The same defect existed in the samples, but was latent & was not discoverable by due diligence upon such inspection as was ordinary & usual upon sales of cloths of that class:—*Held*: upon such a contract there was an implied warranty that the goods should be fit for use in the manner in which goods of the same quality & general character ordinarily would be used.—*DRUMMOND v. VAN INGEN* (1887), 12 App. Cas. 284; 56 L. J. Q. B. 563; 57 L. T. 1; 36 W. R. 20; 3 T. L. R. 541, H. L.

*Annotations:—Expld. Jones v. Padgett* (1890), 24 Q. B. D. 650; *Bostock v. Nicholson*, [1904] 1 K. B. 725; *Sumner Permain v. Webb*, [1922] 1 K. B. 55. *Reid. Hawkins & Sunderland v. Duché* (1821), 90 L. J. K. B. 913; *Manchester Liners v. Rea*, [1922] 2 A. C. 74.

**814. — — — — — Knowledge of manufacturer of purpose for which goods required.]—***JONES v. PADGETT*, No. 726, *ante*.

*SUB-SECT. 3.—FAILURE TO CORRESPOND WITH SAMPLE.*

*A. In General.*

**815. Right to reject goods.]—**If a party purchases an article at a certain price, pursuant to a

a. — — — — —.]—*MOORE MILLING CO. v. LAIRD* (1908), 1 Sask. L. R. 471; 9 W. L. R. 199; *affd.*, 11 W. L. R. 301. —*CAN.*

*PART III. SECT. 6, SUB-SECT. 2.—C.*

b. *How far merchantableness implied—Articles of food.]—*Deft., a manufacturer of canned goods, sent to pltf., samples of lobsters, which pltf. acknowledged receipt of, stating that they were satisfactory, & ordering a quantity at the price named by deft. which he paid. When the lobsters were received by pltf., soon after the order given, they were found on examination to be of bad quality & unfit for food. In an action for breach of warranty:—*Held*: there was an implied warranty that the lobsters supplied were merchantable & fit for food.—*LEGGETT v. YOUNG* (1888), 29 N. B. R. 675.—*CAN.*

*PART III. SECT. 6, SUB-SECT. 3.—A.*

**815. Right to reject goods.]—***WESTRALIA BLACK DIAMOND COL-*

*PART III. SECT. 6, SUB-SECT. 2.—B.*

**808 i. Time for inspection—Reasonable time.]—***COVENTRY v. M'ENIRY* (1862), 13 L. C. L. R. 160, 163; 14 Ir. Jur. 144.—*IR.*

**808 ii. — — — — —.]—**Appellants sold tobacco to D. under a warranty that it was equal to sample. D. did not examine & reject the tobacco until eight days after delivery. There was evidence that the tobacco could not have deteriorated owing to the method of storage within that time:—*Held*: the tobacco had not been accepted, & there had been no unreasonable delay in making the examination.—*GREEN & CO. v. DAVIS' EXECUTRIX*, [1914] E. D. L. 380.—*S. AF.*

**809 i. Inspection refused—Repudiation of contract.]—**Where goods are sold by sample, the place of delivery is, in the absence of a special agreement to the contrary, the place for inspection by the buyer, & refusal to inspect there, when opportunity therefor is afforded, is a breach of the contract to purchase.—*OEHRICH & CO. v. TRENT VALLEY*

*WOOLLEN MANUFACTURING CO.* (1893), 20 A. R. 673; 23 S. C. R. 682.—*CAN.*

p. *Necessity for inspection.]—*The duty of the purchaser is to examine, not the goods sent, because, though he has a right to do so, he may waive that right & rely upon the warranty, but to examine the sample.—*CARLSTADT DEVELOPMENT CO. v. ALBERTA PACIFIC ELEVATOR CO.* (1912), 21 W. L. R. 433; 4 Alta. L. R. 366; 2 W. W. R. 404.—*CAN.*

q. *Place of inspection—Place of delivery.]—**TOWERS v. DOMINION IRON & METAL CO.* (1885), 11 A. R. 315.—*CAN.*

r. — — — — —.]—Where goods are sold by sample, the place of delivery is, in the absence of a special agreement to the contrary, the place of inspection by the buyer.—*TRENT VALLEY WOOLLEN MANUFACTURING CO. v. OEHRICH & CO.* (1894), 23 S. C. R. 682.—*CAN.*

t. — — — — —.]—*ATKINSON v. PLIMPTON* (1903), 23 C. L. T. 331; 6 O. L. R. 566; 2 O. W. L. R. 827, 814.—*CAN.*



specimen exhibited, &, on delivery, it is found to be of inferior performance, the party cannot, in an action for goods sold, set up the inferiority of it to the specimen; he should have returned it, & so have rescinded the contract.—*GRIMALDI v. WHITE* (1802), 4 Esp. 95; 170 E. R. 654, N. P.

**816.** —[.]—Goods having been sold to debt. by sample, at a stipulated price, he cannot, after payment of money into ct., in an action of *indebitatus assumpsit*, insist upon any defect in the goods, since by the payment of money into ct., he admits the original contract. If a purchaser mean to insist on such an objection, he ought to return the goods.—*LEGGETT v. COOPER* (1817), 2 Stark. 103; 171 E. R. 587, N. P.

**817.** —[.]—To a count upon a contract by debt. to receive a certain quantity of wool from plfts. at a certain price, debt. pleaded, that, at the time of making the contract, plfts. produced a sample, & promised debt. that the bulk was equal in quality & description thereto, but that the wool when tendered was found to be of inferior quality, wherefore debt. refused to accept it:—*Held*: the plea was not bad, on special demurrer, as amounting to *non assumpsit*, inasmuch as the contract therein set up, was not necessarily incompatible with the contract declared on.—*SIEVEKING v. DUTTON* (1846), 3 C. B. 331; 15 L. J. C. P. 276; 7 L. T. O. S. 258; 136 E. R. 133.

*Annotations*:—*Refd.* *Sharland v. Lefschild* (1847), 4 C. B. 529; *Weedon v. Woodbridge* (1850), 13 Q. B. 470.

**818.** —[.]—(1) Pltf. having agreed to sell to debt. a quantity of oil, described as foreign refined rape oil, but warranted only equal to samples, & having delivered oil which was not foreign refined oil, but which corresponded with the samples:—*Held*: debt. was not bound to accept the same, as he was entitled to the delivery of oil answering the description of foreign refined rape oil, & the statement in the contract as to samples related only to the quality of the oil.

(2) The meaning of an expression in a contract which indicates the nature of the article contracted for cannot be altered by any alleged custom of the trade.—*NICHOL v. GODTS* (1854), 10 Exch. 191; 2 C. L. R. 1408; 23 L. J. Ex. 314; 23 L. T. O. S. 162.

*Annotations*:—*Consd.* *Bannerman v. White* (1862), 31 L. J. C. P. 28; *Mody v. Gregson* (1868), L. R. 4 Exch. 49; *Randall v. Newson* (1877), 2 Q. B. D. 102. *Refd.* *Josling v. Kingsford* (1863), 13 C. B. N. S. 447; *Jones v. Just* (1868), L. R. 3 Q. B. 197; *Bostock v. Nicholson*, [1904] 1 K. B. 725; *Wallis & Wells v. Pratt & Haines* (1910), 79 L. J. K. B. 1013.

**819.** —[.]—*HEYWORTH v. HUTCHINSON*, No. 484, *ante*.

**820.** —[.]—*MELLOR v. JAPING* (1889), 5 T. L. R. 574

**821.** — *Evidence of acceptance of part.*—*EVANS v. GARDNER* (1850), 15 L. T. O. S. 274, n. *Annotation*:—*Refd.* *Morton v. Tebbutt* (1850), 15 L. T. O. S. 274.

**822.** — *No express condition to that effect.*—Upon the sale of specific goods, with a warranty that they are equal to sample, the vendee cannot, it seems, refuse to receive them, on the ground that they do not correspond with the sample, unless there be an express condition to that effect; but must resort to a cross-action, or rely on the non-correspondence with sample as a ground for reduction of damages.—*DAWSON v. COLLIS* (1851),

10 C. B. 523; 2 L. M. & P. 14; 20 L. J. C. P. 116; 138 E. R. 208.

**823.** — *On discovery of deficiency—Goods partly delivered.*—To a count for not accepting petroleum pursuant to contract by bought & sold notes, defts. pleaded, by way of equitable defence, that the real contract was not that which was contained in the bought & sold notes, but was a contract for one hundred & fifty cases of refined petroleum to agree with a sample shown by the brokers at the time of making the contract, & that the brokers, who were acting as agents for both parties, in drawing up the contract, by mistake omitted to state therein that the sale was by sample; that the mistake was not discovered until after defts. had received a portion of the petroleum; that plfts. were never ready & willing to deliver to defts. any cases of petroleum as the petroleum they so agreed to sell, except a certain lot of one hundred & fifty cases; that the petroleum which plfts. was so ready & willing to sell in fact did not agree with the sample, but were greatly inferior thereto, & of less value; & that, as soon as defts. discovered that fact, they refused to receive any more of it, & gave notice of such refusal to plfts.:—*Held*: this plea afforded a good equitable defence, inasmuch as, the full performance of the agreement having become impracticable by reason of the default of plfts., the case was not one in which a ct. of equity could reform the contract, or impose conditions upon defts.—*BORROWMAN v. ROSSELL* (1864), 16 C. B. N. S. 58; 33 L. J. C. P. 111; 10 L. T. 236; 10 Jur. N. S. 679; 12 W. R. 426; 143 E. R. 1045; *sub nom.* *BOWMAN v. ROSSEL*, 3 New Rep. 471.

*Annotation*:—*Mentd.* *Nicol v. Bell* (1875), 32 L. T. 815.

**824.** — *On immediate notice to vendor—Goods to be at risk of vendor.*—The purchaser of goods by sample ought to examine them without delay; & if he find that they are not conformable to the sample, he may reject them & rescind the contract, giving immediate notice that he does so, & that the goods are at the risk & disposal of the vendor. Should the vendor not acquiesce, the purchaser should place the goods in neutral custody, duly apprising the vendor. The purchaser is not entitled to hold by the contract & ask for other goods instead of those to which he objects. Where in such a case certain purchasers had omitted to rescind the contract & neither returned nor offered to return the goods, they were held liable for the price.—*COUSTON v. CHAPMAN* (1872), L. R. 2 Sc. & Div. 250, H. L.

*Annotation*:—*Expld.* *Grimoldby v. Wells* (1875), L. R. 10 C. P. 391.

**825.** — — — — —[.]—Where goods were sold by sample, & the bulk was found by the purchaser on inspection after delivery not to be equal to sample:—*Held*: the purchaser might reject the goods by giving notice to the vendor that he would not accept them, & they were at the vendor's risk, & was not bound to send back, or offer to send back, the goods to the vendor, or to place them in neutral custody.—*GRIMOLDBY v. WELLS* (1875), L. R. 10 C. P. 391; 44 L. J. C. P. 203; 32 L. T. 490; 39 J. P. 535; 23 W. R. 524.

*Annotation*:—*Refd.* *Perkins v. Bell*, [1893] 1 Q. B. 193.

**826.** — — — — — *Whether goods placed in neutral custody—Vendor refusing to accept rejection.*—*COUSTON v. CHAPMAN*, No. 824, *ante*.

*LIERIES, LTD. v. PERTH FIREWOOD SUPPLY CO., LTD.* (1922), 25 W. A. L. R. 39.—*AUS.*

*a.* — *On discovery of deficiency—Goods partly delivered—Countermand of order accepted by vendor.*—*MCKENNA-THOMPSON CO. v. EDMONTON CLOTH-*

*ING CO. (N. W. T.)* (1906), 4 W. L. R. 22.—*CAN.*

*d.* — *Subsequent acceptance of part—Whether creating obligation to take balance.*—Where debt. is entitled under Sale of Goods Code, s. 32 (3), to refuse to accept the goods tendered

by reason of some of them not being up to sample, his subsequent acceptance of part of such goods does not create any liability to take the balance.—*ROMBERG v. GILBERT* (1901), 11 Q. L. J. 96.—*AUS.*

*e.* — *On notice to vendor within*



received them into stock:—*Held*: the purchasers had retained the goods without rejecting them within a reasonable time &, under Sale of Goods Act, R. S. M., 1902, c. 152, ss. 35, 36, had

W. R. 318 ; 21 T. L. R. 118 ; 49 Sol. Jo. 120 ; 10 Com. Cas. 42.

*Annotations*.—*Refd.* Biddell v. E. Clemens Horst Co., 111 F. B. 334 ; Aron v. Comptoir Wegimont, [1921] 3 K. B. 435 ; Ballantine v. Cramp & Bosman (1923), 129 L. T. 502.

— **Trade usage to make allowance for inferiority.**—*See* Nos. 842–845, *post*.

**834. Right to demand other goods in exchange.**—*COUSTON v. CHAPMAN*, No. 824, *ante*.

— **Alleged usage of hop trade.**—*PEENE v. TAYLOR*, No. 845, *post*.

**836. Action by seller for price—Defence—Breach of condition.**—*GRIMALDI v. WHITE*, No. 815, *ante*.

**837. ——— Portion of bulk unfit for manufacture.**—*SAYERS v. LONDON & BIRMINGHAM FLINT GLASS & ALKALI CO.*, No. 750, *ante*.

**838. ——— How much recoverable.**—*GERMAINE v. BURTON*, No. 957, *post*.

**839. ———**—*A* cider merchant, at Cheltenham, sold to *deft.*, a publican in London, to be delivered to him there, a hogshead of cider, warranted “good” and “prime.” A hogshead being delivered, it was tapped, & found unfit for use. *Deft.* at once wrote to *pltf.* that the little he had sold was complained of, & that if it continued to be so, he should have to return it. No notice was taken of this letter for about a month, during which period *deft.* was trying to sell it, & found it unsaleable. He then wrote to *pltf.* proposing to return the hogshead, but *pltf.* refused to assent to this, & sued *deft.* for the price. *Deft.* paid into *ct.* the value of the part he had used :—*Held* : he was not liable for the residue ; & *semble*, he was liable for none.—*LUCY v. MOUFLET* (1860), 5 H. & N. 229 ; 29 L. J. Ex. 110 ; 157 E. R. 1168.

*Annotation*.—*Consd.* Grimoldby v. Wells (1875), L. R. 10 C. P. 391.

**840. Action by buyer for return of price.**—*HEILBUTT v. HICKSON*, No. 828, *ante*.

**841. Damage for loss of profit.**—*HEILBUTT v. HICKSON*, No. 828, *ante*.

#### *B. Allowance in respect of Inferiority.*

**842. Evidence of trade usage—Modifying buyer’s right to reject.**—In the sale of goods by sample, if the bulk does not accord with the sample, the purchaser is not bound to accept or pay for the goods, on any terms ; although no fraud was intended on the part of the vendor, & although the custom may have been that, under such circumstances, the bargain shall stand good, upon an allowance being made for the inferiority.—*HIBBERT v. SHEE* (1807), 1 Camp. 113 ; 170 E. R. 896.

**843. ——— Action within reasonable time.**—Where goods are sold by sample, evidence of a custom of trade as to returning or making an allowance for such of the goods as do not answer the sample, is receivable. But in such a case the vendee cannot claim the benefit of the custom, if he have not elected to comply with it within a reasonable time.—*COOKE v. RIDDELIEN* (1844), 1 Car. & Kir. 561, N. P. ; *subsequent proceedings* (1845), 4 L. T. O. S. 376.

**844. ——— London Corn Exchange.**—*A*

lost the right of rejection.—*WHITMAN FISH CO. v. WINNIPEG FISH CO.* (1909), 41 S. C. R. 453 ; 17 Man. L. R. 620.—*CAN.*

**I. ———**—*PHAGGU MAL v. BABU LAL* (1913), 1 L. R. 35 All. 325.—*IND.*

**G. ——— After acceptance of part—Entire contract.**—*YOUNG v. WALKER*, 1 J. R. 72.—*N.Z.*

**840 i. Action by buyer for return of price.**—*TRETHEWEY v. MOYES* (1912), 23 O. W. R. 563 ; 4 O. W. N. 445 ; 8 D. L. R. 280.—*CAN.*

**h. Duty of purchaser to return goods on rejection.**—*A* merchant, who had ordered certain goods according to sample, on their being delivered, intimated to the seller that he rejected them as disconform to sample, but at the same time refused to return them

contract in writing for the sale of barley at an agreed price per bushel provided that the barley at the time of shipment under the contract was to be about as per sample, & contained an arbn. clause. The buyers having rejected the barley for inferiority to the sample, the sellers relied before the arbitrator upon a custom of the London Corn Exchange, applicable to such contracts, by which the buyer was not entitled to reject for difference or variation in quality, unless the same was excessive or unreasonable, & was so found by arbn. under the contract. The arbitrator found that the barley was not about as per sample, so as to entitle the sellers to insist upon payment of the full contract price without any allowance ; but that the inferiority was not excessive or unreasonable, nor so great as to amount to a difference of description, & he awarded that the buyers were not entitled to reject the barley, but must accept it with an allowance in price in respect of the inferiority :—*Held* : the custom was good in law, not being unreasonable or uncertain or in contradiction of the written contract, & the award must therefore be upheld.—*Re WALKERS, WINSER & HAMM & SHAW, SON & CO.*, [1904] 2 K. B. 152 ; 9 Com. Cas. 174 ; *sub nom.* WALKERS, WINSER & HAMM v. SHAW, SON & CO., 73 L. J. K. B. 325 ; 90 L. T. 454 ; 53 W. R. 79 ; 20 T. L. R. 274 ; 48 Sol. Jo. 277.

**845. ——— Hop trade.**—*Held* : in the hop trade there was no custom whereby, if hops sold in packets were not up to sample, the vendor had a right to replace them by others of contract quality or make an allowance in the price & to insist that the purchaser should take delivery of the whole parcel so made up or on the terms of the allowance.—*PEENE v. TAYLOR* (1916), 32 T. L. R. 674.

**846. Allowance clause—Applicable to quality not kind.**—*AZÉMAR v. CASELLA*, No. 648, *ante*.

**847. Arbitration award—Validity.**—*HEYWORTH v. HUTCHINSON*, No. 484, *ante*.

#### SECT. 7.—WARRANTY OF AUTHORITY OF AGENT.

*See* AGENCY, Vol. I., pp. 657–667, Nos. 2748–2805 ; AUCTION & AUCTIONEERS, Vol. III., pp. 43, 44, Nos. 303–312.

#### SECT. 8.—ANIMALS

*See* ANIMALS, Vol. II., pp. 200 *et seq.*

#### SECT. 9.—DANGEROUS GOODS.

**848. Duty to warn purchaser—Danger known to vendor—Not apparent to purchaser.**—Where the vendor of a tin containing disinfectant powder knew that it was likely to cause danger to a person opening it, unless special care was taken, & the danger was not such as presumably would be known to or appreciable by the purchaser, unless

until other goods should be sent, or a claim for damages for non-fulfilment of the order paid :—*Held* : if the purchaser intended to reject the goods, he was bound to return them ; he was not entitled to retain them otherwise than as purchaser ; & having retained them he was liable for the contract price.—*PADGETT v. M’NAIR & BRAND* (1852), 15 Dunl. (Ct. of Sess.) 76 ; 25 Sc. Jur. 55 ; 2 Stuart, 41.—*SCOT.*

*Sect. 9.—Dangerous goods. Sects. 10, 11, 12 & 13.]*

warned of it:—*Held*: independently of any warranty, there was cast upon the vendor a duty to warn the purchaser of the danger.—*CLARKE v. ARMY & NAVY CO-OPERATIVE SOCIETY*, [1903] 1 K. B. 155; 72 L. J. K. B. 153; 88 L. T. 1; 19 T. L. R. 80, C. A.

*Annotation*:—*Refd.* *White v. Steadman*, [1913] 3 K. B. 340.

**849. — Dangerous nature disclosed or obviously apparent.**—(1) The manufacturer of a dangerous article, the nature of which he has disclosed or the danger of which is apparent on the face of it, is under no obligation to a third person who is injured owing to its imperfect manufacture.

(2) The manufacturer of an article dangerous in itself has a duty to the person to whom he supplies it to warn him of its character, & a breach of that duty may render him liable to the recipient, or to a third person into whose hands he ought to contemplate it may come, if he is injured whilst using it.—*BLACKER v. LAKE & ELLIOT, LTD.* (1912), 106 L. T. 533, D. C.

*Annotations*:—*As to (1)* *Consd.* *Bates v. Batey*, [1913] 3 K. B. 351. *As to (2)* *Refd.* *White v. Steadman*, [1913] 3 K. B. 340.

**850. — Article dangerous in itself.**—*BLACKER v. LAKE & ELLIOT, LTD.*, No. 849, *ante*.

**851. — Instructions for user inadequate.**—*Pltfs.*, who were the owners of a steamship, sent her to first defts., a firm of ship repairers, for the cleaning of the condenser, which was partly made of cast iron, & told them to use a cleaning fluid, known as the "pluperfect liquid," which was manufactured by second defts. This fluid, which was a secret preparation & had a property, unknown to *pltfs.* & to first defts., of giving off hydrogen if it was in contact with cast iron, was used & gave off hydrogen which made an explosive mixture in contact with the air. A workman then went to the spot with a lighted candle, & an explosion occurred, doing damage to the ship. First defts. repaired the damage, & *pltfs.* claimed a declaration that they were not liable to pay for the repair, & damages for loss of use of the ship during the repair; & alternatively *pltfs.* claimed damages against second defts.:—*Held*: on the facts first defts. were not liable, but as the "pluperfect liquid" was dangerous in itself & the instructions issued with it failed to give any adequate warning, *pltfs.* were entitled to recover as against second defts.—*ANGLO-CELTIC SHIPPING CO., LTD. v. ELLIOTT & JEFFERY* (1926), 42 T. L. R. 297.

**852. Liability to party injured.**—In case, the declaration stated that L., the father of *pltf.*, bargained with *deft.* to buy of him a gun, to wit, for the use of himself & his sons; & *deft.* then, by falsely & fraudulently warranting the gun to have been made by N., & to be a good, safe, & secure gun, then sold the gun to L. for the use of himself & his sons, for £24, whereas in truth & in fact *deft.* was guilty of great breach of duty, & of wilful deceit, negligence, & improper conduct, in this, that the gun was not made by N., nor was a good, safe, & secure gun, but on the contrary thereof, was made by a very inferior maker to N., & was a bad, unsafe, ill manufactured & dangerous gun, & wholly unsound & of very inferior materials, of all which *deft.*, at the time of such warranty & sale, had notice; & that *pltf.* knowing & confiding

in the warranty, used the gun which but for the warranty he would not have done; & that the gun, being in the hands of *pltf.*, by reason & wholly in consequence of its weak, dangerous, & insufficient construction & materials, burst & exploded, whereby *pltf.* was greatly wounded, etc., & wholly by means of the premises, breach of duty, & improper conduct of *deft.*, lost the use of his hand:—*Held*: the action was maintainable.—*LEVY v. LANGRIDGE* (1838), 4 M. & W. 337; 1 Horn & H. 325; 150 E. R. 1458, Ex. Ch.; *sub nom.* *LEVI v. LANGRIDGE*, 7 L. J. Ex. 387; *affg.* *S. C. sub nom.* *LANGRIDGE v. LEVI* (1837), 2 M. & W. 519.

*Annotations*:—*Consd.* *Winterbottom v. Wright* (1842), 10 M. & W. 109. *Distd.* *Longmeid v. Holliday* (1851), 6 Exch. 761. *Consd.* *Blakemore v. Bristol & Exeter Ry.* (1858), 8 E. & B. 1035; *Barry v. Croskey* (1861), 2 John. & H. 1. *Distd.* *Thompson v. Lucas* (1868), 17 W. R. 520. *Apld.* *George v. Skivington* (1869), L. R. 5 Exch. 1. *Consd.* *Francis v. Cockerell* (1870), 10 B. & S. 950; *Heaven v. Pender* (1883), 11 Q. B. D. 503; *Blacker v. Lake & Elliot* (1912), 106 L. T. 533. *Refd.* *Pilmore v. Hood* (1838), 5 Bing. N. C. 97; *Brown v. Edgington* (1841), 2 Scott, N. R. 496; *Howard v. Shepherd* (1850), 9 C. B. 297; *Collett v. L. & N. W. Ry.* (1851), 16 Q. B. 984; *Gorhard v. Bates* (1853), 2 E. & B. 476; *Hadley v. Baxendale* (1854), 18 Jur. 358; *Farrant v. Barnes* (1862), 11 C. B. N. S. 553; *The Norway* (1864), Brown. & Lush 226; *Alton v. Mid. Ry.* (1865), 19 C. B. N. S. 213; *Mullett v. Mason* (1866), Har. & Ruth. 779; *Collis v. Selden* (1868), L. R. 3 C. P. 495; *Peck v. Gurney* (1873), L. R. 8 H. L. 377; *Swift v. Winterbotham* (1873), L. R. 8 Q. B. 244; *Cattle v. Stockton Waterworks Co.* (1875), L. R. 10 Q. B. 453; *Smith v. Green* (1875), 24 W. R. 142; *Hosegood v. Bull & Kingdom* (1876), 36 L. T. 617; *Cavaller v. Pope*, [1906] A. C. 428; *Jackson v. Watson* (1909), 78 L. J. K. B. 587; *Bamfield v. Goole & Sheffield Transport Co.*, [1910] 2 K. B. 94; *Janvier v. Sweeney*, [1919] 2 K. B. 316. *Mentd.* *Keates v. Cadogan* (1851), 10 C. B. 591; *Eastwood v. Bain* (1858), 3 H. & N. 738; *Collins v. Cave* (1859), 4 H. & N. 225; *Rogers v. Rajendro Dutt* (1860), 13 Moo. P. C. C. 209; *Dutton v. Powles* (1861), 7 Jur. N. S. 725; *Playford v. United Kingdom Electric Telegraph Co.* (1867), 17 L. T. 243; *West London Commercial Bank v. Kitson* (1884), 50 L. T. 656; *Wilkinson v. Downton*, [1897] 2 Q. B. 57; *Tallerman v. Dowling Radiant Heat Co.*, [1900] 1 Ch. 1; *Earl v. Lubbock* (1904), 74 L. J. K. B. 121.

**853. —**—*GEDDLING v. MARSH*, No. 723, *ante*.

**854. — Third party.**—A tradesman, who contracts with an individual for the sale to him of an article to be used for a particular purpose by a third person, is not, in the absence of fraud, liable for injury caused to such person by some defect in the construction of the article.

A declaration by husband & wife stated, that *deft.* was the maker & seller of certain lamps, called "The Holiday Lamp," & thereupon the husband bought of him one of those lamps to be used by his wife & himself in his shop, & that *deft.* then fraudulently warranted that the lamp was reasonably fit & proper for that purpose, whereas the lamp was dangerous & unsafe, by reason whereof, when the wife attempted to use the lamp, it exploded & injured her. At the trial, it appeared that the accident arose from the defective construction of the lamp, but there was no proof that *deft.* knew of the defect; & the jury found that he was not guilty of any fraudulent or deceitful representation:—*Held*: the action could not be maintained by the wife, there being no misfeasance towards her independently of the contract, which was with the husband alone.—*LONGMEID v. HOLLIDAY* (1851), 6 Exch. 761; 20 L. J. Ex. 430; 17 L. T. O. S. 243; 155 E. R. 752.

*Annotations*:—*Distd.* *George v. Skivington* (1869), L. R. 5 Exch. 1. *Apld.* *Preist v. Last* (1903), 89 L. T. 33. *Consd.* *Earl v. Lubbock*, [1905] 1 K. B. 253. *Apld.* *Bates v. Batey*, [1913] 3 K. B. 351. *Refd.* *Farrant v. Barnes*

proceeding the date of the sale any sale made without such certificate is illegal & void.—*SWANSTON v. MERRETT & CHERRY* (1910), 33 W. L. R. 745; 9 W. W. R. 1208; 9 Sask. L. R. 101.—*CAN.*

## PART III. SECT. 9.

**8541. Liability to party injured.**—*Third party.*—*BUCKLEY v. MOTT* (1919), 50 D. L. R. 408.—*CAN.*

*k. Sale forbidden by statute unless accompanied by certificate.*—Where a statute forbids the sale of a boiler unless accompanied by an inspection certificate issued within one year next

(1862), 11 C. B. N. S. 553; *Thompson v. Lucas* (1868), 17 W. R. 520; *Francis v. Cockrell* (1870), 10 B. & S. 950; *Heaven v. Pender* (1883), 11 Q. B. D. 503; *Blackie v. Elliot* (1912), 106 L. T. 533. *Mentd. Collins* N. 225; *Playford v. United King- Co.* (1867), 17 L. T. 243; *Lawrence*

855. —.]—*GEORGE v. SKIVINGTON*, No. 705, *ante*.

856. —.]—*ELLIOT, LTD.*, No. 849, *ante*.

857. **Seller unaware of defect—Ascertainable with ordinary care.**—Defts., who were manufacturers of ginger beer, sold a bottle of ginger beer to a shop-keeper, who resold it to pltf. The bottle, which had been purchased by defts., was defective, but defts. when they sold it had no knowledge of the defect. Plaintiff, who was injured through the bursting of the bottle when it was being opened, brought an action against defts. in which the jury found that the accident was caused by the defect in the bottle; that the defect was not a latent defect which could not have been discovered by the exercise of reasonable care & skill, & that the defect was owing to the negligence of defts.:—*Held*: as defts. had in fact no actual knowledge of the defect in the bottle they were not liable, notwithstanding that such defect was discoverable by the exercise of ordinary care.—*BATES v. BATEY & Co., LTD.*, [1913] 3 K. B. 351; 82 L. J. K. B. 963; 108 L. T. 1036; 29 T. L. R. 616.

**Negligence generally.**—See *NEGLIGENCE*, Vol. XXXVI., pp. 6 *et seq.*

#### SECT. 10.—FERTILISERS, FEEDING STUFFS, AND SEEDS.

See *AGRICULTURE*, Vol. II., pp. 115–116, Nos. 971–978.

#### SECT. 11.—FOODS.

858. **Express warranty—As to quality of flour.**—*HARNOR v. GROVES*, No. 946, *post*.

859. — **As to quality of milk—Continuing warranty.**—A general warranty in writing given by wholesale milk dealers to a firm of retail dealers that “all milk which may hereafter be supplied by us to you shall be pure new milk with all the cream as yielded by the cow & unadulterated” is a continuing warranty applying to every consignment of milk delivered under it.—*THOMAS, LTD. v. HOUGHTON*, [1911] 2 K. B. 959; 81 L. J. K. B. 21; 105 L. T. 825; 75 J. P. 523; 9 L. G. R. 1142; 22 Cox, C. C. 628, D. C.

**Adulteration & impoverishment.**—See, generally, *FOOD & DRUGS*, Vol. XXV., pp. 70–108.

— **Warranty as defence.**—See *FOOD & DRUGS*, Vol. XXV., pp. 93–101, 115, Nos. 188–246, 386.

**Sale of unwholesome food.**—See *FOOD & DRUGS*, Vol. XXV., pp. 108–115.

**Particular articles of food.**—See *FOOD & DRUGS*, Vol. XXV., pp. 116–131.

860. **Implied warranty—Goods controlled in war time—Buyer not rendered liable to penalty.**—In response to an order for “whisky” from pltf.,

who was a publican, defts., who were dealers, sent whisky which was invoiced at the controlled price applicable to whisky 30 under proof & was accompanied by a certificate under Spirits Act, 1880 (c. 24), s. 108. The whisky was in fact 30·9 under proof, & pltf. was prosecuted for selling it above the maximum price. She successfully pleaded that she had sold the spirits as received by her. In an action against the dealers to recover the costs incurred by her in defending the summons:—*Held*: on the sale of controlled articles there was an implied warranty that the sellers were not rendering the buyers liable to penalties, & that the goods were such as might legally be sold at the prices charged, & the damages in this case flowed from the breach so as to make the sellers liable.—*PROOPS v. CHAPLIN (W. H.) & Co., LTD.* (1920), 37 T. L. R. 112, D. C.

861. — **Legality of sale.**—*PROOPS v. CHAPLIN (W. H.) & Co., LTD.*, No. 860, *ante*.

**Fitness for particular purpose.**—See Nos. 710–715, *ante*.

— **Merchantable quality.**—See Nos. 772–777, *ante*.

#### SECT. 12.—MEDICINES AND POISONS.

See *MEDICINE & PHARMACY*, Vol. XXXIV., pp. 561, 567–570, Nos. 200, 201, 242–272.

#### SECT. 13.—PICTURES.

862. **Ascription to particular artist—In catalogue.**—The putting down the name of an artist in a catalogue as the painter of any picture, is not such a warranty as will subject the party selling to an action, if it turns out that he might be mistaken, & that it was not the work of the artist to whom it was attributed.—*JENDWINE v. SLADE* (1797), 2 Esp. 572; 170 E. R. 459, N. P.

*Annotations*:—*Distd. Power v. Barham* (1836), 4 Ad. & El. 473; *Consd. Gee v. Lucas* (1867), 16 L. T. 357.

863. — **In bill of parcels.**—In *assumpsit* for breach of a warranty of pictures, it was proved, among other things, that deft., at the time of the sale, gave the following bill of parcels:—four pictures, views in Venice, Canaletto, 1601. The judge left it to the jury upon this & the rest of the evidence, whether deft. had contracted that the pictures were those of the artist named, or whether his name had been used merely as matter of description, or intimation of opinion, the jury found for pltf., saying that the bill of parcels amounted to a warranty:—*Held*: the question had been rightly left to the jury, & the verdict was not to be disturbed.—*POWER v. BARHAM* (1836), 4 Ad. & El. 473; 1 Har. & W. 683; 6 Nev. & M. K. B. 62; 5 L. J. K. B. 88; 111 E. R. 865.

*Annotations*:—*Refd. Carter v. Crick* (1859), 33 L. T. O. S. 166; *Gee v. Lucas* (1867), 16 L. T. 357.

864. — **In sale notes.**—*PENNELL v. ARCH-BUTT* (1847), 9 L. T. O. S. 195; 11 Jur. 762.

865. **Question of warranty for jury.**—*LOMI v. TUCKER*, No. 623, *ante*.

866. —.]—*DE SEWHANBERG v. BUCHANAN*, No. 936, *post*.

867. —.]—*POWER v. BARHAM*, No. 863, *ante*.

#### PART III. SECT. 13.

**1. Ascription to particular artist.**—*HYSLOR v. SHIRLAW* (1905), 7 F. (Ct. of Sess.) 875; 42 Sc. L. R. 668; 13 S. L. T. 209.—*SCOT*.

**858 i. Express warranty—As to quality of flour.**—Where flour is guaranteed to inspect of a particular grade, such as “No. 1 superfine,”

it must inspect sweet of that grade. If it inspects as of the grade contracted for, but sour, the guarantee is broken.—*BAIN v. GOODERHAM* (1857), 15 U. C. R. 33.—*CAN.*

## SECT. 14.—SHIPMENT OF GOODS.

**868. Disclosure of name of vessel.]—***BUSK v. SPENCE*, No. 570, *ante*.

**869. — Disclosure by seller to broker—Usage of Liverpool—Buyer bound.]—***Defts.*, London merchants, employed a broker at Liverpool to purchase some wool. The broker negotiated a sale by *pltf.* to *defts.* of certain bales deliverable at Odessa, "the names of the vessels to be declared as soon as the wools were shipped." In this transaction the broker acted for both *pltf.* & *defts.* By the custom of Liverpool, where a contract contained a stipulation that notice of an event should be given by the vendor to the vendee, it was usual for the vendor to give the notice to the broker who communicated it to the vendee:—*Held*: *defts.* were bound by such usage, & therefore a notice by *pltf.* to the broker, of the names of the vessels on which the wools were shipped was a performance of that stipulation, although the broker omitted to communicate them to *defts.*—*GRAVES v. LEGG* (1857), 2 H. & N. 210; 26 L. J. Ex. 316; 5 W. R. 597; 157 E. R. 88; *sub nom.* *GREAVES v. LEGG*, 29 L. T. O. S. 145; 3 Jur. N. S. 519, Ex. Ch.

*Annotations*:—*Consd.* *Sweeting v. Pearce* (1859), 7 C. B. N. S. 449. *Refd.* *Gilkes v. Leonino* (1858), 4 Jur. N. S. 537; *White v. Beeton* (1861), 30 L. J. Ex. 373; *Kidston v. Monceau Ironworks Co.* (1902), 86 L. T. 556.

**870. — Failure of broker to inform buyer.]—***GRAVES v. LEGG*, No. 869, *ante*.

**871. — Disclosure after knowledge of loss of ship—Knowledge of seller & buyer.]—**By a contract dated Dec. 11, 1917, *defts.* sold goods to *pltf.* to be shipped during Dec. to Feb. 1918, per steamer from the East to Liverpool, where they were to be delivered, the name of the vessel, marks & full particulars to be declared to the buyer in writing with due despatch. The contract also provided: "(a) Should the vessel or vessels which may apply to this contract be lost before declaration this contract to be cancelled so far as regards such lost vessel or vessels on the production of the bill or bills of lading or other satisfactory proof of shipment by sellers so soon as fairly practicable after the loss is ascertained. (b) Should the vessel or vessels & the goods or any portion thereof be lost, the contract to be cancelled for the whole or any such portion, but should the vessel or vessels be lost & the goods or any portion thereof be transhipped to some other vessel or vessels & arrive on account of the original importer, this contract to stand good for the whole or such portion." On Mar. 27, 1918, *defts.* declared in fulfilment of the contract goods shipped on a named steamer which sailed from Singapore on Jan. 21, 1918, but was lost at sea by enemy action about Feb. 20, 1918. At the time of the declaration both *pltf.* & *defts.* knew that the ship & cargo had been lost. In an action for damages for failure to deliver *pltf.* contended that the declaration, having been made after *defts.* knew of the loss of the vessel, was invalid:—*Held*: the declaration was made with due despatch, & was good although made with knowledge of the loss, & the contract was consequently cancelled.—*CLARK v. COX, McEUEEN & Co.*, [1921] 1 K. B. 139; 89 L. J. K. B. 596; 122 L. T. 647; 15 Asp. M. L. C. 5; 25 Com. Cas. 94, C. A.

**872. Goods free on board—Necessity to name vessel.]—***Assumpsit* on an agreement "to give yearly free to *pltf.* during three years twenty tons

of coals, to be put free on board ship at Cardiff for the use of *pltf.*" Breach, that *defts.* did not give *pltf.* yearly or at any time during the said three years twenty tons of coals, etc., in the terms of the contract:—*Held*: bad for want of an averment by *pltf.* that he was ready & willing to receive the coals, & that he had named a ship on which *deft.* was to deliver them.—*ARMITAGE v. INSOLE* (1850), 14 Q. B. 728; 19 L. J. Q. B. 202; 14 L. T. O. S. 439; 14 Jur. 619; 117 E. R. 280.

*Annotations*:—*Apld.* *Sutherland v. Allhusen* (1866), 14 L. T. 666. *Consd.* *Budgett v. Binnington* (1890), 25 Q. B. D. 320.

**873. — ]—***Assumpsit* on a contract for the sale of fifty tons of bicarbonate of soda at "£11 per ton in 1 cwt. kegs; or, if taken in 10 cwt. casks, the price to be 10s. less per ton; free on board, to be delivered in equal monthly quantities during Apr., May, & June, 1865." Averment, that *defts.* duly delivered divers portions of the goods according to agreement, & that *pltf.* was not required by *defts.* to accept delivery of the residue. Breach, non-delivery of the residue. Plea, that *defts.* were ready & willing to deliver the residue according to the agreement, whereof *pltf.* had notice, & that *pltf.* was not ready & willing to accept, & would not accept, & did not require delivery of the same:—*Held*: before *defts.* were bound to deliver the goods, *pltf.* was bound to name the ship or the place where he desired the goods to be delivered, & a tender of the goods by *defts.* was not a condition precedent to their delivery, or to the ship or place being named by *pltf.*—*SUTHERLAND v. ALLHUSEN* (1866), 14 L. T. 666; 2 Mar. L. C. 349.

**874. Shipment by particular vessel—Vessel capable of carrying goods.]—**An agreement for the sale of certain steam engines & boilers contained the following clause: "the remaining four tons, being one of the boilers, to be delivered by one of the first ships that sails from Liverpool to Plymouth that can take it. In an action for the non-delivery:—*Held*: *pltf.* was bound to show that a vessel had sailed from Liverpool that could have taken the boiler whole.—*HARRISON v. BANCER* (1847), 10 L. T. O. S. 162.

**875. — ]—***Deft.*, by bought & sold note, contracted to sell to *pltf.* "about 500 tons nitrate of soda, in bags, of good merchantable quality," to be ready for delivery by a given day, at a certain price & upon certain terms & conditions. The contract then proceeded,—"It is understood that the above nitrate of soda is to form the full & complete cargo of the *John Phillips*, 345 tons register, now on her passage to Sydney, to proceed thence without undue delay to the west coast of South America, there to load the above. In the unexpected event of the *John Phillips* getting ashore, or being unable to prosecute her voyage, from any casualties of the sea, then the seller agrees to deliver, & the buyer agrees to take, in lieu thereof, another cargo or cargoes of about equal quantity, to be named at the earliest practicable period prior to arrival off the coast. The only ground on which the seller is to be excused delivery of the above nitrate of soda, is the loss of the vessel, or that which may be substituted for it, on her homeward voyage; in which case this contract is to be considered void, but in no other event whatever":—*Held*: (1) this was an absolute contract for the sale of 500 tons more or less, & not of a quantity limited by

## PART III. SECT. 14.

*m. Shipment by particular vessel—First-class vessel.]—*To an action

brought for the non-acceptance of a cargo of sugar, *deft.* pleaded that his undertaking & promise were made & given subject to a proviso, which had

not been complied with, that the sugars should be shipped in a first-class vessel:—*Held*: this was a condition precedent, the non-performance



the capacity of the vessel named; though, *semble*, the incapacity of the *John Phillips* to carry the whole 500 tons would excuse the seller from bringing it all home by that vessel; (2) the contract did not amount to a warranty that the *John Phillips* should be of capacity to carry the whole 500 tons.—*BOURNE v. SEYMOUR* (1855), 16 C. B. 337; 24 L. J. C. P. 202; 25 L. T. O. S. 162; 1 Jur. N. S. 1001; 3 W. R. 511; 139 E. R. 788.

—*Generally, Mentd.* Kelsall v. Marshall (1856), 3 P. 19.

**876.** — *Impossibility of performance by such ship—Sailing ship.*—*ASHMORE & SON v. COX* (O. S.) & Co., No. 568, *ante*.

**877.** — *Damage to vessel.*—By a contract made in Oct. 1899, defts. sold to pltf. a cargo of cotton seed, to be shipped per steamship *Orlando* at an Egyptian port during the month of Jan. 1900, & to be delivered to pltf. in the United Kingdom. The contract provided that, in case of prohibition of export, blockade, or hostilities preventing shipment, the contract or any unfulfilled part thereof should be cancelled. In Dec. 1899, the *Orlando* was stranded through perils of the sea without default on defts.' part, & was so much damaged as to render it impossible for her to arrive at the port of loading in time to load during Jan. In an action by pltf. against defts. for failure to ship a cargo under the contract:—*Held*: the contract must be construed as subject to an implied condition that, if at the time for its performance the *Orlando* should, without default on defts.' part, have ceased to exist as a ship fit for the purpose of shipping the cargo, then the contract should be treated as at an end; & the action was therefore not maintainable.—*NICKOLL & KNIGHT v. ASHTON, EDRIIDGE & CO.*, [1901] 2 K. B. 126; 70 L. J. K. B. 600; 84 L. T. 804; 49 W. R. 513; 17 T. L. R. 467; 9 Asp. M. L. C. 209; 6 Com. Cas. 150, C. A.

*Annotations*:—*Consd.* Chandler v. Webster (1904), 73 L. J. K. B. 401; Dunford v. Cia Anonima Maritima Union (1911), 104 L. T. 811. *Distd.* Seville & United Kingdom Carrying Co. v. Mann, George (1915), 32 T. L. R. 192. *Apld.* Re Shipton, Anderson & Harrison, [1915] 3 K. B. 676. *Refd.* Tredegar Iron & Coal Co. v. Hawthorn (1902), 18 T. L. R. 716; Blakeley v. Muller, Hobson v. Pattenden (1903), 88 L. T. 90; Krell v. Henry, [1903] 2 K. B. 740; Leiston Gas Co. v. Leiston-cum-Sizewell U. C., [1916] 2 K. B. 428; Tamplin S.S. Co. v. Anglo-Mexican Petroleum Products Co., [1916] 1 K. B. 485; Metropolitan Water Board v. Dick, Kerr, [1917] 2 K. B. 1; Blackburn Bobbin Co. v. Allen, [1918] 1 K. B. 540. *Mentd.* Horlock v. Beal, [1916] 1 A. C. 486.

**878.** *Goods to be taken ex quay.*—*NEILL v. WHITWORTH*, No. 395, *ante*.

**879.** *Ship to be in particular port.*—*OPPENHEIM v. FRASER*, No. 482, *ante*.

**880.** “*Shipment to France.*” — Goods were taken to a French port & thence to London:—*Held*: this was not “shipment to France” within the meaning of the contract.—*BERK & CO., LTD. v. DAY & WHITE* (1897), 13 T. L. R. 475.

*Annotation*:—*Mentd.* Re Rubel Bronze & Metal Co. & Vos, [1918] 1 K. B. 315.

**881.** *Shipment in good order & condition.*—*COMPANIA NAVIERA VASCONZADA v. CHURCHILL & SIM, SAME v. BURTON & CO.*, No. 1024, *post*.

**882.** *Prevention of shipment by force majeure—Hostilities.*—On Dec. 5, 1914 a coaling contract was entered into between pltf., the owners of a line of steamships, & defts., a coaling co., by which it was agreed that pltf. should take all the bunker coal they wanted at (*inter alia*) Algiers from defts., & that defts. should supply all the coal normally needed by pltf. at that port. The

form of contract utilised was one in use before the outbreak of the war, & contained a clause allowing defts. to cancel the contract if either Great Britain or France became engaged in war with any other power. A slip, however, was pasted on the contract, which provided that, “notwithstanding the war clause in the contract, depôts will supply during the present hostilities . . . & should circumstances arise to further interfere in any manner with the supply, shipment, carriage, or delivery of the coals, this contract is subject to cancelment by suppliers.” In Feb. 1915, defts. refused to supply one of pltf.'s ships with coal at Algiers, & pltf. were thereby put to expense in obtaining coal elsewhere. In an action by pltf. for breach of contract defts. contended that they were protected from liability by the exception clause in the contract & added slip. It appeared that between Dec. 1914, & Feb. 1915, there was a great rise in freights between Cardiff & Algiers. The judge held that the word “supply” in the slip meant supply to defts. at Cardiff, & not to pltf. at Algiers, & was satisfied that if defts. were bound by their contract they would have had difficulty in chartering a vessel between these places at more than double the freights prevalent when the contract was made:—*Held*: since, to fulfil their contract, defts. would not only have been put to extra expense, but would have had difficulty in obtaining ships, there was “interference” within the meaning of the slip, & therefore, defts. were excused from liability.—*SCHIEPVAART MAATSCHAPPIJ GYLSEN v. NORTH AFRICAN COALING CO.* (1916), 85 L. J. K. B. 1386; 114 L. T. 755; 13 Asp. M. L. C. 339. *Annotation*:—*Refd.* Tennants (Lancashire) v. Wilson (1917), 23 Com. Cas. 41.

**883.** — *Re* COMPTOIR COMMERCIAL ANVERSOIS & POWER, SON & CO., No. 893, *post*.

**884.** — *Usage of dried fruit trade.*—The ct. found that since the outbreak of war in 1914 it had been a universal custom in the dried fruit trade to insert in all contracts for the sale of sultanas a clause as follows, “Should shipment be prevented by *force majeure* such as prohibition of export, blockade, war, or any consequence of warlike operations, this contract or the then unfulfilled part thereof to be cancelled without claim.” The ct., therefore, rectified certain bought & sold notes by the addition of this clause on the ground that the parties must be taken to have contracted on this basis.—*CARAMAN ROWLEY & MAY v. APERGHIS* (1923), 40 T. L. R. 124.

**885.** *Dating of bill of lading—On provisional invoice—Error unaffected by letters “E. & O. E.”* —By a contract dated Jan. 23, 1925, the sellers sold to the buyer about 50 tons of Japanese green peas. The conditions of the contract included:—“Provisional invoice based on bill of lading weight with ship's name & date of bill or bills of lading shall be sent by shipper's house . . . within three days after arrival of documents in Europe & by other sellers to their buyers respectively in due course after receipt.” “Shipment as per bill or bills of lading dated or to be dated Feb. & or Mar. 1925.” “Bill of lading to be dated when goods actually on board.”

The provisional invoice described the bill of lading as dated Feb. 1, 1925, but the date of the bill of lading was Feb. 2, 1925. On the provisional invoice appeared the letters “E. & O. E.” which were understood to mean “errors & omissions excepted.” The buyer refused to

of which entitled deft. to repudiate the contract.—*SCHMIDT v. BOYD* (1866), 15 L. T. 445.—*IND.*

*n.* — *]*—*BIHARI LAL v. MADHUSUDUB KUNDU* (1869), 2 B. L. R. 154.—*IND.*

*o.* — *]*—*BHAILAL CHATURBHAI PATEL v. KALYANRAI VRAJRAI DESAI* (1921), 1 L. R. 45 Bom. 1222.—*IND.*



**Sect. 14.—Shipment of goods. Sects. 15, 16 & 17: Sub-sect. 1.]**

accept the peas on the ground that the error was material, & that the provision that the date of the bill of lading must be given in the provisional invoice was a condition precedent. Arbitrators decided in favour of the buyer, & found that a wrong statement in a provisional invoice as to the date of a bill of lading under a contract in this form affected the substance of the contract:—**Held:** the provision as to the date of the bill of lading being stated in the provisional invoice was not a warranty only, but a condition, that the letters "E. & O. E." did not remedy the error, & in the circumstances the award must be confirmed.—**BERG (V.) & SONS v. LANDAUER (1925), 42 T. L. R. 142.**

**886. Shipment "in usual bags."**—Defts. sold to plffs. a quantity of Calcutta barley. This sale was on c.i.f. terms, shipment to be made "in the usual bags." Plffs. took up the documents & paid the price before the barley arrived, & when it arrived they claimed to reject it on the ground of bad quality. The claim was referred to arbns., & an award was made that plffs. were entitled to reject & that the sellers must refund the price. The sellers then refused to carry out the award, on the ground that it must be mutual, & that a term must be implied in it that on receiving back the price plffs. must return the barley to defts. in the condition in which they received it, which they were unable to do because on receipt of the barley they had turned it out of the bags in which it had been delivered to them & had bulked it in a warehouse & had afterwards put it in different bags & had disposed of the original bags. In an action by plffs. on the award:—**Held:** (1) plffs. were entitled to have the award enforced as it stood without any implied term being read into it; (2) whether that was so or not, the contract was one for the sale of barley, not for the sale of barley in particular bags, & as plffs. were prepared to return the actual barley received by them defts. must accept its rejection.—**DOWER (E. M.) & Co. v. CORRIE MACCOLL & SONS, LTD. (1925), 42 T. L. R. 43.**

**Time of shipment.]—See Sect. 2, sub-sect. 3, ante.**

**SECT. 15.—GOODS BY WEIGHT.**

*See WEIGHTS & MEASURES.*

**SECT. 16.—FALSE TRADE DESCRIPTION.**

*See TRADE MARKS, TRADE NAMES, & DESIGNS.*

**SECT. 17.—OTHER CONDITIONS AND WARRANTIES.**

**SUB-SECT. 1.—CONDITIONS.**

**887. Approval of goods by inspector—To be notified within reasonable time—Whether such condition implied.]—In an action on a contract by defts. to deliver goods at the wharf of third**

parties, in equal portions, in four months, to be made to the satisfaction of the inspector of such parties, & if not so made, to be removed by defts., & others substituted in the time named, to wit, four months; averments of performance on plffs.' part, & breach that the goods were delivered & not made to the satisfaction of the inspector, whereby they were rejected, & plffs. lost the benefit of a contract with the third parties mentioned: pleas, denying the contract as stated; denying the breach; & alleging that the contract was subject to a condition that the disapproval of each portion should be notified in a reasonable time after its delivery. The contract, as stated, being proved, in fact, & it not appearing that there was any such condition in fact:—**Held:** there was no such condition implied in law from the contract as stated or proved; nor that the disapproval should be notified within the time named, or the four months; & the jury not having found that the disapproval was in an unreasonable time, the ct. discharged a rule to enter the verdict for defts.—**COULSON v. ATTWOOD (1857), 26 L. J. Ex. 244.**

**888. Sale by manufacturer as such—Goods must be of manufacturer's make.]—On the sale of goods by a manufacturer of such goods, who is not otherwise a dealer in them, there is, in the absence of any usage in the particular trade or as regards the particular goods to supply goods of other makers, an implied contract that the goods shall be those of the manufacturer's own make.**

Plffs., who were manufacturers but not dealers in iron, by a written contract, on the margin of which was their trade mark, a crown with their initials, contracted to sell to defts., who thereby contracted to buy of plffs., 2,000 tons of ship plates of the quality known as "Crown," to pass Lloyd's survey to be delivered monthly, at defts.' shipyard. The contract contained a strike clause by which the supply of the iron contracted for might be suspended during the continuance of any strike of workmen; but it had no express stipulation that the plates should be of plffs.' manufacture. Before the contract was completed plffs. closed their works, & proposed to complete the contract by delivery of ship plates of the quality mentioned in the contract made by another firm. Defts. having refused to accept these, plffs. sued them for breach of contract. At the trial defts. tendered evidence to show that in the iron trade there is a custom that, under a contract between a manufacturer of iron plates & a customer for the supply of them, the seller must, in the absence of stipulation to the contrary, supply plates of his own make, & that the purchaser is entitled to reject other plates if tendered, though of the quality contracted for. The judge at the trial rejected this evidence, & gave judgment for plffs.:—**Held:** (1) such evidence was improperly rejected; (2) without such evidence defts. were entitled to succeed, as the contract implied that the plates to be supplied should be of the manufacture of plffs., & therefore plffs. could not require defts. to accept plates not of their own manufacture, even though of the quality contracted for, & as good as those

**PART III. SECT. 17, SUB-SECT. 1.**

**p. Approval of goods by inspector—Inspection to be by inventor of goods supplied—Inspection by substitute on refusal of inventor.]—COWAN v. FISHER (1900), 31 O. R. 426.—CAN.**

**q. — Government inspector—Inspection by assistant—Sufficiency of.]**

**—FAWOETT v. HATFIELD & SCOTT (1919), 50 D. L. R. 322.—CAN.**

**888 i. Sale by manufacturer as such—Goods must be of manufacturer's make.]—In the absence from a contract of specific words to the contrary, there is an implied warranty, in the nature of a condition or undertaking where the vendor is a manufacturer, that the**

goods are of his manufacture.—**RANDALL v. SAWYER-MASSEY CO., LTD. (1919), 43 O. L. R. 602.—CAN.**

**888 ii. — — —.]—WEST STOCKTON IRON CO., LTD. v. NEILSON & MAXWELL (1880), 7 R. (Ct. of Sess.) 1055.—SCOT.**

**888 iii. — — —.]—JOHNSON & REAY v. NICHOLL & SON (1881), 8 R.**

made by plffs. themselves.—*JOHNSON v. RAYLTON* (1881), 7 Q. B. D. 438; 50 L. J. Q. B. 753; 45 L. T. 374; 30 W. R. 350, C. A.

*Annotation*.—As to (2) *Refd. Starey v. Chilworth Gunpowder Co.* (1889), 24 Q. B. D. 90.

**889. Sale of wool—Time for weighing—Sale by weight at auction.**—*FORDER v. WALDRON* (1901), 45 Sol. Jo. 655, D. C.

**890. Sale of rag flock—Conditions as to standard of cleanliness—Rag Flock Act, 1911 (c. 52).**—Where a second-hand furniture dealer purchases bedding stuffed with rag flock, & sells it without having dealt with or altered it by process of manufacture or otherwise, he does not commit an offence against above Act, by reason of the fact that at the time of the sale the rag flock did not conform to the prescribed standard of cleanliness.—*COOPER v. EVAN COOK'S DEPOSITORIES, LTD.*, [1915] 1 K. B. 344; 84 L. J. K. B. 382; 112 L. T. 431; 79 J. P. 159; 31 T. L. R. 82; 13 L. G. R. 368; 24 Cox, C. C. 564, D. C.

**891.**

above Act, s. 1, is not limited to rags which have become polluted through having been used in association with human or animal life, & it includes cuttings from woven jute fabric cut away as waste in the process of manufacture.—*COOPER v. SWIFT*, [1914] 1 K. B. 253; 83 L. J. K. B. 630; 110 L. T. 79; 78 J. P. 57; 12 L. G. R. 115; 23 Cox, C. C. 759, D. C.

*Annotation*.—*Fold. Balmforth v. Chadburn*, [1927] 1 K. B. 663.

**892.** ————.—*The Rag Flock Act, 1911 (c. 52), s. 1 (1)*, provides that a person shall not sell or have in his possession for sale flock manufactured from rags unless the flock conforms to a standard of cleanliness prescribed by regulations made as therein provided. The Rag Flock Regulations, 1912, made under that Act in relation to flock manufactured from rags provide by art. 1 that flock shall be deemed to conform to the standard of cleanliness for the purposes of the above sub-sect. when the amount of soluble chlorine in the form of chlorides removed by thorough washing with distilled water at a temperature not exceeding 25 degrees Centigrade from not less than 40 grammes of a well mixed sample of flock does not exceed 30 parts of chlorine in 100,000 parts of the flock:—*Held*: the word "rags" in the above provisions is not limited to rags which have become polluted through association with human or animal life, but it includes flock made from new & uncontaminated material.—*BALMFORTH v. CHADBURN*, [1927] 1 K. B. 663; 96 L. J. K. B. 516; 136 L. T. 305; 91 J. P. 21; 43 T. L. R. 122; 25 L. G. R. 39; 23 Cox, C. C. 286, D. C.

**893. Dissolution of contract on frustration of adventure.**—By eight contracts in similar form, made in June & July, 1914, a firm of merchants in New York sold to a co. which carried on business at Antwerp a quantity of wheat to be shipped during Aug. & not later than the middle of Sept. 1914, from an Atlantic &/or Canadian port at sellers' option, under one contract to Rotterdam & under the rest to Antwerp, at a price free on board including freight & insurance, to be paid net cash on presentation of bills of lading &/or delivery order. The contracts provided that the sellers were to furnish marine policies of insurance for 2 per cent. over invoice amount; & they contained

the following clauses: "In the event of war, should sellers not have received from buyers approved English &/or American policies . . . for approximate invoice amount covering war risk three days prior to shipment, sellers shall have the right, if they think fit, & are able, to cover war risk for account & risk of buyers." "In case of prohibition of export, *force majeure*, blockade, or hostilities preventing shipment, this contract or any unfulfilled part thereof shall be at an end."

At the beginning of Aug. the sellers cabled to the buyers that they could not effect insurance against war risks & that they were therefore unable to sell the drafts, & asking the buyers to arrange for payment in New York. The buyers refused, & the sellers on Aug. 6 cancelled the contracts. The buyers claimed damages for breach of contract. The dispute was referred to arbn. in London under a clause in the contracts. The wheat was in fact shipped, but for other buyers & for other ports. The sellers claimed that they were entitled to treat the contracts as cancelled as they were unable to sell in America exchange on Rotterdam or Antwerp. The arbitrators found that the business of exporting grain from America to Europe was based upon the sale of exchange in America & it had long been a well-recognised usage or custom for shippers of grain from America to sell or negotiate the exchange to or with an exchange buyer in America, & the sale of wheat could not be carried out unless such exchange were possible, & it was an implied term &/or condition of the contracts that the sellers should at all material times be able to sell or negotiate the exchange; that the buyers were aware of this usage or custom at the time when the contracts were made; that from Aug. 1 to 6 inclusive when the sellers claimed to cancel the contracts they were unable to sell exchange on Antwerp or Rotterdam, & this inability continued throughout the whole period for shipment provided by the contracts; that from Aug. 1 to 6 inclusive no war insurance could have been effected by the sellers on the shipments; that the commercial purpose of the adventure so far as the sellers were concerned became frustrated by the impossibility in the circumstances prevailing of their being able to sell or negotiate exchange in America; that this impossibility & the circumstances prevailing were caused by hostilities; & that shipment was prevented by hostilities within the meaning of the prohibition clause in the contracts. They accordingly made an award in favour of the sellers:—*Held*: (1) the shipment was not "prevented" by hostilities within the meaning of the prohibition clause in the contracts, "prevention" there meaning a physical or legal prevention; (2) the question whether a term should be implied in the contracts providing for their dissolution on the ground of the frustration of the commercial adventure was a question of law for the ct.; & as the buyers were not concerned with the general method by which the sellers financed their exports of wheat to Europe, & considering that the contracts contained a provision as to insurance of war risks in the event of war, a term or condition could not be implied in the contracts that if the sellers were unable to sell the exchange the contracts should be determined.—*Re COMPTON COMMERCIAL ANVERSOIS & POWER, SON & Co.*, [1920] 1 K. B. 888; 89 L. J. K. B. 849; 122 L. T. 567; *sub nom.* *COMPTON*

(Ct. of Sess.) 437; 18 Sc. L. R. 268.—*SCOTT*.

**r. Sale of motor car—Condition as to good running order.**—*BACKHOUSE v. MOTOR BUS SERVICES (ADELAIDE), LTD.*

(IN LIQUIDATION), [1920] S. A. L. R. 81.—*AUS.*

**t. ————.**—*GRAY-CAMPBELL, LTD. v. COE*, [1925] 2 D. L. R. 622.—*CAN.*

**a. Sale of brick making machinery—Condition as to capacity of output.**—*KOMNICK SYSTEM SANDSTONE BRICK CO. v. BRITISH COLUMBIA PRESSED BRICK CO.*, [1919] 1 W. W. R. 645.—*CAN.*

*Sect. 17.—Other conditions and warranties: Sub-sects. 1 & 2. Sect. 18: Sub-sects. 1 & 2.]*

**COMMERCIAL ANVERSOIS v. POWER, SON & Co., 36 T. L. R. 101, C. A.**

*Annotations:—As to (2) Refd. Larrinaga v. Soc. Franco-Americaine Des Phosphates De Medulla (1922), 38 T. L. R. 739; Tournier v. National Provincial & Union Bank of England, (1924) 1 K. B. 461.*

**894. Delivery of goods from particular mills—Failure of mill to deliver.]—HURNANDRAI FULCHAND v. PRAGDAS BUDHSEN, No. 581, ante.**

**895. Goods deemed to be in accordance with contract—Unless notification to contrary—Whether applicable to quantity & quality.]—BECK & Co. v. SZYMANOWSKI & Co., No. 925, post.**

#### SUB-SECT. 2.—WARRANTIES.

**896. Express warranty — “Defendant could warrant.”]**—Declaration on a warranty that seed was good, “which deft. could warrant,” held sufficient after verdict.—**BUTTON v. CORDER (1817), 7 Taunt. 405; 1 Moore, C. P. 109; 129 E. R. 162.**

**897. Goods stated to be “on voyage.”]**—**GORRISSEN v. PERRIN, No. 391, ante.**

**898. Warranty that safe burglar proof — Whether absolute warranty for all time.]—WALKER v. MILNER, No. 500, ante.**

**899. Sale of chain cable—Implied warranty of proper test & stamp—Chain Cables Acts.]**—In every case of a contract for the sale of a chain cable, whether for use on a British ship or not, there is an implied warranty that it has been properly tested & stamped in accordance with the provisions of the Chain Cables Acts.—**HALL v. BILLINGHAM & SONS (1885), 54 L. T. 387; 34 W. R. 122; 2 T. L. R. 124; 5 Asp. M. L. C. 538, D. C.**

**900. Warranty as to quantity—Label on goods.]**—A purchaser buying goods from a firm of good reputation is justified in trusting the label as to

quantity appearing upon the package when received, & is not bound to make inquiry as to its accuracy.—**BRITISH SOUTH AFRICA CO. v. LENNON, LTD. (1915), 85 L. J. P. C. 111; 113 L. T. 935; 31 T. L. R. 585, P. C.**

**901. Sale of yacht—Accuracy of survey.]**—An agent of pltf., who had agreed to purchase a yacht subject to a satisfactory survey by Lloyd's, wrote to defts., the trustees of Lloyd's Register of Shipping, asking them to instruct their surveyor to make a survey, & signed a form which stated that Lloyd's would not be responsible for any inaccuracy or negligence of its surveyors. Defts. replied that the half-time survey had recently been completed & they offered pltf. a copy at a guinea. Pltf. accepted the offer, & as the report was satisfactory he bought the yacht, but he found her to be in bad condition. In an action for breach of an implied warranty that the survey was accurate:—**Held:** there was no implied warranty & the action failed.—**GAGE v. BEAUCHAMP (1920), 36 T. L. R. 253.**

#### SECT. 18.—EXCLUSION OR VARIATION OF IMPLIED CONDITIONS OR WARRANTIES.

##### SUB-SECT. 1.—IN GENERAL.

*See Sale of Goods Act, 1893 (c. 71), ss. 14, 55.*

**902. Goods to be taken “with all faults” — How far vendor divested of liability.]**—A man may be morally, & under the terms of an Act of Parliament, legally culpable, & yet his conduct may not give any right of action to a private individual who suffers injury thereby. A breach of a statutory duty may not constitute the foundation for a private right of action. A statement that the purchaser of an article must take it “with all faults,” & that the vendor will give no warranty with it, & will refuse all future claim for compensation, where the vendor does nothing to conceal

#### PART III. SECT. 17, SUB-SECT. 2.

**b. Express warranty — How far purchaser protected against adverse claimants.]**—On a sale of “timber limits” held under licenses in pursuance of Consolidated Statutes of Canada, c. 23, a clause of simple warranty does not operate to protect the purchaser against eviction by a person claiming to be entitled under a prior license to a portion of the limits sold.—**DUCONDU v. DUPUY (1883), 9 App. Cas. 150, P. C.—CAN.**

**c. — Trees warranted “in good condition” — Meaning of condition.]**—**WELLINGTON v. FRASER (1909), 14 O. W. R. 291; 19 O. L. R. 88.—CAN.**

**d. — Engine made “in a workmanlike manner.”]**—Where an engine is warranted to be made in a workmanlike manner, that warranty is not satisfied if it is shown that the engine can be operated, but only by experts employed by the manufacturers. An engine, to satisfy the warranty, must be so constructed that it can be operated by any gasoline engineer of average skill & knowledge.—**CANADIAN FAIRBANKS CO. v. THOMPSON (1911), 18 W. L. R. 658; 4 Sask. L. R. 475.—CAN.**

**e. — Warranty as to quantity —**—**SWIFT v. W. W. R. 709.—CAN.**

**f. Sale of specific goods — Implied warranty of existence of goods.]**—**MORT & Co.**

#### PART III. SECT. 18, SUB-SECT. 1.

**g. By express agreement.]**—**COCK-**

**SHUTT PLOW CO. v. MILLS (1905), 7 Terr. L. R. 397; 2 W. L. R. 355.—CAN.**

**h. —.]—MILLS v. MANITOBA COMMISSION CO. (1905), 2 W. L. R. 30.—CAN.**

**k. —.]**—An express warranty in a contract for sale of goods does not necessarily negative the implied condition under Sale of Goods Ordinance, s. 16 (1).—**REEVES & Co. v. CHASE (1908), 8 W. L. R. 313; 1 Alta. L. R. 274.—CAN.**

**l. —.]**—Pltfs. cannot set up an implied warranty or condition for the purpose of getting rid of an express warranty to the same effect contained in the contract.—**ELLIOTT v. BROWN (1910), 13 W. L. R. 690; 3 Sask. L. R. 238.—CAN.**

**m. —.]—ALLOOCK v. MANITOBA WINDMILL & PUMP CO. (1911), 18 W. L. R. 77; 4 Sask. L. R. 135.—CAN.**

**n. —.]**—In an action for damages for breach of warranty on sale of a 25 horse power traction-engine for threshing & ploughing:—**Held:** as to implied warranties, a clause in the agreement of sale that “the above-described engine is sold subject to the following conditions & warranties & no other,” cut out all implied warranties.—**HUTCHINS v. GAS TRACTION CO. (1914), 29 W. L. R. 288; 20 D. L. R. 204.—CAN.**

**o. —.]**—An express warranty on the sale of farm machinery that “the vendor does not give any warranties with this machinery other than the following: Machine is to be in good repair,” excludes all implied warranties.—**RIVERS v. WHITE (G.) & SONS**

**Co., LTD. (Sask.), [1918] 3 W. W. R. 61.—CAN.**

**p. —.]**—A provision in a contract for the sale of goods that the contract is “made upon the express condition that this order & agreement contains all the terms & conditions of the sale & purchase,” excludes all implied warranties.—**SCHOFIELD v. EMERSON-BRANTINGHAM IMPLEMENT CO., [1918] 1 W. W. R. 306; 38 D. L. R. 528; 11 Sask. L. R. 11.—CAN.**

**q. —.]—J. I. CASE THRESHING MACHINE CO. INCORPORATED v. WEBB, [1920] 1 W. W. R. 338; 13 Sask. L. R. 151.—CAN.**

**r. —.]—SIMMERS (J. A.), LTD. v. POWELL, [1924] 3 D. L. R. 972; 55 O. L. R. 559.—CAN.**

**t. —.]**—Warrantice completely excluded by a covenant to the contrary.—**PARKER & FINNIE v. PATERSON (1816), Hume, 707.—SCOT.**

**u. —.]**—*Intention must be clear.*—Implied warranty that on a sale of personality the thing sold shall be reasonably fit & proper for the purpose for which it was designed, cannot be evaded by the seller inserting a provision in the contract of sale whose language does not clearly deprive the buyer of the benefit of the implied provision, especially where the inserted clause appears on its face to have a distinctly different function.—**ALABASTINE CO., PARIS, LTD. v. CANADA PRODUCER & GAS ENGINE CO., LTD. (1912), 23 O. W. R. 841; 4 O. W. N. 486; 8 D. L. R. 405; 30 O. L. R. 394; 17 D. L. R. 813; 5 O. W. N. 723.—CAN.**

*far implied warranty*

defect, relieves the vendor from all liability in respect of any defect in the article itself.

If such a statement was followed by a declaration of the vendor, who knew the reverse, that he believed the article to be free from objection, there might be ground for an action of deceit (LORD CAIRNS, C.).—WARD *v.* HOBBS (1878), 4 App. Cas. 13; 48 L. J. Q. B. 281; 40 L. T. 73; 43 J. P. 252; 27 W. R. 114, H. L.

*Annotations*.—*Reid*. Peters *v.* Planner (1895), 11 T. L. R. 169; Dunn *v.* Currie (1902), 71 L. J. K. B. 963; Clarke *v.* Army & Navy Co-op. Soc., [1903] 1 K. B. 155; Phillips *v.* Britannia Hygienic Laundry Co., [1923] 1 K. B. 539. *Mentd.* Sarson *v.* Roberts (1895), 43 W. R. 690.

**903.** By express agreement—Right of inspection.]—POLENGHI BROTHERS *v.* DRIED MILK CO., LTD., No. 833, *ante*.

#### SUB-SECT. 2.—CONDITION AS TO FITNESS.

See Sale of Goods Act, 1893 (c. 71), ss. 14, 55.

**904.** Whether condition excluded—Trade usage—Bacon trade.]—On a warranty of prime singed bacon evidence is not admissible of a practice in the bacon trade to receive bacon to a certain degree tainted as prime singed bacon, nor of a practice to preclude the purchaser from all remedy, if he does not discover & point out the defect by an early day.—YATES *v.* PYM (1816), 6 Taunt. 446; 128 E. R. 1107; *sub nom.* YEATS *v.* PIM, 2 Marsh 141.

*Annotations*.—*Distd.* Parker *v.* Palmer (1821), 4 B. & Ald. 387. *Reid*. Budd *v.* Fairmanner (1831), 1 L. J. C. P. 16; Powell *v.* Horton (1836), 2 Bing. N. C. 668; Brown *v.* Byrne (1854), 18 Jur. 700; Humfrey *v.* Dale (1857), 7 E. & B. 266; Lucas *v.* Bristow (1858), 27 L. J. Q. B. 364.

**905.** ———— Meat trade.]—By Sale of Goods Act, 1893 (c. 71), s. 55, it is provided that evidence of a trade usage, if it be such as to bind both parties to a contract, may set aside ordinary rights & liabilities which might arise under the contract by implication of law. So where a butcher sought to make a market salesman liable for selling him bad meat, & pleaded that he had made known the purpose for which the meat was bought, & had relied upon the skill & judgment of the seller:—*Held*: these conditions would *prima facie* give the purchaser a remedy under Sale of Goods Act, 1893 (c. 71), s. 55, but the salesman was entitled to set up the defence that there was an implied usage amongst traders in the market to give no warranty in the sale of meat.—COINTAT *v.* MYHAM & SON

*excluded*—Right to deliver different subject-matter.]—On a contract of sale, the parties may stipulate that the rights or obligations which would otherwise attach to a sale should not apply to the sale in question, but a clause altering or limiting the effect of a contract for the sale of a specified article cannot be held to alter the subject-matter of the sale, nor to give the vendor a right to supply any article he may choose, unless clear language to that effect be used.—HART-PARR *Co.* *v.* JONES (Sask.), [1917] 2 W. W. R. 888.—CAN.

c. ————.]—Where one person agrees to sell & another to buy an article under an agreement by which the rights or obligations which otherwise would flow from the contract of sale are limited or extinguished, the provisions limiting or extinguishing these rights or obligations have application only where the vendor delivers the article agreed to be purchased, or the purchaser agrees to accept a different article as the article he was to receive.—J. I. CASE THRESHING MACHINE CO. *v.* MITTEN, [1919] 1 W. W. R. 101; 44 D. L. R. 40; 12 Sask. L. R. 1.—CAN.

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d. ———— Whether statutory warranties excluded—Warranties under Farm Machinery Act.]—NOLAN *v.* EMERSON-BRANTINGHAM CO., [1920] 2 W. W. R. 470; 15 Alta. L. R. 353; 49 D. L. R. 378.—CAN.

#### PART III. SECT. 18, SUB-SECT. 2.

e. Whether condition excluded—“Guarantee to pass survey.”]—In an action of damages for breach of a contract to furnish stores for an emigrant ship “for twenty weeks’ consumption, as per charterparty, warranted to pass survey of Government inspectors,” founded on allegations of bad quality & deficiency in quantity:—*Held*: on a construction of contract, the express warranty “to pass survey of Government inspectors” did not exclude the warranty implied at common law, that the goods should be fit for the purpose for which they were furnished.—COOPER & AVES *v.* CLYDESDALE SHIPPING CO. (1863), 1 Macph. (Ct. of Sess.) 677; 35 Sc. Jur. 383.—SCOT.

f. ————.]—On the sale of a threshing engine by description there is an im-

(1914), 84 L. J. K. B. 2253; 110 L. T. 749; 78 J. P. 193; 30 T. L. R. 282; 12 L. G. R. 274, C. A.

*Annotations*.—*Mentd.* Leslie *v.* Reliable Advertising & Addressing Agency, [1915] 1 K. B. 652; Turpin *v.* Victoria Palace, [1918] 2 K. B. 539; Proops *v.* Chaplin (1920), 37 T. L. R. 112; Weld-Blundell *v.* Stephens, [1920] A. C. 956; Britannia Hygienic Laundry Co. *v.* Thornycroft (1926), 135 L. T. 83.

**906.** ———— Conduct of purchaser—Delay in complaining.]—Pltf. bought saffron of an inferior quality, which, having kept six months, & sold part, he then objected that the article was not saffron:—*Held*: in an action for a breach of warranty, from the length of time & inferior price given, it was such an article as pltf. intended to purchase.—PROSSER *v.* HOOPER (1817), 1 Moore, C. P. 106.

**907.** ———— Inferiority of price paid.]—PROSSER *v.* HOOPER, No. 906, *ante*.

**908.** ———— “Guarantee to pass survey”—Provisions.]—Pltfs. having entered into an agreement with the East India co. for the conveyance of troops to Bombay, deft. undertook to supply pltfs. with troop stores, “guaranteed to pass survey of the East India co.’s officers”:—*Held*: this express warranty did not exclude the warranty implied by law that the stores should be reasonably fit for the purpose for which they were intended.—BIGGE *v.* PARKINSON (1862), 7 H. & N. 955; 31 L. J. Ex. 301; 8 Jur. N. S. 1014; 10 W. R. 349; *sub nom.* SMITH *v.* PARKINSON, 7 L. T. 92, Ex. Ch.

*Annotations*.—*Appld.* Beer *v.* Walker (1877), 46 L. J. Q. B. 677; Ollett *v.* Jordan, [1918] 2 K. B. 41. *Reid*. Jones *v.* Just (1868), L. R. 3 Q. B. 197; Mody *v.* Grogson (1868), 38 L. J. Ex. 12. *Mentd.* Redhead *v.* Mid. Ry. (1869), L. R. 4 Q. B. 379.

**909.** ———— Special conditions not brought to buyer’s notice—Bicycle.]—Pltf. wrote to defts., inquiring the price of a certain type of bicycle sold by them, & thereupon was sent defts.’ catalogue. Subsequently pltf. went to defts.’ depot & selected a bicycle. The catalogue contained at the end terms of sale, which excluded the implied warranty under Sale of Goods Act, 1893 (c. 71), s. 14, & contained in lieu a modified warranty & conditions as to repair free of charge in case any fault should be developed in a bicycle sold. An *erratus* slip at the beginning of this catalogue had a notice referring to the terms of sale, & then there were 10 pages, each with a model of a bicycle depicted, & at the foot of the model on the last page was a notice calling attention to the terms of sale at the end. Pltf. did not read the slip, & stopped short

plled warranty that it shall be reasonably fit for the work that the vendor knew the buyer wanted it for, which is not inconsistent with any of the express warranties usually inserted in such a contract.—NORTH WEST THRESHER CO. *v.* DARRELL (1905), 15 Man. L. R. 553.—CAN.

g. ————.]—SAWYER & MASSEY CO. *v.* THIBART (1907), 5 W. L. R. 241; 6 Terr. L. R. 409.—CAN.

h. ————.]—CLARK *v.* WATERLOO MANUFACTURING CO. (1910), 16 W. L. R. 53; 20 Man. L. R. 289.—CAN.

k. ————.]—Pltfs. sold machinery to the deft., who signed a written contract containing a special clause stating that “There are no other warranties or guarantees, promises or agreements, than those contained herein”:—*Held*: this stipulation was not sufficient to exclude the implied condition as to reasonable fitness for the purpose for which the article was bought which attached to such a sale as this by the Sale of Goods Ordinance, C. O. 1905, c. 39, s. 16 (1), & which is something higher than a warranty, & not inconsistent with the express warranty first set out in the contract.—

H H

*Sect. 18.—Exclusion or variation of implied conditions or warranties: Sub-sect. 2. Sect. 19: Sub-sect. 1, A.]*

of the third page, on which was a model of the bicycle he intended to buy, & did not appreciate that the bicycles were offered on any special terms. Nothing was said to him at the depot about any special or modified warranty & no reference was made to any special terms in either the invoice or receipt which were given. If the special terms of sale were imported into the contract for sale of the bicycle the claim *pltf.* made for damages could not succeed:—*Held*: the bicycle was not contracted to be sold subject to the special terms & warranty & therefore there was a warranty implied by Sale of Goods Act, 1893 (c. 71), s. 14, that the bicycle was reasonably fit to be ridden by *pltf.* & as it was owing to the family construction of the bicycle that the accident occurred, that implied warranty has not been fulfilled & *pltf.* was entitled to the damages claimed.—*WALLS v. CENTAUR Co., LTD. (1921), 126 L. T. 242.*

910. — *Express agreement referring only to warranty.—Seed.*—*HOWCROFT v. LAYCOCK (1898), 14 T. L. R. 460; 42 Sol. Jo. 572, D. C.*

*Annotations* — *Overd.* *Walls & Wells v. Pratt & Haynes, [1910] 2 K. B. 1003. Refd. Harrison v. Knowles & Foster, [1917] 2 K. B. 606.*

911. — *—*—*—*—*—*—*WALLIS, SON & WELLS v. PRATT & HAYNES, No. 996, post.*

912. — *—*—*Motor car.*—*BALDRY v. MARSHALL, No. 762, ante.*

913. — *—*—*Coal.*—*WILLIAM BARKER (JUNIOR) & Co., LTD. v. ED. T. AGIUS, LTD., No. 926, post.*

914. — *Goods delivered different from those contracted for.*—*PINNOCK BROTHERS v. LEWIS & PEAT, LTD., No. 1029, post.*

915. — *Article sold under trade name.*—*BALDRY v. MARSHALL, No. 762, ante.*

916. — *Ambiguity of excluding clause.*—*Pltfs., a ship repairing co., requiring a new intermediate pressure cylinder for the engine of a steamer which they had contracted to repair, obtained a quotation from defts., who were marine engineers. At the head of defts.' letter was a printed notice, "All offers are subject to our usual strike & guarantee clauses, accidents, etc." Pltfs. ordered the cylinder, but after it had been delivered & fitted it was found to be defective. A new cylinder was subsequently supplied by defts., but owing to the delay *pltf.* were not able to complete the repairs in accordance with their contract with the shipowners, & had to pay them*

damages. In an action to recover the amount of the damages *defts.* alleged that the contract for the supply of the cylinder was made subject to "our usual" guarantee clause & that their guarantee clause provided (*inter alia*) that "the contractors shall not in any case be liable for any detention of the vessel or other consequential damages howsoever arising":—*Held*: as it was not clear what guarantee clause was incorporated, since the clause suggested by *defts.* was inapplicable to the contract, & as it was not proved that *defts.* had made it clear that they intended to limit their liability, *pltf.* were entitled to recover.—*J. GORDON ALISON & Co., LTD. v. WALLSEND SLIPWAY & ENGINEERING Co., LTD. (1927), 43 T. L. R. 323, C. A.*

*Sale of food—Notice to purchaser.*—*See FOOD & DRUGS, Vol. XXV., pp. 83–88, Nos. 113–145.*

## SECT. 19.—BREACH OF CONDITIONS AND WARRANTIES.

### SUB-SECT. 1.—CONDITIONS.

#### A. In General.

*See Sale of Goods Act, 1893 (c. 71), s. 11 (1) (a) (b) (c).*

917. *Right of repudiation.*—A party published a prospectus for the publication of a county map & gazetteer, stating that the map would contain "the exact limits of every parish & township in the county." *Deft.* agreed to take a copy of each. They were published, & there were lines on the map denoting the boundaries of townships, but no distinct lines to show the boundaries of those parishes which consisted of several townships:—*Held*: the map was not according to the prospectus, & *deft.* was not bound to take the map, although, by reference to the gazetteer, it could be ascertained what townships were in each parish.—*TEESDALE v. ANDERSON (1830), 4 C. & P. 198; 172 E. R. 669, N. P.*

918. —*—*—*OPPENHEIM v. FRASER, No. 482, ante.*

919. —*—*—The provision in the contracts as to the passing of the property only applies to a shipment of goods which came within the meaning of the contract; it cannot apply to any others (*BIGHAM, J.*).—*VIGERS BROTHERS v. SANDERSON BROTHERS, [1901] 1 K. B. 608; 70 L. J. K. B. 383; 84 L. T. 464; 49 W. R. 411; 17 T. L. R. 316; 45 Sol. Jo. 328; 6 Com. Cas. 99.*

*Annotations* — *Refd. Re Bourgeois & Wilson Holgate (1920), 25 Com. Cas. 260; Aron v. Comptoir Wégimont, [1921] 3 K. B. 435; Szymonowski v. Beck, [1923] 1 K. B. 457.*

*SAWYER-MASSEY Co. v. RITCHIE (1910), 13 W. L. R. 89.—CAN.*

1. —*—*—*SAWYER & MASSEY Co. v. FERGUSON (1911), 20 Man. L. R. 451.—CAN.*

m. —*—*—In an action upon promissory notes given for the price of an engine sold by *pltf.* to *deft.*, *deft.* counterclaimed for breach of a written warranty contained in the agreement of sale:—*Held*: as *deft.* did not send the notice required by the agreement, & did not discontinue the use of the engine until about a year after he purchased it, he could not recover upon this warranty, & he could not succeed upon a counterclaim based on an implied warranty of fitness, because he had expressly agreed that there were no conditions or warranties other than these set out in the agreement.—*ROBERT BELL ENGINE Co. v. BURKE (1912), 19 W. L. R. 934; 5 Sask. L. R. 75; 4 D. L. R. 342.—CAN.*

n. —*—*—*ADVANCE RUMELY THRESHER Co. v. LESTER, [1927] 4 D. L. R. 51; 61 O. L. R. 4.—CAN.*

o. —*—*—Where goods are sold for a specific purpose, the implied condition that the goods must be fit for that purpose is not superseded by an express warranty which is not inconsistent with it.—*DOUGLAS & Co. v. MILNE (1895), 23 R. (Ct. of Sess.) 163; 33 Sc. L. R. 128; 3 S. L. T. 157.—SCOT.*

p. — *Intention must be clear.*—Regarding the implied warranty that goods should be reasonably fit for use or should be merchantable & being articles of food, that they should be reasonably fit for the purpose for which they were supplied, the rule is that in order to get rid of such a warranty there must be between the vendor & purchaser a clear & distinct contract resulting in that effect.—*WINDSOR v. SIMMONS (1908), 5 E. L. R. 139.—CAN.*

q. — *Goods "as classified."*—*M'CLELLAND v. STEWART (1863), 12 L. R. Ir. 125.—IR.*

r. — *By agreement to supply new for defective parts—Additional to clause excluding warranties express & implied.*

—*CANADIAN FAIRBANKS MORSE Co., LTD. v. TEIGHTMEYER, [1921] 2 W. W. R. 683; 16 Alta. L. R. 479.—CAN.*

t. —*—*—A warranty that an engine is reasonably fit for the purposes to which it is intended to be put, implied by reason of the fact that *pltf.* rely upon the knowledge & skill of *defts.*, is not displaced by reason of the fact that the contract of sale contains a clause providing for the replacement of defective parts.—*ALABASTINE Co., PARIS, LTD. v. CANADA PRODUCER & GAS ENGINE Co., LTD. (1912), 23 O. W. R. 841; 4 O. W. N. 486; 8 D. L. R. 405; affd. 30 D. L. R. 394.—CAN.*

### PART III. SECT. 19, SUB-SECT. 1.—A.

a. *Right of repudiation—Rejection of goods—Breach of condition going to root of contract.*—*BOWES v. CHALEYER, [1923] V. L. R. 295.—AUS*

b. —*—*—*—*—*HART v. ANDERSON (1892), 24 N. S. R. 157.—CAN.*

c. —*—*—*—*—*MITCHELL v. SEAMAN (1909), 43 N. S. R. 311.—CAN.*



920. —THAMES SACK & BAG CO., LTD.  
& Co., LTD., No. 560, *ante*.

—]—BENABU & Co.  
Co., LTD., No. 487, *ante*.

922. —]—ARON (J.) & Co. *ante*

v. COMPTON WEGIMONT, No. 589, *ante*.

923. —]—By a contract dated July 26, 1922, the sellers sold to the buyers 500 tons of palm kernels, shipment from Matadi during Sept. 1922. One of the terms of the contract was that particulars of the kernels, namely quantity, port of shipment, & ship's name should be duly declared, & that the sellers were to be deemed to have made default in declaring shipment if the goods were not declared within six weeks of the last day allowed for shipment. On Aug. 17, 1922, the buyers agreed at the sellers' request to accept the balance of the palm kernels necessary to complete the contract from a shipment which the sellers declared would arrive on board the steamship *W*. The *W*. did not call at Matadi, nor were any kernels in fact shipped on that vessel. In Sept. 1922, the sellers shipped the balance of the palm kernels by the steamship *A. V.*, & the documents for the goods were presented to the buyers in Oct. 1922, who then refused to take them up on the ground that the contract had been converted into a contract for palm kernels to be shipped by the *W*. The arbitrators appointed under the contract held that the buyers were entitled to reject the goods, but their decision was reversed by the committee of appeal on the ground that there had been no effectual declaration of shipment by the *W*. & that the sellers were entitled to ship the goods by the later steamer. Upon a case stated for the opinion of the ct.:—*Held*: there had been a variation of the contract by the agreement to ship in August by the *W*., & the buyers were entitled to reject the goods which did not comply with the contract as varied. The award of the committee of appeal was set aside & that of the arbitrators restored.—BERNARDINO CORREA, LDA v. PORTER (W.) & Co. (1923), 129 L. T. 800.

924. —Temporary waiver of breach—Notice to purchaser.]—A contract, made in Sept. for the sale & shipment of 4,000 tons of flour, to be shipped to Greece not later than Nov. 7, provided that "each shipment shall be deemed a separate contract," & that payment should be "by confirmed bankers credit." The buyer opened a banker's credit which was not in fact "confirmed" & the seller, with notice of that fact, made some shipments & received payment therefor by means of the credit, & also obtained from the buyer an extension of time to Nov. 30 for shipment of the balance of the flour. On Nov. 25 the seller cancelled the contract as to the shipment of the balance of the flour, without any previous notice, upon the ground that the credit was not in accordance with the contract:—*Held*: the seller, by waiving for a time the breach of the condition as to a confirmed credit, was not thereby bound to act upon that credit up to the end of the contract, but he was not entitled to cancel the contract without giving the buyer reasonable notice of his intention to cancel so as to give the buyer an opportunity of complying with the condition.—

d. — — — —]—CALIFORNIA PRUNE & APRICOT GROWERS INC. v. BAIRD & PETERS, [1926] 1 D. L. R. 314; [1926] S. C. R. 208.—CAN.

e. — — — —]—*Within reasonable time*.—BURKE v. ROBERTS (1895), 27 N. S. R. (15 R. & G.) 445.—CAN.

—]—NIAGARA GRAIN CO. v. RENO (1917), 38 O. L. R.

g. — — — —]—SAWYER & MASSEY Co. v. WADDELL (1907), 5 W. L. R.

h. — — — —]—M'CARTER v. STEWART & MACKENZIE (1877), 4 R. (Ct. of Sess.) 890; 14 Sc. L. R. 572.—SCOT.

k. — — — —]—*Right to reject all where part only defective*.—AMERICAN-ABELL ENGINE & THRESHER Co. v.

v. RAYMOND HADLEY CORPN. OF NEW YORK, [1917] 2 K. B. 473; 86 L. J. K. B. 1325; 117 L. T. 330; 33 T. L. R. 436; 61 Sol. Jo. 590; 22 Com. Cas. 308, C. A.

Annotations:—*Appld.* Hartley v. Hymans, [1920] 3 K. B. 475. *Consd.* Moore v. Landauer (1921), 125 L. T. 372. *Refd.* Ayrey v. British Lateral & United Provident Assoc., [1918] 1 K. B. 136. *Mentd.* Cape Asbestos Co. v. Lloyds Bank, [1921] W. N. 274.

Whether right to damages affected.]—A contract note for the sale of 2,000 gross of "200 yards reels" of sewing cotton contained the following condition: "The goods delivered shall be deemed to be in all respects in accordance with the contract & the buyers shall be bound to accept & pay for same accordingly unless the sellers shall within fourteen days after the arrival of the goods at their destination receive from the buyers notice of any matter or thing by reason whereof they may allege that the goods are not in accordance with the contract." Eighteen months after delivery the buyers discovered for the first time that the length of cotton per reel was less than 200 yards, the average shortage being about 6 per cent., & they brought an action against the sellers for damages for breach of contract. The sellers pleaded that the condition was a bar to the action:—*Held*: (1) the condition applied to quality only & not to quantity, & the buyers were entitled to judgment; (2) assuming that the conditions extended to quantity, while the condition excluded the right to reject, it did not extend to the right to claim damages.—BECK & Co. v. SZYMANOWSKI & Co., [1924] A. C. 43; 93 L. J. K. B. 25; 130 L. T. 387; 29 Com. Cas. 50, H. L.; *affg.* S. C. *sub nom.* SZYMONOWSKI & Co. v. BECK & Co., [1923] 1 K. B. 457, C. A.

Annotation:—*Generally*, *Refd.* Lancaster v. Turner, [1921] 2 K. B. 222.

926. Rejection of goods—Invalid exercise of right to reject—Remedy in damages.]—*Applts.* sold to resps for shipment from Hamburg to Liverpool, a cargo of coal to consist of briquettes size 2 in., the contract providing as follows: "Bills of lading to be accepted by buyers as absolute & conclusive proof of weight, quality, & description, the buyers having right of inspecting the cargo. No warranty is expressed or implied, & sellers accept no responsibility in regard to the description, size, quality, condition, or fitness for steaming purposes or otherwise of the coal or fuel contracted for or supplied, & no reduction in price will be made in respect of any such matters."

Resps. required the coal to supply power stations, & at the time of the contract *applts.* were aware of this. The cargo was shipped, some of it being in the holds & the remainder on deck & covering the hatch covers. On arrival at Liverpool the vessel had to wait for a discharging berth, & the captain, finding that the cargo in the holds was heating, bought the deck cargo from resps. & removed it & opened the hatches. Resps. then found that, though the briquettes on the deck were of the contractual size, the briquettes in the holds were larger & were not suitable for use in power stations, & they gave notice of rejection of the whole cargo:—*Held*: (1) it was a condition of the

SCOTT (1907), 6 W. L. R. 4

1. — — — —]—*Goods not description—Remedy according to intention of parties*.—Where sellers of good do not satisfy the stipulated descriptions, the question whether or not this is a cause for rejection or gives rise only to a claim for damages, depends upon the intention of the parties as evidenced by the contract in the light



**Secl. 19.—Breach of conditions and warranties:**  
**Sub-sect. 1, A. & B.; sub-sect. 2, A.]**

contract that the briquettes should be of the size of 2 in., & the condition was effective as the warranty clause dealt only with warranties as such & did not affect a condition; (2) resps. had a right to reject the underdeck part of the cargo, but as they had claimed the right to reject the whole cargo they had never validly exercised their right to reject the underdeck part; (3) they were remitted to their right to recover damages for breach of a condition, namely, failure to ship a cargo in conformity with the contract.—**WILLIAM BARKER (JUNIOR) & Co., LTD. v. ED. T. AGIUS, LTD.** (1927), 43 T. L. R. 751.

— **Bulk not corresponding with sample.]—**  
*See Nos. 825-833, ante.*

**927. Buyer compelled to treat breach as breach of warranty—Acceptance of goods—Remedy in damages.]—**By a written agreement, pltf. contracted to sell to deft. from 300 to 350 bales of white washed Donskoy fleece wool, laid down at certain ports in England, "deliverable at Odessa during Aug. then next, to be shipped with all despatch, warranted fair average quality; but should they prove otherwise, to be taken with fair allowance, to be assessed by Messrs. H. & R., subject to the safe arrival of the wool in good condition at any of the ports stated, & the names of the vessels to be declared as soon as the wools were shipped," etc. To an action for the breach of this contract, by not accepting the wools, deft. pleaded that the wools were bought, with the knowledge of both parties, for the purpose of reselling in the course of deft.'s business; that wool is an article of fluctuating value, & not saleable until the names of the vessels in which it was shipped should have been declared according to the contract; & pltf. had neglected to declare the names of the vessels in which the wools were shipped until after an unreasonable time after they had been shipped:—**Held:** the provision in the

contract, that the names of the vessels in which the wools were shipped should be declared as soon as they had been shipped, was a condition precedent to defts.' obligations to accept & pay for them; & the plea was good.

After such acceptance, defts. would have been bound to pay the price, or the residue of it, & could not have insisted on the neglect to name in due time, but, if there had been any such neglect, would nevertheless have had their remedy for the damage by cross action on the contract to declare the names (**PARKE, B.**).—**GRAVES v. LEGG** (1854), 9 Exch. 709; 2 C. L. R. 1266; 23 L. J. Ex. 228; 23 L. T. O. S. 254; *subsequent proceedings* (1857), 2 H. & N. 210, Ex. Ch.

**Annotations:—****Consd.** *Rolt v. Cozens* (1856), 18 C. B. 673. **Appl.** *Pust v. Dowie* (1864), 5 B. & S. 20. **Refd.** *Crooke v. Fletcher* (1857), 1 H. & N. 893; *Gilkes v. Leonino* (1858), 4 Jur. N. S. 537; *Newson v. Smythies* (1858), 28 L. J. Ex. 97; *Robert v. Brett* (1859), 6 C. B. N. S. 611; *Seeger v. Duthie* (1860), 7 Jur. N. S. 239; *Behn v. Burness* (1863), 3 B. & S. 751; *Carter v. Scargill* (1875), L. R. 10 Q. B. 564; *Oppenheim v. Fraser* (1876), 34 L. T. 524; *Kidston v. Monceau Ironworks Co.* (1902), 86 L. T. 556; *Leiston Gas Co. v. Leiston-cum-Sizewell U. C.*, [1916] 2 K. B. 428; *Metropolitan Water Board v. Dick Kerr*, [1917] 2 K. B. 1. **Mentd.** *Bettini v. Gye* (1876), 1 Q. B. D. 183; *River Wear Comrs. v. Adamson* (1877), 2 App. Cas. 743; *Butterley Co. v. New Hucknall Colliery Co.*, [1909] 1 Ch. 37.

**928. ———.]—****WALLIS, SON & WELLS v. PRATT & HAYNES, No. 996, post.**

**B. Waiver of Breach.**

*See Sale of Goods Act, 1893 (c. 71), s. 11 (1) (a) (c).*

**929. Temporary waiver—Whether continuing to end of contract.]—****PANOUTSOS v. RAYMOND HADLEY CORPN. OF NEW YORK, No. 924, ante.**

**930. When to be evidenced in writing.]—****HARTLEY v. HYMANS, No. 580, ante.**

**SUB-SECT. 2.—WARRANTIES.**

**A. In General.**

**931. Warranty given by servant—Liability of master.]—**A master is not liable on the warranty

of the surrounding circumstances.—**WEIL v. COLLIS LEATHER CO.** [1927] 2 D. L. R. 141; [1927] S. C. R. 326.—**CAN.**

**927 i. Buyer compelled to treat breach as breach of warranty—Acceptance of goods—Remedy in damages.]—****FAIRCHILD CO. v. RUSTIN** (1907), 17 Man. L. R. 194; 39 S. C. R. 274.—**CAN.**

**927 ii. ———.]—****BRITISH AMERICAN PAINT CO. v. FOGH** (1915), 32 W. L. R. 142; 24 D. L. R. 61; 22 B. C. R. 97.—**CAN.**

**927 iii. ———.]—****HART-PARR CO. v. WELLS**, [1918] 2 W. W. R. 239; 11 Sask. L. R. 123; 40 D. L. R. 169.—**CAN.**

**927 iv. ———.]—****BOREN v. WATERLOO BOY KEROSENE TRACTOR OF CANADA, LTD.** (Sask.), [1919] 1 W. W. R. 478.—**CAN.**

**927 v. ———.]—****BISHINSKY v. APPLETON** (1921), 64 D. L. R. 477; 50 O. L. R. 426.—**CAN.**

**m. ——— Under contract for specific goods.]—****LUCAS v. SMITH**, [1926] V. L. R. 400; 48 A. L. T. 66; [1926] Argus L. R. 319.—**AUS.**

**n. ——— Unless express or implied power of rejection.]—**Where goods are sold on a representation, amounting to a condition of the contract, if the buyer accepts the goods, the effect of Sale of Goods Ordinance, s. 13 (b), is that the condition sinks to the position of a warranty, unless there is an express or implied term in the contract giving a right of rejection under such circumstances.—**ROBERTSON v. MORRIS** (1909), 1 Alta. L. R. 493; 8 W. L. R. 611; 10 W. L. R. 404.—**CAN.**

**o. ———.]—****PATTERSON,**

**McKINNON & BELL v. LANE**, [1921] 2 W. W. R. 187; 16 Alta. L. R. 377.—**CAN.**

**p. Option of buyer to retain goods after rejection & claim damages.]—****ELECTRIC CONSTRUCTION CO., LTD. v. HURRY & YOUNG** (1897), 24 R. (Ct. of Sess.) 312; 34 Sc. L. R. 295; 4 S. L. T. 287.—**SCOT.**

**q. ———.]—**In a contract between a firm of engineers & the owner of a fishing boat for the supply of a twin-screw set of motor engines, the buyer retained the engines & claimed damages on the ground that they were disconform to the contract. Even if the buyer had rejected the engines, he was not thereby barred from subsequently retaining them & claiming damages, that being the alternative remedy provided by Sale of Goods Act, 1893, s. 11 (2).—**POLLOCK & Co. v. MACRAE**, [1922] S. L. T. 510; 60 Sc. L. R. 11, H. L.—**SCOT.**

**PART III. SECT. 19, SUB-SECT. 1.—B.**

**r. Shipment to be within specified time—Acceptance of part delivered after time—Obligation to accept remainder.]—**

**—****LUBRANO v. GOLLIN & Co. PROPRIETARY, LTD.** (1921), 21 S. R. N. S. W. 300; 36 N. S. W. N. 139; 27 C. L. R. 113.—**AUS.**

**t. Condition of inspection before shipment—Shipment of part without inspection at request of purchaser.]—****GOODALL v. SMITH** (1881), 46 U. C. R. 388.—**CAN.**

**u. By acceptance of part—Before opportunity for inspection.]—****HENEY v. BOSTWICK** (1885), 24 N. B. R. 414.—**CAN.**

**b. Obstruction of performance of condition.]—**No one can take advantage

of the non-fulfilment of a condition the performance of which he has himself hindered.—**TEMISKAMING & NORTHERN ONTARIO RY. COMMISSION v. WALLACE** (1906), 37 S. C. R. 696.—**CAN.**

**c. Acceptance by purchaser of offer by vendor to take back defective goods.]—****HAM v. SMITH TYRER & Co.** (1908), 42 N. S. R. 321.—**CAN.**

**d. Notice of breach condition precedent to action—Waiver of notice by inspection by vendor.]—**Where a provision in a contract requires the buyer to give notice of defects before making claim for a breach of warranty & the seller undertakes by his own agents a test or demonstration, in a manner not contemplated by the order, & thus acquires a more accurate knowledge of defects than could be conveyed in a written notice, any purpose for which the notice should have been sent has disappeared & it will be held to have been waived, especially when the agents undertake to satisfy the buyer.—**J. I. CASE THRESHING MACHINE CO., INCORPORATED v. MITTEN**, [1918] 2 W. W. R. 871; 11 Sask. L. R. 238; 44 D. L. R. 40.—**CAN.**

**e. Use of goods after discovery of breach.]—****NEW HAMBURG MANUFACTURING CO., LTD. v. KLOTZ** (1905), 6 Terr. L. R. 323; 1 W. L. R. 471; 7 Terr. L. R. 319; 3 W. L. R. 404.—**CAN.**

**f. ——— Sowing of seed known to be full of weed seed—Loss of right to damages for injury to land.]—****HENDRIE v. MILLER** (Sask.), [1927] 3 D. L. R. 75.—**CAN.**

**PART III. SECT. 19, SUB-SECT. 2.—A.**

**g. Buyer deprived of remedy—Failure to notify defect in goods—Where**

of his servant.—*SOUTHERN v. How* (1617), Cro. Jac. 408; *J. Bridg.* 125; *Poph.* 143; 2 26; 50 B. 11.

*Blanchard v. Hill* (1742), 2 Atk. 484; *Crawshaw v. Johnson* (1842), 4 Man. & G. 357; *Hall v. Barrows*, 8 L. T. 227; *Hirst v. Denham* (1872), L. R. 14 Eq. 542.

**932. Proof that warranty made at sale.**—A declaration founded on a warranty must show that the warranty was made at the time of the sale.—*POPE v. LEWYNS* (1621), Cro. Jac. 630; 79 E. R. 543.

*Annotation*.—*Mentd.* *Henly v. Walsh* (1705), 2 Salk. 686.

**933. Buyer deprived of remedy—Failure to notify defect in goods—Usage of bacon trade.**—*YATES v. PYM*, No. 904, *ante*.

**934. Goods retained & used by buyer—Right of seller to recover on quantum meruit.**—*POULTON v. LATTIMORE*, No. 954, *post*.

**935. ———.**—*LOMI v. TUCKER*, No. 623, *ante*.

**936. ———.**—*A.* sold a picture to *B.* as a Rembrandt. There was contradictory evidence in an action on an accommodation bill given for the price, as to whether there was a warranty, or only a representation. The picture was kept:—*Held*: if the jury thought there was a warranty, & it was broken, then they should find their verdict for that sum which they considered to be the actual value of the picture.—*DE SEWHANBERG v. BUCHANAN* (1832), 5 C. & P. 343; 172 E. R. 1004, N. P.

**937. Whether action maintainable—Limitation of time.**—Where *A.*, under a contract to deliver spring wheat had delivered to *B.* winter wheat, & *B.*, having again sold the same as spring wheat, had, in consequence, been compelled, after a suit in Scotland which lasted many years, to pay damages to the vendee, & afterwards *B.* brought an action of *assumpsit* against *A.* for his breach of contract, alleging as special damage, the damages so recovered:—*Held*: although such special damage had occurred within six years before the commencement of the action by *B.* against *A.*, yet the breach of contract, which, in *assumpsit*, was the gist of the action, having occurred & become known to *B.* more than six years before that period, *A.* might properly plead *actio non accrevit infra sex annos*.—*BATLEY v. FAULKNER* (1820), 3 B. & Ald. 288; 106 E. R. 608.

*Annotations*.—*Refd.* *Brown v. Howard* (1820), 2 Brod. & Bing. 73; *Collinge v. Heywood* (1839), 9 Ad. & El. 633; *East India Co. v. Odithurn Paul* (1849), 7 Moo. P. C. C. 85; *Gibbs v. Guild* (1881), 8 Q. B. D. 296. *Mentd.* *Davis v. Bank of England* (1824), 2 Bing. 393; *Rhodes v. Smethurst* (1838), 4 M. & W. 42; *Violet v. Sympson* (1857), 8 E. & B. 344.

**938. ———. Action for indemnity against original sellers.**—*G. & A. S.*, who had been held

liable to *K. & C.* in the first action in respect of damages & costs, claimed to be indemnified in respect of the same by a French firm of manufacturers from whom they had originally bought the skins. The manufacturers contended (*inter alia*) that the law governing the sale of the skins was the law of the French Republic, & that the action was barred by the French law of limitation:—*Held*: (1) although a contract made in England is *prima facie* to be governed by English law, in view of the facts that the goods were made in France & were to be delivered in France, & that payment was to be made in French money by a draft in favour of a French vendor payable on a French bank, it must be inferred that here the parties intended French law to govern the contract; but that in matters of limitation the *lex fori* applied, & the action was not statute barred by not having been brought within the French time limit; & (2) according to the rule governing the measure of damages laid down by *FRY, L.J.*, in *Hammond v. Bussey*, No. 995, *post*, the damages that must reasonably be supposed to have been in the contemplation of the parties as the probable result of a breach of the contract, in view of the special circumstances, were the damages & costs incurred by *G. & A. S.* in reasonably defending the action brought against them, & they were accordingly entitled to recover these from the manufacturers.—*SLAVONSKI v. LA PELLETERIE DE ROUBAIX SOCIÉTÉ ANONYME* (1927), 137 L. T. 645.

**939. ———. Inspection of goods by buyer's engineer—Inspection conclusive.**—An English co., who owned a railway in Russia, entered into a contract for the manufacture & delivery to them of rails for their railway. The contract provided that a sample should be sent to the co.'s engineer for approval before the commencement of the work. It was, however, "to be expressly understood that such approval is not in any way to relieve the contractor from any of the conditions or stipulations contained in this specification." During the progress of the work tests were to be applied by the engineer at his discretion, & the entire contract was to be executed in every respect to the satisfaction of the engineer, "who shall have the power of rejecting any rails or fishing plates he may disapprove on any ground whatever, & whose decision on any points of doubt or dispute that may arise in reference to this contract shall be final & binding on all parties. . . . The engineer will inspect, either personally or by deputy, every stage of the process of the manufacture at the works. . . . This examination at the works is not in any way to commit the co. to the approval & acceptance of any rails or fishing plates which, when delivered, shall not be strictly in accordance with the drawings & specification." After the rails had been

latent defect.]—The purchaser of goods subject to a latent defect, sold with a warranty, is not estopped from claiming for breach of the warranty, when sued for the price, by having received the goods without objection made at the time.—*SMITH v. ARCHIBALD* (1907), 2 E. L. R. 397; 41 N. S. R. 211.—*CAN.*

*h.* ———. Within reasonable time.]—*SHINN v. MOLEAN* (1909), 11 W. L. R. 527.—*CAN.*

*k.* ———. ———.]—*HUTCHINS v. GAS TRACTION CO.* (1914), 29 W. L. R. 288; 20 D. L. R. 204.—*CAN.*

*l.* ———. Whether right of vendor waived by subsequent sending of experts.]—*NEILSON v. MINNEAPOLIS STEEL & MACHINERY CO. OF CANADA, LTD.*, [1920] 2 W. W. R. 72.—*CAN.*

*m.* ———. Waiver after breach—Necessity for consideration.]—The jury found

that deft. had consented to waive the alleged warranty. There was no consideration for this consent, therefore there could be no waiver. The alleged waiver occurred after breach of contract:—*Held*: deft. was entitled to damages on his counter-claim.—*DAVIDSON v. REID* (1909), 6 E. L. R. 428.—*CAN.*

*n.* ———. By repair & adjustment of goods to satisfaction of buyer—Before expiration of time limited by warranty.]—*FULKOSKI v. SHNIER* (Sask.), [1933] 3 D. L. R. 1078.—*CAN.*

*o.* Goods retained & used by buyer—With knowledge of defect.]—*HEYWOOD & SON v. CHAPMAN* (1927), 48 N. L. R. 164.—*AF.*

*p.* ———. Seed sown when known to be defective.]—A dealer in grass seeds held liable in damages &

repetition of the price of certain seed grown by himself, & sold by him at a good price, but which, from its bad quality, did not vegetate; & held not to be a bar to the buyer claiming damages, that before sowing the seed he had observed it to have a bad colour & smell, without returning it, or intimating this to the seller.—*HILL v. PRINGLE* (1827), 6 Sh. (Ct. of Sess.) 229; 3 Fac. Coll. 227.—*SCOT.*

*Waiver of warranty of fitness—Warranty of fitness*  
Where goods which are  
by are not at once returned, & the  
contract of sale repudiated, the implied  
condition that they are fit for the  
purpose for which they are bought is  
waived, but the implied warranty of  
fitness remains, on which an action  
for damages may be brought.—*WHITTY*

### 19.—Breach of conditions and

delivered to the co. & paid for by them, & more than half of them laid down in Russia, it was discovered that they were defective. An action being brought by the co. for breach of contract:—*Held*: it could not be maintained, as the contract showed that the parties intended the final expression of the engineer's satisfaction with the entire contract to be conclusive.—*DUNABERG & WITEPSK RY. CO., LTD. v. HOPKINS, GILKES & CO., LTD.* (1877), 36 L. T. 733.

**940. Seller holding out as manufacturer—Goods manufactured by third party.]**—A., a wine merchant, orders a crane rope of B., a dealer in, & who represents himself as a manufacturer of, ropes. B.'s foreman thereupon ascertains the nature & dimensions of the rope required, & being told that it is wanted to raise pipes of wine from the cellar, says that a rope must be made on purpose. B. does not make the rope himself, but sends the order to his manufacturer, who employs a third party to make the rope:—*Held*: in an action on the case by A. against B., to recover damages resulting from the insufficiency of the rope, B., as between him & A., is to be considered as the manufacturer of the rope; & an implied warranty arises out of the contract, that the rope is a fit & proper one for the purpose for which it was ordered. *Semble*: to raise an implied warranty, it is not necessary that the vendor should also be, or should represent himself as, the manufacturer, where he is told of the purpose for which the goods are required, & the purchaser does not select them himself, but relies on the skill & judgment of the vendor.—*BROWN v. EDINGTON* (1841), 2 Man. & G. 279; *Drinkwater*, 106; 2 Scott, N. R. 490; 10 L. J. C. P. 66; 5 J. P. 276; 133 E. R. 751.

*Annotations*:—*Consd.* *Shepherd v. Pybus* (1849), 3 Man. & G. 868. *Distd.* *Ollivant v. Bayley* (1843), 5 Q. B. 288; *Burnaby v. Bollitt* (1847), 17 L. J. Ex. 190. *Consd.* *Mallan v. Radloff* (1864), 17 C. B. N. S. 589; *Jones v. Just* (1868), L. R. 3 Q. B. 197. *Refd.* *Hart v. Windsor* (1843), 12 M. & W. 68; *Sutton v. Temple* (1843), 12 M. & W. 52; *Morley v. Attenborough* (1848), 13 Jur. 282; *Eichholtz v. Bannister* (1864), 17 C. B. N. S. 708; *Readhead v. Mid. Ry.* (1867), L. R. 2 Q. B. 412; *Randall v. Newson* (1877), 2 Q. B. D. 102.

**941. Right to recover purchase-money—Part delivery—Resale of undelivered part by vendor.]**—Pltf. agreed to buy 13 tons of oil from deft., & paid a deposit for the price, 5 tons were delivered, when pltf. said they were of inferior quality, & required deft. to take them back or return the deposit money. Def. sold the other 8 tons, but it did not appear whether he had thus rendered himself incapable of completing the contract, before or after pltf. refused to receive any more of the oil:—*Held*: in the absence of such evidence, on an action brought to recover back the money, the jury were properly directed, whether there was fraud on the

part of deft. in the inception of the contract & if, not, whether there was sufficient evidence that deft. had agreed to rescind the contract.—*PITT v. CASSANET* (1842), 4 Man. & G. 898; 5 Scott, N. R. 902; 12 L. J. C. P. 70; 134 E. R. 369; *sub nom.* *PITT v. CASSANET*, 6 Jur. 1125.

**942. Written contract—Admissibility of parol evidence as to warranty.]**—*HARNOR v. GROVES*, No. 946, *post*.

**943. Rules of auction mart—When court will consider.]**—The ct. will take into consideration the rules of an auction mart in an action for breach of warranty; but where the sale was by private contract those rules cannot prevail.—*TUMMONS v. GAMMELL* (1866), 15 L. T. 191.

**944. Service of summons—Out of jurisdiction.]**—M., a merchant at New York, contracted to supply certain goods to B., a merchant in London, on certain terms. On arrival in London the goods were found to be defective & not according to contract, & the defects in them were not due to sea voyage:—*Held*: inasmuch as the breach was continuing, so as to speak, the English cts. had a jurisdiction, & defts. might be served with notice of a writ of summons under R. S. C., Ord. 11, r. 1 (e).—*BARROW v. MYERS* (1888), 52 J. P. 345; 4 T. L. R. 441, D. C.

*Annotation*:—*Overd.* *Crozler, Stephens v. Auerbach*, [1908] 2 K. B. 161.

**945. ———.]**—Goods were sold under a c.i.f. contract by a foreigner carrying on business & resident abroad to purchasers in England, who paid the price in exchange for the bill of lading. On inspection of the goods after their arrival in England, the purchasers alleged that they were not of the description stipulated for in the contract, & obtained leave to issue a writ, of which notice was to be served, & was served, on deft. out of the jurisdiction, claiming a return of the money paid or damages for breach of contract:—*Held*: the contract of sale being a c.i.f. contract, the alleged breach had taken place out of the jurisdiction, & the case did not fall within R. S. C., Ord. XI., r. 1 (e), & the writ & service must be set aside.—*CROZIER, STEPHENS & CO. v. AUERBACH*, [1908] 2 K. B. 161; 77 L. J. K. B. 873; 99 L. T. 225; 24 T. L. R. 409; 52 Sol. Jo. 335, C. A.

*Annotation*:—*Refd.* *Biddell v. E. Clemens Horst Co.*, [1911] 1 K. B. 934.

**Action in county court—Jurisdiction.]**—*See* COUNTY COURTS, Vol. XIII., p. 463, No. 130.

**Breach of condition treated as breach of warranty.]**—*See* Nos. 927, 928, *ante*.

### B. Repudiation of Contract.

**946. After goods accepted & partially resold—Repudiation & recovery of price.]**—In an action for a breach of warranty on the sale of goods upon a written contract, parol evidence is not admissible to show that the seller's agent at the time of the

SEWING MACHINE CO. v. ——— (1894), 29 I. L. T. 37.—*IR*.

**r. — Right of buyer to refuse to accept bill for contract price.]**—Where goods sold with a warranty are to be paid for by bill of exchange, & in breach of warranty goods of an inferior quality are delivered, the purchaser, although he retains the goods, is not bound to accept a bill of exchange for the contract price. The diminished value of the goods must first be ascertained, & a bill for that amount drawn upon the purchaser before he can be sued for breach of agreement for refusing to accept a bill of exchange for the purchase-money.—*THOMPSON v. GILMOYR* (1883), 2 N. Z. J. R. 226 (S. C.).—*F*

**t. — Attempt by buyer to repair—Part payment of purchase price.]**—A purchaser of machinery which develops a defect against which the vendor had given an express warranty, does not lose his right to sue for damages caused by such defect if instead of repudiating the contract he attempts to repair the defect & pays a portion of the purchase price.—*DU PLESSIS v. VOS*, [1920] C. P. D. 602.—*S. AF*.

**a. Right of action barred—Limitation of period of liability by agreement.]**—It is competent for the parties by their agreement to limit the period within which the vendors shall be liable for breach of warranty; & where that period is by the agreement fixed at one year from the date

shipment, & has elapsed some months before action, pltf.'s right of action is then barred.—*BENSON v. INTERNATIONAL HARVESTER CO. OF AMERICA* (1913), 27 W. L. R. 513; 6 W. W. R. 242; 16 D. L. R. 350.—*CAN*.

### PART III. SECT. 19, SUB-SECT. 2.—B.

**b. General rule.]**—A completed sale of chattels cannot be rescinded for breach of warranty.—*WILLIAM HAMILTON MANUFACTURING CO. v. KNIGHT BROTHERS* (1897), 5 B. C. R. 391.—*CAN*.

**c. ———.]**—Where a chattel sold with a warranty is delivered as agreed upon & is not up to the warranty, that fact, in the absence of fraud, affords no ground for rescinding the contract,

sale represented the goods to be of a particular quality. The vendee of goods who has used or sold a portion of them after he has discovered that they do not answer the contract, cannot repudiate the contract, & recover back the price.

An undertaking in a general contract, not for the sale of specific flour, but of a given quantity of flour, that it shall be of a certain kind or quality, is not a representation, but a warranty, & if binding, it is part of the contract itself.—*HARNOR v. GROVES* (1855), 15 C. B. 667; 3 C. L. R. 406; 24 L. J. C. P. 52; 24 L. T. O. S. 215; 3 W. R. 168; 139 E. R. 587.

*Annotation*:—*Mentd.* *Rye v. Purcell*, [1926] 1 K. B. 446.

**947. Right to reject goods—Goods taken in exchange.]**—Pltf. exchanged a watch with deft. for a pair of candlesticks, which the latter warranted to be silver:—*Held*: pltf. could not maintain trover for the watch, on proof that the candlesticks were of base metal.—*EMANUEL v. DANE* (1812), 3 Camp. 299; 170 E. R. 1389, N. P.

*Annotations*:—*Consd.* *Street v. Blay* (1831), 2 B. & Ad. 456. *Refd.* *Dawson v. Collis* (1851), 10 C. B. 523.

**948. — In case of fraud.]—Semble**: the purchaser of a specific chattel under warranty, having once accepted it, can in no instance return the chattel, or resist an action for the price, on the ground of breach of warranty, unless in case of fraud, or express agreement authorising the return, or consent of the vendor. But where the contract is executory only when the chattel is received, as where goods are ordered of a manufacturer, & he contracts to supply them of a certain quality, or fit for a certain purpose, the vendee may rescind the contract if the goods do not answer the warranty, provided he has not kept them longer than was necessary for the purpose of trial, or exercised the dominion of an owner over them, as by selling them.—*STREET v. BLAY* (1831), 2 B. & Ad. 456; 109 E. R. 1212.

*Annotations*:—*Apld.* *Gompertz v. Denton* (1832), 1 Cr. & M. 207; *Allen v. Cameron* (1833), 1 Cr. & M. 832. *Consd.* *Chappel v. Hicks* (1833), 4 Tyr. 43; *Parsons v. Sexton* (1847), 4 C. B. 899. *Apld.* *Murray v. Mann* (1848), 2 Exch. 538; *Dawson v. Collis* (1851), 10 C. B. 523. *Distd.* *Woodgate v. Wetton* (1854), 24 L. T. O. S. 159. *Consd.* *Clarke v. Dickson* (1858), 4 Jur. N. S. 832. *Distd.* *Bannerman v. White* (1861), 10 C. B. N. S. 844. *Refd.* *Pateshall v. Tranter* (1835), 3 Ad. & El. 103; *Elliott v. Thomas* (1838), 1 Horn. & H. 38; *Mondel v. Steel* (1841), 1 Dowl. N. S. 1; *Sieveking v. Dutton* (1846), 3 C. B. 331; *Syers v. Jonas* (1848), 2 Exch. 111; *Behn v. Burness*

but the remedy is for a breach of warranty.—*FINN v. BROWN* (1901), 35 N. B. R. 335.—*CAN.*

**d. Right to reject goods—Immediately or within reasonable time.]—MCGREGOR v. HARRIS (1891), 30 N. B. R. 456.—*CAN.***

**e. — — —.]—The purchaser's remedy, where no notice is required, but where he has not promptly rejected the chattel on discovering a defect constituting a breach of warranty is in damages & not in rejection.**—*FISCHER v. ROBERT BELL ENGINE & THRESHING CO., LTD.* (Sask.), [1923] 3 W. W. R. 320; *revid.* 18 Sask. L. R. 330.—*CAN.*

**f. — — —.]—PIONEER LUMBER CO. v. ALBERTA LUMBER CO., LTD. (1923), 32 B. C. R. 442.—*CAN.***

**g. — — —.]—VICKERS & Co. v. SHERIFF & DUDGEON (1803), Hume, 332.—*SCOT.***

**h. — — —.]—Reservation of right of disposition by vendor—Acts of ownership by vendee.]—While the rule, that in absence of agreement the purchaser of a specific chattel cannot return it on breach of warranty, may not apply to a sale providing that the property shall not pass until payment of the purchase-price, it will apply in such case where the vendee in addition to keeping the chattel a longer time than reasonable or necessary for trial, has**

exercised the dominion of an owner over it, as by giving a chattel mortgage of it to the vendor.—*PETROPOLOUS v. WILLIAMS (P. E.) CO., LTD.* (1906), 3 N. B. R. 346; 1 E. L. R. 533.—*CAN.*

**k. — — —.]—After discovery of latent defect—Retention & payment during attempts of vendor to remedy defects.]—NEW HAMBURG MANUFACTURING CO. v. WEISBROD (1908), 1 Sask. L. R. 342; 7 W. L. R. 894.—*CAN.***

**l. — — —.]—AIRD & COGHILL v. PULLAN & ADAMS (1904), 7 F. (Cl. of Sess.) 258.—*SCOT.***

**m. — — —.]—A purchaser's right to rescind a sale of machinery on the ground of a latent defect is not barred because he has paid portion of the price & used the machinery in his business after discovering the defect, where the purchaser acted in the expectation that the seller would remedy the defect.**—*VORSTER BROTHERS v. LOUW*, [1910] T. P. D. 1285.—*S. AF.*

**n. — — —.]—Whether entire or divisible nature of contract material.]—EDILSON v. JOYCE, [1917] N. Z. L. R. 648.—*N.Z.***

**o. — — —.]—For latent defects.]—The purchaser of goods with a warranty as to defects is not bound to examine them on delivery. He is entitled to rely on the warranty & if latent defects**

(1862), 5 L. T. 670; *Horsfall v. Thomas* (1862), 1 H. & C. 90; *Azémar v. Casella* (1867), L. R. 2 C. P. 677; *Heilbutt v. Hickson* (1872), L. R. 7 C. P. 438; *Re Green & Balfour, Williamson* (1890), 63 L. T. 97; *Bright v. Rogers*, [1917] 1 K. B. 917. *Mentd.* *Kennedy v. Panama, etc., Mail Co.* (1867), L. R. 2 Q. B. 580; *Phosphate Sewage Co. v. Hartmont* (1877), 5 Ch. D. 394.

**949. — Agreement authorising return.]—STREET v. BLAY, No. 948, *ante*.**

**950. — Consent of vendor.]—STREET v. BLAY, No. 948, *ante*.**

**951. — — —.]—A purchaser with a warranty, on breach thereof, has no right, without the assent of the vendor, to return the article purchased, & to bring an action for the price; but his remedy is by an action for damages upon the warranty.**—*GOMPERTZ v. DENTON* (1832), 1 Cr. & M. 207; 1 Dowl. 623; 3 Tyr. 232; 2 L. J. Ex. 82; 149 E. R. 376.

**952. — — —.]—A bookcase was warranted to be an ancient bookcase; but it was a modern bookcase, made to appear only as ancient. The purchaser having discovered that fact, refused to receive it or pay for it, notwithstanding he had bought, received, & paid for other articles of the same person at the same time:—*Held*: he was not liable for it, the jury having believed the warranty to be made, & returned a verdict for deft., the alleged purchaser.**—*WOODGATE v. WETTON* (1854), 24 L. T. O. S. 158.

**953. — — —.]—HEYWORTH v. HUTCHINSON, No. 484, *ante*.**

**Sale of animals.]—See ANIMALS, Vol. II., pp. 258, 269–271, Nos. 381–384, 475–485.**

**Bulk not corresponding to sample.]—Compare Nos. 825–833, *ante*.**

### C. Setting up Breach of Warranty.

#### (a) In Action by Seller.

*See Sale of Goods Act*, 1893 (c. 7), s. 53 (1).

**954. General rule.]—By a contract for the sale of cinq foin seed, the vendor warranted it to be good new growing seed. Soon after the sale, the buyer was told that it did not correspond with the warranty, & he afterwards sowed part & sold the residue:—*Held*: in answer to an action by the seller to recover the price of the seed, it was competent to the buyer to show that it did not correspond with the warranty.**

subsequently become manifest he can reject the goods.—*MITCHELL'S PIANO SALOONS v. THEUNISSEN*, [1919] T. P. D. 392.—*S. AF.*

**p. — — —.]—TURPIN v. DAVIES, [1920] E. D. L. 109.—*S. AF.***

**q. On breach of warranty of title.]—Under Sale of Goods Act, 1896, s. 11 (a), a breach of the implied condition that the seller of goods has a right to sell them can be treated only as a breach of warranty & not as a ground for repudiating the contract.**—*BANK OF HAMILTON v. DONALDSON* (1901), 13 Man. L. R. 378.—*CAN.*

**r. Where warranty condition precedent.]—UNDERFRED STOKER CO. v. READY (1906), 1 E. L. R. 502; 37 N. B. R. 505.—*CAN.***

**t. — — —.]—JOHNSON v. DIGNY & ONE NORTHERN MILLING CO. (1920), 56 D. L. R. 437.—*CAN.***

**a. Small difference of quality.]—A small difference in the quality of the goods does not justify a buyer in repudiating the sale.**—*BELANGER v. LEDUC* (1907), 3 E. L. R. 213.—*CAN.*

PART III. SECT. 19, SUB-SECT. 2.—C. (a).

**b. In extinction or reduction of price—Extinction—Admissibility of oral warranty.]—GORDON v. WATROUS (1875), 36 U. C. R. 321.—*CAN.***

**Sect. 19.—Breach of conditions and warranties:**  
**Sub-sect. 2, C. (a).]**

The vendee was not bound to return the seed without using it; by keeping it, he has not precluded himself either from bringing an action for breach of the warranty, or from insisting on such breach in this action, in order to show that the seed was of less value than the seller represented it to be (BAYLEY, J.).—**POULTON v. LATTIMORE** (1829), 9 B. & C. 259; 4 Man. & Ry. K. B. 208; 7 L. J. O. S. K. B. 225; 109 E. R. 96.

**Annotations:—***Refd.* Allen v. Cameron (1833), 1 Cr. & M. 832; Cousens v. Paddon (1835), 5 Tyr. 535; Dawson v. Collis (1851), 10 C. B. 523; Bannerman v. White (1861), 31 L. J. C. P. 28; Heilbutt v. Hickson (1872), L. R. 7 C. P. 438; Bostock v. Nicholson, [1904] 1 K. B. 725. **Mentd.** Horsfall v. Thomas (1862), 8 Jur. N. S. 721; Perkins v. Bell (1892), 41 W. R. 195.

**955. In extinction or reduction of price—Extinction.]—**GROUNSELL v. LAMB, No. 431, *ante*.

**956. — Reduction.]—**KING v. BOSTON (1789), 7 East, 481, n.; 103 E. R. 186.

**Annotations:—***Refd.* Street v. Blay (1831), 2 B. & Ad. 456; Mondel v. Steel (1841), 1 Dowl. N. S. 1; Dawson v. Collis (1851), 10 C. B. 523; Davis v. Hedges (1871), L. R. 6 Q. B. 687; Bow, McLachlan v. Ship Camosun, [1909] A. C. 597.

**957. — —.]—**If after a sale by sample at a specific price, goods of an inferior quality be supplied, the vendor cannot recover more than the actual value.—**GERMAINE v. BURTON** (1821), 3 Stark. 32; 171 E. R. 757, N. P.

**Annotation:—***Refd.* Mondel v. Steel (1841), 8 M. & W. 858.

**958. — —.]—**Where A., for a valuable consideration, contracted to sell & plant 70,000 trees on certain lands of deft., & also "well & sufficiently to keep in order the trees aforesaid, for two years next after the planting thereof, & that such of them as should die during such period, except from injury by sheep, game, or cattle, should be replanted in the autumns of the two years by him:—*Held*: evidence of non-performance by A. of any part of his contract, by which the trees had become of less value to deft., was admissible to reduce the damages in an action on the agreement for their price, & for planting them. *Semle*: this agreement meant to keep in order, not by pruning only, but by weeding & clearing the ground about the trees.—**ALLEN v. CAMERON** (1833), 1 Cr. & M. 832; 3 Tyr. 907; 2 L. J. Ex. 263; 149 E. R. 635.

**Annotations:—***Refd.* Baillie v. Kell (1838), 4 Bing. N. C. 638; Dawson v. Collis (1851), 10 C. B. 523; Charles v. Altin (1854), 15 C. B. 46.

**959. — —.]—**Under the general issue to an action for goods sold & delivered, or for work & labour done, deft. may prove, even since the new rules, that the goods delivered were not such as were contracted for, or that the work was done in an unworkmanlike manner, although there was a special contract to pay for the goods or work

at a certain price; & pltf. can then recover only on the *quantum meruit*.—**COUSINS v. PADDON** (1835), 2 Cr. M. & R. 547; 4 Dowl. 488; 1 Gale, 305; 5 Tyr. 535; 5 L. J. Ex. 49; 150 E. R. 234.

**Annotations:—***Consd.* Dicken v. Neale (1836), 1 M. & W. 556. *Refd.* Hayselden v. Staff (1836), 5 Ad. & El. 153; Jones v. Nanney (1836), Tyr. & Gr. 634. **Mentd.** Broomfield v. Smith (1836), 1 M. & W. 542; Goldsmid v. Raphael (1836), 3 Scott, 385; Gregory v. Hartnoll (1836), 1 M. & W. 183; Green v. Marsh (1837), Will Woll. & Dav. 343; Fischer v. Aldi (1838), 7 L. J. Ex. 229; Eastmure v. Laws (1839), 7 Scott, 461; Kilner v. Bailey (1839), 5 M. & W. 382; Tuck v. Tuck (1839), 5 M. & W. 109; Falcon v. Benn (1841), 2 Q. B. 314; Turner v. Diaper (1841), 2 Man. & G. 241; Lord v. Ferrand (1844), 13 L. J. Ex. 111; Ford v. Beech (1846), 11 Q. B. 842; Rodgers v. Maw (1846), 15 M. & W. 444; Roberts v. Campbell (1847), 10 L. T. O. S. 183; Roche v. Champagne (1847), 16 L. J. Ex. 249; Wilkinson v. Kirby (1854), 15 C. B. 430; Parr v. Jewell (1856), 16 C. B. 684; Tonge v. Chadwick (1856), 2 Jur. N. S. 232; Traherne v. Gardner (1857), 8 E. & B. 161.

**960. — —.]—**Debt, in £20, for a boat sold & delivered by pltf. to deft. Plea, as to £17 10s., parcel of the sum of £20, that the action, as to the said sum of £17 10s., was brought to recover that sum as being the residue of a sum of £57 10s., whereof the sum of £20 was parcel, such sum of £57 10s. being the price of the boat sold & delivered by pltf. to deft.; that pltf., at the time of the sale, warranted that the boat was sound & that deft., confiding in such promise, bought the boat on the terms aforesaid, & then paid to pltf. the sum of £40 in part & on account of the boat. The plea then averred that the boat, at the time of the sale & warranty, was unsound & was not then worth more than the £40 which had been & was so paid to pltf. for the same; & that deft. incurred an expense exceeding £17 10s. in putting her into a sound state:—*Held*: bad on special demurrer, as amounting to the general issue.—**DICKEN v. NEALE** (1836), 1 M. & W. 556; 5 Dowl. 176; Tyr. & Gr. 878; 5 L. J. Ex. 265; 150 E. R. 556.

**961. — —.]—**In all actions for the price of goods sold & delivered with a warranty of work & labour, as well as in actions for goods supplied under a particular contract, it is competent for deft. to give in evidence a breach of the warranty or contract, & to show how much less the subject-matter of the action is worth by reason of such breach. In such case a deft. must be considered as having obtained satisfaction for the breach, to the extent of the abatement he is capable of obtaining in the price, & he is precluded recovering in another action on the same breach, to that extent, & no more; he cannot set off, by a proceeding in the nature of a cross-action, the amount of damage which he has sustained by the breach.

Declaration on a special *assumpsit* on a contract to build a ship according to a specification, assigning a breach in not building the ship with scantling,

**956 i. — Reduction.]—**A purchaser of goods, with an implied warranty that they are of merchantable quality, is at liberty to take the goods, keep them, & use them or a portion of them, & then either to set up their inferior quality in answer to an action for their price, or to bring an action to recover damages for their inferiority.—**THOMAS v. MARKS** (1884), 10 V. L. R. (Law) 217.—**AUS.**

**956 ii. — —.]—**In an action for the price of fish, warranted sound deft. may give the unsoundness of the fish in evidence in mitigation of damages, & is not obliged to resort to an action on the warranty.—**SMITH v. DUNHAM** (1845), 2 Kerr, 630.—**CAN.**

**956 iii. — —.]—**In an action for the contract price of goods sold & delivered, in which it was shown that

the goods delivered were not manufactured as agreed upon, the vendors having substituted castings for forgings:—*Held*: defts. were entitled to have their damages applied in reduction of pltf.'s claims.—**CENTAUR CYCLO Co. v. HILL** (1903), 22 C. L. T. 253; 24 C. L. T. 121, 209; 1 O. W. R. 229, 377; 2 O. W. R. 1025; 3 O. W. R. 255, 354; 7 O. L. R. 110.—**CAN.**

**956 iv. — —.]—****PROUT v. ROGERS FRUIT CO.** (1908), 18 Man. L. R. 240; 9 W. L. R. 554.—**CAN.**

**956 v. — —.]—**Defts. bought from pltf. 700 crates of peaches; the peaches were to be of a specified size & quality; pltf. sued for the contract price of the peaches, & defts. set up that the peaches were not as agreed:—*Held*: upon the evidence, there was

a representation & warranty, the warranty was broken, & defts. were entitled to a reduction in the contract price.—**CATALANO & SANSONE v. CUNEO FRUIT & IMPORTING CO.** (1919), 46 O. L. R. 160; 17 O. W. N. 60.—**CAN.**

**956 vi. — —.]—****WILLOMME v. PILANTZ** (Sask.) (1921), 62 D. L. R. 694.—**CAN.**

**956 vii. — —.]—**Where a buyer accepts goods sold to him under a warranty & subsequently discovers that portion of the goods do not come up to the warranty he may, on being sued for the purchase price, deduct the difference between the contract price & the lower price at which the faulty goods are resold by him in open market.—**PURELL v. MARKS, LTD.**, [1920] C. P. D. 17.—**S. AF.**



fastening, & planking, according to the specification & alleging special damage. Plea, that deft. had sued pltf. for the balance of the agreed price of the ship, after payment of £3,500, & also for a sum of £150, for extra work, in the form of an action for work & labour, & for goods sold & delivered: that issue was joined &, on the trial of the cause, the now pltf. gave evidence in his defence of the same breach of contract alleged in the declaration, & insisted, if the amount of compensation to which he was entitled exceeded & equalled the balance & value of the extra work, the now pltf. was entitled to a verdict; if less, then he was entitled to a reduction upon the amount of both, to the extent of such amount of compensation: that the judge who tried the cause so directed the jury & the jury found that the now deft. had committed a breach of the contract, & that the now pltf. was entitled to some compensation, which they deducted from the price of the ship, & the value of the extra work: that the now deft. had judgment for the amount, after such deduction had been made, since the commencement of this suit:—*Held*: (1) the plea was bad on general demurrer; (2) the plea did not disclose any mutual agreement between pltf. & deft. to leave the amount claimed to the determination of the jury, as arbitrators.—*MONDEL v. STEEL* (1841), 8 M. & W. 588; 1 Dowl. N. S. 1; 10 L. J. Ex. 426; 151 E. R. 1288.

*Annotations*:—As to (1) *Consd.* Davis v. Hedges (1871), L. R. 6 Q. B. 687. *Appld.* Towerson v. Aspatia Agricultural Co-op. Soc. (1872), 27 L. T. 276. *Consd.* Bow, McLachlan v. Ship Camosun, [1909] A. C. 597. *Refd.* Rigge v. Burbridge (1846), 15 M. & W. 598; Bartlett v. Holmes (1853), 13 C. B. 630; The Camilla (1858), Sw. 312; Sayers v. London & Birmingham Flint Glass & Alkali Co. (1858), 27 L. J. Ex. 294; Oastler v. Pound (1863), 1 New Rep. 393; Dakin v. Oxley (1864), 15 C. B. N. S. 646; Meyer v. Dresser (1864), 16 C. B. N. S. 646; Heyworth v. Hutchinson (1867), L. R. 2 Q. B. 447; Bright v. Rogers, [1917] 1 K. B. 917. *Generally, Refd.* Bannerman v. White (1861), 8 Jur. N. S. 282. *Mentd.* Horsfall v. Thomas (1862), 6 L. T. 462.

**962.** ———.]—The breach of a warranty is no answer to an action for the price of a specific chattel supplied, though it may be used in reduction of the price, & may be the subject-matter of an action at law.

A. contracted in writing with B. to supply him with "a 14-horse power engine" & erect the same by a given day upon the premises of B. in a good & workmanlike manner. B. in answer, wrote, "In consideration of your supplying me with a 14-horse power engine, which my foreman has inspected, & erecting the same according to your undertaking, I agree to pay £260 for the same, by instalments, etc.: & on being satisfied with the engine, to pay the remainder within two months of the completion of the contract." At the time of the inspection, the engine was lying in separate parts on pltf.'s premises; & upon being put up, defts. asserted that it did not do the work of a 14-horse power engine, & insisted on their right to return it, & refused to pay the last instalment, upon which pltf. brought an action:—*Held*: defts. had contracted for the purchase of a specific chattel, & if there was any breach of warranty, it would only amount to evidence in reduction of the

**965 i.** *As defence to action for price.*]—Where a buyer of goods has a claim for damages for breach of warranty arising out of the sale, such a claim by the buyer in an action by the seller may be set up both by way of defence & counterclaim.—*FORDEN v. MORRIS*, [1921] 1 W. W. R. 547; 16 Alta. L. R. 364; 59 D. L. R. 74.—*CAN.*

**967 i.** *Where payment by bill of exchange—Partial failure of consideration.*]—Deft. proved that the note had

been given by him to pltf. for the balance of purchase money on a sale of some hams warranted good by pltf., & that many of the hams were bad. The jury found for deft. on the ground that the hams were not worth more than the money paid:—*Held*: the partial failure was no defence, without evidence of fraud.—*KELLOGG v. HYATT* (1841), 1 U. C. R. 445.—*CAN.*

**967 ii.** ———.]—*LEGGATT v. CLARRY* (1887), 13 O. R. 105.—*CAN.*

sum agreed to be paid.—*PARSONS v. SEXTON* (1847), 4 C. B. 899; 16 L. J. C. P. 181; 9 L. T. O. S. 410; 11 Jur. 849; 136 E. R. 763.

*Annotations*:—*Appld.* Dawson v. Collis (1851), 10 C. B. 523. *Distd.* Mallan v. Hadloff (1864), 17 C. B. N. S. 589. *Refd.* Stadhard v. Lee (1863), 3 B. & S. 364; Haegerstrand v. Anne Thomas S.S. Co. (1905), 10 Com. Cas. 67.

**963.** ——— *Not if alleged breach merely collateral.*]—In an action for goods sold & delivered, or in an action upon a guarantee of the payment of the price of such goods, it is not competent for deft. to set up in reduction of damages the fact that the goods were delivered by the vendor to the vendee after the stipulated time, in breach of the agreement between them.

Where the breach of warranty, of which a deft. complains, is upon the very subject-matter of the action, it is competent for him to show in reduction of damages, how much less the subject-matter of the action is worth by reason of such breach. But there is no case which carried the rule so far as to permit the introduction of evidence which does not affect the subject-matter of the action (*BLACKBURN, J.*).—*OASTLER v. POUND* (1863), 1 New Rep. 393; 7 L. T. 852; 11 W. R. 518.

**964.** ——— *How far bar to recovery in further action for same breach.*]—*MONDEL v. STEEL*, No. 961, *ante*.

**965.** *As defence to action for price.*]—On a count for a *quantum valebant* pltf. may give evidence of an agreed price for the goods, & deft. on a plea of *non assumpsit*, may also go into evidence to induce the jury not to give that price, by showing that the articles delivered were inferior to those that the price was agreed to be paid for.

Pltf. declared specially in *assumpsit* that in consideration that pltf. had sold & delivered 20 tons of best Dutch lead to deft., the latter had promised to deliver to pltf. prussiate of potash to the same amount, & pltf. averred the delivery of the 20 tons of best Dutch lead, & stated as a breach that deft. would not deliver the full quantity of potash. Deft. pleaded *non assumpsit*:—*Held*: as deft. had not pleaded that pltf. had not delivered best Dutch lead, he could not go into evidence to show that the lead was of inferior quality.—*PEGG v. STEAD* (1840), 9 C. & P. 636, N. P.

**966.** ———.]—*PARSONS v. SEXTON*, No. 962, *ante*.

**967.** *Where payment by bill of exchange—Partial failure of consideration.*]—*MORGAN v. RICHARDSON* (1804), 7 East, 482, n.; 1 Camp. 40, n.; 3 Smith, K. B. 487, n.; 170 E. R. 808.

*Annotations*:—*Follid.* Tye v. Gwynne (1810), 2 Camp. 346. *Appld.* Day v. Nix (1824), 9 Moore, C. P. 159. *Follid.* Obbard v. Betham (1830), L. & Welsb. 180; Warwick v. Naira (1855), 10 Exch. 762. *Refd.* Baston v. Butter (1806), 3 Smith, K. B. 486.

**968.** ———.]—In an action on a bill of exchange accepted for the price of goods purchased for exportation deft. cannot give in evidence that the goods were of a bad quality, & improperly packed, but is driven to his cross-action.—*TYE v. GWYNNE* (1810), 2 Camp. 346; 170 E. R. 1179, N. P.

*Annotation*:—*Follid.* Obbard v. Betham (1830), L. & Welsb. 180.

**967 iii.** ———.]—*LAWTON v. REID* (N. W. T.) (1905), 2 W. L. R. 240.—*CAN.*

**967 iv.** ———.]—*LOSIER v. MAL-LAY* (1915), 43 N. B. R. 364.—*CAN.*

*o.* ——— *Right to set-off against costs of seller.*]—*BELL ENGINE & THRESHING CO. v. WESERNBERG* (1912), 21 O. W. R. 969; 3 O. W. N. 1169; 3 D. L. R. 550.—*CAN.*



**Sect. 19.—Breach of conditions and warranties:**  
*Sub-sect. 2, C. (a), (b) & (c).]*

**969.** ———.]—(1) A partial failure of consideration cannot be given in evidence in answer to an action on a bill of exchange even between the original parties. The remedy for such partial failure of consideration is to be obtained by a cross action.

(2) A total failure of consideration may be given in evidence between the original parties as an answer to the action.—**OBARD v. BETHAM** (1830), 5 Man. & Ry. K. B. 632; L. & Welsb. 180; 8 L. J. O. S. K. B. 254.

**970.** ———.]—Plea, to an action by drawer against an acceptor of a bill of exchange for £20 8s. 6d., that before the drawing & acceptance of the bill, it was agreed between pltf. & deft. that pltf. should do certain carpenter's work for deft. for £63; that deft. paid pltf. £43 in part payment of the £63, & afterwards accepted the bill of exchange, on account of the residue of the £63; that pltf. did not perform his agreement, but neglected to perform some work, & performed in an unworkmanlike manner other work, necessary to be done under the agreement; & that the £43 was more than the whole work done was worth:—**Held**: bad, on motion for judgment *non obstante veredicto*, as disclosing, not a total failure of consideration for the bill, but only a partial failure of the consideration, to which the money payment & the bill were alike applicable.—**TRICKEY v. LARNE** (1840), 6 M. & W. 278; 9 L. J. Ex. 141; 151 E. R. 414; *sub nom.* **PRIQUET v. LARNE**, 8 Dowl. 174.

*Annotations*:—**Consd.** **Sully v. Freaan** (1854), 10 Exch. 535. **Fold.** **Warwick v. Nairn** (1855), 10 Exch. 762.

**971.** ———.]—To an action by the drawer against the acceptor of a bill of exchange for £313 12s. 9d. deft. pleaded, except as to £108 15s. 3d. parcel, that the bill was drawn & accepted in respect of the price of certain goods sold by pltf. to deft., & for no other debt; that, at the time of sale, pltf. promised deft. that the goods should be of a certain quality; that he bought the goods & accepted the bill on the faith of pltf.'s promise; that the goods delivered were not of the quality specified but of inferior quality, & that they were of the value of £108 15s. 3d. & no more; & that, save as aforesaid, there never was any value or consideration for the making or accepting the bill of exchange:—**Held**: the plea was bad.—**WARWICK v. NAIRN** (1855), 10 Exch. 762; 156 E. R. 648.

*Annotation*:—**Refd.** **Bow, McLachlan v. Ship Camosun**, [1909] A. C. 597.

**972. Total failure of consideration.]**  
**MORGAN v. RICHARDSON** (K. B.), 7 East, 482, n.; 1 Camp. 40, n.; 3 Smith, 804, n.; 170 E. R. 868.

*Annotations*:—**Consd.** **Tye v. Gwynne** (1810), 2 Camp. 346; **Day v. Nix** (1824), 9 Moore, C. P. 159. **Refd.** **Baston v. Butter** (1806), 3 Smith, K. B. 486; **Obbard v. Betham** (1830), L. & Welsb. 180; **Warwick v. Nairn** (1855), 10 Exch. 762.

**975.1. Wrongful repudiation of contract by buyer.]**—When the purchaser of an article has absolutely refused to accept it because he had changed his mind about buying it, he cannot avoid paying damages on the ground that the seller was to prepay the freight & had not done so.—**GREER v. DENNISON** (1911), 21 Man. L. R. 46.—**CAN.**

**d. Retention of goods as security for damages.]**—A purchaser who paid the price of goods, on finding they did not answer their description, immediately gave notice to the seller, but instead of returning them on being offered repayment of the price, he

retained them in security of damages & expenses:—**Held**: the only legal retention being in security of the price, he must be treated as abiding by the contract & was barred from pleading that the goods were of inferior quality, & from claiming damages.—**MELVILLE v. CRITCHLEY** (1856), 18 Dowl. (Ct. of Sess.), 643; 28 Sc. Jur. 277.—**SCOT.**

**PART III. SECT. 19, SUB-SECT. 2.—**  
**C. (b).**

**e. Provision for inspection before payment.—Failure to reject on discovering defect.]**—Where the contract for the sale of apples provided that the

**973.**

**969, ante.**

**974.**

**800, ante.**

**975. Wrongful repudiation of contract by buyer.]**—**BRAITHWAITE v. FOREIGN HARDWOOD Co., No. 495, ante.**

**976. Nature of defence.—Within County Court Rules, Ord. 10.—Not set-off.]**—To a claim for the price of goods sold the defence of a breach of warranty is not a set-off within Ord. 10, r. 10, of C. C. R., 1903 & 1914; nor has it by the passing of Sale of Goods Act, 1893 (c. 71), become a statutory defence within r. 18 of that Ord.; therefore notice of such a defence need not be given under the Ord.—**BRIGHT v. ROGERS**, [1917] 1 K. B. 917; 86 L. J. K. B. 804; 117 L. T. 61; 61 Sol. Jo. 370, D. C.

**977. ——— Not statutory.—Necessity for notice.]**—**BRIGHT v. ROGERS**, No. 976, *ante*.

**Failure to set up breach.—Whether bar to subsequent action by buyer.]**—*See* Nos. 978–980, *post*.

*(b) In Action against Seller.*

*See* Sale of Goods Act, 1893 (c. 71), s. 53 (4).

**978. Effect of previous action by seller for price.—Breach of warranty not set up as defence.]**

*Semle*: where an action has been brought for the value of goods furnished at a stipulated price & the purchaser does not either in bar of the action or to reduce the damages object to the quality of the goods, but allows the seller to recover a verdict for the full price agreed upon, he cannot afterwards maintain a cross action on the ground of the goods being of a bad quality & unfit for the purpose for which they were ordered. As soon as the purchaser of goods discovers that they do not answer the order given for them, he ought to return them to the vendor or send him notice to take them back & if he does neither, he cannot afterwards maintain an action on the ground of the article being quite unfit for the purposes for which he ordered it.—**FISHER v. SAMUDA** (1808), 1 Camp. 190; 170 E. R. 925, N. P.

*Annotations*:—**Refd.** **Jones v. Bright** (1829), 5 Bing. 533; **Allen v. Cameron** (1833), 3 Tyr. 907; **Francis v. Baker** (1839), 3 Jur. 771; **Shepherd v. Pybus** (1842), 11 L. J. C. P. 101; **Davis v. Hedges** (1871), L. R. 6 Q. B. 687; **Randall v. Newson** (1877), 2 Q. B. D. 102.

**979. ———.]**—In an action for the stipulated price of a specific chattel, deft. pleaded payment into ct. of a sum which pltf. took out in satisfaction of the cause of action:—**Held**: deft. in that action was not estopped thereby from suing pltf. for negligence in the construction of the chattel.—**RIGGE v. BURBIDGE** (1846), 15 M. & W. 598; 4 Dow. & L. 1; 15 L. J. Ex. 309; 153 E. R. 988.

*Annotation*:—**Refd.** **Davis v. Hedges** (1871), 25 L. T. 155.

**980. ———.]**—In an action for damages for the non-performance & improper performance of certain work which pltf. had employed deft. to do, the defence set up was that deft. had sued pltf.

purchaser should “pay balance on cars where they are spotted on tracks subject to inspection,” the failure of the purchaser to reject the apples on unloading & learning their objectionable kind & condition, was held, under Sales of Goods Act, R. S. M. 1913, c. 174, s. 13, not to prevent his right of action for breach of warranty.—**SMALLMAN v. BATES** (Man.), [1919] 2 W. W. R. 238; 47 D. L. R. 709.—**CAN.**

**f. Proof of breach.—Of warranty of title.]**—In an action for breach of warranty of title it is necessary to prove at the trial that the title was not

for the price of the work alleged to have been improperly done, & pltf. had settled by paying the whole amount then sued for; & that, as pltf. might have given the non-performance & the defective performance complained of in evidence in reduction of damages, pltf. was precluded from bringing a cross action for them:—*Held*: though pltf. might have used the causes of action for which he sued in reduction of the claim in the former action, yet he was not bound to do so, but might maintain a separate action for them.

It is clear that before any action is brought for the price of an article sold with a warranty . . . the person to whom an article is sold . . . may pay the full price without prejudice to his right to sue for the breach of warranty. . . . Is there any reason why he should be deprived of this right by the mere fact of his opponent having commenced an action for the price? We think that there is none . . . he [the buyer] may claim no reduction at all & afterwards sue for his entire cause of action (*HANNEN, J.*).—*DAVIS v. HEDGES* (1871), L. R. 6 Q. B. 687; 40 L. J. Q. B. 276; 25 L. T. 155; 20 W. R. 60.

*Annotations*:—*Reid*. Caird v. Moss (1886), 33 Ch. D. 22; Bright v. Rogers, [1917] 1 K. B. 917. *Mentd.* *Re* Hilton, *Ex p.* March (1892), 67 L. T. 594; Bow, McLachlan v. Ship Camosun, [1909] A. C. 597.

**981. Whether action contract or tort.**—*MOENS v. HEYWORTH* (1842), 10 M. & W. 147; H. & W. 138; 10 L. J. Ex. 177; 152 E. R. 418.

*Annotations*:—*Mentd.* Gorsuch v. Cree (1860), 2 L. T. 567; Udell v. Atherton (1861), 7 H. & N. 172; Mackay v. Commercial Bank of New Brunswick (1874), L. R. 5 P. C. 394; London Assoc. v. Mansel (1879), 11 Ch. D. 363; Derry v. Peek (1889), 14 App. Cas. 337; Joel v. Law Union & Crown Insco., [1908] 2 K. B. 431; Yorke v. Yorkshire Insco., [1918] 1 K. B. 662.

**982.** —.]—A purchaser buying goods on the recommendation of the vendor that they are suited to a special purpose, has a remedy by action for breach of contract, & not for tort, in negligently giving bad advice, if the goods prove unsuitable.—*ROWE BROTHERS & Co., LTD. v. CROSSLEY BROTHERS, LTD.* (1912), 108 L. T. 11; 57 Sol. Jo. 144, C. A.

*Annotations*:—*Mentd.* Lock v. Army, Navy & General Assoc. Assocn. (1915), 31 T. L. R. 297; Metropolitan Tunnel & Public Works v. L. Elec. Ry., [1926] Ch. 371.

**983. Action founded on invalid instrument—Sale of ship.**—Defts.' testator being sole owner of a ship, signed & delivered to pltf., G., an instrument, describing the ship as copper bolted, but not reciting the certificate of registry; at the foot of which was written, "Sold the within-mentioned ship to G." He afterwards executed a bill of sale to pltf. in the usual form, which did not describe the ship as copper bolted. She was not copper bolted, & pltf. declared in *assumpsit* against defts., as exors. of the vendor, for the breach of his warranty in that particular:—*Held*: the action

could not be maintained, the instrument first mentioned being void by 34 Geo. 3, c. 68, s. 14.—*KAIN v. OLD* (1824), 2 B. & C. 627; 4 Dow. & Ry. K. B. 52; 2 L. J. O. S. K. B. 102; 107 E. R. 517.

*Annotations*:—*Distd.* Freeman v. Baker (1833), 5 B. & Ad. 797. *N.F.* Lloyd v. Sturgeon Falls Pulp Co. (1901), 85 L. T. 162. *Reid.* Dobell v. Stevens (1825), 5 Dow. & Ry. K. B. 489; Jones v. Bright (1829), 5 Bing. 533.

**984. Breach must be caused by seller—Evidence of negligence by purchaser.**—In an action on a contract to sell to & ship for & on account of pltf. a quantity of beer, to a firm at Bombay, for sale on his account, & on an alleged undertaking that it should be in a fit condition for shipment; it was proved that when the beer was warehoused it was in bad condition; but it appeared that, through the default of pltf. in not advising the Bombay firm of the consignment, the beer had lain for six weeks unwarehoused in the ship or on the quays, & that this would amply account for its bad condition:—*Held*: there was no evidence of a cause of action, whether for breach of contract or negligence.—*ESCOMBE v. JARVIS* (1862), 3 F. & F. 435.

**985. Provision for inspection before payment—Failure to inspect—Or to discover defect on inspection.**—Where goods are sold "Payment net cash after inspections of goods immediately on arrival of steamer," the buyer has a right to claim damages if the goods are not in accordance with the contract even though he does not inspect the goods, or, by mistake does not on inspection discover the defect in them.—*KHAN v. DUCHÉ* (1905), 10 Com. Cas. 87.

(c) *Prior Return of Goods or Notice of Breach.*

**986. Necessity for.]**—The vendee of a merchantable commodity warranted to be of the best quality, proceeds to use it from time to time till the whole has been consumed, when the value of the article can no longer be ascertained, having given no notice to the vendor during this time of any defect in the article, & having deprived the vendor of the means of proving the value of the article by proper tests, the vendee is not entitled to recover on the ground of any alleged defect in the article.—*HOPKINS v. APPLEBY* (1816), 1 Stark. 477; 171 E. R. 535, N. P.

**987.** —.]—In an action for the price of clover seed sold by sample, deft. contends that the seed delivered did not accord with the sample; before he can go into such a defence, he must prove that he gave notice of his objection to pltf.—*GRONING v. MENDHAM* (1816), 1 Stark. 257; 171 E. R. 466, N. P.

**988.** —.]—*POULTON v. LATTIMORE*, No. 954, ante.

**989.** —.]—*GROUNSELL v. LAMB*, No. 431, ante.

as warranted.—*KOESTER v. HAMILTON PROVIDENT & LOAN SOCIETY* (1895), 10 Man. L. R. 374.—*CAN.*

**g.** — *Onus of proof.*—*BOUCHER LIVESTOCK & LAND CO. v. BROWN* (Sask.), [1920] 3 W. W. R. 817.—*CAN.*

**h.** — *By affidavit of consignee of buyer.*—*PROVINCIAL LUMBER CO., LTD. v. TYEE LUMBER CO., LTD.* (B. C.), [1922] 2 W. W. R. 1330.—*CAN.*

**k.** — *Presumption of breach—Hay supplied exceptionally early in season—Defect presumed due to improper curing.*—*HILL v. CAMPBELL* (Alta.), [1927] 2 D. L. R. 1007.—*CAN.*

**l.** *Provision for determination of deficiency by arbitration—Whether arbitration condition precedent to action.*—*DAVID v. SWIFT* (1910), 15 B. C. R. 70; 44 S. C. R. 179.—*CAN.*

**m.** *Whether remedy barred—On*

*implied warranty of title & quiet possession—Possession yielded to lien-holder.*

—If a purchaser for value without notice sells to another & the latter on learning of the original vendor's claim of lien allows him to take the goods, he has no claim against his immediate vendor on the implied warranty of title or for quiet possession.—*BERGFELDT v. MARKELE*, [1921] 1 W. W. R. 453.—*CAN.*

**n.** *Liability of original vendor on sale by general description—Liability to subsequent purchaser.*—*PIONEER LUMBER CO. v. DOMINION LUMBER SALES CO.* (B. C.), [1923] 2 D. L. R. 1194.—*CAN.*

**o.** *Defences—Defects due to mis-handling & inexperience of purchaser.*—*JOHNSON INV. CO. v. COLPITTS* (Alta.), [1927] 2 D. L. R. 728.—*CAN.*

**p.** *After payment of full*

A purchaser may pay the full price in the first instance, but may afterwards bring an action against the seller for the breach of warranty, & recover from him the amount of the damage occasioned thereby.—*COVENTRY v. M'ENTRY* (1862), 13 I. C. L. R. 160; 14 Ir. Jur. 144.—*IR.*

**PART III. SECT. 19, SUB-SECT. 2.—C. (c).**

**986 i.** *Necessity for.]*—*HARRIS SCARFE & CO., LTD. v. BROWNLEE BROTHERS* (1915), 13 W. A. L. R. 65.—*AUS.*

**986 ii.** —.]—*JOHN ABELL Co. v. LONG* (N. W. T.) (1905), 1 W. L. R. 24.—*CAN.*

**986 iii.** —.]—*ALLCOCK v. MANITOBA WINDMILL & PUMP CO.* (1911), 18 W. L. R. 77.—*CAN.*

*Sect. 19.—Breach of conditions and warranties:  
Sub-sect. 2, D. (a).]*

*D. Measure of Damages.*

*(a) In General.*

See Sale of Goods Act, 1893 (c. 91), s. 53 (2), &, generally, DAMAGES, Vol. XVII., pp. 130 *et seq.*

**990. Damages & costs paid or payable to third party—On resale.]—**A. in Holland commissioned B. in London, to purchase & ship tobacco of the best quality, B. employed C. as his broker for that purpose who accordingly made a purchase from D. On the arrival of the tobacco in Holland, it turned out to be of a very bad quality, when A. brought an action & recovered against B.:—*Held*: B. was entitled to recover from C. the whole of the damages he had sustained in the action brought against him by A. although he had received a bought note from C. in which the tobacco was not described as of the best quality.—**MAINWARING v. BRANDON** (1818), 8 Taunt. 202; 2 Moore, C. P. 125; 129 E. R. 361.

*Annotation:—***Reid**, Exploring Land & Minerals Co. v. Kolkmann (1905), 94 L. T. 234.

**991. ———.]—**A. sold a picture to B., warranting it a Claude. B. sold it to J., & warranted it a Claude to him. The picture was not a Claude, & J. brought an action against B. on the warranty. B. defended the action, & J. recovered damages & costs against him. B. then brought an action against A. upon the first warranty:—*Held*: B. was in this action entitled to recover against A. the amount of the damages & costs that B. had paid to J., & also the costs incurred by B. in defending the first action. But, if the jury should be of opinion that the sale from B. to J. was not a real sale of the picture, in the ordinary course of business, but merely a colourable sale, on the usurious discount of a bill, they ought to disallow these sums.—**PENNELL v. WOODBURN** (1835), 7 C. & P. 117, N. P.

*Annotation:—***Mentd**, Penley v. Watts (1841), 7 M. & W. 601.

**992. ———.]—**Declaration charged that deft. had sold to pltf. seed barley, warranting it to be of a particular quality, but had delivered seed barley of an inferior quality & it alleged, as special damage, that pltf., relying on the warranty, had sold the seed barley with a similar warranty to T., who had sown it & had thereby obtained a crop inferior to that which would have been produced by seed barley of the quality warranted, & so incurred damages which the pltf. was liable to make good. Deft. having suffered judgment by default, it was proved, on the execution of the writ of inquiry for damages, that the sale by pltf. had taken place as alleged; & evidence was given of the pecuniary amount of the values of the crop obtained & the crop which would have been produced by seed barley of the quality warranted. It further appeared that pltf.'s vendee had claimed from him compensation, which pltf. had agreed to make; but no sum had been agreed upon, & no payment actually made:—*Held*: in assessing the damages, the jury ought to include the amount to which they considered pltf. had become liable

to his vendee in respect of the difference of the crops.—**RANDALL v. RAPER** (1858), E. B. & E. 84; 27 L. J. Q. B. 266; 31 L. T. O. S. 81; 4 Jur. N. S. 662; 6 W. R. 445; 120 E. R. 438.

*Annotations:—***Distd**, Josling v. Irvine (1861), 6 H. & N. 512; **Borries v. Hutchinson** (1865), 18 C. B. N. S. 445. **Apld**, Smith v. Green (1875), 1 C. P. D. 92. **Consd**, Bostock v. Nicholson, [1904] 1 K. B. 725; **Pinnock v. Lewis & Peat**, [1923] 1 K. B. 690. **Reid**, Spark v. Heslop (1859), 28 L. J. Q. B. 197; **The Chieftain** (1863), Brown. & Lush. 104; **Mullett v. Mason** (1866), L. R. 1 C. P. 559; **Woolley v. Broad** (1892), 61 L. J. Q. B. 259; **Britannia Hygienic Laundry Co. v. Thornycroft** (1926), 135 L. T. 83. **Mentd**, Dixon v. Fawcus (1861), 7 Jur. N. S. 895; **English & Scottish Trust Co. v. Flatau** (1887), 36 W. R. 238; **Wednesbury Corpn. v. Lodge Holes Colliery Co.**, [1907] 1 K. B. 78.

**993. ———.]—****DINGLE v. HARE**, No. 1020, *post*.

**994. ———.]—**Although the vendor of a commodity he has purchased and resold with a warranty may recover in respect of liabilities to his vendees, yet the question of such liability will depend upon the opinion of the jury, on the whole case, as to the breach of the original warranty.—**HENLEY v. WOODCOCK** (1859), 1 F. & F. 532.

**995. ———.]—**Deft. contracted for the sale of coal of a particular description to pltf's., knowing that they were buying such coal for the purpose of reselling it as coal of the same description. Pltf's. did so resell the coal. The coal delivered by deft. to pltf's. under the contract & by them delivered to their sub-vendees did not answer such description, but this could not be ascertained by inspection of the coal, & only became apparent upon its use by the sub-vendees. The sub-vendees thereupon brought an action for breach of contract against pltf's. Pltf's. gave notice of the action to deft., who, however, repudiated all liability, insisting that the coal was according to contract. Pltf's. defended the action against them, but at the trial the verdict was that the coal was not according to contract, & the sub-vendees accordingly recovered damages from pltf's. Pltf's. thereupon sued deft. for breach of contract, claiming as damages the amount of the damages recovered from them in the action by their sub-vendees, & the costs which had been incurred in such action. Deft. paid the amount of the damages in the previous action into ct., but denied his liability in respect of the costs:—*Held*: the defence of the previous action being, under the circumstances, reasonable, the costs incurred by pltf's. as defts. in such action were recoverable as being damages which might reasonably be supposed to have been in the contemplation of the parties, at the time when they made the contract, as the probable result of a breach of it.—**HAMMOND & Co. v. BUSSEY** (1887), 20 Q. B. D. 79; 57 L. J. Q. B. 58; 4 T. L. R. 95, C. A.

*Annotations:—***Apld**, Agius v. Great Western Colliery Co., [1899] 1 Q. B. 413; **Prince of Wales Dry Dock Co. (Swansea) v. Fownes Forge & Engineering Co.** (1904), 90 L. T. 527. **Distd**, Coitait v. Myham, [1913] 2 K. B. 220. **Apld**, Pinnock v. Lewis & Peat, [1923] 1 K. B. 690; **Bennett v. Kreeger** (1925), 41 T. L. R. 609; **Kasler & Cohen v. Slavovski** (1927), 96 L. J. K. B. 850; **Patrick v. Russo-British Grain Export Co.**, [1927] 2 K. B. 535; **Slavovski v. La Pelletier De Roubaix Soc. Anon.**

**PART III. SECT. 19, SUB-SECT. 2.—  
D. (a)**

**990 i. Damages & costs paid or payable to third party—On resale.]—****GROCCERS' WHOLESALE CO. v. BOSTOCK** (1910), 17 O. W. R. 129; 2 O. W. N. 144; 22 C. L. T. 130.—**CAN.**

**a. ———.]—***Where purchaser failed to inspect before resale.]—***WILSON v. CARMICHAEL & SONS** (1894), 1 S. L. T. 615.—**SCOT.**

**f. Sale of unsound food—Loss of**

**cattle by poisoning.]—****WILSON v. DUNVILLE** (1879), 6 L. R. Ir. 210.—**IR.**

**t. Price paid for defective article—Whether possession of third party material.]—**As soon as the vendee discovers the defect he may bring an action on the warranty & recover the value of the article he should have received, & the measure of damages is the same whether the goods are in his warehouse or in the hands of persons to whom he may afterwards have pledged or sold them.—**CENTAUR**

**CYCLE CO. v. HILL** (1902), 22 C. L. T. 253; 1 O. W. R. 839; 2 O. W. R. 1025; *affd.* (1903), 7 O. L. R. 110; 3 O. W. R. 354; 24 C. L. T. 209.—**CAN.**

**a. ———.]—****ELLIOTT v. ARRO-LITE CO. (Sask.)** (1921), 60 D. L. R. 705.—**CAN.**

**b. ———.]—**Within seven days after the plaintiff had purchased two oxen they sickened of lung-sickness & died within three days thereafter. The expert evidence showed that the disease must have been contracted before date of sale & been latent at that time:—

(1927), 137 L. T. 645. **Consd.** *Re Hall & Pim (Junior)* (1927), 137 L. T. 585. **Refd.** *Scott v. Foley, Aikman* (1899), 16 T. L. R. 55; *Gaselee v. Darling, The Millwall* (1905), 93 L. T. 429; *Clare v. Dobson*, [1911] 1 K. B. 35; *Proops v. Chaplin* (1920), 37 T. L. R. 112; *Britannia Hygienic Laundry Co. v. Thornycroft* (1926), 135 L. T. 83. **Mentd.** *The Argentine* (1888), 13 P. D. 191; *Sanderson v. Blyth Theatre Co.*, [1903] 2 K. B. 533; *The WallSEND*, [1907] P. 302; *Furness, Withy v. Hall* (1909), 25 T. L. R. 233; *South Wales & Liverpool S.S. Co. v. Nevill's Dock & Ry.*, *Nevill's Dock & Ry. v. Maatschappij S.S. Bestevaer, Rotterdam* (1913), 108 L. T. 568; *The Cairnbahn* (1914), 30 T. L. R. 309; *Hoole U. D. C. v. Fidelity & Deposit Co.* (1915), 80 J. P. 118; *Weld-Blundell v. Stephens*, [1919] 1 K. B. 520.

**996.** —.]—Resps. sold seed to applt. as "common English sainfoin" on the condition that "sellers give no warranty expressed or implied as to growth, description or any other matters." The seed delivered to applt. was not "common English sainfoin," but "giant sainfoin," a different & inferior seed. Applt. accepted the seed believing it to be "common English sainfoin," & resold it as such to other parties, to whom applt. were obliged to pay damages for the mistake :—**Held** : applt. were entitled to the remedies applicable to a breach of warranty & to recover from resps. the damages which applt. had been obliged to pay to the other parties.

If a thing of a different description is accepted in the belief that it is according to the contract, then the buyer cannot return it after having accepted it, but he may treat the breach of the condition as if it were a breach of warranty, that is to say, he may have the remedies applicable to a breach of warranty (**LORD LOREBURN, C.**).—**WALLIS, SON & WELLS v. PRATT & HAYNES**, [1911] A. C. 394; 80 L. J. K. B. 1058; 105 L. T. 146; 27 T. L. R. 431; 55 Sol. Jo. 496, H. L.

**Annotations** :—**Consd.** *Re Bourgeois & Wilson, Holgate* (1920), 25 Com. Cas. 260. **Distd.** *Japy v. Sutherland, Sutherland v. S.S. Thoege* (1921), 91 L. J. K. B. 19. **Consd.** *Wimble v. Lillico*, London (1922), 38 T. L. R. 296; *Szymonowski v. Beck*, [1923] 1 K. B. 457. **Apld.** *Baldry v. Marshall*, [1925] 1 K. B. 260; *Barker (Junior) v. Agius* (1927), 43 T. L. R. 751. **Refd.** *Harrison v. Knowles & Foster*, [1918] 1 K. B. 608; *Lancaster v. Turner*, [1924] 2 K. B. 222. **Mentd.** *Lake v. Simmons*, [1926] 1 K. B. 366.

**997.** —.]—Pltf., a coal merchant at Cardiff, having contracted with shipowners for the supply of coal to their steamers there, entered into a contract with defts., who were colliery proprietors also carrying on business at Cardiff, for the supply to him of coal, which was expressly stated to be for shipment in those steamers. Defts. committed a breach of their contract in not supplying coal under it with reasonable despatch, in consequence of which the supply of coal to one of the steamers by pltf. was delayed & the steamer was detained. The shipowners thereupon made a claim of £150 upon pltf. in respect of her detention, & subsequently brought an action against him to enforce their claim. Pltf. gave notice of the claim & action to defts., who repudiated all liability, & refused to take up the defence, stating however that they considered the claim preposterous, & the amount of it excessive. Pltf. thereupon defended the action, paying £20 into ct., & at the

trial he succeeded in showing that the sum so paid in was sufficient. He then brought an action against defts. for breach of their contract. The judge at the trial found that the course taken by pltf. in defending the action against him was reasonable :—**Held** : the pltf. was entitled under the rule in *Hadley v. Baxendale* (1854), 9 Ex. 341, to recover from defts. as damages the amount of the costs reasonably incurred by him in defending the action against him over & above the amount which he had received for costs as between party & party from the pltf. in that action.—**AGIUS v. GREAT WESTERN COLLIERY CO.**, [1899] 1 Q. B. 413; 68 L. J. Q. B. 312; 80 L. T. 140; 47 W. R. 403, C. A.

**Annotations** :—**Apld.** *Pinnock v. Lewis & Peat*, [1923] 1 K. B. 690; *Bennett v. Kreeger* (1925), 41 T. L. R. 609; *Kasler & Cohen v. Slavovski* (1927), 96 L. J. K. B. 850. **Refd.** *Scott v. Foley, Aikman* (1899), 5 Com. Cas. 53; *Clare v. Dobson*, [1911] 1 K. B. 35; *The Solway Prince* (1914), 31 T. L. R. 56; *Weld-Blundell v. Stephens*, [1920] A. C. 956; *Britannia Hygienic Laundry Co. v. Thornycroft* (1926), 135 L. T. 83. **Mentd.** *South Wales & Liverpool S.S. Co. v. Nevill's Dock & Ry.*, *Nevill's Dock & Ry. v. Maatschappij S.S. Bestevaer, Rotterdam* (1913), 108 L. T. 568; *The Cairnbahn* (No. 2) (1914), 30 T. L. R. 309.

**998.** —.]—Pltf. bought a coat with fur collar attached, for resale, from deft. & sold it to a customer. Owing to the colouring matter with which the fur was dyed, the customer contracted a skin disease & brought an action against pltf., claiming damages. Pltf. informed deft. thereof & requested him to undertake the defence of the action. Dft. denied liability but never suggested that pltf. had no answer to the action, with the result that pltf. defended the action & a jury awarded the customer £138 18s. as damages for her suffering, & pltf. had to pay the costs of the action :—**Held** : pltf. were entitled to recover from deft. the damages so awarded, together with the customer's taxed costs of the action & their own costs of defending the action as between solr. & client.—**BENNETT (SIDNEY), LTD. v. KREEGER (1925), 41 T. L. R. 609.**

**999.** —.]—B., a wholesale furrier, bought some dyed rabbit skins from A. for the purpose, as A. knew, of making them into fur collars. B. having made the fur collars, resold to C., C. resold to D., & D. to E., a draper. E. then sold a coat, with one of these fur collars attached, to F., a customer, for her own wear. F. developed "fur dermatitis," owing to antimony in the fur. F. sued E. for damages for breach of warranty on the sale of the coat. E. gave notice of the action to D., D. to C., C. to B., & B. to A.

E. defended, but judgment was given against him for £67 & £248 costs. E. claimed this sum, together with his own costs, £643 in all, from D. who paid without resisting the claim. D. recovered this amount from C. together with a further sum for his costs. C. claimed from B., & B. having paid £645 & £45 for costs, sued A. for £699 damages for breach of warranty on the sale of the skins.

The ct. found as a fact that E. had acted reasonably in defending the original action by F. :

**Held** : plaintiff was entitled to recover back the purchase price by means of an *actio redhibitoria*.—**HAYSIDIE v. JORDAN**, 20 S. C. 149.—**S. AF.**

**c. Damage to goodwill of business**—**Conviction on resale of butter.**—**FITZGERALD v. LEONARD** (1893), 32 L. R. Ir. 675.—**IR.**

**d. Damages flowing naturally from breach.**—**NORTHWOOD v. RENNIE** (1878), 28 C. P. 202; 3 A. R. 37.—**CAN.**

**e. —.]—CORBIN v. THOMPSON** (1907), 39 S. C. R. 575.—**CAN.**

**f. — Within contemplation of parties.**—Where an express warranty is given by the seller as to the quality of an article sold & this turns out to be untrue, an action lies for damage which flows naturally from the breach of warranty, & may reasonably have been supposed to have been in the contemplation of the parties.—**EVANS & PLOWS v. WILLIS & Co.**, [1923] C. P. D. 496.—**S. AF.**

**g. Cost of putting goods in state as warranted.**—**LA ROCHE v. O'HAGAN** (1882), 1 O. R. 300.—**CAN.**

**h. —.]—Action upon a warranty given on sale of second-hand machinery "good for twelve months with proper care."**—**Held** : the measure of damages was the sum which, at the time of the sale, it would have been necessary to expend in order to remove any defect which constituted a breach of the warranty.—**COOK v. THOMAS** (1889), 6 Man. L. R. 286.—**CAN.**

**k. —.]—SUMNER v. DOBBIN** (1906), 16 Man. L. R. 151.—**CAN.**

**l. —.]—CHAPIN & Co. v.**

**Sect. 19.—Breach of conditions and warranties:**  
**Sub-sect. 2, D. (a) & (b).]**

—**Held:** B. was entitled to recover from A. (a) the damages recovered in the original action by F.; (b) the costs of both sides in that action; & (c) a sum in respect of costs incurred by themselves & C. & D. respectively in connection with the claims against them.—**KASLER & COHEN v. SLAVOUSKI**, [1928] 1 K. B. 78; 96 L. J. K. B. 850; 137 L. T. 641.

**Annotation:**—**Consd.** *Slavovski v. La Pelleterie de Roubaix* Soc. Anon. (1927), 137 L. T. 645.

**1000.** — — — — — **SLAVONSKI v. LA PELLETERIE DE ROUBAIX SOCIETE ANONYME**, No. 938, *ante*.

**1001.** — — — — — **Defective article used in goods manufactured by plaintiff.**—Defts. contracted to sell by description to pltf. sulphuric acid, commercially free from arsenic. Pltfs. did not make known to defts., either expressly or by implication, the purpose for which they required the acid. In breach of the implied condition that the acid should correspond with the description in the contract, defts. supplied to pltfs. sulphuric acid which was not commercially free from arsenic. Pltfs. by the exercise of ordinary care might have discovered the presence of arsenic in the acid; but they did not do so, & in ignorance of the fact, used the acid in the manufacture of brewing sugar in the shape of invert & glucose, which they sold to brewers who used it in the brewing of beer. The beer thus made was rendered poisonous, & the brewers suffered loss in respect of which pltfs. were liable to them. Pltfs. also lost the price of the acid, which was rendered worthless to them, & the value of other goods spoilt through being mixed with the acid: & the goodwill of their business was damaged.—**Held:** pltfs. were entitled to recover from defts. the price of the acid & the value of the goods spoilt, but not the damages payable by pltfs. to the brewers or the damage to the goodwill of pltfs.' business.—**BOSTOCK & CO., LTD. v. NICHOLSON & SONS, LTD.**, [1904] 1 K. B. 725; 73 L. J. K. B. 524; 91 L. T. 626; 53 W. R. 155; 20 T. L. R. 342; 9 Com. Cas. 200.

**Annotations:**—**Distd.** *Cointat v. Myham*, [1913] 2 K. B. 220. **Apld.** *Turpin v. Victoria Palace*, [1918] 2 K. B. 539. **Distd.** *Taylor v. Bank of Athens*, *Plincock v. Bank of Athens* (1922), 91 L. J. K. B. 776; *Plincock v. Lewis & Peat*, [1923] 1 K. B. 690.

**1002. Loss of anchor—Defect in warranted cable.**—Under an averment that one of the links of a warranted chain cable broke, & that thereby the chain cable & an anchor to which it was attached were wholly lost, it is sufficient to prove that a link of the chain cable being broken, the pilot, for the preservation of the ship & crew, slipped the cable, & that the anchor & chain cable were thereby lost. Under the warranty of the cable, pltfs. might, in addition to the value of the cable, recover the value of the lost anchor, to which the insufficient cable was attached.—**BORRADAILE v. BRUNTON** (1818), 8 Taunt. 535; 2 Moore, C. P. 582; 129 E. R. 491.

**Annotation:**—**Dbtd.** *Hadley v. Baxendale* (1854), 23 L. T. O. S. 69.

**MATTHEWS** (1915), 32 W. L. R. 663; 9 W. W. R. 301; 24 D. L. R. 457; 9 Alta. L. R. 209.—**CAN.**

**m.** — — — — — **MAENNEL v. GARAGE CONTINENTAL, LTD.** (1910), App. D. 137.—**S. AF.**

**n.** — — — — — **Plus loss of profits.**—**CANADIAN AVERY CO., LTD. v. WACH (MAN.)**, [1923] 3 W. W. R. 798.—**CAN.**

**o. Breach of warranty of title—Value of goods—Loss of profits contemplated by parties.**—**SHEARD v.**

**HORAN** (1899), 30 O. R. 618.—**CAN.**

**p.** — — — — — **The purchaser of a chattel is entitled to recover from the vendor upon failure of title, the value of the chattel, & not merely the amount paid by him to the vendor.**—**CONFEDERATION LIFE ASSOCN. v. LABATT** (1900), 27 A. R. 321.—**CAN.**

**q. Cost of repacking defective**—**BIGELOW v. GRAHAM (N. E.)**, 13 E. L. R. 595; 16 D. L. R. 294; *affd.* (1913), 48 S. C. R. 512.—**CAN.**

**1003. At launching of vessel.**—**CATO, MILLER & CO. v. GIBSON & SON** (1856), 3 L. T. 217.

**1004. Sale of ship—Loss of services while under repairs.**—**THE SILDANHA, BAINES v. GIBBS** (1856), 4 L. T. 742; 9 L. T. 87.

**1005. Defective carriage pole—Injury to horses—Consequential damage.**—**RANDALL v. NEWSON**, No. 694, *ante*.

**1006. Sale of unsound food—Loss of custom.**—**WILTS, DORSET & SOMERSET DAIRY PRODUCE SUPPLY ASSOCN. v. HAMMOND** (1888), 4 T. L. R. 584; *on appeal* (1889), 5 T. L. R. 196, C. A.

**1007.** — — — — — **BLAKE v. FENNER** (1911), cited in, [1913] 2 K. B. at p. 224; 82 L. J. K. B. at p. 554; 108 L. T. at p. 558, C. A.

**Annotation:**—**Apld.** *Cointat v. Myham*, [1913] 2 K. B. 220.

**1008. — Condemnation of food & imposition of fine—Costs & fine.**—If a retailer buys provisions with an implied or express warranty & such provisions are seized & destroyed, & he himself is fined, because, unknown to him, they are unfit for food, he may recover from his vendor, in addition to their value, the costs of his defence & costs ordered to be paid by him; & *semble*: also the amount of the fine if he can show that it was not imposed, or increased, in consequence of any default on his part.—**CRAGE v. FRY** (1903), 67 J. P. 240; 1 L. G. R. 253.

**Annotations:**—**Refd.** *Cointat v. Myham*, [1913] 2 K. B. 220; *Leslie v. Reliable Advertising & Addressing Agency*, [1915] 1 K. B. 652. **Mentd.** *Weld-Blundell v. Stephens*, [1919] 1 K. B. 520.

**1009. — Death from poisoning—Expenses of illness.**—**FROST v. AYLESBURY DAIRY CO.**, No. 733, *ante*.

**1010. — — — — — Loss of wife's services.**—In an action for breach of a warranty that tinned salmon sold by defts., to pltf. was fit for consumption as human food pltf. claimed damages under the following head, among others namely on the ground that his wife having partaken of the salmon had in consequence died, & that, she having performed services for him in the care of his house & family until her death, he was under the necessity after her death of hiring some one else to perform such services. The jury found a verdict for pltf., & awarded £200 in respect of the damages claimed as above-mentioned:—**Held:** the death of pltf.'s wife not forming an essential part of the cause of action sued upon but only an element in ascertaining the damages arising therefrom there was no rule of law which prevented such damages as aforesaid from being recoverable in the action.—**JACKSON v. WATSON & SONS**, [1909] 2 K. B. 193; 78 L. J. K. B. 587; 100 L. T. 799; 25 T. L. R. 454; 53 Sol. Jo. 447, C. A.

**Annotations:**—**Consd.** *Cointat v. Myham*, [1913] 2 K. B. 220; *The Amerika*, [1914] P. 167. **Refd.** *Berry v. Humm*, [1915] 1 K. B. 627.

**1011. Sale of mortar—Building condemned—Cost of pulling down & rebuilding.**—Deft. sold pltf. mortar for some building operations, & subsequently the building was condemned by the London County Council on the ground that the mortar was bad:—**Held:** pltf. was entitled to recover from deft. the cost of pulling down &

**r.** — — — — — **WHITE & CO., LTD. v. DONKIN** (1914), 27 W. L. R. 789; 6 W. W. R. 508; 16 D. L. R. 446.—**CAN.**

**t. Loss of use—Necessity for purchaser to have use for goods.**—The damages recoverable by the purchaser for breach of warranty on sale of a tractor engine may include damages for loss of use of the engine at the rate which it would have cost him to hire an engine. But where owing to the breach of warranty the engine had to



rebuilding.—SMITH v. JOHNSON (1899), 15 T. L. R. 179; Emden's B. C., 4th ed. 668.

*Annotation*.—*Reid*. Britannia Hygienic Laundry Co. v. Thornycroft (1926), 135 L. T. 83.

**1012. Value of article destroyed—Contaminated beer.**—The measure of damages, apart from special circumstances, which the manufacturer of an article that has had to be destroyed by the fault of another is entitled to recover, is the price which he could have sold it for on the day that it had to be destroyed:—*Held*: therefore, although plffs. were brewers they were entitled to recover the full selling value of the beer in their cellars, which had by the fault of defts. to be thrown away, & not merely such a sum as they themselves must have expended in order to brew an equal amount of beer of the same quality to replace it.—HOLDEN (RICHARD), LTD. v. BOSTOCK & CO., LTD. (1902), 50 W. R. 323; 18 T. L. R. 317; 46 Sol. Jo. 265, C. A.

*Annotation*.—*Distd*. Cointat v. Myham, [1913] 2 K. B. 220.

**1013. —Poisoned glucose.**—BOSTOCK & CO., LTD. v. NICHOLSON & SONS, LTD., No. 1001, *ante*.

**1014. Price paid for defective article.**—BOSTOCK & CO., LTD. v. NICHOLSON & SONS, LTD., No. 1001, *ante*.

**1015. Damage to goodwill of business.**—BOSTOCK & CO., LTD. v. NICHOLSON & SONS, LTD., No. 1001, *ante*.

**1016. Nominal damages—Loss not due to seller's breach of contract.**—By a contract made in July, 1919, for the sale of Cyprus locust beans, it was provided (*inter alia*), that shipment was to be made by the sellers in July &/or Aug., 1919, & that the bills of lading were to be dated for those months.

The goods arrived in London on Sept. 27, 1919, & on Sept. 29 the buyers paid for them. It was subsequently discovered that the goods had not been shipped until Sept., & that the bills of lading, although dated Aug. 31, had not in fact been signed until on or after Sept. 6. From the date of the contract in July, the market for all locust beans had fallen heavily. The buyers had resold the beans, & so could not reject or return them. There was no difference in value at the material time between locust beans shipped in Aug. & those shipped in Sept. On a claim for damages

for breach of contract, which was admitted:—*Held*: as the buyers' loss was not due to the sellers' breach of contract, the buyers were only entitled to nominal damages.—TAYLOR & SONS, LTD. v. BANK OF ATHENS, PINNOCK BROTHERS v. SAME (1922), 91 L. J. K. B. 776; 128 L. T. 795; 27 Com. Cas. 142.

**Breach of warrant of authority.**—See AGENCY, Vol. I., pp. 664–667, Nos. 2791–2805.

### (b) Breach of Warranty of Quality.

See Sale of Goods Act, 1893 (c. 71), s. 53 (3).

**1017. Difference between value as contracted for & value as delivered.**—Goods sold are described in the invoice as scarlet cuttings, a warranty is to be inferred that the goods answered the known mercantile description of scarlet cuttings.

In an action of *assumpsit* it is alleged as a breach, that certain goods sold & delivered to pltf., & warranted to be scarlet cuttings, were not scarlet cuttings, *per quod*, they became & were of no use or value to pltf. Pltf. is entitled, without any further allegation of special damage, to recover as much as the goods would have been worth to him had the contract been faithfully performed by deft.—BRIDGE v. WAIN (1816), 1 Stark. 504; 171 E. R. 543, N. P.

*Annotations*.—*Reid*. Budd v. Fairmanner (1831), 1 L. J. C. P. 16; Barr v. Gibson (1838), 3 M. & W. 390; Ramesden v. Gray (1849), 7 C. B. 961; Hall v. Couder (1857), 2 C. B. N. S. 22; O'Hanlan v. G. W. Ry. (1865), 6 B. & S. 434; Elbinger Act. v. Arnstrong (1874), L. R. 9 Q. B. 473; Hinde v. Liddell (1875), L. R. 10 Q. B. 265.

**1018. —**—Pltf. sued on a breach of warranty on the sale of wheat. The declaration contained a special count which stated a warranty that the wheat would grow, & a breach that it would not, & that pltf. was deprived of great gains, etc. The declaration also contained counts for money had & received, & on an account stated. The particulars of demand were for the price of the wheat, but were expressly limited to the *indebitatus* counts:—*Held*: this did not prevent pltf. from giving evidence of what the value of the crops might have been with a view to his damages on the first count.—PAGE v. PAVEY (1839), 8 C. & P. 769, N. P.

**1019. —**—In an action for the breach of a contract by delivering goods of a quality inferior

to the dismantled & rebuilt, the et. in view of the known climatic conditions of the country refused to allow damages for loss of use of the engine after that date, in the absence of evidence by the purchaser showing that for any period after that date he had work for the engine to do & that it could have been properly used therein. In any event the compensation recoverable for loss of use of the engine in such case would be only for the time necessarily taken to rebuild it using due diligence & dispatch. — ADVANCE RUMELY THREBBER CO. INCORPORATED v. WHALEY, [1920] 2 W. W. R. 325; 52 D. L. R. 169; 13 Sask. L. R. 239.—CAN.

### PART III. SECT. 19, SUB-SECT. 2.—D. (b).

**1017 i. Difference between value as contracted for & value as delivered.**—When the bought note specifies the article bought to No. 1 mackerel, it is a warranty that they are of that quality. The measure of damages is the difference between the value of the article actually sold & the value in the same market of an article of the quality specified in the bought note.—WIER v. BISSETT (1859), 2 Thom. 178.

**1017 ii. —**—ELLIS v. ABELL (1882), 10 A. R. 226.—CAN.

—]—HOGG v. PARK (1893), 3 Terr. L. R. 171.—CAN.

**1017 iv. —**—]—ROBINSON v. BOYD (N. W. T.) (1905), 2 W. L. R. 425.—CAN.

**1017 v. —**—]—The measure of damages for breach of warranty is set out in Sale of Goods Ordinance, s. 51, ss. 2 & 3, & is the difference between the value of the goods at the time of delivery to the buyer & the value they would have had if they had answered to the warranty.—SCRAMLIN & SMITH v. PHALEN (1910), 14 W. L. R. 259; 3 Sask. L. R. 194.—CAN.

**1017 vi. —**—]—DECKER v. SYLVESTER MANUFACTURING CO. (1910), 14 W. L. R. 500; 3 Sask. L. R. 173.—CAN.

**1017 vii. —**—]—NEISS v. CANADIAN PORT HUBON CO. (1911), 16 W. L. R. 542.—CAN.

**1017 viii. —**—]—The measure of damages for a breach of warranty of a chattel when the article has not been returned is the difference between its value with the defect warranted against & the value which it would have borne without the defect.—BUCK v. GRAHAM (1911), 16 W. L. R. 291; 4 Sask. L. R. 22.—CAN.

**1017 ix. —**—]—STEINACKER v. SQUIRE (1914), 30 O. L. R. 149; 19 D. L. R. 434; 5 O. W. N. 566.—CAN.

**1017 x. —**—]—LALEUNE v. FAIRWEATHER (1915), 32 W. L. R. 917; 9 W. W. R. 567; 25 Man. L. R. 783.—CAN.

**1017 xi. —**—]—MC PHAIL v. ARBOTT (1916), 34 W. L. R. 134; 10 W. W. R. 347.—CAN.

**1017 xii. —**—]—The measure of damages recoverable for delivery of goods of an inferior quality to that of the sample by which they were sold is the difference between the market-value of the goods of the quality contracted for & the market-value of the goods actually delivered.—JOHN HALLAM, LTD. v. BAINTON, [1920] 2 W. W. R. 296; 54 D. L. R. 537; 60 S. C. R. 325.—CAN.

**1017 xiii. —**—]—WARD v. ROSSER (1920), 54 D. L. R. 531.—CAN.

**1017 xiv. —**—]—ARNOTT v. CANADIAN FAIRBANKS MORSE CO., LTD., [1921] 1 W. W. R. 261; 56 D. L. R. 731; 14 Sask. L. R. 32.—CAN.

**1017 xv. —**—]—BISHINSKY v. APPLETON (1921), 64 D. L. R. 477; 50 O. L. R. 426.—CAN.

**1017 xvi. —**—]—DE LAVAL CO. v. KENNEDY (Sask.), [1923] 1 D. L. R. 151.—CAN.

a. — *Warranty of farm implements.*—There are cases of breach of warranty of quality on a sale of goods where the damages are not measured



*Sect. 19.—Breach of conditions and warranties:  
Sub-sect. 2, D. (b), E. & F.]*

to that contracted for, the proper measure of damages is, the difference between the value of goods of the quality contracted for, at the time of the delivery, & the value of the goods then actually delivered, or their value as ascertained by a resale within a reasonable time: & the fact of the goods having been previously paid for cannot be taken into consideration in estimating the damages.—*LODER v. KEKULÉ* (1857), 3 O. B. N. S. 128; 27 L. J. C. P. 27; 30 L. T. O. S. 64; 4 Jur. N. S. 93; 5 W. R. 884; 140 E. R. 687.

1020. —.]—In an action for a breach of warranty on the sale of goods which the buyer has sold again:—*Held*: the proper measure of damages was, the difference between the real market value at the time of the sale & the contract price. *Qu.*: whether the buyer might not have been entitled to recover a sum fairly & reasonably paid by him as compensation to a third person to whom he had upon the faith of deft.'s warranty sold a portion of the goods.—*DINGLE v. HARE* (1859), 7 C. B. N. S. 145; 29 L. J. C. P. 143; 1 L. T. 38; 6 Jur. N. S. 679; 141 E. R. 770.

*Annotations*:—*Reid*, *Mullett v. Mason* (1866), L. R. 1 C. P. 559; *Baldry v. Bates* (1885), 1 T. L. R. 558.

1021. —.]—*JONES v. JUST*, No. 632, *ante*.

1022. —.]—On a sale of seed potatoes, the potatoes were of an inferior quality to that warranted:—*Held*: the purchaser was entitled to the difference in value between the crop actually produced & the crop that would have been produced if the warranty had been complied with, if it were a reasonable thing for the purchaser to plant the seed without examination.—*WAGSTAFF v. SHORT-HORN DAIRY CO.* (1884), *Cab. & El.* 324.

1023. —.]—Pltf. purchased an orchid from deft. at an auction for twenty guineas with the warranty that it was "*Cattleya Acklandiae alba*, only known plant." After two years it flowered, & produced not a white but a purple flower. The value of such a plant is 7s. 6d. In an action for breach of warranty, the county ct. judge found as a fact, that, if the orchid had been an actual alba, it was at the time of sale worth £50; but that until it showed its real nature there was no probability that an orchid grower would give more than twenty guineas for it:—*Held*: judgment must be entered for pltf. for £50.—*ASHWORTH v. WELLS* (1898), 78 L. T. 136; 14 T. L. R. 227, C. A.

1024. —.]—Shippers of goods at a foreign port chartered a ship to carry the goods to London. The charterparty provided that the master should sign bills of lading in the form indorsed on it. That form contained the clauses "shipped in good order & condition & to be delivered in the like good order & condition" & "quality & measure unknown" & incorporated the American Harter Act which imposes upon shipowners & masters the duty of delivering to shippers of merchandise bills of lading stating (*inter alia*), "the apparent order & condition" of the merchandise delivered for carriage. The goods in question were damaged before shipment & the damage was apparent. The master, however, took them on board & gave the shippers a bill of lading in the form indorsed on the charter. Before delivery of the goods in London, the shippers sold them to purchasers there, who thereupon became

indorsees of the bill of lading to whom the property in the goods passed. On presentation of the bill of lading & shipping documents the purchasers paid the contract price of the goods to the shippers & the goods having been delivered in their damaged condition in London, the purchasers, in an arbn. between themselves & the shippers obtained an award against the latter for damages representing the difference between the price paid by the purchasers & the value of the goods when delivered. The purchasers did not sue the shippers, who were a foreign firm, on that award, but now sued the owners of the ship for damages for not delivering the goods in good order & condition:—*Held*: the words in the bill of lading "shipped in good order & condition" were not words of contract, & the purchasers were not entitled to sue for any breach of contract in respect of them; but the shipowners were bound by the representation of the master in the bill of lading that the goods were shipped in good order & condition; & there being sufficient evidence that the purchasers had altered their position & acted to their own prejudice on the faith of that representation, the shipowners were estopped from denying the truth of it, & were liable in damages to the purchasers for not delivering the goods in good order & condition, the measure of damages being the difference between the price paid by the purchasers, & the value of the goods when delivered, together with the reasonable expenses incurred on delivery by reason of their damaged condition.

The words "shipped in good order & condition" are not words of contract in the sense of a promise or undertaking (*CHANNELL, J.*).—*COMPANIA NAVIERA VASCONZADA v. CHURCHILL & SIM, SAME v. BURTON & CO.*, [1906] 1 K. B. 237; 75 L. J. K. B. 94; 94 L. T. 59; 54 W. R. 406; 22 T. L. R. 85; 50 Sol. Jo. 76; 10 Asp. M. L. C. 177; 11 Com. Cas. 49.

*Annotations*:—*Apd.* *Martineaux v. Royal Mail Steam Packet Co.* (1912), 106 L. T. 638. *Reid*, *Hogarth Shipping Co. v. Blyth Greene, Jourdain*, [1917] 2 K. B. 534; *New Chinese Antimony Co. v. Ocean S.S. Co.*, [1917] 2 K. B. 664; *The Tromp*, [1921] P. 337; *Brandt v. Liverpool, Brazil & River Plate Steam Navigation Co.*, [1924] 1 K. B. 575.

1025. Advantage accruing in mitigation of damage — Relevant considerations.]—Although the opinion of the High Ct. upon a special case stated by an arbitrator under Arbitration Act, 1889 (c. 49), with regard to a question of law arising in the course of the reference cannot be the subject of an appeal, yet, if that opinion is erroneous, an award expressed to be founded on that opinion can be set aside as containing an error of law apparent on the face of the award. Turbines supplied under a contract to a railway co. were deficient in power & in economy of working & were not in accordance with the contract. The railway co., whilst reserving their right to damages for breach of contract, used the turbines for a time, but ultimately replaced them by other turbines of a different make & design. In the course of an arbn. between the contractors & the railway co. as to the measure of damages in respect of the breach of contract the arbitrator found (1) that the purchase of the substituted turbines by the railway co. was a reasonable & prudent course for the purpose of mitigating the damages; (2) even if the original turbines had complied with the contract,

under Sale of Goods Act, R. S. S. 1909, c. 147, s. 51 (3). The use of the expression *primis facie* in said sub-sect. indicates that the sub-sect. raises a presumption only. A buyer of farm machinery is entitled to damages for

loss of use of the machinery & loss of time resulting from a breach of the statutory warranties that the machinery is well made, of good materials & durable.—*SCHLOSSER v. SAWYER MASSEY CO., LTD.*, [1921] 1

W. W. R. 124; 56 D. L. R. 745; 14 Sask. L. R. 22.—CAN.

b. —.]—*JOHNSTON v. ALBERTA FOUNDRY & MACHINE CO., LTD. (Alta.)* (1922), 63 D. L. R. 161; [1922] 2 W. W. R. 1011.—CAN.

it would still have been to the pecuniary advantage of the railway co. at their own cost to have replaced them by the other turbines owing to their greater efficiency; & he stated a special case for the opinion of the ct. whether in the circumstances the cost of the substituted turbines was recoverable by the railway co., as part of their damages. The ct. answered this question in the affirmative, & the arbitrator made an award expressed to be made on the footing of this answer. A motion to set aside the award as containing an error of law on the face of it was refused:—*Held*: the pecuniary advantage which the railway co. derived from the superiority of the substituted turbines was relevant matter for the consideration of the arbitrator in assessing the damages, & the award ought to be remitted to him with a declaration to that effect.—**BRITISH WESTINGHOUSE ELECTRIC & MANUFACTURING CO., LTD. v. UNDERGROUND ELECTRIC RYS. CO. OF LONDON, LTD.**, [1912] A. C. 673; 81 L. J. K. B. 1132; 107 L. T. 325; 56 Sol. Jo. 734, H. L.

*Annotations*:—**Consd.** Williams v. Agius, [1914] A. C. 510; *Re Wulst & Dreyfus* (1917), 86 L. J. K. B. 1368. **Apld.** Hill v. Showell (1918), 87 L. J. K. B. 1106. **Consd.** Payzu v. Saunders, [1919] 2 K. B. 581; *Champsary Bhara v. Jivraj Balloo Spinning & Weaving Co.*, [1923] A. C. 480. **Reid.** *Re King & Duven*, [1913] 2 K. B. 32; *May v. Mills* (1914), 30 T. L. R. 287; *Re Olympia Oil & Cake Co. & MacAndrew Moreland*, [1918] 2 K. B. 771; *Re Parsons & Brixham Fishing Smack Insee. Soc.* (1918), 62 Sol. Jo. 384; *Westacott v. Hahn*, [1918] 1 K. B. 495; *Re Cogstad & Newsum*, [1921] 1 K. B. 87; *A.-G. for Manitoba v. Kelly*, [1922] 1 A. C. 268; *Taylor v. Bank of Athens*, Pinnock v. Same (1922), 91 L. J. K. B. 776; *Kelantan Government v. Duff Development Co.*, [1923] A. C. 395; *Northwood v. L. C. C.* (No. 2) (1927), 96 L. J. K. B. 520; *Roberts v. Anglo-Saxon Insee. Assocn.* (1927), 96 L. J. K. B. 590.

**1026. Contract for sub-sale—Whether taken into account.**—Manufacturers agreed to sell 3,000 pieces of unbleached cotton cloth of a specified quality at a certain price per piece to be delivered within a certain period. They delivered 1,625 pieces of inferior quality. The purchasers accepted & paid for these pieces but refused to take any further deliveries, & being sued by the manufacturers for non-acceptance of the remaining pieces, counterclaimed damages for breach of warranty of quality in relation to the 1,625 pieces. The purchasers had made a contract to deliver 2,000 pieces of bleached cloth to third persons at a price per piece higher than the market price per piece of the 1,625 pieces as delivered, & in fulfilment of that contract had actually delivered 691 of the 1,625 pieces, & had received payment for them:—*Held*: this contract was not to be taken into account in measuring the damages.—**SLATER v. HOYLE & SMITH**, [1920] 2 K. B. 11; 89 L. J.

**1026 i. Contract for sub-sale—Whether taken into account.**—**SHRAGOE IRON & METAL CO., LTD. v. WESTERN HIDE & JUNK CO. (Alta.)**, [1923] 3 D. L. R. 1; [1923] 2 W. W. R. 730.—**CAN.**

**1027 i. — Value at time of delivery to sub-purchaser.**—**HAMILTON v. MAGILL** (1883), 12 L. R. Ir. 186.—**IR.**

**c. Loss of profit—Goods supplied for special purpose—Known to seller.**—**CROMPTON & KNOWLES LOOM WORKS v. HOFFMAN** (1903), 23 C. L. T. 188; 5 O. L. R. 554; 1 O. W. R. 717; 2 O. W. R. 273.—**CAN.**

**d. — — — — —**—**GRAHAM v. BIGELOW** (1912), 11 E. L. R. 114; 46 N. S. L. 116; 3 D. L. R. 404.—**CAN.**

**e. — Within contemplation of parties.**—Damages recoverable by a purchaser of a tractor for breach of warranty in the contract of sale may include loss of profits derivable from crops which would have been grown had the tractor fulfilled the warranty, if the circumstances are such that such profits were or ought to have been

within the contemplation of the parties when the contract was made.—**MAGER v. BAIRD RANCH CO., LTD. & BAIRD (Man.)**, [1919] 3 W. W. R. 428; 48 D. L. R. 724.—**CAN.**

**f. — On probable resales.**—**MILLAR v. BELLVALE CHEMICAL CO.** (1898), 1 F. (Ct. of Sess.) 297; 36 So. L. R. 214; 6 S. L. T. 218.—**SCOT.**

**g. — — — — — If resale within contemplation of parties.**—**MANNIX & CO. v. OSBORN**, [1921] O. P. D. 138.—**S. AF.**

**h. Exclusion of consequential damages by express stipulation—Whether damage from breach of warranty included.**—**BALDWIN v. CANADA FOUNDRY CO.** (1914), 26 O. W. R. 134, 858; 6 O. W. N. 152, 340; 17 D. L. R. 834.—**CAN.**

**k. Cost of procuring equivalent article.**—**CREELMAN (A. G.) CO., LTD. v. CANADA CEMENT CO., LTD.**, [1920] 3 W. W. R. 81.—**CAN.**

**l. — — — — —**—**FLEMING & CO., LTD. v. AIRDRIE IRON CO.** (1882), 9 R. (Ct. of Sess.) 473; 19 So. L. R. 405.—**SCOT.**

K. B. 401; 122 L. T. 611; 36 T. L. R. 132; 25 Com. Cas. 140, C. A.

*Annotations*:—**Reid.** *Lebeaupin v. Crispin*, [1920] 2 K. B. 714; *Taylor v. Bank of Athens*, Pinnock v. Same (1922), 91 L. J. K. B. 776.

**1027. — Value at time of delivery to sub-purchaser.**—Resps. sold to claimant sodium sulphide in drums. The drums were delivered to claimant in Manchester, but resps. knew that they were intended for export. Owing to the difficulty of opening & reclosing the drums it is impracticable to open them until the contents are actually required for use. The drums were resold by claimant, & owing to congestion on the French railways & other causes they did not reach the ultimate consignees at Lyons & Genoa respectively till some months later. On the drums being opened by those consignees the contents were found to be not sodium sulphide but caustic soda of inferior quality. The drums were thereupon rejected. On a claim for damages by claimant against resps.:—*Held*: the damages were to be assessed according to the prices ruling, not at the date of the delivery in Manchester, but at the date when the drums were opened by the ultimate consignees at Lyons & Genoa.—**VAN DEN HURK v. MARTENS (R.) & CO., LTD.**, [1920] 1 K. B. 850; 89 L. J. K. B. 545; 123 L. T. 110; 25 Com. Cas. 170.

*Annotations*:—**Apld.** *Saunt v. Belcher & Gibbons* (1920), 90 L. J. K. B. 541. **Consd.** *Hardy (London) v. Hillerns & Fowler* (1923), 92 L. J. K. B. 930.

#### *E. Expenses of Keeping Goods or Animals.*

**Cost of keep of animals.**—See **ANIMALS**, Vol. II., pp. 271–272, Nos. 489–492.

#### *F. Remedies Other than Action for Breach.*

**1028. Agreement to exchange.**—The purchaser of a warranted but worthless watch, is entitled to maintain an action for deceit, although it is stipulated, that if he dislikes the watch, the vendor shall exchange it for one of equal value.—**WALLACE v. JARMAN** (1817), 2 Stark. 162; 171 E. R. 607, N. P.

**1029. Arbitration clause—As bar to action.**—Pltfs. bought from defts. a quantity of East African copra cake to be of fair average quality, sound delivered. The contract provided that “the goods are not warranted free from defect rendering same unmerchantable, which would not be apparent on reasonable examination”; that any disputes arising out of the contract should be settled by arbn.; & that notice of arbn. should be given & the arbitrator nominated in writing

#### **PART III. SECT. 19, SUB-SECT. 2.—E.**

**m. General rule.**—A purchaser who succeeds in the redhibitory action is entitled also to recover the expenses incurred by him for the due preservation of the things sold & delivered to him.—**THIERON v. AFRICA** (1893), 10 S. C. 246.—**S. AF.**

**n. Cost of warehousing rejected hay.**—**POIRIER v. R.** (1910), 13 Exch. C. R. 321; 9 E. L. R. 375.—**CAN.**

#### **PART III. SECT. 19, SUB-SECT. 2.—F.**

**o. Condition for return—Return of article & replacement by another.**—Where in a contract for the sale of a gasoline engine & tank there was a warranty that if the engine would not work well, notice thereof was to be given to defts., stating wherein it failed, & giving a reasonable time to get to it & remedy the defect, & if such defect could not be remedied, the engine was to be returned to the defts. & a new engine given in its place:—*Held*: pltf.’s remedy under such warranty was for

**Sect. 19.—Breach of conditions and warranties: Sub-sect. 2, F. & G. Part IV. Sect. 1: Sub-sect. 1.]**

not later than fourteen days after the final discharge of the vessel. Pltfs. resold the copra cake to B. & co., who resold it to dealers, & they in turn resold it to farmers, who used it for feeding cattle. The cattle fed on the cake became ill, & it was then found on analysis, that the cake contained an admixture of castor beans in so large a proportion as to make it poisonous. Claims were then made by the various buyers against their sellers & by pltfs. against defts. as soon as the mischief was discovered, but this was after the expiration of fourteen days from the final discharge of the vessel. Pltfs. claimed arbn., but the arbitrator before whom the matter came held that he had no jurisdiction, as notice of arbn. was not given nor the arbitrator nominated in time. In an action by pltfs. claiming damages, it was found that it was within the contemplation of the parties that the copra cake would be used for cattle food & nothing else:—*Held*: (1) the presence of the arbn. clause was not in itself a bar to the action, nor was the award, which dealt merely with the arbitrator's jurisdiction & not with the claim; (2) the clause as to defects in the goods did not protect defts. inasmuch as the copra cake mixed with castor beans could not properly be described as copra cake; & pltfs. were entitled to recover the damages & costs they had had to pay to their purchasers.—PINNOCK BROTHERS v. LEWIS & PEAT, LTD., [1923] 1 K. B. 690; 92 L. J. K. B. 695; 129 L. T. 320; 39 T. L. R. 212; 67 Sol Jo. 501; 28 Com. Cas. 210.

*Annotation*:—*Distd.* Ayseough v. Sheed Thomson (1924), 93 L. J. K. B. 924.

— **Stay of proceedings.**—*See* ARBITRATION, Vol. II., pp. 363, 368, 369, Nos. 321, 354, 358.

— **Liability of arbitration for negligence.**—*See* ARBITRATION, Vol. II., p. 429, No. 791.

— **Conduct of hearing.**—*See* ARBITRATION, Vol. II., p. 446, Nos. 949.

— **Validity of award.**—*See* ARBITRATION, Vol. II., pp. 473-475, Nos. 1178-1188.

— **Mistake in or amendment of award.**—*See* ARBITRATION, Vol. II., p. 522, No. 1599.

**1030. Award as bar to action.**—*SPEAK v. TAYLOR* (1894), 10 T. L. R. 224, D. C.

**1031.** — *By two contracts made in 1919, applt. bought from resps. a large quantity of "American Fresh Eggs." The contracts provided that in case of any dispute as to the quality or condition of the goods, the question should be referred to arbn., provided that "such reference shall be claimed in writing within three days after the goods have been landed." It was also provided that the award in writing of any two arbitrators should be conclusive & binding on all parties, subject to the right of appeal. The goods arrived in England, & were not examined at the port of landing, but were sold by applt. to sub-purchasers. More than three days after the goods had been landed applt. wrote to resps. complaining that the goods were of inferior quality, & some time later he wrote a letter claiming a reference to arbn. Resps. did not then take the objection that the claim was out of time, but signed a submission to arbn. in respect of each contract. At the reference resps. took the points that applt.'s claim was out of time, & that the goods should have been examined at the port of landing. The arbitrators awarded "that the buyer was out of time in examining & making claim on the goods, & also in claiming arbn., & that therefore his case fails." The buyer took no steps to set aside the awards, but nearly two years later brought an action claiming damages for breach of contract:—*Held*: the awards were a bar to the action.—AYSCOUGH v. SHEED, THOMSON & Co. (1924), 93 L. J. K. B. 924; 131 L. T. 610; 40 T. L. R. 707; 30 Com. Cas. 23, H. L.*

*Annotation*:—*Distd.* Pinnock v. Lewis & Peat, [1923] 1 K. B. 690.

— *See, also*, ARBITRATION, Vol. II., pp. 534-539, Nos. 1703-1739.

— **Condition for return—Sale of animals.**—*See* ANIMALS, Vol. II., pp. 258, 269-271, Nos. 381-384, 475-485.

*G. Warranties as to Animals.*

*See* ANIMALS, Vol. II., pp. 268-274, Nos. 461-513.

## Part IV.—Effects of the Contract.

### SECT. 1.—TRANSFER OF PROPERTY FROM SELLER TO BUYER.

#### SUB-SECT. 1.—IN GENERAL.

*See* Sale of Goods Act, 1893 (c. 71), ss. 17, 18, 61 (2).

**1032. Construction of agreement.**—In an agreement between A. & B. whereby B. agreed to let, & A. to take, a certain brewery for a term of

years at a yearly rent; it was stipulated that A. should take also the casks & stock of beer, a horse & dray, & the book debts, at a valuation to be estimated by two indifferent persons; "& in consideration of the above grant being fulfilled, A. has paid a deposit of £20 & upon the valuation being complete, payment to be made as under":—*Held*: the property in the casks, etc., passed to A. by that agreement, though no valuation had

the return of the engine & its replacement by another engine, & not for damages for breach of warranty.—*HAMILTON v. NORTHEY MANUFACTURING Co.* (1899), 20 C. L. T. 178; 31 O. R. 468.—*CAN.*

p. — *J.*—*MAGRANE v. LOY* (1839), 1 *Craw. & D.* 286.—*IR.*

q. **Payment of actual value of goods.**—Pltf. need not rescind the contract, on breach of warranty, but may retain the goods, & pay for them what they are reasonably worth, having regard to the contract price & the inferiority of the article delivered.—

*COVENTRY v. McENIRY* (1862), 13 I. C. L. R. 160; 14 Ir. Jur. 144.—*IR.*

#### PART IV. SECT. 1, SUB-SECT. 1.

**1032i. Construction of agreement.**—*YULE BROTHERS v. SIMS*, [1918] V. L. R. 670.—*AUS.*

**1032ii.** — *J.*—*TILT v. SILVER-THORNE* (1854), 11 U. C. R. 619.—*CAN.*

**1032iii.** — *J.*—*HANINGTON v. CORMIER* (1875), 3 *Pug.* 212.—*CAN.*

**1032iv.** — *J.*—*ROSS v. EBY* (1877), 28 C. P. 316.—*CAN.*

**1032v.** — *J.*—*POISSON v. DEGEER* (1886), 12 O. R. 275.—*CAN.*

**1032vi.** — *J.*—*ACME SILVER Co. v. PERRET* (1887), 4 *Man. L. R.* 501.—*CAN.*

**1032vii.** — *J.*—*ROGERS v. DEVITT* (1894), 25 O. R. 84.—*CAN.*

**1032viii.** — *J.*—*KING v. DUPUIS* (1898), 28 S. C. R. 388.—*CAN.*

**1032ix.** — *J.*—*DOMINION PRESSED BRICK Co. v. BLACK* (1908), 9 W. L. R. 445.—*CAN.*

**1032x.** — *J.*—*BELL v. ROBERTSON* (1911), 17 W. L. R. 412.—*CAN.*

been made.—**CHALLON HUMMELL** (1849), 14 L. T. O. S. 173.

**1033. — As a whole.**—By an agreement in writing the "owners & lessors" of a gas engine agreed to let, & the "lessee" agreed to hire, the engine at a rent to be paid by instalments amounting in all to £240; upon payment in full the agreement to be at end & the engine to become the property of the lessee, but until payment in full to remain the sole & absolute property of the lessors. It was also agreed that in case of failure to pay any of the instalments or if the lessee should become bkpt. the lessors might elect either to recover the full balance remaining due, or instead to resume possession of the engine & sell it &, after retaining out of the purchase-money all expenses & the balance remaining due, pay the surplus, if any, to the lessee. Provided that if the lessors should see fit to resume possession of the engine without selling, the loss to them occasioned by the lessee's non-performance of the agreement should be borne by him, & in case of bkpcy. the lessors should be entitled to prove against his estate for that loss as liquidated damages. The lessee paid the first instalment & the engine was placed on his premises. While it was still there he became bkpt., some instalments being overdue. The lessors having taken no steps to recover the balance due or to sell:—*Held*: upon the true construction of the agreement the property in the engine never passed to the lessee, but remained in the lessors.

If the words in one part of it point in one direction & the words in another part in another direction, you must look at the agreement as a whole & see what its substantial effect is (**LORD HERSCHELL, C.**).

Upon an agreement to sell it depends upon the intention of the parties whether the property passes or does not pass . . . & it might be necessary to hold that the property has passed, although the parties have said that their intention was that it should not, because they have provided that it shall (**LORD HERSCHELL, C.**).

They could not sue for the purchase-money & insist that the property in the goods, the price of which they were suing for, had not passed. . . . They may, instead of suing for the balance of the price & treating it then & there as a sale at that price then due, resume possession (**LORD HERSCHELL, C.**).—**MCENTIRE v. CROSSLEY BROTHERS**, [1895] A. C. 457; 64 L. J. P. C. 129; 72 L. T. 731; 2 Mans. 334; 11 R. 207, H. L.

*Annotation*:—**Reid**, *Hobson v. Gorrings*, [1897] 1 Ch. 182.

**1034. Transfer by deed—On execution thereof—Admissibility of extrinsic evidence to vary.**—Pltf., being in difficulties & fearing that some of his creditors would issue execution against his goods, agreed with deft., who was also a creditor, that there should be a pretended sale of them to him.

**1032 xi.** —.—**—MORRIS v. MCAULAY**, 21 C. L. T. 547.—**CAN.**

**1035 i. Intention of parties.**—**BURNS, PHILIP & Co. v. DINGLE & Co.** (1923), 23 S. R. N. S. W. 240; 40 N. S. W. N. 26.—**AUS.**

**1035 ii.** —.—**—REYNOLDS v. AYRES** (1862), 5 All. 333.—**CAN.**

**1035 iii.** —.—**—TOMPKINS v. TIBBITTS** (1867), 1 Han. 317.—**CAN.**

**1035 iv.** —.—**—GIBSON v. MCKEAN & RANDOLPH** (1876), 3 Pug. 299.—**CAN.**

**1035 v.** —.—**—CLOSE v. TEMPLE** (1880), 20 N. B. R. 234.—**CAN.**

**1035 vi.** —.—**—B1 v. FRY** (1888), 15 O. R. 122.—**CAN.**

**1035 vii.** —.—**—AMES-HOLDEN CO. v. HATFIELD** (1898), 29 S. C. R. 95.—**CAN.**

**1035 viii.** —.—**—Whether the property in goods contracted to be sold has or has not passed to the purchaser, depends in each case upon the intention of the parties, & the property may pass even though the goods have not been measured & the price has not been ascertained.**—**WILSON v. SHAVER** (1901), 22 C. L. T. 11; 3 O. L. R. 110.—**CAN.**

**1035 ix.** —.—**—WATTS v. HEHSDORFER** (No. 1) (N. W. T.) (1905) 1 W. L. R. 105.—**CAN.**

**1035 x.** —.—**—UNION BANK OF CANADA v. BLACKWOOD** (Man.) (1906), 2 W. L. R. 574.—**CAN.**

For this purpose an invoice was made out & a receipt given to deft. for a sum therein stated to be the purchase-money, & possession of the goods was delivered to deft. Afterwards deft. sold the goods as his own, whereupon pltf. brought trover:—*Held*: no property in the goods passed to deft.; & pltf. was not precluded from showing that no payment was in fact made & that the transaction was not a real, but a pretended sale.

Where goods are professed to be transferred by deed, the deed actually transfers the property; & the moment the deed is executed, by law the property ceases to be the property of the person who has executed the deed, & becomes the property of the person in whose favour it has been executed (**POLLOCK, C.B.**).

Is there any established rule of evidence or practice in the administration of justice, that, where parol documents are produced leading to one result, it is not competent to contradict them & show that the real truth is not that which the documents import? I think that there is no such rule (**POLLOCK, C.B.**).—**BOWES v. FOSTER** (1858), 2 H. & N. 779; 27 L. J. Ex. 262; 30 L. T. O. S. 306; 4 Jur. N. S. 95; 6 W. R. 257; 157 E. R. 322.

*Annotations*:—**Reid**, *Ashpittel v. Bryan* (1863), 3 B. & S. 474; *Lee v. L. & Y. Ry.* (1871), 6 Ch. App. 527; *Taylor v. Bowers* (1876), 1 Q. B. D. 291.

**1035. Intention of parties.**—**TURLEY v. BATES**, No. 1223, *post*.

**1036. —.**—**—A. & co. contracted with B. & co. for the purchase of a large quantity of railway sleepers, to be delivered at intervals at the wharf of A. & co., & to be paid for on delivery. The sleepers arrived at the wharf of B. & co. in timbers of length sufficient when sawn asunder to make each two sleepers. After several deliveries had taken place, one of the firm of B. & co. called at the office of A. & co., & obtained from A. an advance of £800 "on account of the last cargo of timber," which he represented to be, & which then was, at the wharf of B. & co., & a portion of which had already been sawn into sleepers:—*Held*: this was such a specific appropriation of the timber & sleepers to A. & co., who had possessed themselves of them, as to entitle them to retain them as against the assignees of B. & co., who had become bkpt. after the advance.**—**LANGTON v. WARING** (1865), 18 C. B. N. S. 315; 11 L. T. 633; 13 W. R. 347; 144 E. R. 165.

*Annotations*:—**Consd.** *Young v. Matthews* (1866), L. R. 2 C. P. 127. **Distd.** *Thompson v. Simpson* (1870), 39 L. J. Ch. 857. **Reid**, *Brown v. Bateman* (1867), L. R. 2 C. P. 272.

**1037. To pass by delivery.**—A sheriff having seized pltf.'s goods under a writ of execution, an order was made by consent giving the sheriff power to sell them by private contract to deft. co. The goods were sold to co. for the amount of the execution debt; the money was paid, & a

**1035 xi.** —.—**—Re FAULKNER, LTD., ARTHUR & Co. (EXPORT) LTD.'S CLAIM** (1917), 40 O. L. R. 75; 38 D. L. R. 81.—**CAN.**

**1035 xii.** —.—**—BRADLEY v. BAILLY & JASPERSION** (1920), 48 O. L. R. 612; 57 D. L. R. 673; 19 O. W. N. 340.—**CAN.**

**1035 xiii.** —.—**—REID (ROBERT) (CARMICHAEL, MACLEAN & Co.'s TRUSTEE) v. MACBETH & GRAY** (1904), 6 F. (Ct. of Sess.) (H. L.) 25; [1901] A. C. 223; 41 Sc. L. R. 369; 11 S. L. T. 783.—**SCOT.**

**1035 xiv.** —.—**—HEPBURN v. LAW** (1914), 51 Sc. L. R. 342.—**SCOT.**

**1035 xv.** —.—**—WOODBURN v. MOTHERWELL (ANDREW), LTD.**, [1917] S. C. 533.—**SCOT.**

**Sect. 1.—Transfer of property from seller to buyer :  
Sub-sects. 1, 2 & 3, A.]**

receipt for it, together with an inventory of the goods, sent by post. The same day deft. co. let the goods to debtor's wife on a hiring agreement. Debtor became bkpt., & his trustee claimed the goods. The receipt & inventory were not registered. The county ct. judge set aside the transaction as void :—*Held* : the transaction was one of purchase & sale.

Property in goods passes by delivery if there is an intention that it should pass (FIELD, J.).—JONES v. TOWER FURNISHING CO. (1889), 61 L. T. 84 ; *sub nom. Re JONES, Ex p. TOWER FURNISHING CO.*, 6 Morr. 193, D. C.

*Annotations* :—*Refd.* Beckett v. Tower Assets Co., [1891] 1 Q. B. 1. *Mentd.* Stammers v. Margrett (1905), 21 T. L. R. 342.

**1038. — Intention against passing.]—M.**, a planter residing in Jamaica, being the owner of sugars, the produce of his estate there, & indebted to deft., who resided in London, for more than their value, shipped them at Jamaica, on Apr. 4, on board a ship belonging to deft., which was in the habit of carrying supplies to Jamaica, to the estates of M. & others, & taking back consignments from M. & others, & was then employed in that course. On Apr. 4, the captain signed, & handed to M. a bill of lading, by which the sugars were to be delivered to deft. at London, he paying freight. On Apr. 6, M. made an indorsement on the bill that the sugars were to be delivered to deft. only on condition of his giving security for certain payments, but otherwise to pltf.'s agent. On the same day M. indorsed the bill of lading & delivered it to pltf., to whom he was indebted in more than the value of the sugars ; & the bill was never in deft.'s hands. During Feb. & Mar. M. had written letters to deft., advising that the ship would sail with the sugars in question & others, directing him to insure the cargo, & advising him of bills drawn in favour of B. on account of the estates producing the sugars in question. On Apr. 4, M. had written to pltf. desiring him to secure himself for his balance with the produce of those estates. The sugars arrived in London, & deft. paid the bills drawn in favour of B., but did not comply with the condition of the indorsement made on Apr. 6 :—*Held* : pltf. was entitled to the sugars, for that (a) M. had not parted with the property by delivering it on board deft.'s ship so employed as above stated ; (b) nor by accepting the bill of lading, as drawn on Apr. 4, from the captain ; M. being entitled to change the bill of lading, as drawn on Apr. 4, from the captain ; M. being entitled to change the destination of the sugars till he had delivered them or the bill ; (c) & that the letters to deft. did not show an intention to consign the specific property to him ; (d) that for these reasons, strengthened by the proof of intention in M.'s letter of Apr. 4, the indorsement to pltf. passed the property.—MITCHEL v. EDE (1840), 11 Ad. & El. 888 ; 3 Per. & Dav. 513 ; 9 L. J. Q. B. 187 ; 113 E. R. 651.

*Annotations* :—*Consd.* Turner v. Liverpool Docks Trustees (1851), 6 Exch. 543 ; Schotsmans v. L. & Y. Ity. (1867), 2 Ch. App. 332. *Refd.* Evans v. Nichol (1841), 4 Scott, N. R. 43 ; Van Casteel v. Booker (1848), 2 Exch. 691 ; Browne v. Hare (1858), 3 H. & N. 484 ; Berndtson v. Strang (1867), L. R. 4 Eq. 481.

**1039. — Agreement providing for pass-**

**10391. — Intention against passing**  
—*Agreement providing for passing.]—*  
DOMINION BRIDGE CO. v. BRITISH-AMERICAN NICKEL CORPN., LTD., [1925] 2 D. L. R. 138 ; 56 O. L. R.

**288.—CAN.**

*r. Symbolical delivery.]—*A symbolical delivery of a bulky article, such as timber, is sufficient to pass the property to the purchaser.—FIDDES v.

*Ing.]—*McENTIRE v. CROSSLEY BROTHERS, No. 1033, ante.

**1040. —.]—**The junior partner in a London firm of diamond merchants, when the firm was in financial embarrassment, made an oral offer to pltf's, who were diamond merchants abroad, to buy from them a certain parcel of diamonds at 180 francs per carat & to give a six months' bill. The offer was accepted on behalf of pltf's. & the diamonds were sent by post to the purchaser's firm together with the bill for acceptance & an invoice marked "Settled by acceptance." The bill was never accepted, the senior partner repudiated the transaction, & a month later the junior partner committed suicide. Afterwards the senior partner executed a deed of assignment, & eventually a trustee in bkpcy. was appointed. Pltf's. then brought an action against the trustees for the return of the diamonds. The defence was that the property in them had passed to the firm & therefore to the trustee. It was admitted that all similar dealings in diamonds were carried through on the credit of acceptances. The jury found that it was the intention of the parties that the property should not pass to the London firm until they had accepted the bill by signing it :—*Held* : there was evidence on which the jury could properly so find, & pltf's. were entitled to the return of the diamonds & were not limited to proving in the bkpcy.—SAKS v. TILLEY (1915), 32 T. L. R. 148, C. A.

**1041. —.]—**UNDERWOOD, LTD. v. BURGII CASTLE BRICK & CEMENT SYNDICATE, No. 1208, post.

**1042. Act to be done by vendor—Performance a condition precedent.]—**(1) The risk of accident to goods must remain in the seller until the right of property passes to the buyer.

(2) In ordinary cases, the seller has the right of lien until payment ; & unless he do some act to show that he means to divest himself of the property, the right in the property is concurrent with the lien.

(3) The property remains in the seller so long as any act remains to be done by him to divest it.

(4) Where a contract was made for the sale of bark at a particular place, at so much per ton, to be paid for at a certain day, & before the goods had been weighed an accident happened to them :—*Held* : the risk lay upon the seller ; & although a partial delivery had taken place, that partial delivery could not alter the liability, because the seller had still the right of lien.—SIMMONS v. SWIFT (1826), 5 B. & C. 857 ; 8 Dow. & Ry. K. B. 693 ; 5 L. J. O. S. K. B. 10 ; 108 E. R. 319.

*Annotations* :—*As to* (3) *Refd.* Scott v. England (1844), 2 Dow. & L. 520 ; Logan v. Le Mesurier (1847), 6 Moo. P. C. C. 116 ; Gilmour v. Supple (1858), 11 Moo. P. C. C. 551 ; Turley v. Bates (1863), 2 H. & C. 200. *As to* (4) *Consd.* Clarke v. Sponce (1836), 4 Ad. & El. 448. *Distd.* Martineau v. Kitching (1872), L. R. 7 Q. B. 436. *Refd.* Dixon v. Yates (1833), 5 B. & Ad. 313 ; Alexander v. Gardner (1835), 1 Bing. N. C. 671 ; Bannerman v. White (1861), 4 L. T. 740 ; *Re McLaren, Ex p. Cooper* (1879), 27 W. R. 518. *Generally, Refd.* Boorman v. Nash (1829), 7 L. J. O. S. K. B. 150.

**1043. Delivery on board buyer's ship.]—**MITCHEL v. EDE, No. 1038, ante.

**1044. Sale of ship—Contingent sale—On arrival in this country.]—**A., the owner of a ship at sea, agreed to sell her to B. for £4,000, when she should arrive within the United Kingdom, & should have discharged her cargo & been repaired. B. was then to give promissory notes in payment, & in

HENDERSON (1825-1897), N. B. Dig. 274.—CAN.

*t. Bare delivery—Sufficiency.]—*BEYERS v. MCKENZIE, [1880] F. 125.—S. AF.



case of default on his part, A. was to be at liberty to resell the ship, & B. was to make good any loss arising from the sale. Before the arrival of the ship B. became bkpt., & his assignees refused to purchase the ship when she arrived. She was then sold by A. for less than £4,000 & he afterwards applied to prove against B.'s estate for the deficiency:—*Held*: the agreement to purchase was contingent, & no debt was created, & A. was, therefore, not entitled to prove against B.'s estate.—*Re GALES, Ex p. JONASSOHN* (1846), 15 L. J. Bcy. 9.

**1045. — Passing by delivery.**—*HOOPER v. GUMM, McLELLAN v. GUMM*, No. 1437, *post*.

**1046. Effect of mistake in parting with possession.**—The London Dock co. by mistake delivered two hogsheads of sugar to a carrier, who produced two delivery notes authorising them to deliver two other hogsheads of sugar, the property of B. The carrier broke bulk, & was indicted for larceny:—*Held*: the property was well described as the property of the London Dock co., they having still a special Property in the Chattels, notwithstanding that they parted with the possession by mistake.

It is a misapprehension to suppose that when possession of property is parted with by mistake, the rights of the owner are affected. It effects no change in the ownership of the property (*POLLOCK, C.B.*).—*R. v. VINCENT* (1852), 3 Car. & Kir. 246; 2 Den. 464; 21 L. J. M. C. 109; 19 L. T. O. S. 96; 16 J. P. 295; 16 Jur. 457; 5 Cox, C. C. 537, C. C. A.

**1047. Goods purchased & paid for by de facto government—De facto government displaced—Goods property of succeeding government.**—Where goods have been purchased on behalf of a govt. *de facto*, & paid for by moneys of, or the produce of taxes levied by, that govt.—& such govt. is displaced by a succeeding one, the goods become the property of the succeeding govt.; but subject to all agreements & contracts entered into by the former owners of such goods with British subjects.—*U.S.A. v. PRIOLEAU* (1865), 2 Hem. & M. 559; 35 L. J. Ch. 7; 13 L. T. 92; 11 Jur. N. S. 792; 13 W. R. 1062; 71 E. R. 580.

*Annotations*:—*Consd.* Peru Republic v. Dreyfus (1888), 38 Ch. D. 348. *Refd.* Smith v. Weguelin (1869), L. R. 8 Eq. 198. *Mentd.* The Beatrice (otherwise The Rappahannock) (1866), 36 L. J. Adm. 9; West Rand Central Gold Mining Co. v. R., [1905] 2 K. B. 391; Luther Aktionsairnoye Obschestvo A. M. Luther v. Sagor, [1921] 1 K. B. 456.

**1048. Waiver of right to dispute transfer.**—Pltfs. N. & co. engaged with defts., who were shipowners, for the shipment of a large quantity of oil to Montreal during the season, & it was arranged that defts. were to receive no goods on board unless a clean receipt were given. Pltf. A.

sold fifty barrels of oil to N. & co. & delivered them to defts. Defts. received the oil, but refused to give a clean receipt for it. Pltf. A. demanded redelivery, which defts. refused, as other cargo had been stowed on the top of it. N. & co. having agreed to pay A. for the oil in cash in exchange for mate's receipt, refused to pay for the fifty barrels. A. brought an action against defts. for conversion, & afterwards amended the writ by adding N. & co. The consignees at Montreal accepted the oil & paid N. & co. who thereupon paid A.:—*Held*: A. had waived the right of saying that the property in the goods had not passed to N. & Co., & no action lay for his loss of interest through the delay in payment to him of the price of the goods.—*ARMSTRONG v. ALLAN BROTHERS* (1892), 67 L. T. 738; 9 T. L. R. 38; 7 Asp. M. L. C. 293; 4 R. 107, C. A.

**Effect of winding up of company.**—*See COMPANIES, Vol. X., pp. 864, 865, Nos. 5834–5839.*

## SUB-SECT. 2.—MISREPRESENTATION OR FRAUD.

*See Part IX., post.*

## SUB-SECT. 3.—UNASCERTAINED GOODS.

### A. In General.

*See Sale of Goods Act, 1893 (c. 71), s. 16.*

**1049. General rule—Goods must first be ascertained.**—Defts. contracted to sell to K. fifty hogsheads of sugar, called double loaves, at 100s. per cwt., to be delivered free on board a British ship: K. sold to pltf. by the same description, & defts. assented to the resale, the sugar not having been delivered or weighed:—*Held*: pltf. could not recover for it in trover against defts., the first vendors.

Trover cannot be maintained but for specific goods (*MANSFIELD, C.J.*).—*AUSTEN v. CRAVEN* (1812), 4 Taunt. 614; 128 E. R. 483.

*Annotations*:—*Refd.* White v. Wilks (1813), 1 Marsh. 2; Gillett v. Hill (1834), 3 L. J. Ex. 145; Laurie & Morewood v. Dudin, [1926] 1 K. B. 223.

**1050. — — —**—*GILLETT v. HILL*, No. 1063, *post*.

**1051. — — —**—*DEFRIES v. LITTLEWOOD* (1845), 5 L. T. O. S. 285; 9 Jur. 988.

*Annotation*:—*Consd.* Heseltine v. Siggers (1848), 1 Exch. 856.

**1052. — — —**—*HEILBUTT v. HICKSON*, No. 1913, *post*.

**1053. — — —**—“Ascertained goods” within Sale of Goods Act, 1893 (c. 71), s. 52, are goods the individuality of which has in some way been found out at the time of contract.

## PART IV. SECT. 1, SUB-SECT. 3.—A.

**1049 i. General rule—Goods must first be ascertained.**—*PHIN v. BARCLAY*, [1913] S. A. L. R. 27.—*AUS.*

**1049 ii. — — —**—*RIGNEY v. MITCHELL & McMASTER* (1851), 2 C. P. 266.—*CAN.*

**1049 iii. — — —**—*COLEMAN v. McDERMOTT* (1856), 1 E. & A. 445; 5 C. P. 303.—*CAN.*

**1049 iv. — — —**—*McDOUGALL v. ELLIOTT* (1860), 20 U. C. R. 299.—*CAN.*

**1049 v. — — —**—A firm having in its premises goods consisting of books, & stationery of the invoice value of \$17,000, executed a conveyance to pltf. of goods to the invoice value of \$6,500. The conveyance was in general terms & did not specify any particular portion of the stock, nor

was it followed by any selection or appropriation from the stock, or any delivery of any part of it:—*Held*: no property passed by such conveyance, as it was impossible to state what particular goods became the property of pltf.—*ROSS v. CAMERON* (1889), 40 N. S. R. 126.—*CAN.*

**1049 vi. — — —**—*ROSS v. HURTEAU* (1890), 18 S. C. R. 713.—*CAN.*

**1049 vii. — — —**—*HUXTABLE v. CONN* (1904), 14 Man. L. R. 713.—*CAN.*

**1049 viii. — — —**—*LEE v. CULP* (1904), 24 C. L. T. 316; 8 O. L. R. 210; 4 O. W. R. 41.—*CAN.*

**1049 ix. — — —**—*TEMPLE v. CLOSE, Cass. Dig., 2nd ed. 765.*—*CAN.*

**1049 x. — — —**—A sale is not completed & the property is not vested in the vendee until there has been a

delivery, & acceptance, & such delivery is not completed, so long as anything remains for the vendor to do, whereof the quantity, quality, price or identity of the chattel sold is to be ascertained.—*BODEN v. ROGERSON* (1859), 4 Nfld. L. R. 266.—*NFLD.*

**1049 xi. — — —**—*RIDLEY v. GRIEVE & EHLERS* (1859), 4 Nfld. L. R. 336.—*NFLD.*

**1049 xii. — — —**—*HAYMAN & SON v. M'LINTOCK*, [1907] S. C. 936; 44 Sc. L. R. 691; 15 S. L. T. 63.—*SCOT.*

**1049 xiii. — — —**—*ERASMUS v. ROSENBERG*, [1910] T. P. D. 1188.—*S. AF.*

**a. Sale by sample—Property passes acceptance.**—Where unascertained on goods are sold under a contract that they shall be equal to sample, the property does not pass until the purchaser has actually accepted them.



*Sect. 1.—Transfer of property from seller to buyer :  
Sub-sect. 3, A. & B. (a).]*

By a sold note dated Sept. 12, 1916, the sellers sold to the buyers 10 bales of Hessian bags, all conditions according to the "spot" which meant that the goods were available & ready for delivery—contract form of a certain trade assocn., terms net cash against delivery order on or before Sept. 19, 1916, delivery prompt, rent & insurance free to Sept. 19, 1916. On the same day, but after the sold note was given, the sellers sent to the buyers an invoice for the goods which gave the specific marks & numbers of the bales as 10.30 ex: 6762/6806, & stated that the sale was "ex wharf, London." On Sept. 19, no cheque for payment having been received, the sellers wrote to the buyers cancelling the contract. On Sept. 20 the buyers tendered the price, which was refused. On a reference to arbn., it was decided as a fact, so far as it was a question of fact & not of law, that it was a recognised custom in the trade that if the sellers tendered to the buyer an invoice giving specific marks & numbers of the goods, such goods were specifically appropriated to the contract, & were ready for delivery against payment, that if the price was tendered within a reasonable time before notice of resale, the buyer was entitled to delivery of the goods against payment, & that, no such notice having been given, the contract stood:—*Held*: (1) time was of the essence of the contract to make payment & take delivery, the buyers were in default, & that the sellers were entitled to cancel the contract; (2) in any event, the buyers were not entitled to specific performance of the contract, as the goods were not "ascertained" within Sale of Goods Act, 1893 (c. 71), s. 52.—*THAMES SACK & BAG CO., LTD. v. KNOWLES & CO., LTD.* (1918), 88 L. J. K. B. 585; 119 L. T. 287.  
*Annotation*:—As to (2) *Apld. Re Walt*, [1927] 1 Ch. 606.

**B. When Property Passes.**

*(a) Happening of Specified Event.*

See Sale of Goods Act, 1893 (c. 71), s. 16.

**1054. General rule—Property passes on happening of event.]**—The builder's agreement was . . . a mere legal contract that, upon the happening of a particular event, the property in law should pass in certain chattels which that event itself would identify without the necessity of any further act on the part of anybody, & which could not be identified before (*BOWEN, L.J.*).—*REEVES v. BARLOW* (1884), 12 Q. B. D. 436; 53 L. J. Q. B. 192; 50 L. T. 782; 32 W. R. 672, C. A.

*Annotations*:—*Consd. Morris v. Delobel-Filipo*, [1892] 2 Ch. 352; *Hart v. Porthgarn Harbour Co.*, [1903] 1 Ch. 690. *Refid. Re Hall, Ex p. Close* (1884), 14 Q. B. D. 386; *Joseph v. Lyons* (1884), 51 L. T. 740; *Re Walker, Ex p. Barter*, *Ex p. Black* (1884), 26 Ch. D. 510; *Re Hardwick, Ex p. Hubbard* (1886), 17 Q. B. D. 690; *Climpson v. Coles* (1889), 23 Q. B. D. 465; *Church v. Sage, Froy, Clamant* (1892), 67 L. T. 800; *Spencer v. Mid. Ry.* (1895), 11 T. L. R. 403; *Re Keen & Keen, Ex p. Collins*, [1902] 1 K. B. 555. *Mentd. Re Clarke, Coombe v. Carter* (1887), 36 Ch. D. 348; *Re Standard Manufacturing Co.* (1891), 60 L. J. Ch. 292.

**1055. ———.]**—A contract entered into between a railway co. & a contractor, for the construction of a new railway, contained a provision that once a month during the construction of the railway the engineer of the co. should certify the amount due & payable to the contractor according to a scale to be agreed upon between

the contractor & engineer, in respect of the value of the works executed & materials delivered, until a certain sum had been certified, & that then, the amounts certified for should be paid by the co. to the contractor within seven days after presentation of the certificates:—*Held*: the property in unused materials delivered by the contractor for the purpose of the construction of the railway, which had been comprised in certificates of the engineer, but had not been paid for the co. passed to the co. on the making of the certificates comprising them; & an injunction was granted to restrain the contractor from removing such materials from the land of the co.—*BANBURY & CHELTENHAM DIRECT RY. CO. v. DANIEL* (1884), 54 L. J. Ch. 265; 33 W. R. 321.

**1056. Event must identify goods.]**—Defts. bought from one M. all the ore of a certain mine in Spain, to be shipped by M. at Cartagena on ships to be chartered by defts. or by him. The ore was to be paid for by bills against bills of lading, or by longer bills on the execution of a charterparty, & on a certificate that there was enough ore in stock to load the vessel chartered. On being so paid for, the ore was to be the property of defts. Several vessels had been loaded, & others chartered, & several payments made up to Mar. 1872, when the *T.*, one of the chartered ships, arrived at Cartagena. The payments which had been made at that time exceeded in amount the price of all the ore shipped & to be shipped in all the vessels chartered & not loaded, so that had M. shipped ore on the *T.* he would have been entitled to no payment in respect of it. He had ore which he could & ought to have shipped, taking bills of lading to the order of defts. Instead of doing this, before any ore was put on board the *T.*, he telegraphed to defts. that he would not load the *T.* on their account, & though they telegraphed to him threatening him if he did not, he loaded the *T.*, taking bills of lading, making the shipment to be by one S., & the cargo deliverable to S.'s order. No certificate in relation to this ore was ever given to defts. By the terms of the charter-party, the captain was to sign bills of lading as presented. S. was a fictitious person, & M., after indorsing the name of S. on the bills of lading & then his own, indorsed them for value to plffs.:—*Held*: plffs. as against defts., were entitled to the cargo.

It must be taken, I think, that by virtue of the payment, defts. had become entitled to a quantity of the ore in store, corresponding with the amount of the bills drawn against the charterer . . . but it cannot be doubted that this alone would not transfer the property in any particular part . . . & the question becomes whether by any subsequent act of appropriation the property in a particular part has passed (*CLEASBY, B.*).—*GABARRON v. KREEFT, KREEFT v. THOMPSON* (1875), L. R. 10 Exch. 274; 44 L. J. Ex. 238; 33 L. T. 365; 24 W. R. 146; 3 Asp. M. L. C. 36.

*Annotations*:—*Refid. Mirabita v. Imperial Ottoman Bank* (1878), 3 Ex. D. 164; *The Parchim*, [1918] A. C. 157.

**1057. ———.]**—*REEVES v. BARLOW*, No. 1054, ante.

**1058. Sale of goods from bulk—Custom for precedent searching of oil casks.]**—Where a sale note for the purchase of 50 tons of Greenland oil was delivered by the sellers' broker to the purchasers to be paid for by their acceptance, payable at a

—*GREENSHIELDS v. CHISHOLM* (1884), 3 S. C. 220.—*S. AF.*

**PART IV. SECT. 1, SUB-SECT. 3.—  
B. (a).**

**1054 i. General rule — Property**

*passes on happening of event.]*—Defts. contracted to deliver to plffs. a quantity of logs, "to be delivered safely boomed in cove," & to be at plffs.' "risk after notice that driving operations have ceased for the time

being, & inspection of booms has been made & found satisfactory":—*Held*: property in the logs did not pass until after delivery, notice & inspection as provided for.—*BOCHNER v. SMITH* (1916), 49 N. S. R. 435.—*CAN.*

future day; & they afterwards received from the sellers an order on their wharfingers for the delivery of the 50 out of 90 tons of their oil; yet as the custom of the trade was for the casks to be searched by the sellers' cooper, & for a broker on behalf of both parties to ascertain the footdirt & water in each, for which allowance was to be made, & then the casks were to be filled up by the sellers' cooper at their expense; all which was to precede the delivery to the buyers:—*Held*: the sale was not complete to pass the property; but the sellers, on the insolvency & subsequent bkpcy. of the buyers, before such acts done & delivery made, might countermand it.—*WALLACE v. BREEDS* (1811), 13 East, 522; 1 Rose, 109; 104 E. R. 473.

*Annotations*:—*Apld.* Busk v. Davis (1814), 2 M. & S. 397. *Consd.* Simmons v. Swift (1826), 5 B. & C. 857. *Refd.* Thomas v. Pearse (1818), 5 Price, 578; Gilmour v. Supple (1858), 11 Moo. P. C. C. 552.

1059. — *Weighting*.]—*BUSK v. DAVIS*, No. 1370, *post*.

1060. — —.]—*SHEPLEY v. DAVIS*, No. 1548, *post*.

1061. — —.]—Vendor by a delivery order directed defts., who were wharfingers, to deliver to the vendee 1028 bushels of oats, bin 40, to be weighed over, & the expense of weighing to be charged to the vendor. The vendee afterwards gave an order to the same effect on a sale to plffs. There were no other oats in the bin, & they were transferred to plffs. in defts.' books, but never weighed over. The vendor, on the failure of the first vendee, claimed a right of stoppage *in transitu*:—*Held*: without reference to any stoppage against defts., the wharfingers, the property had passed as between buyer & seller, so as to defeat the vendor's right of stoppage.

. . . If part of a bulk be sold, so that weighing or separation is necessary to determine the identity or individuality of the article, or if the whole of a commodity be sold, but weighing is necessary to ascertain the price, because the quantity is unknown, the weighing or measuring must precede the delivery; & the symbolical delivery without such weighing will not be sufficient, but where the identity of the goods & the quantity are known the weighing can only be for the satisfaction of the buyer, . . . & in such case the transfer in the books of the wharfinger is sufficient (*LORD DENMAN, C.J.*).—*SWANWICK v. SOTHERN* (1839), 9 Ad. & El. 895; 1 Per. & Dav. 648; 112 E. R. 1453.

*Annotations*:—*Refd.* Acraman v. Morrice (1849), 8 C. B. 449; Gilmour v. Supple (1858), 11 Moo. P. C. C. 552.

1062. — *Separation*.]—*WHITE v. WILKS*, No. 1069, *post*.

1063. — —.]—A. contracted to sell B. twenty sacks of flour, & gave him an order on C., his wharfinger, requesting him "to deliver to B. twenty sacks of households." On the order being presented to C. he stated that he had only five sacks to spare, but that B. might have them; & they were delivered accordingly. The order was filed by C., in the way that orders accepted generally were filed by him in the usual course of his business without any indorsement being made on it of a partial acceptance only. Application was made the following day for the remaining fifteen sacks of flour, when C. replied that B. should have it as soon as he got any. A demand being afterwards made C. refused to deliver any more, saying that he had no flour of A.'s in his possession. On trover brought by B. against C.

to recover the value of the fifteen sacks, the jury found that C. had accepted the order generally, & gave a verdict for pltf.:—*Held*: the order was right, & trover was maintainable.

If I agree to deliver a certain quantity of oil as ten out of eighteen tons, no one can say which part of the whole quantity I have agreed to deliver until a selection is made (*BAYLEY, J.*).—*GILLET v. HILL* (1834), 2 Cr. & M. 530; 4 Tyr. 290; 3 L. J. Ex. 145; 149 E. R. 871.

*Annotations*:—*Consd.* Knights v. Wiffen (1870), L. R. 5 Q. B. 660; Thames Sack & Bag Co. v. Knowles (1918), 88 L. J. K. B. 535; Laurie & Morewood v. Dudin, [1926] 1 K. B. 223; Wait & James v. Midland Bank (1926), 31 Com. Cas. 172. *Refd.* Henderson v. Williams (1894), 72 L. T. 98; Sterns v. Vickers, [1923] 1 K. B. 78.

1064. — —.]—B. agreed to buy 5 tons of hops of good quality from K., to be delivered by K. K. sent a large quantity, far exceeding 5 tons, & B., after inspection, refused to receive any of them, as being of bad quality. K. never tendered the specific quantity of 5 tons, & took the whole parcel away, & then sued B. for the price of 5 tons:—*Held*: as the 5 tons had never been separated from the parcel, & there was no complete delivery, B. could not sue for the price, but could merely recover damages for non-acceptance, & the measure of such damages was the difference between the contract price & the market price at the time when the contract was broken.—*BOSWELL v. KILBORN* (1862), 15 Moo. P. C. C. 309; 6 L. T. 79; 8 Jur. N. S. 443; 10 W. R. 517; 15 E. R. 511, P. C.

*Annotation*:—*Refd.* Re Pentregulnea Fuel Co., Pegg's Claim (1862), 4 De G. F. & J. 541.

1065. — —.]—Where, after a sale of 60,000 bricks, part of a bulk of 117,000, the seller had applied all but 62,000 for other purposes, & was still using them when seized in execution:—*Held*: there was no appropriation of any part of the 60,000 to the sale.—*SNELL v. HEIGHTON* (1883), 1 Cab. & El. 95.

*Annotation*:—*Consd.* Re Wait, [1927] 1 Ch. 606.

1066. — — *Residue*.]—*JENKYN v. USBORNE*, No. 2236, *post*.

1067. — —.]—The rule of law is that, if something is to be done by the seller to ascertain the goods to be delivered, it is not to be taken that the property passes. . . . The potatoes sold were "magnum potatoes" & "on an inch & a half sieve," i.e. magnum potatoes which would stand that test & clear such a sieve, that is, not pass through. Thus it was not a sale of all the potatoes grown on these farms, nor even of all "the magnum potatoes," but only such as cleared such a sieve, & who was to ascertain the potatoes? Clearly the seller, that is he was to ascertain what were the potatoes to be sold, & the property was not to pass until they were so ascertained. The property did not pass by the contract, & it was a contract for future delivery of the potatoes when so ascertained (*LORD ESHER*).—*SHARP v. CHRISTMAS* (1892), 8 T. L. R. 687, C. A.

*Annotation*:—*Refd.* Hartley v. Hymans, [1920] 3 K. B. 475.

1068. — —.]—Resp., a fish dealer in Ireland, carried on the business of supplying fish to customers in England. He had an agent at Holyhead, & his practice was not to send fish direct to any particular customer, but to send to his agent at Holyhead a sufficient quantity of fish to fulfil all the orders which he might have received, & to leave the agent to forward parcels of fish to the various customers as might be required. Appls., who were fish salesman in London, gave

10621. *Sale of goods from bulk—Separation*.]—Under a contract for the sale of a certain number of bushels of grain, the handing over of the key

of the bin containing the grain does not, where there is no evidence of the amount of grain in the bin, pass the property in the grain sold before the

quantity sold is separated from the bulk & appropriated to the contract.—*ZAISER v. JESSE* (Sask.), [1918] 3 W. W. R. 757; 43 D. L. R. 223.—*CAN.*

*Sect. 1.—Transfer of property from seller to buyer :  
Sub-sect. 3, B. (a) & (b) i.]*

resp. an order to send them 20 boxes of mackerel, & in fulfilment of that order & of others received at the same time, resp. dispatched 122 boxes of mackerel to his agent at Holyhead, & in due course the agent consigned 20 boxes to appts. Owing to delays which, without the fault of either resp. or appts., had taken place on the journey between resp.'s place of business & Holyhead, the mackerel reached appts. in bad condition, & they refused to pay the full contract price for it. Resp. sued to recover the full price on the ground that, at the moment when the whole consignment of 122 boxes was dispatched by him to his agent at Holyhead, there was a sufficient appropriation of 20 boxes by him to appts., & that the property in the contents of the 20 boxes had passed, & the loss must be borne by appts. :—*Held* : until the agent at Holyhead had earmarked particular boxes for particular customers there was no appropriation to the contract, & the loss must therefore fall on resp.—*HEALY v. HOWLETT & SONS*, [1917] 1 K. B. 337 ; 86 L. J. K. B. 252 ; 116 L. T. 591, D. C.

—*See, also*, Nos. 1531, 1547–1549, *post*.

**1069. — Agreement for oil to remain unseparated in seller's cisterns—Payment of warehousing rent by buyer.]**—A. purchases from deft. a quantity of oil, which was not to be drawn off, but by agreement was to remain undivided in deft.'s cisterns, & for which A. was to pay a weekly rent for warehouse room ; A.'s bill for the oil being dishonoured, & he became bkpt. :—*Held* : the oil not having been severed from deft.'s stock, this did not amount to such a delivery as would entitle the assignees of A. to maintain trover for it.—*WHITE v. WILKS* (1813), 5 Taunt. 176 ; 1 Marsh. 2 ; 128 E. R. 654.

*Annotations:—Reid, Acraman v. Morrice* (1849), 8 C. B. 449 ; *Wiles v. Woodward* (1850), 5 Exch. 557 ; *Laurie & Morewood v. Dudin*, [1926] 1 K. B. 223.

**1070. Ascertainment of price.]**—*WITHERS v. LYSS*, No. 1373, *post*.

**1071. Shipment.]**—*BRITISH & INDIA STEAM NAVIGATION CO. v. DE MATTOS, DE MATTOS v. BRITISH & INDIA STEAM NAVIGATION CO.*, No. 1557, *post*.

**Appropriation to contract.]**—*See* Sub-sect. 3, B. (b), *post*.

(b) *Subsequent Appropriation.*

i. *In General.*

*See* Sale of Goods Act, 1893 (c. 71), s. 18, r. 5 (1).

**1072. Appropriation must be followed by assent.]**—A. having in his warehouse a quantity of sugar, in bulk, more than sufficient to fill 20 hogsheads, agreed to sell 20 hogsheads to B., but there was no note in writing of the contract sufficient to satisfy Stat. Frauds. 4 hogsheads were delivered to & accepted by B. A. filled up & appropriated to B. 16 other hogsheads, & informed him that they were ready, & desired him to take them away. B. said he would take them as soon as he could :—*Held* : the appropriation having been made by A., & assented to by B., the property in the 16 hogsheads thereby passed to the latter, & their value might be recovered by A. under a count for goods bargained & sold.

That selection was made by pltf., & they notified

it to deft., & the latter then promised to take them away. That is equivalent to an actual acceptance of the 16 hogsheads by deft. That acceptance made the goods his own (*HOLROYD, J.*).—*ROHDE v. THWAITES* (1827), 6 B. & C. 388 ; 9 Dow. & Ry. K. B. 293 ; 108 E. R. 495 ; *sub nom.* *RHODE v. THWAITES*, 5 L. J. O. S. K. B. 163.

*Annotations:—Distd. Atkinson v. Bell* (1828), 8 B. & C. 277. *Apld. Alexander v. Gardner* (1835), 1 Bing. N. C. 871 ; *Wilkins v. Bromhead* (1844), 8 Man. & G. 963. *Distd. Campbell v. Mersey Docks & Harbour Board* (1863), 14 C. B. N. S. 412. *Consd. Pignataro v. Gilroy*, [1919] 1 K. B. 459. *Reid. Boorman v. Nash* (1829), 7 L. J. O. S. K. B. 150 ; *Clarke v. Spence* (1836), 4 Ad. & El. 448 ; *Acraman v. Morrice* (1849), 8 C. B. 449 ; *Crane v. London Dock Co.* (1864), 5 B. & S. 313 ; *Heilbutt v. Hickson* (1872), L. R. 7 C. P. 438 ; *Gabarron v. Kreeft, Kreeft v. Thompson* (1875), L. R. 10 Exch. 274.

**1073. —.]**—*ATKINSON v. BELL*, No. 1146, *post*.

**1074. —.]**—A. employed B. to build him a greenhouse for £50. When it was completed, B. gave A. notice, & requested him to remit the price. A. remitted the amount & desired B. to keep the greenhouse till sent for. Afterwards B., unknown to A., deposited the greenhouse with C., telling him it was the property of A., & requesting him to keep it for A., which he agreed to do. B. having become bkpt., his assignees took possession of the greenhouse :—*Held* : the property in the greenhouse passed to A., there having been an appropriation of it to him by B., & an assent on his part to such appropriation.—*WILKINS v. BROMHEAD* (1844), 8 Man. & G. 963 ; 7 Scott, N. R. 921 ; 13 L. J. C. P. 74 ; 2 L. T. O. S. 328 ; 8 Jur. 83 ; 134 E. R. 1182.

**1075. —.]**—(1) Deft., a corn factor, residing at Bristol, in Dec. 1846, wrote to L., at Plymouth, requesting samples of barley, & to make him an offer of a cargo. In the same month L. wrote to deft., & sent samples of barley, & offered to sell deft. from 400 to 500 quarters f.o.b. at Kingsbridge, or some neighbouring port, for a certain sum for cash, on handing the bill of lading, or by acceptance, etc., Deft. accepted the terms, subject to L.'s reply. L. acceded to deft.'s proposal, & requested deft. to give him instructions about the vessel, in order to get her correctly insured. L. sent deft. the charterparty, not under seal, of a vessel in which the barley was to be shipped, & which was made in L.'s name. In Jan. 1847, the vessel was loaded with the barley, & L. received from the master the bill of lading, by which the cargo was deliverable at Bristol to the order of L., or assigns, on payment of freight. Subsequently, L. called at deft.'s counting house in Bristol, & left the invoice & unindorsed bill of lading ; he afterwards called again, when a dispute arose as to the quality of the barley ; deft., after some further dispute, tendered the amount of the cargo in money to L., who refused to accept it, but took away the bill of lading, & indorsed it to pltf. Deft., on the arrival of the vessel, claimed & obtained part of the cargo ; but pltf., on producing the bills of lading, obtained what remained, & paid the freight. The jury found that deft. did not refuse to accept the barley from L. ; that the tender was unconditional ; & that he was not an agent entrusted with the bill of lading by deft. In an action of trover by pltf. for the value of the barley so obtained by deft. :—*Held* : no property in the cargo passed to deft., either by the transaction at Bristol, or by the shipment of the cargo on board the vessel by L., & pltf. were entitled to recover.

The vendor . . . chooses a certain quantity

PART IV. SECT. 1, SUB-SECT. 3.—B. (b) i.

**1072. Appropriation must be followed by assent.]**—*GULAB RAI-SAGAR MAL v. NIRBHE RAM-NAGAR MAL* (1923), 1 L. R. 4 Lah. 423.—*IND.*

of corn, which he intends to offer to the party in performance of his contract; but he keeps it as his property in the meantime. Such being the state of matters, the property in that state arrives at Bristol, & there is nothing to show that there was any transaction which amounted to an agreement between the parties to alter that arrangement; therefore the property did not pass at all (ALDERSON, B.).

The property does not pass unless there is a subsequent appropriation of the goods. The word appropriation . . . may mean a selection on the part of the vendor, where he has the right to choose the article which he has to supply in performance of his contract; & the contract will show when the word is used in that sense. Or the word may mean, that both parties have agreed that a certain article shall be delivered in pursuance of the contract, & yet the property may not pass in either case. . . . "Appropriation" may also be used in another sense, viz. where both parties agree upon the specific article in which the property is to pass, & nothing remains to be done in order to pass it (PARKE, B.).

(2) It may be admitted, that if goods are ordered by a person, although they are to be selected by the vendor, & to be delivered to a common carrier to be sent to the person by whom they have been ordered, the moment the goods, which have been selected in pursuance of the contract, are delivered to the carrier, the carrier becomes the agent of the vendee & such a delivery amounts to a delivery to the vendee (PARKE, B.).—*WAIT v. BAKER* (1848), 2 Exch. 1; 17 L. J. Ex. 307; 154 E. R. 380.

*Annotations* :—*As to* (1) *Consd.* *Van Casteel v. Booker* (1848), 2 Exch. 691. *Apld.* *Jenkyns v. Brown* (1849), 14 Q. B. 496; *Turner v. Liverpool Docks Trustees* (1851), 6 Exch. 543. *Consd.* *Browne v. Hare* (1859), 4 H. & N. 822; *Hoare v. Drosser* (1859), 7 H. L. Cas. 291; *Joyce v. Swann* (1864), 17 C. B. N. S. 84; *Gabarron v. Kreeft, Kreeft v. Thompson* (1875), L. R. 10 Exch. 274. *Expld.* *Mirabita v. Imperial Ottoman Bank* (1873), 3 Ex. D. 164. *Consd.* *The Parchim*, [1918] A. C. 157. *Apld.* *Re Blyth Shipbuilding & Dry Docks Co., Forster v. Blyth Shipbuilding & Dry Docks Co.*, [1926] Ch. 494. *Consd.* *Re Wait*, [1927] 1 Ch. 606. *Refd.* *Spanish & Portuguese Screw Steam Shipping Co. v. Bell, Wood v. Samo* (1856), 2 Jur. N. S. 349; *Gumm v. Tyrie* (1864), 4 B. & S. 680; *Shepherd v. Harrison* (1871), L. R. 5 H. L. 116; *Heilbutt v. Hickson* (1872), L. R. 7 C. P. 438; *Ogg v. Shuter* (1875), 44 L. J. C. P. 161; *The Miramichi*, [1915] P. 71. *As to* (2) *Apld.* *Re Wiltshire Iron Co., Ex p. Pearson* (1868), 3 Ch. App. 443.

1076. —.]—Pltf. contracted to sell to deft. a certain quantity of oil at a certain price per hundredweight. Pltf. at the time had oil at a wharf, & in order to carry out his contract with deft., he gave an order to the wharfinger to transfer such oil to deft. The wharfinger accordingly made a transfer in his books of the oil to deft.'s name, & signed a notice to deft. of such transfer having been made, which notice pltf.'s clerk took to deft., together with the transfer order, requiring from deft. in return a cheque for the purchase-money. Deft. refused to give the cheque, but kept the transfer order, against the will of pltf., who never intended to part with any property in the oil or order until the cheque was given :—*Held* : as the sale was not of any specific oil, & as there had been no assent to the transfer of the oil in the wharfinger's books binding on all parties, no property passed to deft. & pltf. was entitled to maintain trover for the oil & transfer order.

The contract of sale contained a stipulation that the oil was "to be free delivered & paid for in fourteen days by cash, less £2 10s. per cent. discount." *Semble* : the seller had fourteen days to deliver the oil, & he was therefore entitled to call for payment at the time of delivery.

If that transfer order had been delivered to the buyer, & he had carried it to the wharfinger, & the latter had consented to hold the oil therein specified for him, or if, after the order had been left with the wharfinger by the seller's clerk, the wharfinger had communicated it to the buyer, & the latter had assented to it either tacitly or explicitly, that would have constituted a complete transfer, inasmuch as the transaction would amount to an arrangement between the three, the vendor, the wharfinger, & the vendee, that the oil should remain in the wharfinger's hands as agent of the vendee. It is impossible to say that the facts here show that any arrangement of that kind was come to (WILLIAMS, J.).—*GODTS v. ROSE* (1855), 17 C. B. 229; 25 L. J. C. P. 61; 26 L. T. O. S. 240; 1 Jur. N. S. 1173; 4 W. R. 129; 139 E. R. 1058.

*Annotations* :—*Apld.* *Campbell v. Mersey Docks & Harbour Board* (1863), 14 C. B. N. S. 412. *Consd.* *Laurie & Morewood v. Dudin*, [1926] 1 K. B. 223. *Refd.* *Fitzgerald v. Dressler* (1859), 5 Jur. N. S. 598.

1077. —.]—A sale of a given number of bales out of a larger number does not vest the property in the vendee, until there has been a specific appropriation by the vendor assented to by the vendee or his agent. A. bought 250 bales of cotton, part of a cargo of 500, of one mark, landed & warehoused in the Mersey Docks. On landing, the bales were sampled & numbered, & a warrant was handed by the co. to A. for 250 bales "numbered from 1 to 250," as having been entered for him :—*Held* : assuming this to have been an appropriation of the specific bales to A., there having been no assent by him to such appropriation, express or implied, no property passed to him.

The assent of the vendee may be given prior to the appropriation by the vendor; it may be either express or implied, & it may be given by an agent of the party, by the warehouseman or wharfinger (WILLES, J.).—*CAMPBELL v. MERSEY DOCKS & HARBOUR BOARD* (1863), 14 C. B. N. S. 412; 2 New Rep. 32; 8 L. T. 245; 11 W. R. 596; 143 E. R. 506.

1078. —.]—Pltf. at a fair orally contracted to sell to deft. at a given price per hundredweight 2 pockets of hops which were on the spot, & which were there inspected & approved by deft. & also 2 other pockets of which samples were shown, but which were lying in a warehouse in London. Deft. took away with him, & afterwards paid for, the first 2 pockets, but the last 2 were to be forwarded to him at a future time. On his return to London, pltf. went to the warehouse & selected 2 out of 3 pockets which he had there, & directed the warehouse keeper to mark them "to wait the buyer's order," but no alteration was made in the warehouse keeper's books, & he continued to hold pltf. liable for the rent. Pltf. a few days afterwards sent deft. an invoice describing the numbers, the weight, & the prices of the 2 pockets delivered at the fair, & also of the 2 which had been set apart at the warehouse, & at the same time inclosed a draft for acceptance. Deft. sent back the draft unaccepted, & refused to receive the last 2 pockets. In an action for goods bargained & sold :—*Held* : no evidence which would warrant a jury in finding that the appropriation of the 2 pockets in the London warehouse was either originally authorised or subsequently assented to by the buyer, & consequently the property in them did not pass by the contract.—*JENNER v. SMITH* (1869), L. R. 4 C. P. 270.

*Annotation* :—*Refd.* *Hoare v. G. W. Ry.* (1877), De Colyar's County Court Cases, 192.

*Sect. 1.—Transfer of property from seller to buyer : Sub-sect. 3, B. (b) i. & ii.]*

**1079. Effect of absence of appropriation—Where order accepted.]—**UNWIN\* v. ADAMS (1858), 1 F. & F. 312, N. P.

ii. "*Appropriation.*"

See Sale of Goods Act, 1893 (c. 71), s. 18, r. 5 (1).

**1080. Meaning of.]—**WAIT v. BAKER, No. 1075, ante.

**1081. What amounts to.]—**Pltf. was employed by deft. to make a machine for him according to a particular plan, receiving a payment on account, but no specific price being agreed on. When the machine was completed, deft. saw & approved of it, but objected to the price demanded for it. Deft. afterwards requested pltf. to send it home before it was paid for; which the latter refused to do. On being applied to for the amount by pltf.'s attorney, deft. said he would endeavour to arrange it if pltf. would give him time:—*Held*: a sufficient appropriation of the machine by pltf., & assent thereto on the part of deft., to entitle the former to recover the value on a count for goods bargained & sold.—ELLIOTT v. PYBUS (1834), 10 Bing. 512; 4 Moo. & S. 389; 3 L. J. C. P. 182; 131 E. R. 993.

*Annotation:—*Reff. Beaumont v. Brengerl (1847), 5 C. B. 301.

**1082. —.]—**KÖNIG v. BRANDT, No. 1348, post.

**1083. —.]—**Re WAIT, No. 2644, post.

**1084. —.]—**Shipment.]—Pltfs. sold to defts. a quantity of Sligo butter, which it was provided by the contract should be shipped for London in Oct., & be paid for by bill at two months from the date of landing. The butters were on Nov. 6 shipped by M. & S. of Sligo, addressed & invoiced to pltfs., & by the bill of lading made deliverable to their order. On Nov. 10 defts. were informed that the butters were not shipped within the time provided by the contract, & though they at first demurred, they subsequently verbally consented to waive the objection, & accepted the invoice & the bill of lading, which defts. indorsed to them.

**1079 i. Effect of absence of appropriation—Where order accepted.]—**MALCOLM v. HARNISH (1894), 27 N. S. R. 262.—CAN.

**1079 ii. —.]—**SELLS, LTD. v. THOMSON STATIONERY CO., LTD. (1914), 27 W. L. R. 901; 19 B. C. R. 400.—CAN.

**1079 iii. —.]—**BUTTERICK PUBLISHING CO. v. WHITE (1914), 28 W. L. R. 941; 6 W. W. R. 1394; 18 D. L. R. 636; 8 Alta. L. R. 55.—CAN.

**1079 iv. —.]—**C. agreed in writing to purchase from H., about 600 sacks of barley as per sample at a price per bushel. H. had in a store belonging to W. a lot of 709 sacks of barley, & the goods sold were to the knowledge of C. intended to be part of this lot. Shortly after the agreement was made, & before anything had been done to appropriate to C. any part of the barley, & before C. had compared the bulk with the sample, the barley in the store was so damaged by fire that it was rendered undeliverable in terms of the contract of sale:—*Held*: the property in the barley had not passed to C.—CORY & CO. v. HARDING (1905), 26 N. Z. L. R. 361.—N.Z.

**1079 v. —.]—**PYNE, GOULD, GUINNESS, LTD. v. MEREDITH & CO. & JOHN MILL & CO., LTD. (1928) N. Z. L. R. 241.—N.Z.

**b. Withdrawal of implied assent to appropriation.]—**Deft. having at the solicitation of pltf.'s agent signed a

The invoice specified the weights & prices of the several firkins. The vessel on board of which the butters were shipped was wrecked, & part of the butters were lost, & the remainder damaged. In *indebitatus assumpsit* for goods bargained & sold, the jury found that defts. had waived the performance of the condition as to the shipment of the butters in Oct.:—*Held*: (1) there was a sufficient appropriation & ascertainment of the goods, & assent thereto by defts., to vest the property in them, & consequently that the action was maintainable; (2) defts. having waived the performance of the condition as to the time of shipment, the contract became in this respect unconditional, & was properly declared on as such; & such waiver or dispensation need not be in writing; (3) the landing of the butters was not a condition precedent to defts.' liability to be called on for payment of the price.—ALEXANDER v. GARDNER (1835), 1 Bing. N. C. 671; 1 Hodg. 147; 1 Scott, 630; 4 L. J. C. P. 223; 131 E. R. 1276.

*Annotations:—*As to (1) *Apld.* Martineau v. Kitching (1872), L. R. 7 Q. B. 436. *Reff.* Wilkins v. Bromhead (1844), 6 Man. & G. 963; Brown v. Hare (1858), 27 L. J. Ex. 372; Hellbutt v. Hickson (1872), L. R. 7 C. P. 438. As to (2) *Consd.* Hartley v. Hymans, (1920) 3 K. B. 475. As to (3) *Consd.* Castlo v. Playford (1872), L. R. 7 Exch. 98.

**1085. —.]—**On June 26, 1915, defts., coal merchants in Dublin, entered into a contract for the purchase of a quantity of coal from R. & Sons, Glasgow. The contract note contained no reference to demurrage, but, in a letter of the same date to the vendors, defts. intimated that they were prepared to pay a reasonable rate of demurrage. It was provided by the contract that the coal was to be supplied c.i.f. to Dublin, steamers to be discharged in twenty-four running hours from arrival. In pursuance of their contracts with defts., R. & Sons entered into a charter-party, dated July 6, 1915, & executed later, with pltf., for the carriage of the coal by one of his ships to Dublin. The charterparty contained the usual conditions, including a cesser & lien clause, & provided that demurrage at the rate of 15s. per hour should be paid for detention over the specified time of twenty-four running

contract for the purchase of certain volumes on the instalment plan, the goods at the time of the purchase not being in a deliverable state, & not being actually appropriated to the contract, deft. on the same day by letter, cancelled the order:—*Held*: the implied assent to an appropriation of the goods was withdrawn by the letter of cancellation, & pltfs. could not convert the executory contract into an executed one.—PUBLISHERS ASSOCN. OF CANADA, LTD. v. ROWLAND (1915), 32 W. L. R. 646.—CAN.

**PART IV. SECT. 1, SUB-SECT. 3.—**  
B. (b) ii.

**1081 i. What amounts to.]—**SPRAGUE v. KING (1877), 1 P. & B. 241.—CAN.

**1081 ii. —.]—**BERNHART v. McCUTCHEON (1899), 12 Man. L. R. 394.—CAN.

**1081 iii. —.]—**Defts. agreed to make for pltf. certain tools used in making hubs of a special kind, & in consideration of being allowed to use the tools, to make also a number of the hubs:—*Held*: the use of the tools was an unconditional appropriation thereof to the contract, so that the property in them had passed to pltf.—LEGGO v. WELLAND VALE MANUFACTURING CO. (1901), 21 C. L. T. Occ. N. 374; 2 O. L. R. 45.—CAN.

**1081 iv. —.]—**INGLIS v. RICHARDSON & SONS, LTD. (1913), 29 O. L. R. 229; 4 O. W. N. 1519; 14 D. L. R. 137.—CAN.

**1081 v. —.]—**HAMMOND v. DAYKIN & JACKSON (1914), 28 W. L. R. 763; 18 D. L. R. 525; 6 W. W. R. 1205; 19 B. C. R. 550; 8 W. W. R. 512.—CAN.

**1081 vi. —.]—**STANDARD TRUSTS CO. v. KARST & GENTNER (1914), 30 W. L. R. 191; 7 W. W. R. 762; 20 D. L. R. 10.—CAN.

**1081 vii. —.]—**PULLAN v. SPEIZMAN (1921), 51 O. L. R. 386; 67 D. L. R. 365.—CAN.

**1081 viii. —.]—**JUDGGERNATH AUGURWALLAH v. SMITH (1906), 1 L. R. 34 Cal. 173.—IND.

**1081 ix. —.]—**Pltfs. had manufactured 26 tons of binder-twine for defts., & delivered half. Defts., not wishing to take delivery of the balance, wrote to pltfs. asking if pltfs. would store the balance free of cost until defts. required same next season. Defts. replied agreeing to do so, & adding, "You will, of course, attend to the insurance at your end":—*Held*: the twine had been appropriated by pltfs. to defts.—DONAGHY'S ROPE & TWINE CO., LTD. v. WRIGHT, STEPHENSON & CO. (1906), 25 N. Z. L. R. 641.—N.Z.

**1081 x. —.]—**SMELLIE v. SHAND, Mac. 67.—N.Z.

**1081 xi. —.]—**ANDERSON & CROMPTON v. WALLS & CO. (1870), 43 Sc. Jur. 48.—SCOT.

**c. —.** Goods marked & left on premises of seller.]—DOYLE v. LASHER (1860), 16 C. P. 263.—CAN.



Pltf. did not execute the original contract, & defts. were not expressly parties to the contract of affreightment with the shipowner. The vessel arrived in Dublin on July 11, & the discharge of the cargo was completed on the afternoon of July 14, thirty-six hours after the expiration of the time stipulated for discharging. A bill of lading, incorporating the provisions of the charterparty, was prepared on July 12, signed by pltf. on July 13, & posted by the shippers on July 14, to defts., who duly received it on July 15, when the vessel had completely discharged her cargo, & had left the port of Dublin. In these circumstances pltf. sued defts. for demurrage:—*Held*: as soon as the coal had been put on board the vessel at Glasgow there was an unconditional appropriation under Sale of Goods Act, 1893 (c. 71), s. 18, the property then passed to defts., & not under the bill of lading, & defts. were not bound by the terms of the bill of lading incorporating the charterparty, as the cargo had not been received or accepted by them thereunder.—*McKELVIE v. WALLACE BROTHERS, LTD.*, [1919] 2 I. R. 250, H. L.

1086. — *Delivery of component parts of uncompleted article.*—Deft. co. contracted with C. to provide an electrical installation, including (*inter alia*), a storage battery, at her house for £1,363. Deft. co. then sub-contracted with pltf. for the supply of the battery to be erected by them on C.'s premises at the price of £286, including erection. In accordance with the terms of the sub-contract pltf. sent the materials for the battery by rail to a specified station, whence they were to be carted by deft. co. to C.'s premises & there erected by pltf. Deft. co. carted the goods, but pltf. did not proceed with the erection of the battery, which was ultimately completed by deft. co. who went into liquidation. In an action against C. to which the co. was added as deft., C., in pursuance of an order, made by the master upon a summons for directions, paid into ct. the sum of £269, part of the balance owing by her to deft. co., & upon that proceedings were stayed as against her:—*Held*: upon construction of the sub-contract, it was not a contract for the sale of a completed article, but of the component parts of the battery, with a supplemental contract that after delivery they should be erected on C.'s premises; the delivery of the parts was an unconditional appropriation to the contract of goods in a deliverable state with Sale of Goods Act, 1893 (c. 71), s. 18, r. 5, & the property therein passed to deft. co.—*PRITCHETT CO. v. CURRIE*, [1916] 2 Ch. 515; 85 L. J. Ch. 753; 115 L. T. 325, C. A.

*Annotation*:—*Mentd. Pole-Carew v. Western Counties & General Manure Co.*, [1920] 2 Ch. 97.

1087. — *Delivery of parcel of cargo intended for one buyer to lighter of other buyer—Loss of parcel—Delivery documents showing intention to deliver to first buyer.*—A cargo of oats was shipped in bulk, & 500 quarters were sold to pltf. & 500 quarters to defts., while the ship was on her voyage. Pltf. & defts. employed the same lighterman to take delivery of the goods from the ship, & the lighterman sent one of his barges, intending it to take delivery on behalf of defts. of 500 quarters. By a misunderstanding the ship's clerk caused to be delivered to him 500 quarters which the clerk intended for pltf., & for whom he had prepared the requisite documents. Another barge afterwards, owing to a similar misunderstanding, took delivery of a second 500 quarters, which the lighterman intended to receive on behalf of pltf., but which the ship's clerk intended for defts. This latter lighter was damaged, & the

oats were spoiled. In an action by pltf. for the wrongful detention of the oats conveyed to defts.' wharf:—*Held*: there had been an appropriation of these oats to pltf. under the contract of sale within Sale of Goods Act, 1893 (c. 71), ss. 16, & 18; the property therein had passed to him; & he was entitled to damages for their detention by defts.—*DENNY v. SKELTON* (1916), 86 L. J. K. B. 280; 115 L. T. 305; 13 Asp. M. L. C. 437.

1088. — *Appropriation by original seller—Resale by purchaser—Trade usage.*—By a contract dated May 30, 1912, the Produce Brokers co. agreed to sell & deliver to the Olympia Oil & Cake co. 6,000 tons of Soya beans to be shipped from an Eastern port to Hull. In fulfilment of this contract the sellers on Feb. 4, 1913, declared & appropriated a cargo of beans shipped at Vladivostok on a ship called the *Canterbury* by the East Asiatic co. This cargo had on Feb. 4 been tendered to & accepted by the sellers under a contract in similar terms by which the East Asiatic co. had sold to them the same quantity of Soya beans. On Feb. 3 the *Canterbury* had in fact met with disaster near Vladivostok, & on Feb. 4 she sank with her cargo. The fact of the loss became known to the sellers on Feb. 4, in the interval between the receipt by them of the tender from the East Asiatic co. & the handing of that tender to the buyers. On an arbn. between the parties, it was found by the Board of Appeal of the Incorporated Oil Seed Assocn. that by the custom of the trade, in case of resales, buyers under this form of contract were bound to accept the original shipper's appropriation, if passed on without delay, provided that the original shipper's appropriation was valid & in order at the time of being made by the original shipper to his buyers; & that their sellers would be under no obligation to make any appropriation other than that of passing on a copy of original shipper's appropriation without delay, even though the appropriation at the time of being passed on might, apart from such custom, be invalid & not in order. It was further found that the appropriation in question by the sellers was made under a resale to which the custom applied, & that the appropriation of the original shippers, the East Asiatic co., was valid & in order. The arbitrators awarded that the buyers were bound to accept the sellers' appropriation, although at the time it was made the cargo was at the bottom of the sea. On motion by the buyers to set aside the award the Div. Ct. held that the custom was neither unreasonable nor inconsistent with the contract, & dismissed the motion:—*Held*: it was not inconsistent with the contract, & the award must consequently stand.—*PRODUCE BROKERS CO., LTD. v. OLYMPIA OIL & CAKE CO., LTD.*, [1917] 1 K. B. 320; *sub nom. OLYMPIA OIL & CAKE CO. v. PRODUCE BROKERS CO.*, 86 L. J. K. B. 421; 116 L. T. 1; 33 T. L. R. 95, C. A.

*Annotations*:—*Consd. Clark v. Cox, McEuen*, [1921] 1 K. B. 139. *Refd. Manbre Saccharine Co. v. Corn Products Co.*, [1919] 1 K. B. 198. *Mentd. Olympia Oil & Cake Co. v. Macandrew & Moreland* (1918), 34 T. L. R. 581; *Westcott v. Hahn*, [1918] 1 K. B. 495.

1089. — *Provisional invoice—Trade usage.*—*Resps. in Rotterdam* contracted to buy from applts. in Hamburg 6,000 tons of South Russian wheat, the conditions of the contract providing that notice of appropriation with ship's name & date of bill of lading should be given by the shippers to the buyers within seven days from date of bill of lading & that provisional invoice with ship's name & date of bill of lading should be sent by the shippers' London house to the buyers within three days from the arrival of the documents in London.



*Sect. 1.—Transfer of property from seller to buyer :  
Sub-sect. 3, B. (b) ii., iii. & iv.]*

The sellers shipped the wheat at Novorossisk, & within the seven days the sellers sent to the buyers a telegram & confirming letter, which the sellers alleged to be a notice of appropriation, but neither document stated the date of the bill of lading. On the same day the sellers posted to the buyers a provisional invoice which gave the date of the bill of lading, but the provisional invoice was not received by the buyers until after the expiry of the seven days. The buyers contended that there had been no tender in conformity with the contract, & it was found by the appeal committee in an arbn. that there had been no good notice of appropriation in the telegram & confirming letter & that the provisional invoice was not intended as a notice of appropriation & that it was a recognised custom that notice of appropriation & provisional invoice should be separate documents, & that therefore the buyers were under no liability to the sellers:—*Held*: even if the provisional invoice constituted a notice of appropriation, yet, as it was not received by the buyers within the contract time, the sellers had not satisfied the contract, & as the custom was not unreasonable & was not inconsistent with the contract, the provisional invoice was not a notice of appropriation, & the award of the appeal committee must be upheld. —*COMPAGNIE CONTINENTALE D'IMPORTATION v. HANDELSVERTRETUNG DER UNION DER S. S. R. IN DEUTSCHLAND* (1927), 44 T. L. R. 10.

**1090. Place of appropriation—Where goods at time situate.]**—Where a contract is made in the United Kingdom to sell patented goods which are abroad, & is completed by appropriation or delivery abroad, the vendor does not use, exercise or vend the invention in the United Kingdom within the meaning of the patent.

The property in a specific & ascertained chattel may be passed on a contract of sale for valuable consideration without delivery. Whether it does so pass or not will in each instance depend on the intention of the parties as ascertained by the terms of the contract, their conduct, & the circumstances of the case (*LORD ATKINSON*).

If you must decide in what country an appropriation of goods by consent takes place, it takes place not where the consent is given, but where the goods are at the time situate (*LORD LOREBUEN, C.*).—*BADISCHE ANILIN UND SODA FABRIK v. HICKSON*, [1906] A. C. 419; 75 L. J. Ch. 621; 95 L. T. 68; 22 T. L. R. 641, H. L.

**1091. Validity of appropriation—Appropriation by sellers—After knowledge that goods lost in transit.]**—In May, 1912, the P. co. sold to the O. co. 6,000 tons of Soya beans to be shipped from an oriental port during Dec. 1912, &/or Jan. 1913, by steamer to Hull. Clause 3 of the contract provided that "particulars of shipment . . . to be declared by original sellers not later than forty days from the date of last bill of lading. . . . In case of resales, copy or original appropriation shall be accepted by buyers and passed on without delay. . . ." Clause 10 provided that "this contract is to be void as regards any portion shipped that may not arrive by the ship or ships declared against this contract. . . ." In Sept. 1912, the P. co. purchased from the E. A. co. under a similar contract 6,000 tons of Soya beans for shipment in Dec. 1912, &/or Jan. 1913. On Feb. 4, 1913, the P. co. received a declaration & appropriation of a cargo of Soya beans for the *Canterbury*, which was stated to have sailed from Vladivostok on Jan. 31, & on the same date, Feb. 4, the P. co. declared & appropriated this shipment to their

contract with the O. co. On Feb. 4, the *Canterbury* was wrecked & her cargo was totally lost, the loss being known in London about 3 p.m. on that day. The fact of the loss of the ship & cargo was not known to the E. A. co. at the time of their tender to the P. co., but the P. co. were aware of it at the time of making their tender to the O. co. The O. co. refused to accept the tender:—*Held*: the O. co. were not bound to accept the tender as the ship & cargo were to the knowledge of the P. co. lost at the time they purported to make the tender; & clause 10 did not come into operation in a case where there had been no valid declaration & appropriation as between the P. co. & the O. co. —*Re OLYMPIA OIL & CAKE CO., LTD. & PRODUCE BROKERS CO., LTD.*, [1915] 1 K. B. 233; 84 L. J. K. B. 281; *sub nom.* OLYMPIA OIL & CAKE CO., LTD. v. PRODUCE BROKERS CO., LTD., 111 L. T. 1107; 12 Asp. M. L. C. 570; 19 Com. Cas. 359, D. C.; *subsequent proceedings, sub nom.* PRODUCE BROKERS CO., LTD. v. OLYMPIA OIL & CAKE CO., LTD., [1916] 1 A. C. 314, H. L.

*Annotations*:—*Consd. & Distd.* *Karberg v. Blythe, Green, Jourdain, Schneider v. Burgett & Newsam*, [1915] 2 K. B. 379. *Distd.* *Produce Brokers Co. v. Olympia Oil & Cake Co.*, [1917] 1 K. B. 320. *Distd. & Distd.* *Manbre Saccharine Co. v. Corn Products Co.*, [1919] 1 K. B. 198; *Clark v. Cox, McEuen*, [1921] 1 K. B. 139.

**1092.** —[By a contract dated Dec. 11, 1917, defts. sold goods to pltf. to be shipped during Dec. to Feb. 1918, per steamer from the East to Liverpool, where they were to be delivered, the name of the vessel, marks & full particulars to be declared to the buyer in writing with due despatch. The contract also provided: "(a) Should the vessel or vessels which may apply to this contract be lost before declaration this contract to be cancelled so far as regards such lost vessel or vessels on the production of the bill or bills of lading or other satisfactory proof of shipment by sellers so soon as fairly practicable after the loss is ascertained. (b) . . . Should the vessel or vessels & the goods or any portion thereof be lost, the contract to be cancelled for the whole or any such portion, but should the vessel or vessels be lost & the goods or any portion thereof be transhipped to some other vessel or vessels & arrive on account of the original importer, this contract to stand good for the whole or such portion." On Mar. 27, 1918, defts. declared in fulfilment of the contract goods shipped on a named steamer which sailed from Singapore on Jan. 21, 1918, but was lost at sea by enemy action about Feb. 26, 1918. At the time of the declaration both pltf. & defts. knew that the ship & cargo had been lost. In an action for damages for failure to deliver pltf. contended that the declaration having been made after defts. knew of the loss of the vessel, was invalid:—*Held*: the declaration was made with due despatch, & was good although made with knowledge of the loss, & that the contract was consequently cancelled.—*CLARK v. COX, MCEUEN & CO.*, [1921] 1 K. B. 139; 89 L. J. K. B. 596; 122 L. T. 647; 15 Asp. M. L. C. 5; 25 Com. Cas. 94, C. A.

*Compare* *BANKRUPTCY*, Vol. V., pp. 703-706, 711-719, Nos. 6170-6191, 6218-6260.

iii. "*Assent.*"

*See* Sale of Goods Act, 1893 (c. 71), s. 18, r. 5 (1), & generally, *CONTRACT*, Vol. XII., pp. 63 et seq.

**Necessity for.]**—*See* Nos. 1072-1078, *ante*.

**1093. Nature of—Express or implied.]**—*CAMPBELL v. MERSEY DOCKS & HARBOUR BOARD*, No. 1077, *ante*.

**1094. What amounts to—Acceptance of seller's bill of exchange by buyer—In ignorance of seller's**

**bankruptcy.**]—BISHOP v. CRAWSHAY, No. 1148, *post*.

**1095. — Promise to remove goods—On notice of appropriation by seller.**]—ROHDE v. THWAITES, No. 1072, *ante*.

**1096. —**—[Pltf., an artist, made the following agreement with deft., a picture dealer, "I agree to finish three pictures for Mr. Fitzpatrick (deft.) which are now submitted to him, in my best manner for £60 cash & a clock." The pictures were not then completed, but afterwards deft. expressed approval of them, & said he would send for them next day. In an action for the £60:—*Held*: these circumstances constituted sufficient appropriation of the pictures by deft. to support common counts for goods bargained & sold, & sold & delivered.—GIRARDOT v. FITZPATRICK (1869), 21 L. T. 470.

**1097. — Request for time to pay.**]—ELLIOTT v. PYBUS, No. 1081, *ante*.

**1098. — Waiver of breach of condition precedent—Time of shipment.**]—ALEXANDER v. GARDNER, No. 1084, *ante*.

**1099. — Payment.**]—WILKINS v. BROMHEAD, No. 1074, *ante*.

**1100. Time for—Prior to appropriation.**]—CAMPBELL v. MERSEY DOCKS & HARBOUR BOARD, No. 1077, *ante*.

**1101. When presumed.**]—Where, on a sale of unascertained goods by description, goods of that description & in a deliverable state are unconditionally appropriated to the contract by the seller, & the seller sends notice of that appropriation to the buyer, in the event of the buyer neglecting to reply to that notice promptly it must be inferred that he assents to the appropriation, & on the expiry of a reasonable time after receipt of the notice the property must be deemed to have passed.—PIGNATARO v. GILROY, [1919] 1 K. B. 459; 88 L. J. K. R. 726; 120 L. T. 480; 35 T. L. R. 191; 63 Sol. Jo. 265; 24 Com. Cas. 174, D. C.

**1102. By whom assent may be given—Agent—Warehouseman or wharfinger.**]—CAMPBELL v. MERSEY DOCKS & HARBOUR BOARD, No. 1077, *ante*.

#### iv. Authority to appropriate.

See Sale of Goods Act, 1893 (c. 71), s. 18, r. 5 (1).

**1103. May be in buyer or seller.**]—Pltf. agreed to purchase from K. 100 quarters of barley, being part of a larger quantity which pltf. saw & approved of, & of which he took away a sample. It was also agreed that pltf. should send his own sacks to K.; that K. should fill the sacks with barley, take them to the railway, & place them on trucks, to be conveyed to pltf. Pltf. sent 200 sacks, & K. filled 155 of them with barley from the larger quantity. The barley was not delivered, though repeatedly demanded by pltf. & promised by K. K. becoming embarrassed, took the barley out of the sacks, & mixed it with the bulk, without the privity of pltf. K. was soon after adjudicated a bkpt. The assignees thereupon removed the barley, & claimed the whole as the bkpt.'s property:—*Held*: (1) the property in the barley in the 155 sacks passed to pltf. by the appropriation made by K., with the assent of pltf., *a priori* as well as subsequently; (2) notwithstanding the prior conversion by K., the removal of the barley by the assignees was a conversion by them.

(3) Sometimes the right of ascertainment rests with the vendee, sometimes solely with the vendor. Here it is vested in the vendor only. . . . When he had done the outward act which showed which part was to be the vendee's property, his election was made & the property passed (ERLE, J.).—ALDRIDGE v. JOHNSON (1857), 7 E. & B. 885; 26 L. J. Q. B. 296; 3 Jur. N. S. 913; 5 W. R. 703; 119 E. R. 1476.

*Annotations*:—As to (1) *Appl. Langton v. Higgins* (1859, 4 H. & N. 402; *Ogg v. Shuter* (1875), 44 L. J. C. P. 161. *Generally, Reid Jenner v. Smith* (1869), L. R. 4 C. P. 270; *Hellbutt v. Hickson* (1872), L. R. 7 C. P. 438; *Anderson v. Morice* (1876), 1 App. Cas. 713.

**1104. Whether authority in seller—Presumption of assent by buyer.**]—ALDRIDGE v. JOHNSON, No. 1103, *ante*.

**1105. — No original or subsequent assent by buyer.**]—JENNER v. SMITH, No. 1078, *ante*.

**1106. — Revocation.**]—GINNER v. KING (1890), 7 T. L. R. 140, C. A.

**1107. Exercise of authority—Election—Final determination of election.**]—RAYNAY v. ALEXANDER (1605), Yelv. 76; 80 E. R. 53.

*Annotation*:—*Reid. Moterton v. Jollin* (1875), Freem. K. B. 396.

**1108. —**—[—]—ALDRIDGE v. JOHNSON, No. 1103, *ante*.

**1109. —**—[—]—On general principles of law an election, once determined, is determined for ever, & such a determination is made by any act that shows it to be made (BLACKBURN, J.).—RANKIN v. POTTER (1873), L. R. 6 H. L. 83; 42 L. J. C. P. 169; 29 L. T. 142; 22 W. R. 1; 2 Asp. M. L. C. 65, H. L.; *on appeal* from S. C. *sub nom.* POTTER v. RANKIN (1870), L. R. 5 C. P. 341, Ex. Ch.

*Annotations*:—*Reid. Jackson v. Union Marine Insee.* (1874), L. R. 10 C. P. 125; *Ruys v. Royal Exchange Assoc. Corpn.* [1897] 2 Q. B. 135; *Trinder, Anderson v. Thames & Mersey Marine Insee., Trinder, Anderson v. North Queensland Insee., Trinder, Anderson v. Weston, Crocker.* [1898] 2 Q. B. 114; *Mitsui v. Mumford*, [1915] 2 K. B. 27. *Mentid. Beckett v. West of England Marine Insee.* (1871), 25 L. T. 739; *Lidgett v. Secretan* (1871), 40 L. J. C. P. 257; *Hudson v. Hill* (1874), 43 L. J. C. P. 273; *Kaltenbach v. Mackenzie* (1878), 3 C. P. D. 467; *Inman v. S. Co. v. Bischoff* (1882), 7 App. Cas. 670; *Wade v. South of England Marine Insee. Assocn.* (1888), 5 T. L. R. 8; *The Alps*, [1893] P. 109; *Ward v. Weir* (1899), 4 Com. Cas. 216; *Guthrie v. North China Insee., Guthrie & North China Insee. v. London Assoc. Corpn.* (1900), 17 T. L. R. 79; *Angel v. Merchants' Marine Insee.*, [1903] 1 K. B. 811; *Macbeth v. Maritime Insee.*, [1908] A. C. 144; *Pollurrian S.S. Co. v. Young* (1915), 112 L. T. 1053; *Moore v. Evans*, [1918] A. C. 185; *Roura & Forgas v. Townend*, [1919] 1 K. B. 189; *The Ibis VI.*, [1921] P. 255; *Cohen v. Standard Marine Insee.* (1925), 30 Com. Cas. 139; *The Massilia*, [1926] P. 180.

**1110. —**—[—]—BORROWMAN v. FREE, No. 1893, *post*.

**1111. — Irregular exercise—Amounts to proposal for new contract.**]—In an action for goods sold & delivered, to recover the price of 10 hogsheads of claret, it appeared that defts., having verbally ordered certain hogsheads of pltf., the latter, in Oct., sent them 15, whereupon defts., by letter, informed pltf. that they had requested 10 only should be shipped, & that they could take the number only on their proving satisfactory, & that they would hold the other 5 on pltf.'s account. In answer to this, pltf. replied by letter, which, after stating that he regretted that any misunderstanding as to defts.' order should have taken place; & after stating that other vintages were inferior, & that the wine sent was of superior character, concluded thus: "You will ascertain

#### PART IV. SECT. 1, SUB-SECT. 3.— B. (b) iv.

d. Appropriation of goods not in accordance with contract—Revocation.]—An appropriation & tender of goods,

not in accordance with the contract & in consequence rejected by the purchaser is revocable, & the seller may afterwards within the contract time, appropriate & tender other goods

which are in accordance with the contract.—GRAHAM CO. v. CANADA BROKERAGE LTD. (1913), 24 O. W. R. 277; 4 O. W. N. 957; 10 D. L. R. 107.—CAN.

*Sect. 1.—Transfer of property from seller to buyer:*  
*Sub-sect. 3, B. (b) iv. & v., & (c).]*

in the spring whether you have room for it, & you have seen that we are not stringent with old customers as to credit." Defts. placed the wine in a bonded warehouse in their own names, & shortly afterwards tasted the wine, & disapproved of it, & gave pltf. notice in the early part of Apr., that they would not take any part of it:—*Held*: supposing there was a written contract by which defts. were bound to take 10 hogsheads of claret, that contract was not executed, as 15 & not 10 hogsheads had been delivered, & no particular 10 had been selected out of the 15.

I think there was not evidence, either that there was any selection of; any particular ten, or that the precise quantity agreed upon was sent. The delivery of more than ten is a proposal for a new contract (PARKE, B.).—CUNLIFFE v. HARRISON (1851), 6 Exch. 903; 20 L. J. Ex. 325; 17 L. T. O. S. 189.

*Annotations*:—*Apld.* Levy v. Green (1859), 1 E. & E. 969.  
*Refd.* Boswell v. Kilborn (1862), 15 Moo. P. C. C. 309.

*v. Appropriation by Delivery.*

*See* Sale of Goods Act, 1893 (c. 7), s. 18, r. 5 (2).

**1112. Delivery to buyer—Delivery on board ship—Buyer's ship.**—OGLE v. ATKINSON, No. 1331, *post*.

**1113.** ——— **Buyer's chartered ship.**—Where the charterers of a vessel were also the purchasers of a cargo of wheat to be shipped on board, & the master of the vessel from time to time received delivery from the vendors:—*Held*: such delivery from time to time was a delivery to the purchasers, it vested in them a right of possession & property, & consequently, they had an insurable interest in such wheat as had been so delivered.

In many cases of contract to supply a quantity of goods to be delivered within a fixed period, the whole quantity cannot, from the very nature of the case, be delivered at one time, & it must frequently happen, as in contracts for supplies of provision for the army or navy, or any large establishments, that the quantities first delivered are appropriated & actually consumed by the persons to whom they are delivered before the expiration of the period within which the whole contract is to be performed. As no time was fixed by the contract for the payment of the purchase-money the purchasers might not have been bound, if no loss had occurred, to pay for the wheat put on board from time to time until the whole cargo had been supplied (SIR BARNES PEACOCK).—COLONIAL INSURANCE Co. of NEW ZEALAND v. ADELAIDE MARINE INSURANCE Co. (1886), 12 App. Cas. 128; 56 L. J. P. C. 19; 56 L. T. 173; 35 W. R. 636; 3 T. L. R. 252; 6 Asp. M. L. C. 94, P. C.

**1114.** ——— **Delivery order to warehouseman.**—By the usage of Liverpool the vendor of goods was to pay warehouse rent for two months after the sale, if the goods remained there so long:—*Held*: where the vendor of such goods had, within the two months, given the usual order for delivery to the purchaser, the property in the goods from that time vested in the latter, & he became responsible for all accidents which might happen to them, & the circumstance of the goods having within that time been distrained for warehouse rent, was an accident which must fall on the vendee, & such rent having been paid by the vendor's agent, in order to redeem

the goods, the latter could not recover the same from the vendor as money paid to his use.—GREAVES v. HEFKE (1818), 2 B. & Ald. 131; 106 E. R. 315.

**1115.** ——— **Buyer's servant.**—Where a contract was made between A. & B., whereby A., having a quantity of apples, agreed to sell his cyder to B. at a certain price per hogshead, to be delivered at T. at a future time, & to lend such pipes as he had for the use of the cyder, to be manufactured on his, A.'s premises, & to be paid for before it was removed, & A., in pursuance, delivered a quantity of juice expressed from the apples to a servant hired by B. to manufacture the cyder on A.'s premises, & before the cyder was completely manufactured, it was seized by the excise-officers because the place where it was deposited had not been entered, & was condemned in the Exchequer as B.'s property, together with the casks, & in *assumpsit* for goods sold & delivered, brought by A. against B., it appeared that the word cyder, at the place where the contract was made, meant the juice of the apples as soon as it was expressed:—*Held*: the contract must be construed to have been for the sale of cyder in that sense of the word, & the property passed to B. as soon as the apple juice was delivered to his servant.—STUDDY v. SANDERS (1826), 5 B. & C. 628; 8 Dow. & Ry. K. B. 403; 4 L. J. O. S. K. B. 290; 108 E. R. 234.

*Annotation*:—*Refd.* Johnson v. Kirkaldy (1840), 4 Jur. 988.

**1116. Delivery to carrier—Carrier named by buyer.**—VALE v. BAYLE, No. 1790, *post*.

**1117.** ——— **Master of canal boat.**—T., a corn merchant at Longford, who had been in the habit of consigning cargoes of corn to pltf., as his factors for sale at Liverpool, & obtaining from them acceptances on the faith of such consignments, on Jan. 31, obtained from the masters of two canal boats, No. 604 & No. 54, receipts signed by them for full cargoes of oats therein stated to be shipped on board the boats, deliverable to the agent of T. in Dublin, in care for & to be shipped to pltf. at Liverpool. At that time boat 604 was loaded, but no oats were then actually shipped on board boat 54. On Feb. 2, T. inclosed these receipts to pltf., & drew a bill on them against the value of the cargoes, which pltf. accepted on Feb. 7, & paid when due. On Feb. 6, W., an agent of deft., who was T.'s factor for sale in London, arrived at Longford & pressed T. for security for previous advances. T., on that day, gave W. an order on T.'s agent in Dublin, to deliver to W. the cargoes of boats 604 & 54, on their arrival there. Boat 604 had then sailed from Longford, but boat 54 was only partially loaded. The loading was completed on Feb. 9, & T. then transmitted to W. in Dublin a receipt signed by the master of the boat, in the same form as those sent to pltf., making the cargo deliverable to W. W. received this on Feb. 10. On their arrival in Dublin, W. took possession of both cargoes for deft.:—*Held*: the property in the cargo of boat 604 vested in pltf., on their acceptance of the bill, & they were entitled to maintain trover for it; but they could not maintain trover for the cargo of boat 54, since none of it was on board, or otherwise specifically appropriated to pltf., when the receipt for that boat was given by the master. *Qu.*: whether a document, similar in form to a bill of lading, but given by the master of a boat navigating an inland canal, has the effect of such an instrument in transferring the property in the goods.—BRYANS v.

**PART IV. SECT. 1, SUB-SECT. 3.—B. (b) v.**

**1115 i. Delivery to buyer—Buyer's servant.**—DUNNING v. GORDON (1847), 4 U. C. R. 399.—CAN.

Nix (1839), 4 M. & W. 775; 1 Horn & H. 480; 8 L. J. Ex. 137; 150 E. R. 1634.

*Annotations* :—*Consd.* Evans v. Nichol (1841), 3 Man. & G. 614. *Distd.* Jenkyns v. Usborne (1844), 7 Man. & G. 678. *Apld.* Re Wiltshire Iron Co., *Ex p.* Pearson (1868), 3 Ch. App. 443. *Reid.* Gattorno v. Adams (1862), 12 C. B. N. S. 560; British & India Steam Navigation Co. v. De Mattos, De Mattos v. British & India Steam Navigation Co. (1864), 4 New Rep. 67. *Mentd.* Meyerstein v. Barber (1866), L. R. 2 C. P. 38.

**1118. — Delivery on board ship—Bill of lading not executed.**—A. has a sufficient property in goods shipped by B. for the specific purpose of placing funds in the hands of A. to meet a bill drawn by B. upon A., to entitle A. to maintain trover, although no bill of lading is executed, & A. holds merely a receipt signed by the mate of the vessel, acknowledging the shipment of the goods, to be delivered to A.—EVANS v. NICHOL (1841), 3 Man. & G. 614; 4 Scott. N. R. 43; 11 L. J. C. P. 6; 5 Jur. 1110; 133 E. R. 1286.

*Annotation* :—*Reid.* Kerford v. Mondel (1859), 28 L. J. Ex. 303.

**1119. — — & transfer of documents.**—Pltfs. bought of deft. "300 tons Old Bridge rails at £5 14s. 6d. per ton, delivered at Harburgh, cost, freight & insurance; payment by net cash in London, less freight, upon handing bill of lading & policy of insurance; a dock co.'s weight note or captain's signature for weight to be taken by buyers as a voucher for the quantity shipped":—*Held*: according to the true construction of the contract, deft. did not undertake to deliver the iron at Harburgh, but when he put it on board a ship bound for that place & handed to pltfs. the policy of insurance & other documents, his liability ceased & the goods were at the risk of the purchaser.—TREGEELLES v. SEWELL (1862), 7 H. & N. 574; 158 E. R. 600; *affd.* (1863), 7 II. & N. 584, Ex. Ch.

*Annotations* :—*Distd.* Calcutta & Burmah Steam Navigation Co. v. De Mattos, De Mattos v. Calcutta & Burmah Steam Navigation Co. (1863), 2 New Rep. 575; Acme Wood Flooring Co. v. Sutherland Innes Co. (1904), 9 Com. Cas. 170. *Consd.* Biddell v. Clemens Horst Co., [1911] 1 K. B. 934. *Reid.* Calcutta & Burmah Steam Navigation Co. v. De Mattos, De Mattos v. Calcutta & Burmah Steam Navigation Co. (1864), 33 L. J. Q. B. 214; Heilbutt v. Hickson (1872), L. R. 7 C. P. 438; Dupont v. British South Africa Co. (1901), 18 T. L. R. 24.

**1120. — Goods addressed to wrong consignee.**—Pltf., the owner of goods in bulk, sold a portion of them to F. The goods were ascertained & forwarded by defts.' line, but addressed in error to "the order of Jeeves." Jeeves refused to take the goods, Jarvis applied to defts. for goods similar in quantity & kind to pltf.'s goods & consigned by a person of a like surname. Defts. without inquiry delivered the goods to Jarvis. The consignment note signed by pltf.'s agent relieved defts. from liability "except upon proof that such loss, detention, or injury arose from wilful misconduct." In an action for the price of the goods:—*Held*: the property in the goods had not passed from pltf., & he was the proper person to bring the action; the condition in the consignment note extended to defts. as involuntary bailees, under the circumstances; & the delivery of the goods to Jarvis amounted to "wilful misconduct."—HOARE v. GREAT WESTERN RY. CO. (1877), 37 L. T. 186; 25 W. R. 631; De Colyar's County Court Cases, 194, n.

*Annotations* :—*Distd.* Stevens v. G. W. Ry. (1885), 52 L. T. 324. *Consd.* Forder v. G. W. Ry. (1905), 74 L. J. K. B. 871.

**1121. — Foreign parcel post office.**—A trader in England ordered goods from a foreign manufacturer in Switzerland to be sent by post to England. The manufacturer addressed the goods to the trader in England & delivered them to the Swiss Post Office, by whom they were forwarded

to England. The goods were manufactured according to an invention protected by an English patent:—*Held*: since the contract of sale was completed by delivery to the Post Office in Switzerland, & since the Post Office was the agent of the buyer & not of the vendor, the vendor had not made, used, exercised or vended the invention within the ambit of the patent, & the patentee had no right of action against the vendor for an infringement of the patent.—BADISCHE ANILIN UND SODA FABRIK v. BASLE CHEMICAL WORKS, BINDSCHEDLER, [1898] A. C. 200; 67 L. J. Ch. 141; 77 L. T. 573; 46 W. R. 255; 14 T. L. R. 82, II. L.; *affg.* S. C. *sub nom.* BADISCHE ANILIN UND SODA FABRIK v. JOHNSON & CO. & BASLE CHEMICAL WORKS, BINDSCHEDLER, [1897] 2 Ch. 322, C. A.

*Annotations* :—*Apld.* Saccharin Corp'n. v. Reitmeyer, [1900] 2 Ch. 659. *Feld.* Badische Anilin und Soda Fabrik v. Hickson, [1906] A. C. 419. *Reid.* British Motor Syndicate v. Taylor, [1901] 1 Ch. 122; Wimbly v. Rosenberg, [1913] 3 K. B. 743; Underwood v. Burgh Castle Brick & Cement Syndicate, [1922] 1 K. B. 343. *Mentd.* Badische Anilin und Soda Fabrik v. Chemische Fabrik Vormals Sandoz (1903), 88 L. T. 490.

**1122. — When carrier seller's agent.**—BADISCHE ANILIN UND SODA FABRIK v. BASLE CHEMICAL WORKS, BINDSCHEDLER, No. 1121, *ante*.

**1123. — Of unappropriated goods.**—HEALY v. HOWLETT & SONS, No. 1008, *ante*.

**1124. —**—DUTTON v. SOLOMONSON, No. 1782, *post*.

**1125. —**—A., resident at Naples, sent an order to M. & co., hardwaremen at Birmingham, "to dispatch to him certain goods on insurance being effected. Terms, three months' credit from the time of arrival." M. & co. having marked the package with A.'s initials, dispatched the goods by the canal to Liverpool, & effected an insurance, declaring the interest to be in A. At Liverpool, the goods were delivered by the agent of M. & co. to the owner of a vessel bound to Naples, through whose negligence they were damaged:—*Held*: the property in the goods vested in A. as soon as they were dispatched from Birmingham, & the terms of the order did not make the arrival of the goods at Naples a condition precedent to A.'s liability to pay for them, & he might therefore maintain an action for the injury done to the goods through the negligence of the ship owner.

It was next contended that Fragano was not liable to the vendor unless the goods arrived, but the order for insurance is decisive as to that. The policy was to protect Fragano & shows that he considered he should be the sufferer if the goods were lost on the voyage (HOLROYD, J.).—FRAGANO v. LONG (1825), 4 B. & C. 219; 6 Dow. & Ry. K. B. 283; 3 L. J. O. S. K. B. 177; 107 E. R. 1040.

*Annotations* :—*Apld.* Alexander v. Gardner (1835), 1 Bing. N. C. 671. *Consd.* Tronson v. Dent (1853), 8 Moo. P. C. C. 419; Joyce v. Swann (1864), 17 C. B. N. S. 84; Castle v. Playford (1872), L. R. 7 Exch. 98. *Reid.* Valpy v. Gibson (1847), 4 C. B. 837; Browne v. Hare (1859), 4 II. & N. 822; Re Wiltshire Iron Co., *Ex p.* Pearson (1868), 3 Ch. App. 443; Martineau v. Kitching (1872), 26 L. T. 836; Anderson v. Morice (1875), L. R. 10 C. P. 609.

#### (c) Future Goods.

See Sale of Goods Act, 1893 (c. 71), s. 18, r. 5.

**1126. Potentially existing goods—Property passes when goods extant.**—GRANTHAM v. HAWLEY (1615), Hob. 132; 80 E. R. 281.

*Annotations* :—*Apld.* Petch v. Tutin (1846), 15 L. J. Ex. 280. *Reid.* Robinson v. Macdonnell (1816), 5 M. & S. 228; Muskett v. Hill (1839), 5 Bing. N. C. 694; Gale v. Burnell (1845), 7 Q. B. 850; Lunn v. Thornton (1845), 1 C. B. 379.

**1127. Appropriation—When extant.**—ANON. (1583), Moore, K. B. 174; 72 E. R. 513.

*Sect. 1.—Transfer of property from seller to buyer: Sub-sect. 3, B. (c), (d), (e) & (f); sub-sect. 4, A.]*

**1128.** ———.]—In Jan. 1858, C. agreed to sell to pltf. all the crop of oil of peppermint grown on his farm in that year at 21s. per pound. In Sept. C. wrote to pltf. for bottles to put the oil in. Pltf. sent the bottles, & C. having weighed the oil put it in pltf.'s bottles, labelled them with the weight, & made out invoices. Before, however, he had completed the filling of the bottles he sold & delivered several of them to deft. Pltf. had for many years past bought of C. his crop of oil of peppermint, & it was usual for C., when the bottles were filled, to deliver them to a carrier to take to a railway station. In detinue, by pltf. against deft. for the bottles of oil of peppermint delivered to him:—*Held*: the putting the oil in pltf.'s bottles was an act of appropriation which vested the property in pltf.—*LANGTON v. HIGGINS* (1859), 4 H. & N. 402; 28 L. J. Ex. 252; 33 L. T. O. S. 106; 1 W. R. 489; 157 E. R. 896.

*Annotations*:—*Apld.* *Ogg v. Shuter* (1875), 44 L. J. C. P. 161; *Anderson v. Morice* (1876), 1 App. Cas. 713. *Refd.* *Chinery v. Viall* (1860), 29 L. J. Ex. 180; *Hellbutt v. Hickson* (1872), L. R. 7 C. P. 438.

**1129.** ——— *Necessity for.*]—(1) Grant of six hundred cords of wood to be taken by the assignment of the grantor. This is an assignable interest, & the grantee may take them without assignment if not assigned on request.

(2) Grant of one thousand cords of wood to be taken at the election of the grantee, the grantor or stranger fells some trees, the grantee cannot take them, but must supply his grant out of the residue.—*PALMER'S CASE* (1601), 5 Co. Rep. 24 b; 77 E. R. 87; *sub nom.* *BASSET v. MAYNARD*, Cro. Eliz. 819; *sub nom.* *MAYNARD v. BASSET*, Moore, K. B. 691.

*Annotations*:—*As to* (1) *Consd.* *Muskett v. Hill* (1829), 5 Bing. N. C. 694. *As to* (2) *Refd.* *Dewclas & Kendall v. Kendall, Besson & Hands* (1610), Yelv. 187; *Moterton v. Jollin* (1675), Freem. K. B. 396; *Attersoll v. Stevens* (1808), 1 Taunt. 183. *Generally, Refd.* *Rockham v. Jesup* (1772), 3 Wils. 332. *Mentd.* *Heydon & Smith's Case* (1610), Godb. 172; *Jones v. Chorney* (1680), Freem. K. B. 530; *Scattergood v. Edgo* (1699), 12 Mod. Rep. 278; *Kitson v. Hardwick* (1872), L. R. 7 C. P. 473.

*Compare* *BILLS OF SALE*, Vol. VII., pp. 118–125, 148, 150, 151, Nos. 686–706, 809, 810, 818; *EQUITY*, Vol. XX., pp. 253, 254, Nos. 171–173.

**1130. Nature of buyer's interest—Assignable.]—***PALMER'S CASE*, No. 1129, *ante*.

*Compare* *EQUITY*, Vol. XX., p. 294, Nos. 504, 505; *MINES*, Vol. XXXIV., pp. 695, 696.

**Alienation of future acquired property.]—See** *PERSONAL PROPERTY*, Vol. XXXVII., pp. 170, 171.

(d) *Goods to be Manufactured.*

*See* Sub-sect. 4, *post*.

(e) *Contract for Quantity of Goods.*

**1131. Contract for indivisible quantity—Property does not pass till quantity entire.]—***BRYANS v. NIX*, No. 1117, *ante*.

**1132.** ———.]—(1) What the vendor had to furnish was a cargo of merchantable rice; & if when the vessel arrived at Rangoon or at any time before the cargo was completed & before the documents could possibly be obtained, that rice had been utterly destroyed & wasted, I think the vendee would most undoubtedly be in a position

to say: "You have not supplied to me that which I bought . . . it never has been a full cargo of merchantable rice—take it. I will not" (*LORD HATHERLEY*).

(2) The liability to insure & the fact of insurance are, I think admittedly, strong indications pointing to the individual on whom it is designed that the risk of loss shall fall (*LORD O'HAGAN*).

I think that it ought to be inferred, from the evidence of the understanding & intention of the parties as to insurance, in this case, that the buyer was to bear the risk of loss (*LORD SELBORNE*).—*ANDERSON v. MORICE* (1876), 1 App. Cas. 713; 46 L. J. Q. B. 11; 35 L. T. 566; 25 W. R. 14; 3 Asp. M. L. C. 290, II. L.

*Annotations*:—*As to* (1) *Consd.* *The Parchim*, [1918] A. C. 157. *As to* (2) *Distd.* *Colonial Insce. of New Zealand v. Adelaide Marine Insce.* (1886), 12 App. Cas. 128. *Generally, Refd.* *Ingils v. Stock* (1885), 10 App. Cas. 263. *Mentd.* *Pryce v. Monmouthshire Canal & Ry. Cos.* (1879), 4 App. Cas. 197; *Ajum Goolam Hossen v. Union Marine Insce.*, *Hajee Cassim Joosub v. Ajum Goolam Hossen*, [1901] A. C. 362; *Reliance Marine Insce v. Duder*, [1913] 1 K. B. 265.

**1133. Contract for divisible quantity—Property in separately appropriated portions.]—***ALDRIDGE v. JOHNSON*, No. 1103, *ante*.

**1134.** ———.]—*LANGTON v. HIGGINS*, No. 1128, *ante*.

**1135.** ——— *Goods deliverable in successive instalments.]—*COLONIAL INSURANCE CO. OF NEW ZEALAND *v.* ADELAIDE MARINE INSURANCE CO., No. 1113, *ante*.

**1136. What amounts to contract for indivisible quantity—"Cargo" of goods.]—***BRYANS v. NIX*, No. 1117, *ante*.

**1137.** ———.]—*ANDERSON v. MORICE*, No. 1132, *ante*.

**1138.** ———.]—COLONIAL INSURANCE CO. OF NEW ZEALAND *v.* ADELAIDE MARINE INSURANCE CO., No. 1113, *ante*.

*See, further*, Part VI., Sect. 2, sub-sect. 8, *post*.

(f) *Goods Deliverable at Particular Place.*

**1139. General rule—Property passes on delivery at particular place.]—***ULLOCK v. REDDELEIN*, No. 1793, *post*.

**1140.** ———.]—If a particular contract be proved between the consignor & the consignee . . . as where the party undertaking to consign, undertakes to deliver at a particular place, the property, till it reaches that place & is delivered according to the terms of the contract, is at the risk of the consignor (*LORD COTTENHAM, C.*).—*DUNLOP v. LAMBERT* (1839), 6 Cl. & Fin. 600; *MacL. & Rob.* 663; 7 E. R. 824, H. L.

*Annotations*:—*Refd.* *Coombs v. Bristol & Exeter Ry.* (1858), 3 H. & N. 1; *Calcutta & Burmah Steam Navigation Co. v. De Mattos* & *Burmah Steam Navigation Co.* (1863), 2 New Rep. 575; *Colonial Insce. of New Zealand v. Adelaide Marine Insce.* (1886), 12 App. Cas. 128.

**1141.** ———.]—The seller could have maintained no action until the goods reached the purchaser (*WATSON, B.*).—*WHEELER v. PEARSON* (1857), 2 Saund. & M. 170; 28 L. T. O. S. 255; 5 W. R. 227.

**1142.** ———.]—*BRITISH & INDIA STEAM NAVIGATION CO. v. DE MATTOS, DE MATTOS v. BRITISH & INDIA STEAM NAVIGATION CO.*, No. 1557, *post*.

#### PART IV. SECT. 1, SUB-SECT. 3.— B. (f).

**1139 i. General rule—Property passes on delivery at particular place.]—***See* *GODKIN* (1908), 9 W. L. R. 430.—*CAN.*

**1139 ii.** ———.]—A shipbuilder in G. contracted to build & deliver a

ship at S. On her voyage out she was lost, & the buyer sued the builder for repayment of the price, which had been paid by instalments as the building went on. The builder defended the action, alleging that the buyer had agreed to take, & had taken delivery at G.:—*Held*: the case

showed no intention on the part of the buyer to take delivery anywhere but at S., & as defender had failed to deliver the ship there in terms of the contract, he was bound to repay the price.—*HECKEL DU BUISSON & Co. v. SWAN & Co.* (1889), 27 So. L. R. 205; 17 R. (Ct. of Sess.) 252.—*SCOT.*



**1143.** —. —.]—**BADISCHE ANILIN UND SODA FABRIK v. BASLE CHEMICAL WORKS, BINDSCHEDLER, No. 1121, ante.**

*Compare* **FOOD & DRUGS, Vol. XXV., p. 120, Nos. 417, 418.**

**1144. Sale of goods f.o.b.—Property passes on goods being placed on board.]—BROWNE v. HARE, No. 1306, post.**

**1145. — Goods not placed on board—Default of buyer.]—COLLEY v. OVERSEAS EXPORTERS, No. 1509, post.**

#### SUB-SECT. 4.—GOODS TO BE MANUFACTURED.

##### A. In General.

*See* Sale of Goods Act, 1893 (c. 7), s. 18, r. 5 (1).

**1146. Property in materials—Passes on completion of manufacture.]—An action for goods bargained & sold cannot be maintained unless there has been a specific appropriation of the particular goods assented to by the buyer.**

Where goods are ordered to be made, while they are in progress the materials belong to the maker. The property does not vest in the party who gives the order until the thing ordered is completed. . . . If they had expressed their assent . . . there would have been a complete appropriation vesting the property in defts. (**BAYLEY, J.**).—**ATKINSON v. BELL (1828)**, 8 B. & C. 277; **Dan. & Id. 93**; 2 Man. & Ry. K. B. 292; 6 L. J. O. S. K. B. 258; 108 E. R. 1046.

*Annotations:—***Expld.** **Wilkins v. Bromhead (1844)**, 6 Man. & G. 963. **Distd.** **Grafton v. Armitage (1845)**, 2 C. B. 336; **Aldridge v. Johnson (1857)**, 7 E. & B. 885. **Consd.** **Lee v. Griffin (1861)**, 1 B. & S. 272. **Refd.** **Oldfield v. Lowe (1829)**, 7 L. J. O. S. K. B. 142; **Elliott v. Pybus (1834)**, 10 Bing. 512; **Plumer v. Arnold (1835)**, 2 Cr. M. & R. 613; **Clarke v. Spence (1836)**, 4 Ad. & El. 448; **Hughes v. Lenney (1839)**, 5 M. & W. 183; **Scott v. England (1844)**, 2 Dow. & L. 520; **Clay v. Yates (1856)**, 1 H. & N. 73; **Colley v. Overseas Exporters, [1921] 3 K. B. 302. Mentd.** **Mudie v. Bell (1828)**, 6 L. J. O. S. K. B. 325; **Xenos v. Wickham (1867)**, L. R. 2 H. L. 296.

**1147. Property in goods to be manufactured—Passes on completion of manufacture.]—If a person contracts with another for a chattel which is not in existence at the time of the contract, though he pays him the whole value in advance, & the other proceeds to execute the order, the buyer acquires no property in the chattels till it is finished & delivered to him.—MUCKLOW v. MANGLES (1808), 1 Taunt. 318; 127 E. R. 856.**

*Annotations:—***Distd.** **Woods v. Russell (1822)**, 5 B. & Ald. 942; **Carruthers v. Payne (1828)**, 5 Bing. 270; **Wilkins v. Bromhead (1844)**, 6 Man. & G. 963. **Refd.** **Kirkley v. Hodgson (1823)**, 1 B. & C. 588; **Elliott v. Pybus (1834)**, 10 Bing. 512; **Clarke v. Spence (1836)**, 4 Ad. & El. 448; **Laidler v. Burlinson (1837)**, 2 M. & W. 602; **Reid v. Fairbanks (1853)**, 13 C. B. 692.

**1148. — —.]—Some merchants, in London, sent an order for goods, to the manufacturer, in the country, with whom they had been accustomed to deal, & whose bills of exchange they had been accustomed to accept before the goods were received. The manufacturers committed an act of bkpcy., & afterwards sent the goods. The merchants accepted a bill of exchange, of a much greater amount than the value of the goods without knowing of the act of bkpcy.:—*Held*: the assignees could recover back the goods, as the payment was not protected by 1 Jac. 1, c. 15.**

#### PART IV. SECT. 1, SUB-SECT. 4.—A.

**1147 1. Property in goods to be manufactured—Passes on completion of manufacture.]—BURNETT v. MCBEAN (1857), 16 U. C. R. 466.—CAN.**

**1147 II. — —.]—By Scottish law the property in goods sold does not pass before delivery. Goods are not**

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“sold” within Mercantile Law Amendment Act (Scotland), 1856 (c. 60), s. 1, until the purchaser has acquired a *ius ad rem* enforceable in respect of such goods. Under a contract for the purchase of goods to be manufactured, a *ius ad rem* would *prima facie* not be conferred on the purchaser before the goods were so far completed

The bill was not drawn specifically for the price of these goods, & although it was accepted in the confidence that the order given for the goods would be executed, yet so long as that order was not executed but only in course of execution, no property in the goods passed to defts. (**HOLROYD, J.**).—**BISHOP v. CRAWSHAY (1824)**, 3 B. & C. 415; 5 Dow. & Ry. K. B. 279; 3 L. J. O. S. K. B. 65; 107 E. R. 787.

*Annotation:—***Refd.** **Carter v. Breton (1830)**, 6 Bing. 617.

**1149. — —.]—ATKINSON v. BELL, No. 1146, ante.**

**1150. — —.]—A coat ordered of A., a tailor, by B. was cut out, tacked together, & tried on, in A.'s lifetime, but was finished & delivered, after his death, by his administratrix. The jury were told by the undersheriff that the coat, if it was so nearly finished in A.'s lifetime as to require very little to be done to it afterwards, was sold & delivered by A.:—*Held*: a misdirection; & it was said that the price of the coat might be recovered under a count for goods sold & delivered by pltf. as administratrix.—**WERNER v. HUMPHREYS (1841)**, 2 Man. & G. 853; **Drinkwater, 206**; 3 Scott, N. R. 226; 10 L. J. C. P. 214; 133 E. R. 989.**

*Annotation:—***Refd.** **Moseley v. Rendell (1871)**, L. R. 6 Q. B. 338.

**1151. — —.]—REID v. FAIRBANKS, No. 1156, post.**

**1152. — — In absence of expressed contrary intention of parties.]—Where it appears to be the intention of the parties to a contract for the building of a ship that the vessel is not to be delivered & finally accepted until after an official trial off a foreign coast, & until after conditions of the contract have been fulfilled as to speed, consumption of coal, capacity, etc., the property in the ship does not pass to the purchaser while the vessel remains uncompleted, although the contract contains stipulations for the price to be paid by instalments at certain periods of construction.**

*Resps.*, a Glasgow firm of shipbuilders, agreed to build two ships for an Italian firm, according to certain specifications & under the superintendence of an agent appointed by the Italian firm, for a certain amount payable by instalments at specified stages of construction; but delivery of the ships was not to be considered to be completed till they had passed trials at Greenock & off the Italian coast. Before the ships were fully constructed, but after several instalments had been paid, applts., an English firm of shipbuilders, arrested the ships in Scotland for a debt alleged to be due to them by the Italian co., but on a petition to the First Division of the Ct. of Session the arrestments were recalled:—*Held*: no intention was shown in the contract to make delivery of or to pass the property in the ships before they were completed, & the arrestments were properly recalled.—**SIR JAMES LAING & SONS, LTD. v. BARCLAY, CURLE & CO., LTD., [1908] A. C. 35**; 77 L. J. P. C. 33; 97 L. T. 816; 10 Asp. M. L. C. 583, H. L.

*Annotations:—***Distd.** *Re* **Blyth Shipbuilding & Dry Docks Co., Forster v. Blyth Shipbuilding & Dry Docks Co., [1926] Ch. 494. Refd. **Behne v. Bede Shipping Co., [1927] 1 K. B. 649.****

**1153. What amounts to completion of manufacture—Agreement by parties.]—A chariot was**

as to be ready for delivery.—**SEATH & CO. v. MOORE (1886)**, 55 L. J. P. C. 54, H. L.—**SCOT.**

**1152 I. — — In absence of expressed contrary intention of parties.]—ROBERTSON v. STRICKLAND (1868)**, 28 U. C. R. 221.—**CAN.**



*Sect. 1.—Transfer of property from seller to buyer:*  
*sect. 4, A. & B. (a).]*

built to pltf.'s order, & paid for by him; when finished in other respects, pltf. ordered a front seat to be added; but the builder being slow in making this addition, pltf. sent for the chariot repeatedly, & the builder promised to deliver it. Pltf. being afterwards dissatisfied, ordered the chariot to be sold, & while it was, according to the custom of the trade, standing in the builder's warehouse for that purpose, the front seat not having been added, the builder became bkpt., & his assignee seized the chariot; more than three months afterwards pltf. commenced his action:—*Held*: (1) pltf. had sufficient property to maintain trover; (2) the chariot did not pass to the assignee as being in the order a disposition of bkpt. with the consent of the owner.—*CARRUTHERS v. PAYNE* (1828), 5 Bing. 270; 2 Moo. & P. 429; 7 L. J. O. S. C. P. 84; 130 E. R. 1065.

*Annotations*:—*As to* (2) *Refd. Clarke v. Spence* (1836), 4 Ad. & El. 448. *Generally, Mentd. Edge v. Parker* (1828), 8 B. & C. 697; *Worth v. Budd* (1831), 9 L. J. O. S. K. B. 237; *Knight v. Turquand* (1836), 2 Gale, 187.

**1154. — Completion by third party.**—A. a silk throwster, contracted with B. & C. for certain machinery to be made for him, & while the work was in progress, paid money on account. Before the machinery was finished, B. & C. assigned it to D. This circumstance was communicated by D. to A., who said he must go on with the work, & he, A., would see him paid. The machinery having been completed & delivered:—*Held*: D. might sue A. for the price of such parts of it as had been made by him after the assignment.—*OLDFIELD v. LOWE* (1829), 9 B. & C. 73; 7 L. J. O. S. K. B. 142; 109 E. R. 28.

**1155. — Machines complete but not finally "set up."**—Defts. contracted with S. to deliver & set up a set of machines to be paid for three months after delivery. The machines were delivered & put together, but not finally "set up." S. shortly afterwards sent a circular convening his creditors & thereupon defts. came & took away the machines. The trustee in bkpcy. of S. sued defts. in trover for the value of the machines:—*Held*: under the contract the property in the machines had not passed to S.—*ARMITAGE v. HAIGH & SONS, LTD.* (1893), 9 T. L. R. 287, C. A.

*B. Property in Uncompleted Article.*

*(a) In General.*

**1156. Intention of parties.]**—Although, in general, when any chattel, as a ship or other vessel, is ordered to be made, the property does not vest in the employer or proposed purchaser until it is completed, appropriated, & accepted, there may be a contract for its purchase when it is partly made, which may not only be a contract for it in its present & incomplete, but also in its future & finished condition; & if it provide, in such case, for its completion, while it is a sale of the incomplete chattel, the property in the chattel will vest in the purchaser in its present state; the materials added or appropriated to it will also vest in him; & when it is completed, the entire property will be in him.

If there be a bill of sale of a vessel in an unfinished state, & all materials, etc., as a security for past & further advances, with a contract on the part of the builder to complete it for the purchaser,

& on the part of the latter to pay the remainder of the price by stipulated instalments, the property passes to the purchaser in its present state, &, upon completion, the whole vests in him.

Ptfs., in 1848, took an assignment to them of a vessel, then in an unfinished state, from the builder, as a security for past & future advances upon it, he contracting to complete it by May 1, 1852, & they to pay a certain sum by instalments at successive stages of its progress; & the assignment included all materials, etc., then provided or to be provided for the vessel. The builder had it registered in their names as owners. On Mar. 29, 1849, the builder assigned it to defts., still incomplete, cancelled the registration, & had it registered in their names as owners. They completed & launched it, & loaded it to this country, where it was demanded by ptfs., & refused. In an action of trover, pleas, not guilty, & not possessed:—*Held*: the property passed to ptfs. by the bill of sale & the contract, & was theirs at the time of the assignment to defts.—*REID v. FAIRBANKS* (1853), 13 C. B. 692; 1 C. L. R. 787; 21 L. T. O. S. 166; 138 E. R. 1371; *sub nom. READ v. FAIRBANKS*, 22 L. J. C. P. 206; 17 Jur. 918.

*Annotations*:—*Consd. Chinery v. Viall* (1860), 5 H. & N. 288; *Peruvian Guano Co. v. Dreyfus* (1887), [1892] A. C. 170, n. *Refd. Wood v. Bell* (1856), 2 Jur. N. S. 664; *Bell, etc. v. Bank of London* (1858), 28 L. J. Ex. 116; *Jones v. Williams* (1859), 4 H. & N. 706.

**1157. —**—*SEATH v. MOORE*, No. 1206, *post*.

**1158. When intention presumed—Payment by instalments.—At particular stages of construction.]**

—A., a shipbuilder, contracted with B. to build a ship for him, & to complete her in Apr. 1819. The latter was to pay for her by four instalments; the first when the keel was laid, the second when at the light plank, & the third & fourth when the ship was launched. Before June 25, 1819, the ship was measured with the builder's privity, to the intent that B. might get her registered in his name. On June 25, the shipbuilder signed the usual certificate of her building; & on June 26, the ship was registered in B.'s name; & on the same day the third instalment was paid. On June 30, A. committed an act of bkpcy., upon which a commission afterwards issued. On July 2, the ship not being then completed, or launched, deft., & a crew hired by him, took possession of her, & a rudder & cordage, the former of which was made by the shipbuilder, & the latter bought by him, for the express purpose of completing the ship:—*Held*: (1) the legal effect of the shipbuilder's having signed the certificate to enable B. to have the ship registered in his name, was to vest the general property in the ship in B. from the time the registry was completed; (2) as the rudder & cordage were made & bought by the shipbuilder specifically for the ship, they were to be considered as parts of the ship, & the property in them also vested in B.; (3) although the general property in the ship was vested in B., yet as A. had not parted with the possession, &, as he would have had a lien upon the ship for the amount of the fourth instalment, if he had completed it; the taking possession of the ship by B. without tendering the amount of the fourth instalment, or so much thereof as was due, provided any thing was due, was wrongful.—*WOODS v. RUSSELL* (1822), 5 B. & Ald. 942; 1 Dow. & Ry. K. B. 587; 106 E. R. 1436.

*Annotations*:—*As to* (1) *Distd. Bishop v. Crawshaw* (1824), 3 B. & C. 415; *Atkinson v. Bell* (1828), 8 B. & C. 277.

**PART IV. SECT. 1, SUB-SECT. 4.—**  
**B. (a).**

**1158 i. When intention presumed—**

*Payment by instalments.—At particular stages of construction.]*—*HOWDEN BROTHERS, LTD. v. ULSTER BANK, LTD.*, [1924] 1 I. R. 117.—*IR.*

**1158 ii. —**—*NELSON v. CHALMERS (WILLIAM) & CO. LTD.*, [1913] S. C. 441; 50 Sc. L. R. 364; [1913] 1 S. L. T. 190.—*SCOT.*

*Carruthers v. Payne* (1828), 2 Moo. & P. 429;  
*e v. Spence* (1836), 4 Ad. & El. 448. *Distd. Laidler*  
*Robinson* (1837), 2 M. & W. 602; *Beale v. Moulis* (1847),  
 10 Q. B. 976; *As to (3)* *Apd. Holderness v. Rankin*

(1886), 11 App. Cas. 350. *Refd. Banbury & Cheltenham*  
*Direct Ry. v. Daniel* (1884), 54 L. J. Ch. 265. *As to (2)*  
*Dtd. Wood v. Bell* (1856), 6 E. & B. 355; *Seath v. Moore*  
 (1886), 11 App. Cas. 350; *Re Blyth Shipbuilding & Dry*  
*Docks Co., Forster v. Blyth Shipbuilding & Dry Docks Co.*,  
 [1926] Ch. 494. *As to (3)* *Apd. Holderness v. Rankin*  
 (1860), 28 Beav. 180. *Generally, Refd. Acraman v.*  
*Morrice* (1849), 14 L. T. O. S. 292; *Turley v. Bates* (1863),  
 2 H. & C. 200.

1159. ———.]—CLARKE *v.* SPENCE, No.  
 1177, *post*.

1160. ———.]—BEALE *v.* MOULS, No.  
 2477, *post*.

1161. ———.]—REID *v.* FAIRBANKS,  
 No. 1156, *ante*.

1162. ———.]—J., a ship builder,  
 agreed to build an iron steamship for pltf. on the  
 same terms as other vessels which he had previously  
 built for him. By reference to these terms it  
 appeared that the price was to be £16,000, payable  
 by instalments, the first instalment to be £1,000  
 payable immediately. The second, third & fourth,  
 of £1,000 each, to be payable at the end of two,  
 three & four months respectively from the date of  
 the order; the remaining £12,000 to be payable  
 by instalments of £3,000 each, the first £3,000 at  
 the end of six months, provided the vessel was  
 plated & decks laid; the second £3,000 at the end  
 of eight months, provided the vessel was ready  
 for trial; the third £3,000 at the end of eleven  
 months, provided the vessel was according to  
 contract & perfectly completed; the last instal-  
 ment of £3,000 at the end of thirteen months; the  
 vessel to be built under the superintendence of  
 H., appointed for that purpose by pltf., & according  
 to his specifications. The building commenced  
 under the superintendence of H. Pltf. advanced  
 money to J. in anticipation of the instalments.  
 In the tenth month J. became bkpt.; the vessel  
 was at that time unfinished in J.'s yard; &  
 engines & parts of the framework of the vessel,  
 adapted for the unfinished ship, but not yet fixed  
 into her framework, were there also. Pltf. claimed  
 the unfinished vessel & these engines & parts of  
 the framework. The assignees of J. kept them  
 as part of the estate of J. The amount paid in  
 advance by pltf. exceeded the value of this property.  
 In an action against the assignees, a case was  
 stated for the opinion of this Ct., giving power to  
 draw inferences of fact, & setting forth the above  
 facts, & also that the unfinished ship was known  
 at J.'s yard as pltf.'s ship, & that H. had, with  
 J.'s consent, before the bkpcy., stamped pltf.'s  
 name on the keel of the vessel, for the express  
 purpose of indicating that she was the property  
 of pltf. The questions were, whether the property  
 belonged to pltf. or the assignees. The Ct. of  
 Q. B. decided that pltf. was entitled to recover in  
 respect both of the ship & of the loose engines &  
 materials. On error to the Ct. of Exch. Ch.,  
 that Ct. concurred with the Ct. of Q. B. as to the  
 ship, but held that pltf. was not entitled to  
 recover in respect of the loose engines & materials.  
 —WOOD *v. BELL* (1856), 6 E. & B. 355; 25 L. J.  
 Q. B. 321; 2 Jur. N. S. 664; 4 W. R. 602; 119  
 E. R. 897, Ex. Ch.; *varying* S. C. *sub nom.*  
 SPANISH & PORTUGUESE SCREW STEAM SHIPPING  
 CO. *v. BELL*, WOOD *v. SAME*, 25 L. J. Q. B. 148.

*Annotations:—Consd. Anglo-Egyptian Navigation Co. v.*  
*Rennie* (1875), L. R. 10 C. P. 271. *Appvd. Seath v.*  
*Moore* (1886), 11 App. Cas. 350. *Apd. Re Blyth Ship-*  
*building & Dry Docks Co., Forster v. Blyth Shipbuilding*  
*& Dry Docks Co.*, [1926] Ch. 494. *Refd. British Columbia*  
*Saw-Mill Co. v. Nettleship* (1869), L. R. 3 C. P. 499; *Ban-*

*bury & Cheltenham Direct Ry. v. Daniel* (1884), 54 L. J.  
 Ch. 265. *Mentd. France v. Gaudet* (1871), 40 L. J. Q. B.  
 121.

1163. ———.]—A shipbuilder, who was  
 tenant of a dry dock to defts., contracted with  
 pltf. to build a ship, to be paid for by instalments  
 as the work progressed. When the ship was near  
 completion, & several instalments had been paid,  
 defts. distrained upon it for rent due from the  
 shipbuilder in respect of the dock:—*Held*: though  
 the property in the ship, so far as completed,  
 might have passed to pltf. upon payment of the  
 different instalments, the ship was not privileged  
 from distress.—CLARKE *v. MILLWALL DOCK CO.*  
 (1886), 17 Q. B. D. 494; 55 L. J. Q. B. 378; 54  
 L. T. 814; 51 J. P. 5; 34 W. R. 698; 2 T. L. R.  
 669, C. A.

*Annotation:—Refd. Challoner v. Robinson*, [1908] 1 Ch. 49.

1164. ———.]—SEATH *v.* MOORE, No.  
 1206, *post*.

1165. ———.]—SIR JAMES LAING &  
 SONS, LTD. *v. BARCLAY, CURLE & Co., LTD.*, No.  
 1152, *ante*.

1166. ———.]—A shipbuilding con-  
 tract provided for payment of the purchase-price  
 of the vessel by instalments, the first to be paid on  
 the signing of the contract, the next when the  
 keel was laid, & others at various stages in the  
 progress of the ship's construction. She was to  
 be constructed under the inspection of the pur-  
 chaser's surveyor, to whose approval the quality  
 of the material used & the workmanship were to  
 be subject. Clause 6 provided that "from &  
 after payment by the purchasers to the builders  
 of the first instalment on account of the purchase  
 price the vessel & all materials & things appropri-  
 ated for her should thenceforth, subject to the  
 lien of the builders for unpaid purchase-money  
 including extras, become & remain the absolute  
 property of the purchasers."

After the first two instalments of the purchase-  
 money had been paid & the vessel had been partly  
 constructed, a receiver was appointed in an action  
 commenced by debenture holders of the ship-  
 building co. for enforcing their security. Upon a  
 summons in that action to determine the respective  
 rights of pltf. & the purchasers:—*Held*: the  
 property in the uncompleted vessel had passed  
 to the purchasers, & certain worked material  
 lying in the yard ready to be incorporated into the  
 hull of the vessel & approved by the purchasers'  
 surveyor, had not been "appropriated for her"  
 within the meaning of clause 6 so as to become the  
 property of the purchasers.—*Re BLYTH SHIP-*  
*BUILDING & DRY DOCKS CO., FORSTER v. BLYTH*  
*SHIPBUILDING & DRY DOCKS CO.*, [1926] Ch. 494;  
 95 L. J. Ch. 350; 134 L. T. 643, C. A.

*Annotation:—Refd. Behnke v. Bede Shipping Co.*, [1927]  
 1 K. B. 649.

*Compare* DISTRESS, Vol. XVIII., p. 291, No. 268.

1167. ———.]—*Instalments not appropriated to*  
*particular stages of construction.*—In 1833, &  
 until his bkpcy., J. L. carried on business as a  
 shipbuilder; & on June 10, 1833, the following  
 agreement was entered into, "Particulars &  
 description of a new ship now about one-third  
 built in the yard of J. L."; then there followed a  
 description of the length, breadth, & depth of the  
 ship, the number of tons she was to carry, & the  
 timbers, & particulars of every thing that she  
 was to be built of & supplied with, "for the sum  
 of £1,750, & payment as follows, opposite to each  
 respective name." This agreement was signed by  
 J. L.; & after his signature followed these words,  
 "We, the undersigned, hereby engage to take  
 shares in the before mentioned vessel, as set  
 opposite to our respective names, & also the mode

**Sect. 1.—Transfer of property from seller to buyer :  
Sub-sect. 4, B. (a) & (b) ; sub-sect. 5, A. & B. (a).]**

of payment." This was signed by several persons for different shares, & at different times, & amongst the rest, by pltf. for one-fourth, in Oct. 1833. Below these signatures was written the following, " July 14, 1833, I hereby agree to accept the above price & mode of payment, J. L." Pltf. proved payment for his share by bills before the bkpcy. of J. L. The T. C. co. signed the agreement for one-fourth, of which co. H. was a member, & used to go to look at the vessel when building, & occasionally found fault with the work, which was improved in consequence, & J. L. told his foreman to act under H.'s direction. At the time of the bkpcy., the frame of the vessel was on the stocks in J. L.'s building yard in an unfinished state, & after the bkpcy., some of the men continued to work upon her, & receive their money from H. :—**Held** : under these circumstances, the property in one-fourth of the vessel did not pass to T. L., pltf.—**LAIDLER v. BURLINSON** (1837), 2 M. & W. 602 ; **Murp. & H.** 109 ; 6 L. J. Ex. 160.

**Annotations :—****Consd.** Wood v. Bell (1856), 5 E. & B. 772. **Refd.** Reid v. Fairbanks (1853), 21 L. T. O. S. 166 ; Turley v. Bates (1863), 2 H. & C. 200 ; Anglo-Egyptian Navigation Co. v. Rennie (1875), L. R. 10 C. P. 271 ; Seath v. Moore (1886), 11 App. Cas. 350.

**1168. — Superintendence of construction by buyer.]—CLARKE v. SPENCE**, No. 1177, *post*.

**1169. — —.]—WOOD v. BELL**, No. 1162, *ante*.

**1170. — —.]—SEATH v. MOORE**, No. 1206, *post*.

**1171. — —.]—SIR JAMES LAING & SONS, LTD. v. BARCLAY, CURLE & CO., LTD.**, No. 1152, *ante*.

**1172. — —.]—Re BLYTH SHIPBUILDING & DRY DOCKS CO., FORSTER v. BLYTH SHIPBUILDING & DRY DOCKS CO.**, No. 1166, *ante*.

**1173. — Buyer's name stamped on ship's keel.]—WOOD v. BELL**, No. 1162, *ante*.

**1174. Stage at which property passes—Question of construction.]—SEATH v. MOORE**, No. 1206, *post*.

**1175. — Whether stage reached—Question of fact.]—SEATH v. MOORE**, No. 1206, *post*.

**1176. Right of vendor to lien—Until full purchase-price—Price payable in instalments.]—WOODS v. RUSSELL**, No. 1158, *ante*.

**(b) Materials Subsequently Added.**

**1177. When property in materials passes with uncompleted article.]—P.** contracted with a shipbuilder to build him a ship for a certain sum, to be paid by instalments as the work proceeded ; the first instalment when the vessel was rammed, the second when she was timbered, etc. An agent for P. was to superintend the building. The vessel was built under such superintendence, all the materials being approved by the agent before they were used. The builder became bkpt. before the ship was completed. Afterwards the assignees completed the ship. All the instalments were paid or tendered. In an action of trover by P. against the assignees for the ship :—**Held** : on the first instalment being paid, the property in the portion then finished became, by virtue of the above contract, vested in P., subject to the right of the builder to retain such portion for the purpose of completing the work & earning the rest of the price ; & each material subsequently added became, as it was added, the property of P. as the general owner.—**CLARKE v. SPENCE** (1836), 4 Ad. & El. 448 ; 1 Har. & W. 760 ; 6 Nev. & M. K. B. 399 ; 5 L. J. K. B. 161 ; 111 E. R. 855.

**Annotations :—****Distd.** Laidler v. Burlinson (1837), 2 M. & W. 602. **Consd.** Wood v. Bell (1856), 5 E. & B. 772 ; Anglo-

Egyptian Navigation Co. v. Rennie (1875), L. R. 10 C. P. 271 ; Seath v. Moore (1886), 11 App. Cas. 350. **Refd.** Tripp v. Armitage (1839), 1 Horn. & H. 442 ; Gale v. Burnell (1845), 7 Q. B. 850 ; Holderness v. Rankin (1860), 28 Beav. 180 ; Turley v. Bates (1863), 2 H. & C. 200 ; Ilfracombe Ry. v. Poltimore (1868), 37 L. J. C. P. 86 ; Clarke v. Millwall Dock Co. (1886), 17 Q. B. D. 494 ; Re Blyth Shipbuilding & Dry Docks Co., Forster v. Blyth Shipbuilding & Dry Docks Co., [1926] Ch. 494.

**1178. — —.]—REID v. FAIRBANKS**, No. 1156, *ante*.

**1179. — If materials have been "affixed." ]—SEATH v. MOORE**, No. 1206, *post*.

**1180. — —.]—A** firm of shipbuilders contracted to build a ship for a firm of shipowners, to be classed 100 A1 at Lloyd's & to be constructed under the superintendence of the shipowners. The contract contained this clause : " the vessel as she is constructed, & all her engines, boilers, & machinery, & all materials from time to time intended for her or them, whether in the building yard, workshop, river, or elsewhere, shall immediately as the same proceeds, become the property of the purchasers, & shall not be within the ownership, control, or disposition of the builders, but the builders shall at all times have a lien thereon for their unpaid purchase-money." Before the ship was completed the shipbuilders became bkpt. At the date of the bkpcy. there were lying at railway stations a quantity of iron & steel plates at the orders of the shipbuilders. These plates were claimed by the trustee in the shipbuilders' sequestration, & also by the shipowners. The plates had been passed by Lloyd's surveyor at the maker's works, & they were each numbered by the makers with the number of the vessel & with marks showing the position which each plate was to occupy in the vessel :—**Held** : the contract was for the purchase of a complete ship, & the materials in question could not be regarded as appropriated to the contract or sold under Sale of Goods Act, 1893 (c. 71).—**REID v. MACBETH & GRAY**, [1904] A. C. 223 ; 73 L. J. P. C. 57 ; 90 L. T. 422 ; 20 T. L. R. 316, H. L.

**Annotation :—****Distd.** Re Blyth Shipbuilding & Dry Docks Co., Forster v. Blyth Shipbuilding & Dry Docks Co., [1926] Ch. 494.

**1181. Sufficiency of appropriation—Rudder & cordage not affixed to ship.]—WOODS v. RUSSELL**, No. 1158, *ante*.

**1182. — Rudder not affixed to ship.]—A.** orders a rudder to be made by B., a shipbuilder, for A.'s ship. B. begins to make a rudder, which he states is intended for A. Before this intention is communicated to A., & before the rudder is finished, B. becomes bkpt. After the bkpcy., A., who is a creditor of B., is informed that the rudder was intended for him, & takes it away :—**Held** : this acquiescence on the part of A. having relation to the prior intention of B., was evidence to go to the jury of an appropriation of the rudder so as to negative the property of the assignees therein.—**GOSS v. QUINTON** (1842), 3 Man. & G. 825 ; 4 Scott, N. R. 471 ; 12 L. J. C. P. 173 ; 7 Jur. 901 ; 133 E. R. 1372.

**Annotations :—****Consd.** Bessey v. Windham (1844), 6 Q. B. 166. **Refd.** White v. Morris (1852), 11 C. B. 1015 ; Wood v. Bell (1856), 5 E. & B. 355 ; Re Blyth Shipbuilding & Dry Docks Co., Forster v. Blyth Shipbuilding & Dry Docks Co., [1926] Ch. 494.

**1183. — Engines & frame parts not affixed to ship.]—WOOD v. BELL**, No. 1162, *ante*.

**1184. — Numbered iron & steel plates not affixed to ship.]—REID v. MACBETH & GRAY**, No. 1180, *ante*.

**1185. — Materials not affixed to ship.]—In** consideration of certain periodical payments, A. agreed to build a ship for B., to be launched on or before July 31, 1853. The agreement contained the following proviso, " provided always & it is

expressly agreed between the said parties, their exors., etc., that, in case A. should fail to complete the said ship according to the covenants & stipulations hereinbefore contained to be performed on his part, then it shall be lawful for B. to enter upon & take possession of the said ship or vessel, which from & after the payment of the first instalment shall be & be deemed & continue to be as soon as the said ship or vessel shall be commenced, in every respect & for every purpose the property of B., & to cause the works hereby agreed to be done to be completed by any person whom he shall see fit to employ therein, using such of the materials of A. as shall be applicable to the purpose," etc., A. to repay to B. so much as he should expend thereon in excess of the contract price. A. having failed to complete the ship by the stipulated time, B. took possession of her, & after an act of bkpcy. committed by A., proceeded to finish her, using therein certain materials which were in the yard, & were suitable but had not been specifically appropriated by A. to the ship. Some of these materials had been selected by B. before A.'s bkpcy., & some were placed within the carcase of the ship, the remainder in a shed alongside, but none of them had actually been used by B. before A.'s bkpcy. :—*Held*: the assignees were entitled to recover against B. the whole value of these materials.—*BAKER v. GRAY* (1856), 17 C. B. 462; 25 L. J. C. P. 161; 2 Jur. N. S. 400; 4 W. R. 297; 139 E. R. 1154.

1186. ———.]—*Re BLYTH SHIPBUILDING & DRY DOCKS CO., FORSTER v. BLYTH SHIPBUILDING & DRY DOCKS CO., No. 1166, ante.*

#### SUB-SECT. 5.—SPECIFIC OR ASCERTAINED GOODS.

##### A. In General.

*See* Sale of Goods Act, 1893 (c. 71), ss. 17, 18.

1187. **General rule—Property vests in purchaser.**—The property of goods is in the person who, as purchaser, pays the money for them.—*ANON.* (1699), 12 Mod. Rep. 314; 88 E. R. 1368, N. P.

**Meaning of "specific goods."**—*See* Sale of Goods Act, 1893 (c. 71), s. 62 (1).

1188. **Meaning of "ascertained goods."**—*THAMES SACK & BAG CO., LTD. v. KNOWLES & CO., LTD., No. 1053, ante.*

1189. ———.]—*Re WAIT, No. 2614, post.*

##### B. In Deliverable State.

##### (a) In General.

*See* Sale of Goods Act, 1893 (c. 71), s. 18, r. 1.

**Meaning of "deliverable state."**—*See* Sale of Goods Act, 1893 (c. 71), s. 62 (1).

1190. **What amounts to contract for "sale of specific goods in a deliverable state"**—*Sale of growing timber.*—*KURSELL v. TIMBER OPERATORS & CONTRACTORS, No. 1239, post.*

1191. **When property passes—Immediately—**

**Postponement of delivery.**—Where goods were sold by auction to an agent, the auctioneer wrote the initials of the agent's name, together with the prices, opposite the lots purchased by him, in the printed catalogue; & the principal afterwards, in a letter to the agent, recognised the purchase :—*Held*: the entry in the catalogue, & the letter, coupled together, were a sufficient memorandum of the contract within Stat. Frauds. If goods are sold, to be paid for in 30 days, & if not carried away at the end of that time, warehouse rent to be paid for them—the property in the goods rests absolutely in the purchaser, & they remain at his risk, from the moment of the sale.—*PHILLIMORE v. BARRY* (1808), 1 Camp. 513; 170 E. R. 1040, N. P.

1192. ———.]—**payment.**—The risk of accident to goods must be with the buyer, if the right of property has passed to him, though the possession be with the seller.

The right of property remains in the seller so long as any act remains to be done as between him & the buyer.

Where a stack of hay was sold, & by agreement was to remain on the premises of the buyer until a given day; & was not to be cut by the seller until he paid for it; & before the day of payment arrived it was accidentally burned :—*Held*: the loss must fall on the buyer; the right of property being complete in him, though the possession remained in the seller, no act remaining to be done by the latter.—*TARLING v. BAXTER* (1827), 6 B. & C. 360; 9 Dow. & Ry. K. B. 272; 5 L. J. O. S. K. B. 164; 108 E. R. 484.

*Annotations*:—*Distd. Kurcell v. Timber Operators & Contractors*, [1927] 1 K. B. 298. *Refd. Martindale v. Smith* (1841), 1 Q. B. 389; *Cohen v. Roche*, [1927] 1 K. B. 169.

1193. ———.]—*GURR v. CUTHBERT, No. 2665, post.*

1194. **Postponement of payment.**—In a dispute between a landlord & his tenant as to the date upon which the latter sold produce of his holding to a third party :—*Held*: the material date was the actual date when the contract for sale was made & not the date when, as between the contracting parties, the contract for sale became enforceable within Sale of Goods Act, 1893 (c. 71), s. 4.—*MEGGESON v. GROVES*, [1917] 1 Ch. 158; 86 L. J. Ch. 145; 115 L. T. 683; 61 Sol. Jo. 115.

*Annotations*:—*Mentd. Raikes v. Ogile*, [1921] 1 K. B. 576; *Brakspear v. Barton*, [1924] 2 K. B. 88.

1195. ———.]—**Without actual delivery.**—*DIXON v. YATES, No. 2003, post.*

1196. ———.]—*SEATH v. MOORE, No. 1206, post.*

1197. ———.]—*BADISCHE ANILIN UND SODA FABRIK v. HICKSON, No. 1090, ante.*

1198. ———.]—**In absence of contrary intention of parties.**—*GILMOUR v. SUPPLE, No. 1234, post.*

1199. ———.]—*BADISCHE ANILIN UND SODA FABRIK v. HICKSON, No. 1090, ante.*

1200. ———.]—**Sale by auction.**—*SWEETING v. TURNER, No. 1394, post.*

1198 i. ———.]—**In absence of contrary intention of parties.**—Unless a contrary intention appears, where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer at the time the contract is made; & it is immaterial whether the time of payment or the time of delivery or both be postponed.—*CRAIG v. BEARDMORE* (1904), 24 C. L. T. 308; 7 O. L. R. 674; 3 O. W. R. 547.—*CAN.*

1198 ii. ———.]—*KEN-NEDY'S TRUSTEE v. HAMILTON & MANSON* (1897), 25 R. (Ct. of Sess.) 252.—*SCOT.*

#### PART IV. SECT. 1, SUB-SECT. 5.—A.

e. **Agreement as to inspection on delivery.**—*Inspector selected by purchaser—Inspection begun before assent by vendor—Whether inspection binding.*—*THOMSON v. MATHESON* (1900), 30 S. C. R. 357.—*CAN.*

f. **Agreement as to survey of logs.**—*Surveyor selected by purchaser under agreement—Qualification of surveyor.*—*PATTERSON v. LARSEN* (1906), 37 N. B. R. 23.—*CAN.*

g. **Sale of pulp wood—Measurement—Scaling of timber.**—*ST. GEORGE PULP & PAPER CO. v. ROSE* (1906), 37 S. C. R. 687.—*CAN.*

#### PART IV. SECT. 1, SUB-SECT. 5.—B. (a).

h. **What amounts to contract for "sale of specific goods in a deliverable state."**—*MORISON v. LOCKHART*, [1912] S. C. 1017.—*SCOT.*

435.—*CAN.*

1195 ii. ———.]—*ARMAND v. NOONAN* (1918), 41 O. L. R. 551; 13 O. W. N. 343; 41 D. L. R. 433.—*CAN.*

1195 iii. ———.]—*SHANKER DAS-JOTI PARSHAD v. BHANA RAM-SHEO DIAL* (1926), 1 L. R. 7 Lab. 406.—*IND.*

*Sect. 1.—Transfer of property from seller to buyer: Sub-sect. 5, B. (a) & (b), & C.]*

1201. —.]—*SIMMONS v. SWIFT*, No. 1042, ante.

(b) *Entire Contract for Specific Goods and Interest in Land.*

1202. *When property in goods passes—Conditional on passing of interest in land.*—Under a contract for sale of a house, & also of furniture at a certain valuation, as soon as the title & sale of the house shall be completed, the furniture does not vest immediately in the vendee.—*LANYON v. TOOGOOD* (1844), 13 M. & W. 27; 13 L. J. Ex. 273; 3 L. T. O. S. 164; 153 E. R. 11.

1203. —.]—*Effect of appropriation of goods by buyer.*—A., the lessee for years of premises, under a lease containing a stipulation that all improvements made by him were to belong to the lessor at the end of the lease except any greenhouse he might erect, bargained with B. to assign the lease to him, & to sell him a greenhouse which he had erected, & which was affixed to the freehold, together with the furniture, crops of fruit, & plants therein, for a certain sum. B. was let into possession of the greenhouse & its contents, but, owing to a difficulty in obtaining the lessor's consent, no assignment of the lease was made to him:—*Held*: the contract was an entire one for the assignment of the lease & the sale of the greenhouse, & until the lease was assigned B. could not be sued by A. for the price of the greenhouse.—*SLEDDON v. CRUIKSHANK* (1846), 16 M. & W. 71; 16 L. J. Ex. 61; 8 L. T. O. S. 121; 153 E. R. 1103.

*Compare LANDLORD & TENANT*, Vol. XXX., p. 448, No. 1095.

1204. —.]—*Provision for separate valuation of goods.*—By an agreement between pltf. & deft., deft. was to accept of the assignment of the lease of a farm from pltf., & to take the fixtures & crops at a valuation. He was afterwards let into possession of the fixtures, & the crops were valued to him; but the lease was never assigned:—*Held*: *indebitatus assumpsit* would not lie for the price of the fixtures & crops, & pltf.'s only remedy was by a special action on the agreement.—*NEAL v. VINEY* (1808), 1 Camp. 471; 170 E. R. 1025, N. P.

1205. —.]—*Deft. agreed verbally with pltf. to take a house & purchase the fixtures at a valuation to be made by two brokers. An inventory of the furniture & fixtures was accordingly made, described generally as "An inventory of the fixtures, etc.," with the gross amount placed at the foot thereof. In an action for goods sold & delivered, with a count on an account stated:—Held*: deft. having taken possession of & enjoyed the furniture & fixtures, & paid part of the sum determined by the brokers to be due for the same, he was liable on the account stated for the remainder, & could not afterwards object to pltf.'s defective title to the house.—*SALMON v. WATSON* (1819), 4 Moore, C. P. 73.

*Annotation*:—*Mentd.* *Bates v. Townley* (1848), 12 Jur. 606.

*C. To be Put into Deliverable State.*

*See Sale of Goods Act, 1893 (c. 71), s. 18, r. 2.*

1206. *General rule.*—The principles applicable

to the sale of part of a ship are equally applicable to the sale of part of any *corpus manufactum* in course of construction. It is competent for parties to agree for a valuable consideration that a specific article shall be sold & become the property of the purchaser as soon as it has reached a certain stage; but it is a question of construction in each case at what stage the property shall pass; & a question of fact whether that stage has been reached. On the other hand, materials provided by the builders as portions of the fabrics, whether wholly or partially finished, cannot be regarded as appropriated to the contract, or as "sold," unless they have been "affixed," or in a reasonable sense made part of the corpus.

Where it appears to be the intention, or in other words the agreement, of the parties to a contract for building a ship, that at a particular stage of its construction, the vessel, so far as then finished, shall be appropriated to the contract of sale, the property of the vessel as soon as it has reached that stage of completion will pass to the purchaser, & subsequent additions made to the chattel thus vested in the purchaser will, *accessione*, become his property. It also appears to me . . . that such an intention or agreement ought . . . to be inferred from a provision in the contract to the effect that an instalment of the price shall be paid at a particular stage, coupled with the fact that the instalment has been duly paid, & that until the vessel reached that stage the execution of the work was regularly inspected by the purchaser, or some one on his behalf . . . in order to pass the property as sold, there must always be facts proved or admitted sufficient to warrant the inference that the purchaser has agreed to accept the corpus so far as completed as in part implement of the contract of sale (*LORD WATSON*).

A contract for a valuable consideration by which it is agreed that the property in a specific ascertained article shall pass from one to another is effectual according to the law of England to change the property. It may be that the party who has sold the article is entitled to retain possession till the price is paid if that was by the contract to precede delivery, but still the property is changed (*LORD BLACKBURN*).

In general, if there are things remaining to be done by the seller to the article before it is in the state in which it is to be finally delivered to the purchaser, the contract will not be construed to be one to pass the property till those things are done (*LORD BLACKBURN*).—*SEATH v. MOORE* (1886), 11 App. Cas. 350; 55 L. J. P. C. 54; 54 L. T. 690; 5 Asp. M. L. C. 586, II. L.

*Annotations*:—*Apld.* *Reid v. Macbeth & Gray*, [1904] A. C. 223; *Re Blyth Shipbuilding & Dry Docks Co., Forster v. Blyth Shipbuilding & Dry Docks Co.*, [1926] Ch. 494. *Refd.* *Sharp v. Christmas* (1892), 8 T. L. R. 687; *Badische Anilin und Soda Fabrik v. Hickson*, [1906] A. C. 419.

1207. *Whether passing of property suspended—Intention of parties.*—It depends on the intention of the parties whether the property in goods, to which something remains to be done before they are ready to be delivered, passes to a buyer at the time of the sale or on the completion of the goods. A., a brickmaker, who was in embarrassed circumstances, sold to B., to whom he was largely indebted, a large quantity of bricks. B. sent an agent to the brickfield with an order for the delivery of the bricks, & A.'s foreman told him

PART IV. SECT. 1, SUB-SECT. 5.—C.

1207 i. *Whether passing of property suspended—Intention of parties.*—*BANK OF UPPER CANADA v. KILLALY* (1861), 21 U. C. R. 9.—*CAN.*

1207 ii. —.]—*NEW BRUNSWICK RY. CO. v. McLEOD* (1877), 1 P. & B. 257; 5 S. C. R. 281.—*CAN.*

1207 iii. —.]—Where the vendor of a chattel has to do something before it is in a deliverable state,

the doing of that thing is a condition precedent to the vesting of the property, unless there are circumstances indicating a contrary intention.—*WILDE v. FEDIRKO*, [1920] 1 W. W. R. 866; 13 Sask. L. R. 190.—*CAN.*



he was ready to commence delivering them if a man who was in possession under a distress put in by the landlord was paid out, & he pointed out three clamps, one consisting of finished bricks, a second of bricks still burning, & a third of bricks moulded but not burnt, as those from which he should make the delivery. A. having become bkpt. the landlord sold some of the bricks, & B. sold the remainder to C., who removed them. In an action of trover by the assignees of A. against C. for the bricks:—*Held*: the conduct of A.'s foreman was a sufficient appropriation of the bricks, & the property in the whole of them, though unfinished, passed to B. at the time, such having been apparently the intention of the parties.—*YOUNG v. MATTHEWS* (1866), L. R. 2 C. P. 127; 36 L. J. C. P. 61; 15 L. T. 182.

**1208.** ————*]*—The owners of a horizontal condensing engine agreed to sell it at a price free on rail in London. It weighed 30 tons & was bolted to & embedded in a flooring of concrete. Before it could be delivered on rail it had to be detached & dismantled. The sellers detached it, but in loading it on a truck they damaged it by accident, so that the buyers refused to accept it. In an action by the sellers for goods bargained & sold:—*Held*: the property in the engine had not passed to defendants on the ground that the circumstances showed an intention that the property should not pass until the engine was placed in safety on rail in London.—*UNDERWOOD, LTD. v. BURGH CASTLE BRICK & CEMENT SYNDICATE*, [1922] 1 K. B. 343; 91 L. J. K. B. 355; 126 L. T. 401; 38 T. L. R. 44, C. A.

*See, also*, No. 1223, *post*.

**1209.** ————*Act remaining to be done by seller.*—*GILMOUR v. SUPPLE*, No. 1234, *post*.

**1210.** ————*Filling of casks.*—Where turpentine in casks was sold by auction at so much per hundredweight & the casks were to be taken at a certain marked quantity, except the two last, out of which the seller was to fill up the rest before they were delivered to the purchasers; on which account the two last casks were to be sold at uncertain quantities; & a deposit was to be paid by the buyers at the time of the sale, & the remainder within thirty days on the goods being delivered; & the buyers had the option of keeping the goods in the warehouse at the charge of the sellers for those thirty days, after which they were to pay the rent; & the buyers having employed the warehouseman of the seller as their agent, he filled up some of the casks out of the two last, but left the bungs out in order to enable the Custom House officer to gauge them; but before he could fill up the rest a fire consumed the whole in the warehouse within the thirty days:—*Held*: the property passed to the buyers in all the casks which were filled up, because nothing further remained to be done to them by the seller; for it was the business of the buyers to get them gauged, without which they could not have been removed; & the act of the warehouseman in leaving them unbunged after filling them up, which was for the purpose of the gauging, must be taken to have been done as agent for the buyers, whose concern the gauging was, but the property in the casks not filled up remained in the seller,

at whose risk they continued.—*RUGG v. MINETT* (1809), 11 East, 210; 103 E. R. 985.

*Annotations*:—*Consd.* Busk v. Davis (1814), 2 M. & S. 397. *Distd.* Tansley v. Turner (1835), 2 Scott, 238. *Apld.* Acraman v. Morrice (1849), 8 C. B. 449; Gilmour v. Supple (1858), 11 Moo. P. C. C. 552; Campbell v. Mersey Docks & Harbour Board (1863), 14 C. B. N. S. 412. *Consd.* Taylor v. Caldwell (1863), 3 B. & S. 826; Turley v. Bates (1863), 2 H. & C. 200. *Distd.* Young v. Matthews (1866), 36 L. J. C. P. 61. *Expld.* Appleby v. Meyers (1867), 36 L. J. C. P. 331. *Consd.* Elphick v. Barnes (1880), 5 C. P. D. 321. *Refd.* Simmons v. Swift (1826), 5 B. & C. 857; Gillett v. Hill (1834), 3 L. J. Ex. 145; Spartali v. Benecke (1850), 10 C. B. 212; Aldridge v. Johnson (1857), 7 E. & B. 885; Howell v. Coupland (1874), L. R. 9 Q. B. 462; Anderson v. Morice (1876), 1 App. Cas. 713.

**1211.** ————*Felling of timber.*—The contract was not for the growing trees, but for the timber at so much per foot, *i.e.* the produce of the trees when they should be cut down & severed from the freehold. . . . It seems to me that the true construction of the bargain is that it is a contract for the future sale of the timber when it should be in a state fit for delivery (BAYLEY, J.).—*SMITH v. SURMAN* (1829), 9 B. & C. 561; 4 Man. & Ry. K. B. 455; 7 L. J. O. S. K. B. 296; 109 E. R. 209.

*Annotations*:—*Consd.* Morton v. Tibbett (1850), 15 Q. B. 428; Marshall v. Green (1875), 1 C. P. D. 35. *Refd.* Wright v. Percival (1839), 8 L. J. Q. B. 258; Washbourn v. Burrows (1847), 1 Exch. 107; Haughton v. Morton (1855), 27 L. T. O. S. 36; Bailey v. Sweeting (1861), 30 L. J. C. P. 150; Wilkinson v. Evans (1866), L. R. 1 C. P. 407. *Mentd.* Fulmouth v. Thomas (1832), 1 Cr. & M. 89. *Shelton v. Livins* (1832), 2 Tyr. 420; *It. v. Hookworthby* (1837), 7 Ad. & El. 492; *Kodwell v. Phillips* (1842), 9 M. & W. 501.

**1212.** ————*'Settling up' of dismantled engine.*—*UNDERWOOD, LTD. v. BURGH CASTLE BRICK & CEMENT SYNDICATE*, No. 1208, *ante*.

**1213.** ————*Act neither essential nor obligatory*—*Weighing of specific goods in deliverable state.*—*SWANWICK v. SOTHERN*, No. 1061, *ante*.

**1214.** ————*Performance of act by buyer without seller's assent*—*Severance of tops & sidings of felled trees.*—A. contracted with B. to purchase of him the trunks of certain oak trees, then felled, & lying at Hadnock, about 20 miles from Chepstow. The course was, for A.'s agent to select & mark those portions which he intended to purchase, & for B. to sever the tops & sidings, & float the trunks down the river Wye to A.'s wharf at Chepstow, & there deliver them. After a portion of the timber had been delivered, & the whole paid for, B. became bkpt.; whereupon A. sent his men to B.'s premises at Hadnock, & severed & carried away the marked portions of certain trees:—*Held*: no property in the trees, or any portion of the trees, which had not been delivered by B., passed to A. by the contract; & there was no delivery or acceptance to satisfy Stat. Frauds; & the assignees of B. were entitled to recover the value, in trover.—*ACRAMAN v. MORRICE* (1849), 8 C. B. 449; 19 L. J. C. P. 57; 14 L. T. O. S. 292; 14 Jur. 69; 137 E. R. 584.

*Annotations*:—*Refd.* Reid v. Fairbanks (1853), 13 C. B. 692; Gilmour v. Supple (1858), 32 L. T. O. S. 1; Young v. Matthews (1866), L. R. 2 C. P. 127.

**1215.** ————*Payment of warehousing charges*—*Custom of trade.*—*HAMMOND v. ANDERSON*, No. 2074, *post*.

**1216.** ————*]*—*GREAVES v. HEPKE*, No. 1114, *ante*.

**1209 i.** ————*Act remaining to be done by seller.*—Where in an agreement for sale of a separator the vendor agreed to put it in running order:—*Held*: his failure to do so, the purchaser not having taken possession, entitled the purchaser to rescission of the contract & return of moneys paid.—*WILKIE v. FLEMING* (Sask.), [1919] 3 W. W. R.

569.—*CAN.*

**1209 ii.** ————*]*—An arrangement was made to buy certain furniture. It was to be polished by the vendor before delivery. A deposit was paid & subsequently the purchase-price was paid in full. Later, before any polishing was done & before delivery, a fire on

the vendor's premises destroyed the furniture:—*Held*: the property had not passed.—*McDILL v. HILSON*, [1920] 2 W. W. R. 877; 53 D. L. R. 228; 30 Man. L. R. 454.—*CAN.*

**1209 iii.** ————*]*—*BROWN v. CARRON CO.* (1898), 6 S. L. T. 231.—*SCOT.*



**Sect. 1.—Transfer of property from seller to buyer :  
Sub-sect. 5, C. & D.]**

**1217. — Payment of customs duties.]—**Sugars, which were in the King's warehouse under the locks of the King & the owner, from whence they could not be removed till the duties were paid, were advertised for sale by auction on Sept. 20; when samples of half a pound weight from each hogshead, drawn after the sugars had been weighed & the duties ascertained at the King's beam, were produced to the bidders assembled; & the auctioneer wrote down on the catalogue the name of the highest bidder, & the sum bid for the particular lots; having first informed the bidders that the duties were not then paid, but would be paid on the morrow by the seller; & after the biddings closed, the samples were delivered to & accepted by the purchaser, according to the usual practice at such sales, as part of his purchase to make up the quantity marked as weighed at the King's beam; & a fire having consumed the sugars on Sept. 22, before the duties could be paid, & without the default of the seller:—**Held:** at common law there was a sale to change the property at the time & place of auction; though the goods could not be delivered till the duties were paid, which was known at the time; such being the manifest intent of the contracting parties; & consequently, that the loss must fall upon the buyer.—**HINDE v. WHITEHOUSE** (1806), 7 East, 558; 3 Smith, K. B. 528; 103 E. R. 216.

**Annotations:—****Apld.** Carruthers v. Payne (1828), 5 Bing. 270. **Consd.** Turley v. Bates (1863), 2 H. & C. 200; Sweeting v. Turner (1871), L. R. 7 Q. B. 310. **Refd.** Emmerson v. Heelis (1809), 2 Taunt. 38; Dickenson v. Lilwall (1815), 1 Stark. 128; Kenworthy v. Schofield (1824), 2 B. & C. 945; Alexander v. Gardner (1835), 1 Bing N. C. 671; Spartali v. Benecke (1850), 10 C. B. 212; Pelree v. Corf (1874), L. R. 9 Q. B. 210. **Mentd.** North Staffordshire Ry. v. Peck (1860), L. B. & E. 986; Rossiter v. Miller (1878), 39 L. T. 173; Oliver v. Hunting (1890), 44 Ch. D. 205.

**1218. — Retention of warrants for purpose.]—****NORTH BRITISH INSURANCE CO. v. MOFFATT**, No. 1412, *post*.

**1219. — Act remaining to be done by buyer—Gauging of casks.]—****RUGG v. MINETT**, No. 1210, *ante*.

**1220. — Intention of parties.]—****TURLEY v. BATES**, No. 1223, *post*.

**D. Measuring or Testing to Ascertain Price.**

See Sale of Goods Act, 1893 (c. 71), s. 18, r. 3.

**1221. Meaning of "other act or thing"—Sale of timber at "per cube foot"—Length & girth of timber taken—Total cubic contents not calculated.]—**Where pltf. sold timber felled on land occupied by A., to B. at per cube foot, & the length & girth of the timber was taken, but the total cubic contents of all the trees were not calculated, & B. fetched away part of the trees & marked the remainder:—**Held:** (1) the delivery was complete, & nothing remained to be done on the part of the vendor; (2) the timber being on the land of A., the vendor had no right of lien upon that which remained for the price of the whole.—**TANSLEY v. TURNER** (1835), 2 Bing. N. C. 151; 1 Hodg. 267; 2 Scott, 238; 4 L. J. C. P. 272; 132 E. R. 60.

**1222. — Sale of whole flock of sheep at so much per head—Flock not counted.]—**... Suppose the owner of a flock of sheep were to offer to sell, & a purchaser agreed to buy, the whole flock at so much a head, the owner leaving it to his bailiff to count the sheep & ascertain the exact number of

the flock... the property would have passed to the purchaser (**LORD ALVERSTONE, C.J.**).—**R. v. TIDSWELL**, [1905] 2 K. B. 273; 74 L. J. K. B. 725; 93 L. T. 111; 69 J. P. 318; 21 T. L. R. 531; 21 Cox, C. C. 10, C. C. R.

**1223. Act remaining to be done must be done by seller—Not by buyer with seller's authority.]—**The rule "that where anything remains to be done to goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, & they are in the state in which they ought to be accepted," is not to be understood to include cases where all that remains to be done is to be done by the buyer with full authority from the seller, but only cases where something remains to be done by the seller.

The intention of the parties is to be looked at in every case, & the above rule does not apply where they have sufficiently shown whether they intended the property to pass or not.

Therefore, where A. agreed to sell & B. to buy a quantity of fire clay, at a certain price per ton, then stacked in a heap adjoining a pit belonging to A., & B. was to load the clay in his own carts, & weigh each load at a certain weighing-machine which his carts would pass on their way from A.'s pit to B.'s place of deposit, & B. having only carted away & paid for a portion of the clay, refused to take the remainder, in an action brought by A. to recover the price of the remainder of the heap not removed, the jury having found that the contract between the parties was for the sale of the whole heap:—**Held:** on this finding it was to be presumed to have been the intention of the parties that the property in the whole heap should pass, notwithstanding something remained to be done by the buyer, namely, the weighing of the clay by B., & A., the seller, was therefore entitled to recover the contract price of the whole heap.—**TURLEY v. BATES** (1863), 2 H. & C. 200; 3 New Rep. 478; 10 L. T. 35; 10 Jur. N. S. 368; 12 W. R. 438; 159 E. R. 83; *sub nom.* **FURLEY v. BATES**, 33 L. J. Ex. 43.

**Annotations:—****Apld.** Kershaw v. Ogden (1865), 3 H. & C. 717. **Refd.** Vanderberg v. Spooner (1866), 14 L. T. 701; Martineau v. Kitching (1872), L. R. 7 Q. B. 436.

**1224. Whether passing of property suspended—Omission to weigh—Weighing necessary to ascertain price.]—**Under a contract of sale, whereby the vendee agreed to purchase all the starch of the vendor, then lying at the warehouse of a third person, at so much per cwt. by bill at two months, which starch was in papers, but the exact weight not then ascertained, but was to be ascertained afterwards; & fourteen days were to be allowed for the delivery; & the vendor gave a note to the vendee, addressed to the warehouse keeper, directing him to weigh & deliver to the vendee all his starch:—**Held:** under this contract the absolute property in the goods did not vest in the vendee before the weighing, which was to precede the delivery, & to ascertain the price, & that part of the starch having been weighed & delivered to the vendee by his direction, the vendor might, notwithstanding such part delivery, upon the bkpcy. of the vendee, retain the remainder, which still continued unweighed in the warehouse in the name & at the expense of the vendor.—**HANSON v.**

**PART IV. SECT. 1, SUB-SECT. 5.—D.**

**1224 i. Whether passing of property suspended—Omission to weigh—Weighing necessary to ascertain price.]—****WOODBURN v. MOTHERWELL (ANDREW) LTD.**, [1917] S. C. 533; 54 So. L. R. 472.—**SCOT.**

MEYER (1805), 6 East, 614; 2 Smith, K. B. 670; 102 E. R. 1425.

**Annotations:—***Consd.* Hawes v. Watson (1824), 2 B. & C. 540; Simmons v. Swift (1826), 5 B. & C. 857; Gibson v. Caruthers (1841), 8 M. & W. 321; Gilmour v. Supple (1858), 11 Moo. P. C. 552. *Distd.* *Re* Chadwick, *Ex p.* Catling (1873), 29 L. T. 431. *Refd.* Rugg v. Minett (1809), 11 East, 210; Stoveld v. Hughes (1811), 14 East, 308; Bloxam v. Sanders (1825), 4 B. & C. 941; Boorman v. Nash (1829), 7 L. J. O. S. K. B. 150; Gillett v. Hill (1834), 3 L. J. Ex. 145; Tansley v. Turner (1835), 2 Scott, 238; Swanwick v. Sothorn (1839), 9 Ad. & El. 895; Acraman v. Morrice (1849), 8 C. B. 449; Campbell v. Mersey Docks & Harbour Board (1863), 14 C. B. N. S. 412; Turley v. Bates (1863), 2 H. & C. 200; *Re* Edwards, *Ex p.* Chalmers (1873), 8 Ch. App. 289. *Mentd.* Toft v. Stevenson (1848), 7 Hare, 1.

1225. ———. ———.]—WITHERS v. LYSS, No.

1373, *post*.  
1226. ———. ———.]—SIMMONS v. SWIFT, No.

1042,  
1227. ———. ———.]—STURGE v. HALL (1847),  
8 L. T. O. S. 122, 450.

1228. ———. ———.]—Defts. agreed by parol to purchase of pltf. four specific stacks of cotton waste at 1s. 9d. per pound. They sent their own packer with their sacks & their own carts to fetch it; their packer packed the waste into eighty-one sacks, twenty-one of which were weighed & then loaded on defts.' cart & taken to defts.' premises; the rest of the sacks were not weighed. On arrival of the twenty-one sacks at defts.' premises they refused to accept any portion of the waste, on the ground that it was of inferior quality:—*Held*: the property in the waste passed to defts., & there was sufficient evidence of an acceptance & receipt to satisfy Stat. Frauds.—*KERSHAW v. OGDEN* (1865), 3 H. & C. 717; 6 New Rep. 125; 34 L. J. Ex. 159; 12 L. T. 575; 11 Jur. N. S. 642; 13 W. R. 755; 159 E. R. 713.

1229. ———. ———.]—The fact that the price was to be finally determined by ascertaining the weight of the cargo is *prima facie* evidence of an interest remaining in them; but is not conclusive (*BRETT, J.*).—*ANDERSON v. MORICE* (1874), L. R. 10 C. P. 58; 44 L. J. C. P. 10; 31 L. T. 605; 23 W. R. 180; 2 Asp. M. L. C. 424; *on appeal* (1876), 1 App. Cas. 713, H. L.

**Annotations:—***Refd.* The Parchin, [1918] A. C. 157. *Mentd.* Pryce v. Monmouth Canal & Ry. Cos. (1879), 4 App. Cas. 197; Inglis v. Stock (1885), 10 App. Cas. 263; Colonial Insee. of New Zealand v. Adelaide Marine Insee. (1886), 12 App. Cas. 128; Ajum Goolam Nossou v. Union Marine Insee., Hajee Cassim Joosub v. Ajum Goolam Hossou, [1901] A. C. 362; Reliance Marine Insee. v. Duder, [1913] 1 K. B. 265.

1230. ———. ———.]—THE NAPOLI (1898), 15 T. L. R. 56.

1231. ———. **Weighing not necessary to ascertain price.**—*SWANWICK v. SOTHERN*, No. 1061, *ante*.

1232. ———. **Omission to count—Counting necessary to ascertain price.**—Goods sold remain at the risk of the seller while anything is to be done to them by him to ascertain the amount of the price. Therefore where 289 bales of skins, stated in the contract to contain 5 dozen in each bale, were sold at 57s. 6d. a dozen; & it was the duty of the seller to count over the skins to see how many each bale actually contained; but before any enumeration took place, the whole were consumed by fire:—*Held*: an action could not be maintained against the purchaser for the value of the skins & the loss fell entirely upon the seller.—*ZAGURY v. FURNELL* (1809), 2 Camp. 240; 170 E. R. 1142, N. P.

**Annotation:—***Refd.* Turley v. Bates (1863), 2 H. & C. 200.

1233. ———. **Omission to measure timber—**

1231 I. ———. **Weighing not necessary to ascertain price.**—When nothing remains to be done to the goods by the seller for the purpose of ascertain-

ing the price, then *prima facie* the property, in them passes although they have not been weighed by the buyer.

—*ABDUL AZIZ BEFARI v. JOGENDRA KRISHNA ROY* (1916), L. L. R. 44 Cal. 98; 20 C. W. N. 1224.—**IND.**

**Measurement necessary to ascertain price.**—*H. & co.*, of Montreal, entered into a written contract with L. & co., for the sale of a quantity of red pine timber, then lying above the Rapids, Ottawa River, stated to consist of 1,391 pieces, measuring 50,000 feet, more or less, to be deliverable at a certain boom at Quebec, on or before June 15, then next, & to be paid for by the purchasers' promissory notes of ninety days from that date, at the rate of 9½d. per foot, measured off: if the quantity turned out more than above stated, the surplus was to be paid for by the purchasers at 9½d. per foot, on delivery; & if it fell short, the difference was to be refunded by the sellers. The price of the 50,000 feet at the agreed rate, was paid by L. & co., according to the terms of the contract. The timber was not delivered on the day prescribed in the contract of sale, & when it arrived at Quebec, & before it was measured & delivered, the raft was broken up by a storm, whereby the greater part of the timber was dispersed & lost. L. & co., after the storm, collected such of the timber as could be saved, paid salvage for it, & applied the timber saved to their own use. In an action brought by L. & co. against H. & co., to recover the amount paid on their promissory notes, & for a breach of the contract, & for the difference between the contract price of 9½d. per foot & 10½d. per foot, the market price when the timber was to have been delivered:—*Held*: (1) the action was maintainable; (2) by the terms of the contract, until the measurement & delivery of the timber was made, the sale was not complete; & the transfer of the property was postponed until the measurement at the delivery; & the risk remained with the sellers; (3) the taking possession of a part of the timber by L. & co., after the day mentioned for the delivery thereof, in the contract, & not at the place, could not be considered as an acceptance of the whole; nor could it be considered as an admission, that the property in the timber passed to them before the storm which broke up the raft.—*LOGAN v. LE MESURIER* (1847), 6 Moo. P. C. C. 116; 11 Jur. [1091]; 13 E. R. 628, P. C.

**Annotations:—***As to* (2) *Consd.* Gilmour v. Supple (1858), 11 Moo. P. C. C. 552. *Refd.* Langton v. Higgins (1859), 4 H. & N. 402; Calcutta & Burmah Steam Navigation Co. v. De Mattos, De Mattos v. Calcutta & Burmah Steam Navigation Co. (1863), 2 New Rep. 575. *As to* (3) *Refd.* East India Co. v. Oultchem Paul (1849), 7 Moo. P. C. C. 85; Turley v. Bates (1863), 2 H. & C. 200. *Generally Refd.* Acraman v. Morrice (1849), 8 C. B. 449; Martineau v. Kitching (1872), L. R. 7 Q. B. 436.

1234. ———. **Measurement not necessary to ascertain price.**—(1) By the law of England, under a contract for sale of specific ascertained goods, the property immediately vests in the buyer, & a right to the price in the seller, unless it can be shown that such was not the intention of the parties. (2) If the seller is to do something to the goods sold, the property will not be changed until he has done it, or waived his right to do it.

*Resp.* entered into a contract in writing, for the sale to applt. of "a raft of timber now at Carouge, containing white & red pine, the quantity about 71,000 feet, to be delivered at Indian Cove Booms. Price for the whole 7½d. per foot. Payment, one-third cash, one-third sixty & ninety days after date." Shortly before the contract was signed, the raft had been measured by a public officer, called the Supervisor of Cullers, appointed under the Canadian Act, & the number of pieces of timber & the contents of each piece was set down

**Sect. 1.—Transfer of property from seller to buyer:**  
**Sub-sect. 5, D., E., F., G. & H. (a).]**

in a specification thereof, which made a total of 71,455 feet, & this specification was delivered by resp. before the execution of the contract, to applt., & sent by him to the place where the raft was to be delivered. The raft was towed to the Indian Cove Booms, the appointed place for delivery, where it arrived in the afternoon, & notice of its arrival given to the servants of applt. who assisted in fastening the raft outside the Booms. This was done at the instance of applt.'s servant, as, from the state of the tide, the raft could not be placed inside the Booms. During the night a storm arose, by which the raft was carried away, broken to pieces, & dispersed, & a great portion of it lost. Applt. employed his servants in collecting as much of the wood as was saved, & that was put into applt.'s Booms:—**Held:** as resp. had ascertained the price of the raft by the measurement previously made, the specification of which was in applt.'s possession, & as the contract did not show that any future measurement of the raft was necessary, no act then remained to be done by resp. or by applt., & the raft, upon delivery at the Indian Cove Booms, had wholly passed to applt., & the loss incurred must be borne by him.—**GILMOUR v. SUPPLE** (1858), 11 Moo. P. C. C. 551; 32 L. T. O. S. 1; 6 W. R. 445; 14 E. R. 803, P. C.

**Annotations:—As to (1) Reifd. Calcutta & Burmah Steam Navigation Co. v. De Mattos, De Mattos v. Calcutta & Burmah Steam Navigation Co. (1863), 2 New Rep. 375. As to (2) Reifd. Turley v. Bates (1863), 2 H. & C. 200; Anderson v. Morice (1876), 1 App. Cas. 713.**

**1235. — Omission to weigh, measure or test—Intention of parties.]—TURLEY v. BATES, No. 1223, ante.**

**1236. — Payment of agreed approximate price—Intention of parties.]—LOGAN v. LE MESURIER, No. 1233, ante.**

**1237. — — — —.]—MARTINEAU v. KITCHING, No. 1417, post.**

**E. Attached to Land and Severable by Buyer.**

**1238. General rule—Property passes on severance by buyer.]—JONES (JAMES) & SONS, LTD. v. TANKERVILLE (EARL), No. 2657, post.**

**1239. — — — —.]—By a contract dated Sept. 10, 1920, the vendors agreed to sell & the purchasers to purchase all the merchantable timber growing on Aug. 20, 1920, in the forest of Lühde in the Republic of Latvia. Merchantable timber was therein defined to be "all trunks & branches of trees but not seedlings & young trees of less than 6 inches in diameter at a height of 4 feet from the ground." The timber was to be cut not more than 12 inches from the ground. The purchasers were to have fifteen years in which to cut the timber, & were to have the use of the vendors' saw mills, plant & huts, & the right to occupy every part of the forest. The price was £225,000 & the payments were to be made £15,000 on each of the three quarter days in the year, & for the fourth quarter a sum equal to £4 a standard of exportable timber cut in the forest during the year, less £45,000, the three previous instalments. The amount was to be certified by the authorised agents of the vendors & purchasers, the measurements having been**

agreed by them. The purchasers, unless prevented by some Act or enactment of the govt. of the country, or by *force majeure*, were to cut the timber at the rate of 15,000 standards *per annum*, & if they were so prevented, the fifteen years' period was to receive a corresponding extension of time. During the period of prevention the £15,000 instalments of price were to be reduced to £4 a standard of timber cut, carried away & sold or exported during the quarter. On Sept. 16 the Latvian Assembly passed an agrarian law, by which from Oct 1, 1920, the forest became the property of the Latvian State & the contract was annulled & all property & rights of vendors & purchasers in the forest were confiscated. For the last five & a half years, therefore, it had been illegal to perform the contract in the place where alone it could be performed & the obstacle to its performance was continuing. The purchasers had paid £30,000 to the vendors covering the first six months, & no question, therefore, arose that a default of payment of sums due had made the whole price payable:—**Held:** the contract was not a contract for the sale of specific goods in a deliverable state within the meaning of Sale of Goods Act, 1893 (c. 71), s. 18, r. 1; the goods in question were neither identified nor agreed upon; it was not every tree in the forest which passed, but only those complying with certain measurements not then made; the timber was not in a deliverable state until the purchasers had severed it & they could not under the definition in the rule be bound to take delivery of an undetermined part of a tree not yet identified, & accordingly the property in the timber had not passed under Sale of Goods Act, 1893 (c. 71), s. 18, r. 1, & therefore the timber was not at the risk of the purchasers.—**KURSELL v. TIMBER OPERATORS & CONTRACTORS, [1927] 1 K. B. 298; 95 L. J. K. B. 569; 135 L. T. 223; 42 T. L. R. 435, C. A.**

**1240. Validity of instrument purporting to pass property.]—A paper, signed by defts., stated that plffs. agreed to sell to defts. all the two upper veins or beds of coal, describing them by their name & locality, containing by admeasurement 16 acres, at the price or sum of £77 per acre, to be paid for as follows: the sum of £100 on the day of the date thereof, & the remainder by equal quarterly payments of £25 each: & it was stipulated that, if defts. should work more coal than in any year should exceed £100, at the rate of £77 per acre, they should pay for such excess:—**Held:** the instrument did not require an *ad valorem* stamp, as upon a conveyance, under Stamp Act, 1815 (c. 184), & a stamp of 35s. was sufficient.**

I am of opinion that the instrument in question does not come within the clause in the Stamp Act that has been referred to, inasmuch as it passed no interest in the coals (**PARKE, B.**).—**PHILLIPS v. MORRISON (1844), 12 M. & W. 740; 13 L. J. Ex. 212; 3 L. T. O. S. 39; 8 Jur. 343; 152 E. R. 1397.**

**Annotation:—Mentd. A.-G. v. Smith-Marriott, [1899] 2 Q. B. 595.**

**1241. Interest of buyer before severance.]—JONES (JAMES) & SONS, LTD. v. TANKERVILLE (EARL), No. 2657, post.**

**1242. — Whether interest in land.]—(1) A sale of growing timber to be taken away as soon as possible by the purchaser is not a contract or**

**1235 i. — Omission to weigh, measure or test—Intention of parties.]—SILLARS & CAIRNS v. TALBOT (1874), 6 Nfld. L. R. 21.—NFLD.**

**k. Agreement between parties as to re-taring of goods—Liability of purchaser for additional weight so ascer-**

**tained.]—BROWN v. SHAW (1877), 1 A. L. 293.—CAN.**

**l. Exact quantity not ascertained—Amount governed by estimate in contract.]—DOERING v. TSCHRIFFTER (1920), 54 D. L. R. 506.—CAN.**

**m. — Effect of conduct of par-**

**ties.]—MCDONALD v. JANKOSI (1921), 59 D. L. R. 697.—CAN.**

**PART IV. SECT. 1, SUB-SECT. 5.—E.**

**1238 i. General rule—Property passes on severance by buyer.]—MCGREGOR v. MCNEIL (1882), 32 C. P. 538.—CAN.**

sale of land or any interest therein, within Stat. Frauds, s. 4.

(2) Deft. by word of mouth purchased certain growing trees for £28 of pltf. on the terms that he, deft., should remove them as soon as possible. Deft. accordingly cut down some of the trees & agreed to sell the tops & stumps to a third person. Pltf. then countermanded the sale & prohibited deft. from cutting down the rest of the trees. Deft., however, cut down the remainder, & carried the whole away:—*Held*: the case was within Stat. Frauds, s. 17, & before the sale was countermanded there was an acceptance & actual receipt of part of the goods sold within that sect.—*MARSHALL v. GREEN* (1875), 1 C. P. D. 35; 45 L. J. Q. B. 153; 33 L. T. 404; 24 W. R. 175.

*Annotations*:—*As to (1) Distd.* *Lavery v. Pursell* (1888), 39 Ch. D. 508. *Refd.* *Jarvis v. Jarvis* (1893), 63 L. J. Ch. 10; *Kauri Timber Co. v. Taxes Comr.*, [1913] A. C. 771. *As to (2) Consd.* *Jones v. Tankerville*, [1909] 2 Ch. 440. *Generally Refd.* *Stephenson v. Thompson*, [1924] 2 K. B. 240.

1243. ———.]—In a counterclaim by purchasers against a vendor it appeared that the vendor was the lessee of certain land part of which was composed of slag & cinders. On adjoining lands occupied by other persons were two disused cinder tips. The vendor had obtained from these persons licences to remove from the tips slag & cinders adhering to & forming part of their lands. He then agreed with the purchasers to sell to them all the slag on the demised premises & from the tips on the land adjoining, or so much thereof as the purchasers should desire to remove, & for that purpose to give the purchasers access to the demised premises & the cinder tips on the adjoining lands. After certain slag had been removed by the purchasers & sold at a profit the lessor & licensors of the vendor intervened & prevented the further removal of slag by the purchasers:—*Held*: the agreement was a contract to grant an interest in land, & as the vendor's failure to perform his contract was due solely to a defect in his title, the purchasers could not recover any damages for the loss of their bargain.—*MORGAN v. RUSSELL & SONS*, [1909] 1 K. B. 357; 78 L. J. K. B. 187; 100 L. T. 118; 25 T. L. R. 120; 53 Sol. Jo. 136, D. C.

*See, also*, Part I., Sect. 2, sub-sect. 1, *ante*, & MINES, MINERALS & QUARRIES, Vol. XXXIV., pp. 695, 696.

#### F. Anticipation of Instalment Payments.

1244. **Rights of buyer.**—N. hired from L. 20 waggons for five years at a rent of £285, & 24 for three years at a rent of £249. The terms were that on payment of the yearly sums, the property should vest in N., & till the full payment the waggons should be the property of L. After paying two years' rent for the 24 waggons, N. paid the third year's rent, stating it to be in full for the 24 waggons. The rent of the 20 waggons still remained in arrear:—*Held*: the contract was severable for each lot of 20 & 24 waggons; N. had a right to anticipate payment in full; & L. had no right to treat the last payment as a payment to account for the whole waggons.—*LANCASHIRE WAGGON CO., LTD. v. NUTTALL* (1879), 42 L. T. 465; 44 J. P. 536, C. A.

1245. **Rights of seller—Appropriation of tendered price to price of other goods.**—*LANCASHIRE WAGGON CO., LTD. v. NUTTALL*, No. 1244, *ante*.

#### G. Option to turn Agreement into Sale.

1246. **Exercise of option—Agreement to "let or lend"**—Article to be purchased if damaged.]—Pltf. agreed to let, or lend, deft. a musical snuff

box, on the understanding that if it were damaged deft. was to have it & pay for it; & £3 10s was to be taken as its value. Deft. received the box accordingly, & it was damaged while in his possession:—*Held*: pltf. was entitled to maintain an action for goods sold & delivered to recover the £3 10s.—*BIANCHI v. NASH* (1830), 1 M. & W. 545; Tyr. & Gr. 916; 5 L. J. Ex. 252.

*Annotations*:—*Apld.* *Beverley v. Lincoln Gas Light & Coke Co.* (1837), 6 Ad. & El. 829. *Distd.* *Iley v. Frankenstein* (1844), 8 Scott, N. R. 839.

1247. ———. **Option to resume possession or sue for price.**—A. agreed to build an organ for B. & to fix it in the parish church of C. for £768, to be paid by certain yearly instalments. The agreement then provided that "in the event of the organ being completed & erected as aforesaid & the sum of £768, or any part thereof not being paid at the time or times thereinbefore mentioned then it was thereby declared & agreed that the whole sum or balance, with the interest then due thereon, should become due & payable to W., & might be sued for & recovered accordingly; & in the meantime & until the balance & interest should be paid & discharged, W. should have a lien on the organ; & in default of any or either of such payments as aforesaid at the time or times thereinbefore mentioned, W. might either dispose of or remove the organ as he might think proper":—*Held*: property in the organ remained in A. until the instalments were paid.—*WALKER v. CLYDE & WREN* (1861), 10 C. B. N. S. 381; 142 E. R. 500.

1248. ———.]—*McENTIRE v. CROSSLEY BROTHERS*, No. 1033, *ante*.

*As to hire purchase, see BAILMENT*, Vol. III., pp. 92 *et seq.*, & *BILLS OF SALE*, Vol. VII., pp. 15–18.

#### H. Delivery on Approval, or on Sale and Return, or Similar Terms.

##### (a) In General.

*See Sale of Goods Act*, 1893 (c. 71), s. 18 (4).

1249. **Position of party obtaining goods "on sale or return"**—Right to maintain trespass.]—A shopkeeper may maintain trespass for taking goods sent to him on sale or return.—*COLWILL v. REEVES* (1811), 2 Camp. 575; 170 E. R. 1257.

1250. ———. **Right to recover deposit or return of goods.**—A. bought horses of B., paying £80, with liberty to return them within a month, allowing B. £10 out of the £80, & with a stipulation that, if he kept them beyond the month, he should pay B. £10 above the £80. In an action for money had & received:—*Held*: A. on returning the horses within a month, might recover the £70.—*HURST v. ORBELL* (1838), 8 Ad. & El. 107; 3 Nev. & P. K. B. 237; 1 Will. Woll. & H. 157; 7 L. J. Q. B. 138; 2 Jur. 810; 112 E. R. 776.

1251. ———. **Application of Sale of Goods Act, 1893 (c. 71), s. 25.**—A person who obtains goods "on sale or return" is not in possession of the goods under an agreement to buy them within above sect.

On Oct. 2, 1909, pltf. delivered to M. a necklace on sale or return; but it was the intention of both parties to that transaction that the property should not pass except on payment of cash by M. on or before Oct. 18. On Oct. 13 M. pledged the necklace with deft. In an action by pltf. to recover the necklace from deft.:—*Held*: the property in the necklace did not pass under above Act, s. 18, r. 4, when M. pledged it to deft.—*EDWARDS (PERCY), LTD. v. VAUGHAN* (1910), 26 T. L. R. 545, C. A.

**Hire-purchase agreement.**—*See BAILMENT*, Vol. III., pp. 92–94, Nos. 241–247.

*Sect. 1.—Transfer of property from seller to buyer :  
Sub-sect. 5, H. (a) & (b).]*

**1252. Position of party sending goods "on sale or return"—Irrevocable offer to sell.**—Where a person who has received goods on sale or return pledges them he thereby does an act adopting the transaction within Sale of Goods Act, 1893 (c. 71), s. 18, r. 4 (a), so that the property in the goods passes to him, & the original vendor cannot recover them from the person with whom they have been pledged.

In the absence of other terms the contract does not pass the property in the goods directly it is made. The person who has received them may return them, but the person who has entrusted them to another cannot demand their return, & his only remedy is to sue for their price or value. . . .

There must be some act which shows that he [the purchaser] adopts the transaction; but any act which is consistent only with his being the purchaser is sufficient. The act done by W., who was a possible purchaser under this contract, was that he pawned the goods. . . . He ought not to have done this unless he meant to treat himself as purchaser, & by so doing it he made himself purchaser (LORD ESHER, M.R.).—KIRKHAM v. ATTENBOROUGH, KIRKHAM v. GILL, [1897] 1 Q. B. 201; 66 L. J. Q. B. 149; 75 L. T. 543; 45 W. R. 213; 13 T. L. R. 131; 41 Sol. Jo. 141, C. A.

*Annotations:*—**Consd.** Welner v. Gill, Welner v. Smith, [1906] 2 K. B. 574; Janesich v. Attenborough (1910), 102 L. T. 605; Bradley & Cohn v. Ramsay (1912), 106 L. T. 771. **Apld.** Genn v. Winkel (1912), 107 L. T. 434. **Refd.** Kempler v. Bravingtons (1925), 133 L. T. 680.

**1253. When property passes—On adoption of transaction.**—SWAIN v. SHEPHERD (1832), 1 Mood. & R. 223, N. P.

*Annotations:*—**Apld.** Coats v. Chaplin (1812), 3 Q. B. 483. **Refd.** Coombs v. Bristol & Exeter Ry. (1858), 3 H. & N. 510.

**1254. — Calculation of time for return of goods—From time of receipt of goods.**—Where goods were sent by a manufacturer to an agent on sale or return for six months:—**Held:** the six months must be reckoned from the time the agent received the goods.—JACOBS v. HARBACH (1886), 2 T. L. R. 419.

See BANKRUPTCY, Vol. V., pp. 758, 798, 805, Nos. 6527, 6820, 6880.

(b) *What Amounts to.*

See Sale of Goods Act, 1893 (c. 71), s. 18, r. 4.

**1255. Option in bailee—To reject goods if not required—Trade custom.**—NEATE v. BALL, No. 1908, *post*.

**1256. — To reject goods if not approved.**—Pltf., on Monday, Mar. 13, 1871, bought a horse of deft., warranted to have been hunted with the Bicester hounds. By a condition of the contract he was to be at liberty to return the horse if it did not answer its description up to the Wednesday evening following the sale. Previous to removing it from deft.'s premises he was told by the groom

who had charge of it, but who was not in deft.'s employment, that it had not, nor had it, in fact, been hunted with the Bicester hounds. Pltf., nevertheless, took the horse away. Whilst it was in his possession, though not through any neglect or default on his part, it met with an accident which depreciated its value. He returned it before the Wednesday evening, & brought an action to recover the price he had paid for it:—**Held:** (1) pltf.'s conduct in removing the horse after the information given him by the groom did not deprive him of his right under the contract to return the horse; (2) his right to return it was unaffected by an accident having happened to it whilst it was in his possession, without neglect or default on his part.—HEAD v. TATTERSALL (1871), L. R. 7 Exch. 7; 41 L. J. Ex. 4; 25 L. T. 631; 20 W. R. 115.

*Annotations:*—**As to** (2) **Consd.** Elphick v. Barnes (1880), 5 C. P. D. 321. **Generally, Refd.** Chapman v. Withers (1887), 4 T. L. R. 132.

**1257. Option in bailor—To treat goods delivered as sold.**—A. sells beer to B. in casks, giving him notice that unless he returns the casks in a fortnight, he will be considered as the purchaser; B. does not return them within a fortnight; A. cannot maintain an action for goods sold & delivered, the whole resting in special agreement.—LYONS v. BARNES (1817), 2 Stark. 39; 171 E. R. 565, N. P.

*Annotations:*—**Dbtd.** Bianchi v. Nash (1836), 1 M. & W. 545. **Refd.** Johnson v. Kirkaldy (1840), 4 Jur. 988; Moss v. Sweet (1851), 16 Q. B. 493.

**1258. — — — — —**—Pltfs., brewers in Dublin, supplied a customer in Wales with porter in casks on the terms that the empty casks were to be returned to Dublin, at his expense & risk, within six months from the date of the contract, or paid for at invoice prices, at the option of the shippers:—**Held:** as soon as the casks were empty, the vendee of the porter was a mere bailee of the casks during pleasure, & the vendors had such an immediate right of possession as entitled them to maintain trover against a sheriff who wrongfully took them in execution.—MANDERS v. WILLIAMS (1849), 4 Exch. 339; 18 L. J. Ex. 437; 13 L. T. O. S. 325; 154 E. R. 1242.

*Annotation:*—**Apld.** Jelks v. Hayward, [1905] 2 K. B. 460.

**1259. — — — — —**—R. was an agent for precious stones, & carried on business in London, & pltf. had, two years previously, done business with R. As the result of an arrangement made, pltf. delivered to R. the three parcels of diamonds, the subject of the action, subject to the terms of a sale or return note which (*inter alia*) provided as follows: "Mr. S. Ronchi—On sale or return from A. Kempler. . . . I reserve the right to charge any of the undermentioned goods which shall not have been returned within seven days. The goods specified above remain my property until charged by me, you in the meantime being responsible for loss or damage. All uninvoiced goods are to be returned on demand." It was alleged that R.

PART IV. SECT. 1, SUB-SECT. 5.—  
H. (a).

**1253 i. When property passes—On adoption of transaction.**—LONGLEY v. KAHNERT (1905), 36 S. C. R. 397.—CAN.

**1253 ii. — — — — —**—**Resp.** a stamp merchant, mailed from L. to aplt. stamps in several instalments. The stamps, *resp.* alleged were sent on approval & thereby became the property of aplt. & aplt. having failed to return same, was liable for the price. The stamps had been stolen

from aplt.'s premises:—**Held:** aplt. had a reasonable time within which to examine the stamps & make known his intentions respecting them & it was during this time the stamps were stolen, & the loss must be supported by *resp.* who always remained owner of the stamps.—LAURIN v. GINN (1908), 5 E. L. R. 335.—CAN.

**1253 iii. — — — — —**—**AMERICAN-ABELL Co. v. TOUROND (Man.)** (1910), 10 W. L. R. 413.—CAN.

**1253 iv. — — — — —**—**ELLIS v. STERN-BERG'S TRUSTEE**, [1925] 4 D. L. R. 733; 5 C. B. R. 608.—CAN.

PART IV. SECT. 1, SUB-SECT. 5.—  
H. (b).

**1256 i. Option in bailee—To reject goods if not approved.**—BROWNS-BERGER v. HARVEY (1909), 12 W. L. R. 596.—CAN.

**1256 ii. — — — — —**—**LONG v. SMITH** (1911), 18 O. W. R. 88; 2 O. W. N. 631; 23 O. L. R. 121.—CAN.

**1256 iii. — — — — —**—**WATERLOO ENGINE WORKS Co. v. KELLER** (1912), 20 W. L. R. 82; 1 W. W. R. 602.—CAN.

**1256 iv. — — — — —**—**BELL v. ROBERTSON (P. E. I.)** (1913), 12 E. L. R. 414.—CAN.



took the diamonds on the same day as he received them & sold two parcels of them to defts. The two parcels were valued at £1,130 but R. sold them to defts. for £688 in cash, but never accounted to pltf. for the proceeds. R. was subsequently prosecuted for the theft of these diamonds & other frauds. He pleaded guilty & was sentenced to penal servitude. On the day after R. received the diamonds pltf. asked him for the return of the diamonds or his money, & pltf. afterwards wrote to R. demanding the return of the diamonds:—*Held*: in the present case the property in the diamonds did not pass to defts., & pltf. was entitled to recover the diamonds or their value.—*KEMPLE v. BRAYINGTONS, LTD.* (1925), 133 L. T. 680; 41 T. L. R. 519; 69 Sol. Jo. 639, C. A.

*Annotation*:—*Reid*. *Lake v. Simmons* (1926), 95 L. J. K. B. 586.

**1260. Consignment to agent.**—T. & co. were in the habit of sending goods for sale to N., who was a partner in the firm of N. & co., but received these goods on his private account. The course of dealing between T. & co. & N. was that the goods were accompanied by a price list. N. sold the goods on what terms he pleased, & each month sent to T. & co. an account of the goods he had sold, debiting himself with the prices named for them in the price list, & at the expiration of another month he paid the amount in cash, without any regard to the prices at which he had sold the goods, or the length of credit he had given. He paid the moneys which he had received from the sales into the general account of his firm, & made his payments to T. & co. through his firm, with whom he kept an account of moneys paid in & drawn out by him in respect of moneys unconnected with the partnership, which account included many items wholly unconnected with the goods of T. & co. N. & co. having executed a deed of arrangement with their creditors, T. & co. sought to prove against the joint estate for the amount standing to N.'s credit with his firm, on the ground that the same arose from moneys belonging to T. & co., & improperly placed by N. in the hands of his firm:—*Held*: such proof could not be admitted, for the course of dealing showed that although both parties might look upon the business as an agency, N. did not in fact sell the goods as agent of T. & co., but on his own account, upon the terms of his paying T. & co. for them at a fixed rate if he sold them, & the moneys he received for them were therefore his own moneys, which T. & co. had no right to follow.—*Re NEVILL, Ex p. WHITE* (1871), 6 Ch. App. 397; 40 L. J. Bcy. 73; 24 L. T. 45; 19 W. R. 488, L. J.J.; *on appeal, sub nom. TOWLE & Co. v. WHITE* (1873), 21 W. R. 465, H. L.

*Annotations*:—*Reid*. *Re Smith, Ex p. Bright* (1879), 10 Ch. D. 566; *Re Watson, Ex p. Atkins*, [1904] 2 K. B. 753; *Gabriel v. Churchill & Sim*, [1914] 1 K. B. 449. *Mentd.* *Re Cheesbrough, Ex p. Blackburn* (1871), L. R. 12 Eq. 358.

**1261.** —[—]—Goods were consigned by manufacturers under an agreement which, in the opinion of the ct., made the consignees, not purchasers of the goods, but agents of the manufacturers for their sale. The agents described themselves, upon a brass plate which was affixed at their place of business, & also upon the invoices which they used, as “merchants & manufacturers’ agents.” They acted as agents in the same way for several other manufacturers:—*Held*: the creditors of the agents had notice of the agency sufficient to exclude the operation of the reputed ownership clause, & the trustee in their liquidation was ordered to deliver up to the manufacturers goods of theirs which were in the possession of the agents, in specie, at the commencement of their

liquidation, & to pay over to the manufacturers the proceeds of the sale of their goods which had been sold.—*Re SMITH, Ex p. BRIGHT* (1879), 10 Ch. D. 566; 48 L. J. Bcy. 81; 39 L. T. 649; 27 W. R. 385, C. A.

*Annotations*:—*Reid*. *Re Watson, Ex p. Atkins*, [1904] 2 K. B. 753. *Mentd.* *Lamb v. Wright*, [1924] 1 K. B. 857.

**1262.** —[—]—Pltf., a manufacturing jeweller, was accustomed to send articles of jewellery to F., a retail jeweller, for sale on the terms of a letter written by F. to pltf., in which F., after acknowledging that he had had from pltf. “on sale or return” the goods entered up to date in a book in the possession of pltf., & that he was liable to account to pltf. for such goods, continued: “The goods referred to in that book mentioned are your property, & to remain so until sold or paid for, they being only left with me for the purpose of sale or return, & not be kept as my own stock. The goods I receive from you are to be entered at cost price, & my remuneration for selling them is agreed at one half the profit”:—*Held*: upon the construction of the letter as a whole F. was employed as agent for sale; that he was a mercantile agent within Factors Act, 1889 (c. 45), & as such had implied authority to pledge the goods entrusted to him, consequently pltf. could not recover goods pledged by F. with deft. without express authority from pltf.—*WEINER v. HARRIS*, [1910] 1 K. B. 285; 79 L. J. K. B. 342; 101 L. T. 647; 26 T. L. R. 96; 54 Sol. Jo. 81; 15 Com. Cas. 39, C. A.

*Annotations*:—*Appl.* *Janesich v. Attenborough* (1910), 102 L. T. 605. *Distd.* *Kempler v. Bravingtons* (1925), 133 L. T. 680. *Reid*. *Lowther v. Harris*, [1927] 1 K. B. 393. *Mentd.* *Re Jane, Ex p. Trustee* (1913), 109 L. T. 908.

**1263. Sale “for cash only”**—Or on debit by bailor.—Pltf., a manufacturing jeweller, delivered jewellery to H., a retail jeweller, on the terms of a memorandum headed “On approbation. On sale for cash only or return. Goods had on approbation or on sale or return remain the property of W. (pltf.), until such goods are settled for or charged.” H., being informed by L. that he had a customer who might buy the goods, delivered them to L. upon the terms of his paying cash or returning them in a few days. L. had no customer, & fraudulently pledged the goods with deft., a pawnbroker. In an action to recover the goods from deft.:—*Held*: the goods were not delivered to H. “on approval, or on sale or return or other similar terms” within Sale of Goods Act, 1893 (c. 71), s. 18, r. 4; the terms of the memorandum showed that the intention of pltf. & H. was that the property in the goods should not pass to H. until he paid for them or was debited with the price by pltf.; consequently the property in the goods had not passed out of pltf., & he was entitled to recover from deft.

If he deals with the goods in a way which in ordinary circumstances & apart from any special terms in the contract is inconsistent with his right to return them, as, for example, by selling or pledging them, he loses the right to return them & the property in the goods passes to him (*LORD ALVERSTONE, C.J.*).—*WEINER v. GILL, WEINER v. SMITH*, [1906] 2 K. B. 574; 75 L. J. K. B. 916; 95 L. T. 438; 22 T. L. R. 699; 50 Sol. Jo. 632; 11 Com. Cas. 240, C. A.

*Annotations*:—*Folld.* *Edwards v. Vaughan* (1910), 26 T. L. R. 545. *Consd.* *Truman v. Attenborough* (1910), 103 L. T. 218. *Distd.* *Weiner v. Harris*, [1910] 1 K. B. 285; *Whitehorn v. Davison*, [1911] 1 K. B. 463. *Folld.* *Kempler v. Bravingtons* (1925), 133 L. T. 680. *Reid.* *Janesich v. Attenborough* (1910), 102 L. T. 605.

**1264.** —[—]—*EDWARDS (PERCY), LTD. v. VAUGHAN*, No. 1251, *ante*.



*Sect. 1.—Transfer of property from seller to buyer :  
Sub-sect. 5, H. (b), (c) & (d).]*

**1265. *Salé on "invoice."***—On Nov. 18, 1909, pltf's., manufacturing jewellers, delivered a pearl necklace to B., a pearl & diamond dealer, on the terms of a memorandum which recited that he received the article "on appro" & that "these goods remain the property of W. Truman, Ltd. (ptf's.) until invoiced by them." It was verbally arranged between pltf's. & B. that the necklace should be paid for in cash, & that no credit should be given. On the same day B. fraudulently pawned the necklace with deft., who acted in good faith, & without notice of any fraud on the part of B. On Dec. 17, B. falsely represented to pltf's. that he had obtained a customer for the necklace, who would only pay on terms of credit, & pltf's., agreeing to accept payment by bills, thereupon invoiced the necklace to B. On Jan. 17, 1910, pltf's. delivered a diamond necklace to B. on the terms of a note similar to that given on the previous occasion, & on the same day B. pawned it, with other articles on the terms of a deposit note which provided that the necklace, & other articles, should be held by deft. as security for the payment of £550, "to be also a further charge on all securities now held or which may be held" by deft. In an action to recover the goods from deft. :—*Held* : on Jan. 17 deft. acquired a valid charge on the pearl necklace, as the property had passed to B. when it was invoiced to him on Dec. 18 & the contract had not been avoided by pltf's.—*TRUMAN v. ATTENBOROUGH* (1910), 103 L. T. 218; 26 T. L. R. 601; 54 Sol. Jo. 682.

**Hire purchase.**—*See* *PAIEMENT*, Vol. III., pp. 92–98.

(c) *Acts Adopting Transaction.*

**1266. What amounts to—Any act consistent only with purchase.**—*KIRKHAM v. ATTENBOROUGH, KIRKHAM v. GILL*, No. 1252, *ante*.

**1267.** ————*—*—Under the statutory [Sale of Goods Act, 1893 (c. 71), s. 18, r. 4] terms an option is given by the seller to the intending purchaser to buy the goods on credit. He can elect to buy, or, as the statute says, can adopt the transaction in three ways—by signifying his approval or acceptance to the seller or by paying the price; by doing some act indicating that he elects to be purchaser, or inconsistent with his being other than the purchaser; by retaining the goods beyond the stipulated time, or, if no time is stipulated, beyond a reasonable time (*BRAY, J.*).—*WEINER v. GILL, SAME v. SMITH*, [1905] 2 K. B. 172; 74 L. J. K. B. 845; 92 L. T. 843; 53 W. R. 553; 21 T. L. R. 478; 10 Com. Cas. 213; *on appeal*, [1906] 2 K. B. 574, C. A.

*Annotations.*—*Apld.* *Edwards v. Vaughan* (1910), 26 T. L. R. 545. *Consd.* *Truman v. Attenborough* (1910), 103 L. T. 218; *Weiner v. Harris*, (1910) 1 K. B. 285. *Apld.* *Kempler v. Bravingtons* (1925), 133 L. T. 680. *Refd.* *Whitehorn v. Davison*, (1911) 1 K. B. 463. *Mentd.* *Janesch v. Attenborough* (1910), 102 L. T. 605.

**1268. ———— *Payment.***—Let us consider . . . what is the position of a man who has goods sent to him on sale or return. He receives the goods from the true owner with an option of becoming the owner, which can be exercised in one of three ways—by buying the goods at the price named by the vendor; by selling the goods to some one else, which is taken to be a declaration of his option; or by keeping them so long that it would be unreasonable that he should return them. If he sells or attempts to sell the goods, he does not do so as owner, but as having the option of taking them if he sells them (*JESSEL, M.R.*).—*Re*

*FLORENCE, Ex p. WINGFIELD* (1879), 10 Ch. D. 591; 40 L. T. 15; 27 W. R. 246, C. A.

*Annotations.*—*Refd.* *Re Watson, Ex p. Atkin*, [1904] 2 K. B. 753; *Janesch v. Attenborough* (1910), 102 L. T. 605; *Lamb v. Wright*, [1924] 1 K. B. 857. *Mentd.* *Re Crumlin Viaduct Works Co.* (1879), 11 Ch. D. 755.

**1269.** ————*—*—*WEINER v. GILL, SAME v. SMITH*, No. 1267, *ante*.

**1270. ———— *Failure to return goods—Within reasonable time.***—Goods bought on liking must be returned in a convenient time.—*BURCH v. SCORY* (1699), 12 Mod. Rep. 309; 88 E. R. 1341, P. N.

**1271. ———— *—***—*—*—If goods are delivered on the terms of sale or return, & the person receiving them does not return them in a reasonable time, the value of them may be recovered in an action for goods sold & delivered.—*BAILEY v. GOULDSMITH* (1791), Peake, 78; 170 E. R. 85, N. P.

*Annotations.*—*Folld.* *Beverley v. Lincoln Gas Light & Coke Co.* (1837), 6 Ad. & El. 829; *Moss v. Sweet* (1851), 16 Q. B. 493. *Refd.* *Blanchi v. Nash* (1836), 1 M. & W. 545.

**1272. ———— *—***—*—*—Goods were sent from London to Sunderland, upon sale or return, & a letter inclosing an invoice requested the buyer to return such of them as were not approved by him in as short a time as possible. The goods arrived at the shop of the buyer on the evening of Nov. 13, & on the following day he committed an act of bkpey. In an action of trover, brought by the seller against the assignees to recover these goods :—*Held* : they did not pass to such assignees under Bankrupts Act, 1624 (c. 19), s. 11, as bkpt. should have been allowed a reasonable time to have selected such goods as he was disposed to retain.—*GIBSON v. BRAY* (1817), 1 Moore, C. P. 519; *Holt*, N. P. 556; 8 Taunt, 76; 129 E. R. 311.

*Annotations.*—*Apld.* *Sadler v. Whitmore* (1840), 5 Jur. 315. *Refd.* *Smith v. Hudson* (1865), 6 New Rep. 103; *Re Watson, Ex p. Atkin*, [1904] 2 K. B. 753; *Lamb v. Wright*, [1924] 1 K. B. 857.

**1273. ———— *—***—(1) A corpn. aggregate may be sued in *indebitatus assumpsit* for goods sold & delivered, though the contract be not under seal. The contract may be implied or express, as in cases of *assumpsit* against an individual. The implication may arise from the object of the incorporation, as compared with the subject-matter of the contract. As in *assumpsit* against an incorporated gas co. for the price of gas meters sold & delivered to the amount of £15. (2) In the case of corpn's. aggregate, as in that of individuals, if goods be taken on the terms of their being returned if not approved of, & they be retained an unreasonable time, the party so taking & retaining may be sued for goods sold & delivered.—*BEVERLEY v. LINCOLN GAS LIGHT & COKE CO.* (1837), 6 Ad. & El. 829; 2 Nev. & P. K. B. 283; *Will. Woll. & Dav.* 519; 7 L. J. Q. B. 113; 112 E. R. 318.

*Annotations.*—*As to* (1) *Consd.* *Ludlow Corpn. v. Charlton* (1840), 6 M. & W. 815. *Distd.* *Diggle v. London & Blackwall Ry.* (1850), 5 Exch. 442. *Apld.* *Clarke v. Cuckfield Union Grdns.* (1852), 21 L. J. Q. B. 349. *Consd.* *Finlay v. Bristol & Exeter Ry.* (1852), 7 Exch. 409; *Eccle. Comrs. v. Merril* (1869), L. R. 4 Exch. 162. *Refd.* *Church v. Imperial Gas Light & Coke Co.* (1838), 6 Ad. & El. 846; *Gibson v. East India Co.* (1839), 5 Bing. N. C. 262; *Hall v. Swansea Corpn.* (1844), 5 Q. B. 526; *Paine v. Strand Union* (1846), 8 Q. B. 326; *Doe d. Pennington v. Tanlere* (1848), 13 L. T. O. S. 204; *Henderson v. Australian Royal Mail Steam Navigation Co.* (1855), 5 E. & B. 409; *Smart v. West Ham Union Grdns.* (1855), 24 L. J. Ex. 201; *Lawford v. Billericay R. C.* (1903), 72 L. J. K. B. 554. *As to* (2) *Distd.* *Iley v. Frankenstein* (1844), 8 Scott, N. R. 839. *Apld.* *Moss v. Sweet* (1851), 20 L. J. Q. B. 167. *Generally, Mentd.* *Gibson v. Kirk* (1841), 1 Q. B. 850.

**1274. ———— *—***—*—*—Goods sold on a contract of sale or return on notice. The judge left it to the jury to say whether the goods were sold

on sale or return, or out & out. There being no evidence of the goods being kept beyond a reasonable time:—*Held*: this direction was right.—*v. FRANKENSTEIN* (1844), 8 Scott, N. R. 839; P. O. S. 113.

*F. Moss v. Sweet* (1851), 16 Q. B. 493. Is consistent both with principle & with authorities, except *Iley v. Frankenstein*, which has probably been misunderstood (COLERIDGE, J.).

1275. ————]—If there be evidence of a custom that when goods are sent upon sale or return, & they are kept much longer than the usual period without either being paid for or returned, & the jury find in favour of such custom:—*Held*: sufficient to support a count for goods sold & delivered.—*WATTS v. HERETAGE* (1848), 11 L. T. O. S. 204.

1276. ————]—Where goods delivered “on sale or return” are not returned within a reasonable time, the sale of the goods becomes absolute, & the price may be recovered under the common count for goods sold & delivered.—*MOSS v. SWEET* (1851), 16 Q. B. 493; 20 L. J. Q. B. 167; 16 L. T. O. S. 341; 15 Jur. 536; 117 E. R. 968.

*Annotations*:—*Distd.* *Forbes v. Smith* (1863), 2 New Rep. 19. *Consd.* *Ray v. Barker* (1879), 4 Ex. D. 279; *Elphick v. Barnes* (1880), 5 C. P. D. 321. *Apld.* *Ornstein v. Alexandra Furnishing Co.* (1895), 12 T. L. R. 128. *Refd.* *Weiner v. Gill, Same v. Smith*, [1906] 2 K. B. 574; *Janeisch v. Attenborough* (1910), 102 L. T. 605; *Lake v. Simmons* (1926), 95 L. J. K. B. 586.

1277. ————]—*Semle*: where goods are sent “on sale or return,” the person to whom they are sent must return them within a reasonable time, or he will be treated as the purchaser of them, even though he may not have it in his power to return them owing to their having been stolen from him.—*RAY v. BARKER* (1879), 4 Ex. D. 279; 48 L. J. Q. B. 569; 41 L. T. 265; 27 W. R. 745, C. A.

*Annotations*:—*Consd.* *Lake v. Simmons* (1926), 95 L. J. K. B. 586. *Mentd.* *Shurmur v. Young* (1888), 5 T. L. R. 155; *Manger v. Cash* (1889), 5 T. L. R. 271.

1278. ————]—*Re FLORENCE, Ex p. WINGFIELD*, No. 1268, *ante*.

1279. ————]—*ORNSTEIN v. ALEXANDRA FURNISHING CO.* (1895), 12 T. L. R. 128.

1280. ————]—*WEINER v. GILL, SAME v. SMITH*, No. 1267, *ante*.

— *GENN v. WINKEL*, No. 1301, *post*.

1282. ————]—*Within stipulated time.*—*HARRISON v. ALLEN*, No. 2015, *post*.

1283. ————]—In an agreement for the sale of oil was the following memorandum: “The casks to be returned in three months, or to be paid for at the rate of £3 per ton.” The casks not being returned within the time specified:—*Held*: the value of them might be recovered in an action for goods sold & delivered.—*JOHNSON v. KIRKALDY* (1840), 4 Jur. 988.

1284. ————]—*MARSH v. HUGHES-HALLETT* (1900), 16 T. L. R. 376.

1285. ————]—*WEINER v. GILL, SAME v. SMITH*, No. 1267, *ante*.

1286. ————]—A manufacturer sent certain goods to a customer on approbation. The sendee upon the receipt of the goods pledged them, & the manufacturer sought to recover the goods from the person with whom they were pledged, upon the ground that the goods had not been sold:—*Held*:

the goods not having been returned was equivalent to an approval of them by the customer, &, as he had been informed of the price, there was a contract of sale; &, therefore, the goods could not be recovered.—*BLANCKENSEE v. BLAIBERG* (1885), 2 T. L. R. 36, C. A.

1287. ————]—*Sale of goods.*—*Re NEVILL, Ex p. WHITE*, No. 1260, *ante*.

1288. ————]—*Re FLORENCE, Ex p. WINGFIELD*, No. 1268, *ante*.

1289. ————]—*WEINER v. GILL, SAME v. SMITH*, No. 1267, *ante*.

1290. ————]—*Pledging goods.*—Goods are delivered to a bailee on a contract of sale & return, the bailee has no authority to pledge the goods.—*DELAUNEY v. BARKER* (1819), 2 Stark. 539; 171 E. R. 729, N. P.

1291. ————]—*BLANCKENSEE v. BLAIBERG*, No. 1286, *ante*.

1292. ————]—*KIRKHAM v. ATTENBOROUGH, KIRKHAM v. GILL*, No. 1252, *ante*.

1293. ————]—*WEINER v. GILL, SAME v. SMITH*, No. 1267, *ante*.

1294. ————]—*Pawning goods.*—*KIRKHAM v. ATTENBOROUGH, KIRKHAM v. GILL*, No. 1252, *ante*.

1295. ————]—*Delivery of goods to third person “on sale or return.”*—*GENN v. WINKEL*, No. 1301, *post*.

1296. ————]—*Allowing judgment by consent.*—Pltfs. received from a firm abroad a parcel of precious stones to be placed on view at a certain exhibition. The owners instructed pltfs. to sell the stones if not less than the sum of £750 could be obtained for them, but otherwise the same were to be returned to the owners. While at the exhibition the stones were not sold, & therefore were restored to pltfs. Shortly afterwards pltfs. were prevailed upon to allow B., who was a jeweller, to have the stones on approval. B. offered £300 for the stones, but declined to give £750 for them. That offer was communicated to the owners, B. retaining the stones pending the receipt of the owners’ instructions concerning them. B.’s offer was refused by the owners, but before their instructions were received B. had sold the stones to defts., who acted *bonâ fide* in the transaction, for the sum of £300.

On pltfs. demanding an immediate return of the stones they discovered that B. had parted with them. Thereupon pltfs. brought an action against B. for £750 or alternatively for the return of the stones & damages. Ultimately judgment for £750 & costs against B. was consented to, but subsequently B. was adjudicated bkpt. Pltfs. consequently brought an action against defts. to recover possession of the stones or £750 their value, or damages £750 for their detention:—*Held*: whether or not the contract of sale or return was put an end to, the judgment by consent in the action against B. amounted to an affirmation of his property in the goods; & therefore pltfs.’ subsequent action against defts. was not maintainable.—*BRADLEY & COHN, LTD. v. RAMSAY & CO.* (1912), 106 L. T. 771; 28 T. L. R. 388, C. A.

#### (d) Acts Rejecting Transaction.

1297. *Grounds for rejection—Reasons other than defects in goods.*—Defts. asked pltfs. to supply on approval a machine for making brushes &

#### PART IV. SECT. 1, SUB-SECT. 5.—H. (c).

1286 i. *What amounts to—Failure to return goods.*—*HARVEY v. CLARKSON* (1849), 6 U. C. R. 27.—CAN.

1286 ii. ————]—*McCORMICK HARVESTING MACHINE CO. v. HISLOP*

(1903), 7 Terr. L. R. 112.—CAN.

n. ————]—*Effect of notice of rejection.*—Where a lighting plant was sold on approval & the buyer after the plant was installed notified the seller that he rejected it & requested the return of his money:—*Held*: the fact that the buyer, after such rejection,

retained the plant, made use of it & employed experts to try to make it work satisfactorily, did not justify the inference that he had decided to accept & pay for it.—*SWENSON v. LAVIGNE*, [1925] 3 D. L. R. 681; [1925] 2 W. W. R. 603; 19 Sask. L. R. 534.—CAN.

*Sect. 1.—Transfer of property from seller to buyer :  
Sub-sect. 5, H. (d) & (e) ; sub-sect. 6, A. & B. (a).]*

agreed to pay carriage both ways if they rejected the machine within twenty-one days, & to pay for the machine, together with carriage one way, if they retained it. Pltfs. dispatched the machine on these terms, & defts. wrote within twenty-one days rejecting the machine on the ground that though it was satisfactory they anticipated trouble with their hands in working it. In an action for the purchase-price:—*Held*: the contract meant that defts. had a right of rejection for reasons other than defects in the machine & pltfs. were not entitled to recover.—*BERRY & SON v. STAR BRUSH CO.* (1915), 31 T. L. R. 603 ; 60 Sol. Jo. 11, C. A.

**1298. What amounts to rejection—Return of goods within stipulated time.]—**A. having a horse to sell, agreed to let B. have him for 30 guineas, if he liked him, & that he should take him a month upon trial, B. accordingly took him, & kept him about a fortnight, & then told A. he liked the horse, but not the price ; & A. desired him, if he did not like the price, to return the horse ; B., however, kept him ten days more, & then returned him ; but A. refused to receive him, & brought an action on the contract for 30 guineas, the price of the horse:—*Held*: he could not maintain such action.—*ELLIS v. MORTIMER* (1805), 1 Bos. & P. N. R. 257 ; 127 E. R. 460.

*Annotation*:—*Reid. Elphick v. Barnes* (1880), 5 C. P. D. 321.

*See CUSTOM & USAGES*, Vol. XVII., p. 59, No. 636.

*(e) Loss of, or Damage to, Delivered Goods.*

**1299. Whether property passes—Absence of default by prospective purchaser.]—***HEAD v. TATTERSALL*, No. 1256, *ante*.

**1300. ———.]—**A horse was sold by pltf. to deft. upon condition that it should be taken away by deft. & tried by him for eight days, & returned at the end of eight days if deft. did not think it suitable for his purposes. The horse died on the third day after it was placed in deft.'s stable, without fault of either party:—*Held*: pltf. could not maintain an action for the price, as for goods sold & delivered.—*ELPHICK v. BARNES* (1880), 5 C. P. D. 321 ; 49 L. J. Q. B. 698 ; 44 J. P. 651 ; 29 W. R. 139.

*Annotations*:—*Consd. Lake v. Simmons* (1926), 95 L. J. K. B. 586. *Reid. Janesich v. Attenborough* (1910), 102 L. T. 605.

**1301. ——— Default by prospective purchaser.]—**(1) Pltf. delivered certain goods to deft. on sale or return. Defts. delivered them to a third person on the like terms, & he transferred them to a fourth person, upon what terms did not appear. The goods were lost while in the custody of the fourth person, & so could not be returned:—*Held*: in the circumstances deft. had done an "act adopting the transaction" within Sale of Goods Act, 1893 (c. 71), s. 18, r. 4 (a), so that the property in the goods passed to him.

(2) The position of a person receiving goods on sale or return, I think, is this, that if there is a time fixed for the return of the goods, or if not, so long as a reasonable time for the return of the

goods has not expired, his liability is only that of a bailee, so that no action lies against him except for negligence. It is, however, otherwise where there is a fixed time & it has expired (*VAUGHAN WILLIAMS, L.J.*).—*GENN v. WINKEL*, (1912), 107 L. T. 434 ; 28 T. L. R. 483 ; 56 Sol. Jo. 612 ; 17 Com. Cas. 323, C. A.

*Annotations*:—*As to* (1) *Reid. Kempler v. Bravingtons* (1925), 133 L. T. 680 ; *Lake v. Simmons* (1926), 95 L. J. K. B. 586.

*See, also, ANIMALS*, Vol. II., p. 271, Nos. 483, 484, & compare, *AGENCY*, Vol. I., p. 396, No. 981, & *BAILEMENT*, Vol. III., p. 58, No. 35.

— *Effect of trade custom.]—See CUSTOM & USAGES*, Vol. XVII., pp. 61, 64, Nos. 648, 683.

**SUB-SECT. 6.—RESERVATION BY SELLER OF RIGHT OF DISPOSAL.**

*A. In General.*

*See Sale of Goods Act*, 1893 (c. 71), s. 19 (1), (3).

**1302. Extent of reservation—Reservation of absolute power of disposition.]—***MIRABITA v. IMPERIAL OTTOMAN BANK*, No. 1357, *post*.

**1303. ——— Reservation to secure contract price.]—***MIRABITA v. IMPERIAL OTTOMAN BANK*, No. 1357, *post*.

**1304. ———.]—***THE PARCHIM*, No. 1344, *post*.

*B. Bill of Lading or Like Instrument taken to Seller's Order.*

*(a) Bill of Lading.*

*See Sale of Goods Act*, 1893 (c. 71), s. 19 (2).

**1305. Effect of—Intention of seller—Question for jury.]—**L. S. & co., the correspondents at Rio of B. & co., merchants at Liverpool, purchased a quantity of coffee, on their own credit principally, but in part with funds supplied by B. & co. For the amount of the purchase on their credit L. S. & co. drew bills on B. & co., & the coffee they shipped on board a vessel of B. & co., bound for "Cork & a market." An invoice was made out, stating the coffee to be shipped by order on account & risk of B. & co. ; but L. S. & co. procured the captain to sign bills of lading, making the coffee deliverable to their order or assigns, "freight free." One of these bills they indorsed in blank, & transmitted by post to B. & co., on Sept. 21. At the end of Sept., A., the agent in England of L. S. & co., asked the principal partner in the firm of B. & co. to cause the bill of lading to be placed in third hands, to secure the bills drawn on account of the purchase, to which he agreed, & on Oct. 16 gave a written order to that effect. On Nov. 12, which was after B. & co. had committed an act of bkpcy., the bill of lading arrived, & was, in pursuance of the above-mentioned agreement, delivered to A. for the above-mentioned purpose, who, after the fiat, pledged it for a large advance with pltfs., merchants at Rotterdam. The cargo having afterwards arrived, the assignees got possession of it, & trover was brought by pltfs., as indorsees of the bill of lading:—*Held*: though the contract was *prima facie* made on behalf

**PART IV. SECT. 1, SUB-SECT. 6.—A.**

**1308i. Extent of reservation—Reservation to secure contract price.]—***THOMAS v. INGLIS* (1885), 7 O. R. 588.—*CAN.*

**1308 ii. ———.]—**Defts. pur-

chased from pltfs. apples f.o.b. cars Belleville, Ont., to be paid for when received at Regina, Sask. Defts. refused to accept or pay for the apples as they had been damaged by frost during shipment:—*Held*: the property in the apples did not pass as soon as they

were placed upon cars at Belleville, pltf. having retained the power of disposal & control of the apples until payment at Regina.—*GRAHAM v. LAIRD* (1909), 14 O. W. R. 1058 ; 1 O. W. N. 204 ; 20 O. L. R. 11.—*CAN.*

of the vendors, it was a question for the jury, looking at the form of the bill of lading & language of the invoice, etc., whether the goods were not really delivered on board, to be carried for & on account & at the risk of bkpts.; & if they were, the right of stoppage *in transitu*, & also the power of rescinding by bkpts., so as to defeat the rights of their creditors, were both at an end; but if the jury should think, from the form of the bill of lading, that it was intended to preserve the rights of the unpaid vendors until some further act was done, by transferring the bill of lading, the right to stop the goods *in transitu*, & also the power of rescinding, would continue until the bill of lading, indorsed, reached the hands of bkpts.; in which latter case it was competent for them to give the unpaid vendors a lien on the whole for the part not paid.—*VAN CASTEEL v. BOOKER* (1848), 2 Exch. 691; 18 L. J. Ex. 9; 12 L. T. O. S. 65; 154 E. R. 668.

**Annotations:**—*Consd. Gumm v. Tyrie* (1864), 4 B. & S. 680; *Berndtson v. Strang* (1867), L. R. 4 Eq. 481. *Apld. Colonial Insee. of New Zealand v. Adelaide Marine Insee.* (1886), 12 App. Cas. 128. *Refd. Jenkyns v. Brown* (1849), 14 Q. B. 496; *Turner, etc. v. Liverpool Dock Trustees* (1851), 6 Exch. 543; *Sheridan v. New Quay Co.* (1858), 4 C. B. N. S. 618; *Browne v. Hare* (1859), 4 H. & N. 822; *Moakes v. Nicholson* (1865), 34 L. J. C. P. 273; *Smith v. Hudson* (1865), 6 B. & S. 431; *The Marie Joseph* (1866), Brown. & Lush. 449; *Schotsmans v. L. & Y. Ry.* (1867), 2 Ch. App. 332; *Shepherd v. Harrison* (1869), 37 W. R. 609; *Gabarron v. Kreeft, Kreeft v. Thompson* (1875), L. R. 10 Exch. 274; *Ogg v. Shuter* (1875), L. R. 10 C. P. 159; *Mirabita v. Imperial Ottoman Bank* (1878), 3 Ex. D. 164; *The Parchim*, [1913] A. C. 157. *Mentd. Edwards v. Glyn* (1859), 2 H. & E. 29; *Graham v. Candy* (1862), 3 F. & F. 204; *Bills v. Smith* (1865), 11 Jur. N. S. 155.

**1306.** —[—Defts., merchants at Bristol, through a broker contracted to buy of pltf's., merchants at Rotterdam, ten tons of the best refined rape oil, to be shipped "free on board" at Rotterdam in Sept. 1857, at £48 15s. per ton, to be paid for on delivery to defts. of the bills of lading, by bill of exchange to be accepted by defts. payable three months after date, & to be dated on the day of shipment of the oil. On Sept. 8, pltf's., having on the previous day advised that the shipment would be made, shipped on board a general ship, trading between Rotterdam & Bristol, five tons of the oil, & the master signed a bill of lading by which the oil was deliverable "unto shipper's order" & pltf's. indorsed it specially to defts. On the same day pltf's. inclosed in a letter to the broker the bill of lading, invoice & bill of exchange drawn on defts. in accordance with the contract. On the night of Sept. 9 the ship with the oil on board was run down in the Bristol Channel & the oil totally lost. Pltf's. letter of Sept. 8 arrived at Bristol on the afternoon of Sept. 10 in due course of post, but after business hours. On the morning of Sept. 11 the broker left with defts. the bill of lading, invoice, & bill of exchange for their acceptance. At that time he knew of the loss of the ship. In about two hours afterwards defts. returned to the broker the documents left with them, on the ground that, under the circumstances, they were not liable to pay for the oil. In an action for not accepting the bill of exchange, & for goods sold & delivered, the jury stated that in their opinion, according to mercantile usage, the risk of the loss of the oil was on defts.:—*Held*: (1) the property in the oil passed to defts. when it was placed "free on board" in performance of the contract; (2) it was a question for the jury whether pltf's. so shipped the oil in performance of their contract to place it "free on board," or for the purpose of retaining a control over it & continuing to be owners contrary to the contract.—*BROWNE v. HARE* (1859), 4 H. & N. 822; 29 L. J. Ex. 6; 7 W. R. 619; 157

E. R. 1067; *sub nom. HARE v. BROWNE*, 33 L. T. O. S. 334; 5 Jur. N. S. 711, Ex. Ch.

**Annotations:**—*As to* (1) *Refd. Currie v. Anderson* (1860), 2 E. & E. 592; *Gabarron v. Kreeft, Kreeft v. Thompson* (1875), L. R. 10 Exch. 274; *Ingils v. Stock* (1885), 10 App. Cas. 263. *As to* (2) *Consd. Ogg v. Shuter* (1875), L. R. 10 C. P. 159. *Refd. Colley v. Overseas Exporters*, [1921] 3 K. B. 302. *Generally, Refd. Green v. Siche* (1860), 7 C. B. N. S. 747; *Castle v. Swarder* (1861), 6 H. & N. 828; *Joyce v. Swann* (1864), 17 C. B. N. S. 84; *Moakes v. Nicholson* (1865), 12 L. T. 573; *Seagrave v. Union Marine Insee.* (1866), L. R. 1 C. P. 305; *Williams v. Cohen* (1871), 25 L. T. 300; *Helbutt v. Hickson* (1872), L. R. 7 C. P. 438; *The Parchim*, [1913] A. C. 157.

**1307.** —[—D., a merchant in London, was in the habit of shipping salt for exportation at the port of Liverpool. He usually employed pltf. to purchase the salt, & pltf. shipped it, taking receipts in his own name from the mate for each delivery, & when the cargo was complete, taking bills of lading in his own name, which he remitted to D., in exchange for D.'s acceptances for the price of the salt. Pltf. was paid no commission, but he charged D. an advance on the price of the salt. On the present occasion D. had chartered a ship to load a full cargo of salt for Calcutta, & pltf. had placed on board her, in accordance with instructions from D., 1,000 tons of salt which he had purchased for that purpose, & for which he had taken the mate's receipts in the usual course. When this quantity had been placed on board D. stopped payment, & pltf. then ceased loading, & demanded bills of lading for the salt already on board in his own name. Dft., the ship owner, refused to allow them to be given & filled up the ship, & sent her with the salt to Calcutta. The jury found that when pltf. put the salt on board he did not intend to pass the property therein to D., but to retain it in himself:—*Held*: this was the proper question for the jury, & on this finding & these facts there was a conversion of the salt by dft. at Liverpool.—*FALK v. FLETCHER* (1865), 18 C. B. N. S. 403; 5 New Rep. 272; 34 L. J. C. P. 146; 11 Jur. N. S. 176; 13 W. R. 346; 144 E. R. 501.

**Annotations:**—*Distd. Jones v. Hough* (1879), 5 Ex. D. 115. *Refd. Gabarron v. Kreeft, Kreeft v. Thompson* (1875), L. R. 10 Exch. 274; *Cassaboglou v. Gibb* (1883), 11 Q. B. D. 797.

**1308.** —[—Where goods are shipped by the vendors to persons, described as "selling agents," who are paid by commission & to whom the bills of lading are indorsed, & the vendors do not reserve any right of disposal of the goods after shipment, the question whether the property in the goods has passed to the "selling agents" depends upon intention & is a question of fact. An American co. shipped in July, 1914, at New York for Hamburg on a German steamer a consignment of pig lead under bills of lading which were made out to the order of the shippers at Hamburg & were indorsed to a German co. or order & were sent forward to the German co. The goods were shipped under an arrangement between the American co. & the German co. which secured to the former the benefit of a previous agreement in which the German co. were described as "selling agents," & a draft on demand for the provisional price, as arranged, was sent to an English co., which was connected with the arrangement. On Aug. 5, 1914, the goods were seized as prize, & on presentation of the draft on Aug. 8, 1914, the English co. refused, owing to the war, to pay it. The German co. were not accountable to the American co. as principals for the sum actually received by them as agents from the purchasers to whom they sold the goods, but only for a sum to be fixed by a computation of sales of pig lead supplied by other producers:—

*Sect. 1.—Transfer of property from seller to buyer :  
Sub-sect. 6, B. (a).]*

**Held :** on the facts the property in the goods had passed to the German co. & therefore they were enemy goods.—*THE KRONPRINZESSIN CECILIE* (1917), 33 T. L. R. 292, P. C.

**1309. — Onus of proof.]—SHEPHERD v. HARRISON, No. 1355, post.**

**1310. — Passing of property suspended.]—**(1) K. purchased corn at New Orleans for pltf., a London merchant, whose agent K. was. The purchase was made with K.'s money; & K. drew for the amount upon pltf., the bill being, in its body, expressed to be on account of the corn. K. sold the bill to deft. at New Orleans, &, at the same time, handed to deft. a bill of lading of the corn, which had been drawn for delivery to K.'s order & indorsed by K. K. at the same time empowered deft. to sell the corn if the bill of exchange should not be paid. Afterwards K. advised pltf. of the transaction, forwarded to him the invoice, which stated the corn to be shipped at the risk & on the account of pltf., & requested pltf. to accept the bill of exchange:—**Held :** the inference from these facts was that K. did not transfer the property in the corn to pltf., subject to a lien, but only transferred the property to pltf. on the condition of his paying the bill of exchange, &, in the mean time, the corn was the property of deft.

(2) The corn having arrived in England, & the bills of exchange & lading having been forwarded to England by deft., the bill of exchange was accepted by pltf. On its maturity, he offered to take it up: but it was not produced, owing to a mistake of deft.'s agent in England as to its place of deposit. On a later day the bill of exchange was presented to pltf., who did not pay it:—**Held :** deft. under these circumstances, was entitled to retain the corn.—*JENKYNs v. BROWN* (1849), 14 Q. B. 496; 19 L. J. Q. B. 286; 14 L. T. O. S. 395; 14 Jur. 505; 117 E. R. 193.

**Annotations :—As to (1) Refd. *Shepherd v. Harrison* (1869), L. R. 4 Q. B. 196; *Sewell v. Burdick* (1884), 10 App. Cas. 74.**

**1311. —.]—BROWNE v. HARE, No. 1306, ante.**

**1312. —.]—Where an unpaid vendor shipping goods under a contract of sale takes a bill of lading making the goods deliverable to his order, & retains such bill of lading in his own or his agent's hands for his own protection, he does not reserve the vendor's lien only, in case of the purchaser's making default in payment of the price, but reserves a right of disposing of the goods so long, at least, as the purchaser continues in default.—*OGG v. SHUTER* (1875), 1 C. P. D. 47; 45 L. J. Q. B. 44; 33 L. T. 492; 24 W. R. 100; 3 Asp. M. L. C. 77, C. A.**

**Annotations :—Apld. *The Miramichi*, [1915] P. 71. *Refd. Mirabita v. Imperial Ottoman Bank* (1878), 3 Ex. D. 164; *Re Cook, Ex p. Rosevear China Clay Co.* (1879), 40 L. T. 730; *The Annie Johnson, The Kronprinzessin Margareta*, [1918] P. 154.**

**1313. —.]—MIRABITA v. IMPERIAL OTTOMAN BANK, No. 1357, post.**

**1314. — Though payment on general account made by buyer.]—Pltf. a merchant at Leeds, contracted with the London partner of a firm carrying on business as merchants at London & Odessa, for the purchase of a quantity of**

linseed, to be paid for, half by drafts on the buyer at three months from the time of advice of the sale reaching Odessa, & the remainder at three months from the date of shipment. The London partner forwarded the contract to the Odessa partner, & the latter drew upon pltf. two bills of exchange on account of linseed, which were duly accepted, & paid when due. In order to fetch the linseed, pltf. chartered a vessel, which was to proceed with an outward cargo to Odessa, & there take on board "from the agents of the freighter," the linseed, &, being so loaded, proceed to Hull, " & deliver the same to the order of the freighter, on being paid freight." The vessel having arrived at Odessa, the master applied for the linseed, & produced a copy of the charter-party, when he was informed that the cargo should be shipped in due time. A letter was also sent by the Odessa partner to the London partner, informing him of the arrival of the vessel, & stating that a portion of the linseed was ready for her. The Odessa house commenced loading the vessel; but, not being able to procure the entire quantity of linseed, the master consented to receive wheat in substitution thereof, which was accordingly shipped. When the loading of the linseed was completed, the Odessa partner wrote to the London partner stating that he should have the bill of lading by the next post. The Odessa partner afterwards procured the master to sign the bills of lading, making the goods deliverable "unto order or assigns" & indorsed the bills of lading for value to a third person, who transferred them to defts.:—**Held :** under the above circumstances, there was no such delivery of the goods as to vest the right of property or possession in pltf.—*ELLERSHAW v. MAGNIAC* (1843), 6 Exch. 570, n.; 155 E. R. 670.

**Annotations :—Consd. *Gabarron v. Kreeft, Kreeft v. Thompson* (1875), L. R. 10 Exch. 274. *Refd. Van Casteel v. Booker* (1848), 2 Exch. 691; *Browne v. Hare* (1858), 3 H. & N. 484; *Shepherd v. Harrison* (1869), 17 W. R. 609; *Mirabita v. Imperial Ottoman Bank* (1878), 3 Ex. D. 164.**

**1315. — Though price tendered by buyer.]—WAIT v. BAKER, No. 1075, ante.**

**Compare AUCTION & AUCTIONEERS, Vol. III., 42, No. 301.**

**1316. — Though goods delivered on board buyer's ship.]—B. & co., merchants at Liverpool, sent orders to M. & co., merchants at Charleston, to ship on account of B. & co. a quantity of cotton for the homeward voyage of their ship the "*Charlotte*."**

M. & co., accordingly made considerable purchases of cotton, & shipped it on board the vessel of B. & co. The master signed a bill of lading of the cotton, to be delivered at Liverpool, "to order or to our assigns, paying for freight for the cotton nothing, being owners' property"; & M. & co. indorsed the bill of lading—"Deliver the within to the Bank of Liverpool, or order." M. & co. informed B. & co. that they had drawn bills upon them for the cargo on their account by the "*Charlotte*," & desired them to insure the cotton. M. & co. also sent to B. & co. an abstract invoice, which stated that the cotton was shipped by M. & co., on board the "*Charlotte*" for Liverpool, by order, & for account & risk of B. & co., there, & addressed to order." M. & co. afterwards sent a full invoice, stating that the cotton was shipped

**PART IV. SECT. 1, SUB-SECT. 6.—  
B. (a).**

**13101. Effect of—Passing of property suspended.]—In a c.i.f. contract for the shipment of goods from one port to**

another, where payment is to be made at a certain place on the surrender of shipping documents & the seller takes a bill of lading which states that the goods are shipped by him & deliverable to his order or assigns, there is

no sale or delivery of the goods or of the symbol of the goods until the endorsement & delivery of the bill of lading to the buyer or his agent.—*CROSS & SONS v. HASELL*, [1908] V. L. R. 194.—**AUS.**



for Liverpool, "by order & for account of B. & co., there, & to them consigned." M. & co., not having sufficient funds of B. & co. to pay for the cotton, sold the bills to a bank at Charleston, & delivered to the bank the bill of lading so indorsed as a security for payment of the bills; which were dishonoured, & taken up by M. & co. B. & co. became bkpt. before the arrival of the vessel; & on its arrival M. & co., by their agent, claimed to stop the cargo *in transitu*, & it was afterwards stowed in the warehouse of deffts. The assignees of B. & co. having brought detinue, deffts. traversed the possession of the assignees, & also set up the right of M. & co. as against them:—**Held**: (1) the property in the cotton did not vest absolutely in B. & co., notwithstanding the delivery on board their ship; for, by the terms of the bill of lading, M. & co. reserved to themselves a *jus disponendi* of the goods, which the master acknowledged by signing the bill of lading, making the cotton deliverable to their order or assigns, although by so doing the master might have exceeded his authority; (2) M. & co. did not, by their indorsement & delivery of the bill of lading to the bank, divest themselves of their property in or possession of the goods; (3) the right of M. & co., as against plffs., need not be specially pleaded; & the objection to the title of the latter was properly raised under the plea of not possessed. —**TURNER v. LIVERPOOL DOCKS TRUSTEES** (1851), 6 Exch. 543; 20 L. J. Ex. 393; 17 L. T. O. S. 212; 155 E. R. 659, Ex. Ch.

**Annotations**:—As to (1) **Refd.** Brown v. North (1852), 8 Exch. 1; Curney v. Richend (1854), 3 E. & B. 622; Browne v. Hare (1859), 4 H. & N. 822; Schotsmans v. L. & Y. Ry. (1867), 2 Ch. App. 332; Shopherd v. Harrison (1869), L. R. 4 Q. B. 196; Gabarron v. Kreeft, Kreeft v. Thompson (1875), L. R. 10 Exch. 274; Mirabita v. Imperial Ottoman Bank (1878), 3 Kx. D. 164; *Re* Cock, *Ex p.* Rosevear China Clay Co. (1879), 11 Ch. D. 560; *Re* Bruno, Silva, *Ex p.* Francis (1887), 56 L. T. 577; The Anne Johnson, The Kronprinsessan Margareta, [1918] P. 154; The Dirigo, The Hallingdal, etc., [1919] P. 204; As to (2) **Refd.** Joyce v. Swann (1864), 17 C. B. N. S. 84; Berndston v. Strang (1867), L. R. 4 Eq. 481. **Generally**, **Refd.** Key v. Cotesworth (1852), 7 Exch. 595; Shand v. Sanderson (1859), 4 H. & N. 381; Fulk v. Fletcher (1865), 18 C. B. N. S. 403; Imperial Ottoman Bank v. Cowan, Cowan v. Imperial Ottoman Bank (1873), 21 W. R. 770; Ogg v. Shuter (1875), 44 L. J. C. P. 161.

**1317.** — **Though goods shipped "on account & at risk of" buyer.**—**SHEPHERD v. HARRISON**, No. 1355, *post*.

**1318.** — **Passing of property not suspended.—Bill of lading taken to order by seller as buyer's agent.**—There may be a complete contract so as to pass the property in goods from the seller to the buyer, although the price has not been definitively agreed on between them. Where from all the facts it may fairly be inferred that it was the intention of the seller to pass the property in goods shipped to order, the mere circumstances of the bill of lading being taken in the name of the seller, & remaining unindorsed, will not prevent its passing. A., who had been in the habit of buying largely of guano from B. & co., of Liverpool, at prices which were settled at the beginning of each year, wrote to them on Feb. 14 ordering a shipment of 100 tons, provided freight did not exceed 6s. 6d. On Feb. 26 B. & co. wrote in answer, "We have succeeded in fixing the schooner 'Anne & Isabella' to carry about 115 tons at your limit of 6s. 6d. per ton. We presume we may value upon you at six months from the date of shipment at £10 per ton," etc.; adding in a postscript, "Please say if you purpose effecting insurance at your end." On Mar. 3, A. wrote, "I am favoured with yours of Mar. 26. You say we presume we charge you £10 per ton net cash, etc. I really cannot understand this, when I

know that Mr. L. supplies your guano in Scotland at £9 15s. net there to dealers. Besides, I look, as heretofore, for the special allowance made to me at the origin of our transactions; & now that you are making some changes, it may be as well that I should know how we are to get on for the future," & he concluded with a request that some flowering shrubs should be sent to him "in charge of the captain." On the same day, A. effected an insurance on the guano per "Anne & Isabella." The guano was shipped at Liverpool on Mar. 4, under a bill of lading making it deliverable to B. & co. or their assigns. The bill of lading, unindorsed was sent from Liverpool to one of the members of the firm of B. & co., then at Belfast, who was about to pay A. a friendly visit at Londonderry. That gentleman arrived at A.'s house on the evening of Saturday Mar. 7, when he told A. that he had received the bill of lading & invoice of the guano & a draft for A.'s acceptance for the amount; & on the morning of Mar. 9 they went together to A.'s office, & there the bill of lading was indorsed & handed over with the invoice to A., who thereupon accepted the bill. In the course of the same day they heard for the first time that the "Anne & Isabella" with the guano on board had been wrecked on the coast near Londonderry:—**Held**: the property in the guano passed to A. by the contract from the time of its shipment. A.'s letter of Mar. 3 not being a repudiation, though expressing some dissatisfaction at the price. —**JOYCE v. SWANN** (1864), 17 C. B. N. S. 84; 144 E. R. 34.

**Annotations**:—**Refd.** Moakes v. Nicholson (1865), 19 C. B. N. S. 290; Seagrave v. Union Marine Insce. (1866), L. R. 1 C. P. 305; Williams v. Cohen (1871), 25 L. T. 300; Anderson v. Morice (1876), 1 App. Cas. 713; The Parchim, [1918] A. C. 157.

**1319.** **Bill of lading sent to buyer & goods shipped f.o.b.**—In June, 1914, pursuant to a contract of Dec. 1913, entered into between a British co. as sellers & a German co. as buyers a cargo of chrome ore was loaded in a Norwegian sailing ship at a port in New Caledonia for delivery at Rotterdam. In accordance with the terms of the contract, which provided a fixed price per ton f.o.b. 50 per cent. to be paid on shipment the German co. paid half the purchase price, effected the insurance, & sent the policy to the sellers before loading. The bills of lading, made out in favour of the sellers or order, for delivery at Rotterdam, were also sent to & retained by them. The ship sailed on June 9. On Sept. 6, when she put into Pernambuco, her master heard of the outbreak of war, & instructions were cabled to him by the German co. who were the charterers that the ship was to proceed to Gothenburg instead of to Rotterdam. By an Order in Council of Oct. 29, 1914, chrome ore was declared absolute contraband. On Nov. 2 the ship was captured at sea & taken into a British port & a writ in prize was issued against the cargo. Claims were entered by the British co. who claimed that the property in the cargo remained in them, & by a Swedish co. who claimed the German co. as their agents, had bought the cargo for them:—**Held**: the sellers had not reserved the right of disposal, & the property in the goods passed to the German co. on shipment & part payment.—**THE SORFAREREN** (1915), 85 L. J. P. 121; 114 L. T. 46; 32 T. L. R. 108; 13 Asp. M. L. C. 223; 1 Br. & Col. Pr. Cas. 589; *on appeal* (1917), 117 L. T. 259, P. C.

**Annotations**:—**Refd.** The Axel Johnson, The Drottning Sophia, [1917] P. 234; The Parchim, [1918] A. C. 157.

**1320.** — **Bill of lading taken to order of fictitious person.**—**GABARRON v. KREEFT, KREEFT v. THOMPSON**, No. 1056, *ante*.



*Sect. 1.—Transfer of property from seller to buyer:*  
*Sub-sect. 6, B. (b) & C. (a).]*

(b) *Other Like Document.*

See Sale of Goods Act, 1893 (c. 71), s. 19.

**1321. Whether property passes—Use of instruments similar in form to bills of lading.]—**BRYANS *v.* NIX, No. 1117, *ante*.

**1322. — Mate's receipt.]—**RUCK *v.* HATFIELD, No. 2244, *post*.

**1323. —.]—**Pltfs., merchants in London, purchased for C., but on their own credit, goods abroad, debiting C. with the price & a commission. The goods were warehoused in London in pltfs.' name. C. in his own name engaged room for the goods in the ship *E.*, which had been put up as a general ship for Calcutta. Pltfs., at C.'s request, delivered the goods to a lighterman, but, with a view to preserve their lien, took the lighterman's engagement to give them the mate's receipt. The goods were shipped on the *E.*; the mate's receipt in blank was handed to the lighterman, who gave it to pltfs. C. promised pltfs. to redeem the mate's receipt, but never did so, & fraudulently induced the shipbrokers to get bills of lading to C.'s order, to be signed by the master, though the mate's receipt was not produced. C. fraudulently indorsed these bills of lading for value to a *bonâ fide* indorsee. Pltfs. had no communication with the shipbrokers or captain till after the ship had sailed, when, the facts being discovered, they demanded the goods both in this country & on the arrival of the ship at Calcutta. The goods were delivered by the captain at Calcutta to the holders of the bills of lading. An action was brought for this conversion against the shipowner & the captain.

The only question left to the jury was, whether, under the circumstances, the master was justified in signing the bills of lading without the production of the mate's receipt. The jury finding in the negative, pltfs. had the verdict against both defts. on the pleas of not guilty & not possessed:—*Held*: the property in the goods remained the property of pltfs., there never having been any delivery *animo transferendi* to C.—SCHUSTER *v.* MCKELLAR (1857), 7 B. & B. 704; 26 L. J. Q. B. 281; 29 L. T. O. S. 225; 3 Jur. N. S. 1320; 5 W. R. 656; 119 E. R. 1407.

*Annotations:—*Expld. Hathesing *v.* Laing, Laing *v.* Zeden (1873), L. R. 17 Eq. 92. *Refd.* Wagstaff *v.* Anderson (1879), 4 C. P. D. 283; Baumvoll Manufactur Von Scheibler *v.* Gluchrest & Furness, [1891] 2 Q. B. 310. *Mentd.* Dalryll *v.* Tyrer (1858), E. B. & E. 899; The St. Cloud (1863), Brown. & Lush. 4; Sandeman *v.* Scurr (1866), L. R. 2 Q. B. 86; Omoa & Cleland Coal & Iron Co. *v.* Huntley (1877), 2 C. P. D. 464.

**1324. —.]—**FALK *v.* FLETCHER, No. 1307, *ante*.

**1325. —.]—**EVANS *v.* NICHOL, No. 1118, *ante*.

*C. Delivery in Exchange for Payment.*

(a) *In General*

**1326. Whether passing of property suspended—Sale for ready money—Waiver by seller.]—**HASWELL *v.* HUNT (1726), cited in 5 Term Rep. at p. 231; 101 E. R. 130.

*Annotations:—*Distd. Tooke *v.* Hollingsworth (1793), 5 Term Rep. 215; Load *v.* Green (1846), 15 M. & W. 216.

**1327. — Sale against acceptance of bill of exchange—Bill of lading sent to third party.]—**C., a merchant at Waterford, had been in the habit of consigning cargoes of grain to B., a corn factor

in Bristol, who had been accustomed to accept bills on the faith of such consignments. C. wrote to B., stating that he was about to ship him a cargo of oats, & that he had drawn on him for £550 in anticipation of it, & desiring him to effect an insurance on the cargo. C. remitted the bill to B., & he accepted it. Before the vessel sailed, C. stopped payment, & he then sent the bill of lading, indorsed in blank, to F., another factor at Bristol, not informing him of his engagement with B. When the vessel arrived, F., for his own convenience, transmitted the bill of lading to B., desiring him to act for him. B. paid the freight, & took possession of the cargo, as a security for his own claim on C., & it was afterwards taken out of his possession by defts., who also were creditors of C., under a foreign attachment against C. out of the Tolzey ct. of Bristol:—*Held*: B. had not such a property in the goods as to enable him to maintain trover against defts.—BRUCE *v.* WAIT (1837), 3 M. & W. 15; Murp. & H. 339; 7 L. J. Ex. 17; 150 E. R. 1036.

*Annotations:—*Distd. Bryans *v.* Nix (1839), 4 M. & W. 775; Evans *v.* Nichol (1841), 3 Man. & G. 614.

**1328. — Waiver by seller.]—**M., the alleged bkpt., had contracted with H. & B. for the purchase of a quantity of wine, subject to a stipulation that H. & B. were not to be obliged to deliver it before payment of a bill of exchange held by them, unless they chose so to do, or unless M. absolutely required the wine for the purposes of his business. M. afterwards executed a deed of composition under Bkpcy. Act, 1861 (c. 134), s. 192; & in the schedule filed in pursuance of the General Order of May, 1862, the debt set opposite the names of H. & B., who were assenting creditors, included the price of the wine which was not yet delivered:—*Held*: if the right to retain the wine was to be regarded as a security, it was a security for the payment of the bill & not for the price of the wine, & consequently H. & B. were entitled to sign the deed as creditors for the full amount of the unpaid purchase-money.—*Re* MIDDLETON, *Ex p.* MIDDLETON (1864), 3 De G. J. & Sm. 201; 33 L. J. Bey. 36; 10 L. T. 82; 46 E. R. 614, L. C.

**1329. —.]—**By a bill of lading, goods are deliverable to J., if he should accept & pay a bill of exchange; if not, to the holder of the bill of exchange, J. accepts the bill of exchange, & indorses the bill of lading for a valuable consideration; but does not pay the bill of exchange when due. Upon its dishonour:—*Held*: the property in the goods vested in the holder of it, & he might maintain trover for the goods against the indorsee of the bill of lading.—BARROW *v.* COLES (1811), 3 Camp. 92; 170 E. R. 1316, N. P.

*Annotation:—*Distd. Mitchell *v.* Ede (1840), 11 Ad. & El. 888.

**1330. — Sale against cash or bills—Election by buyer to pay by bill—Acceptance of bill by seller.]—**COWAS-JEE *v.* THOMPSON, No. 1659, *post*.

**1331. — Shipment on buyer's ship—Bill of lading taken by seller—Blank bill wrongfully taken.]—**A. being indebted to pltf. accepts an order to purchase goods for him at R., & puts them on board pltf.'s vessel sent for them as pltf.'s goods, advises him of the shipment for pltf.'s risk & on his account, & remits him the invoices. He procures the master to sign bills of lading to the order of blank, assuring him 't is immaterial. He then draws on pltf., & transmits the bills & bill of lading to an agent in

this country, with instructions, that if pltf. does not accept the bills, the agent should indorse over the bill of lading to the payee of the bills, which is accordingly done:—*Held*: the property in the goods was changed by the delivery on board pltf.'s ship & the subsequent indorsement of the bill of lading was inoperative.—*OGLE v. ATKINSON* (1814), 5 Taunt. 759; 1 Marsh. 323; 128 E. R. 890.

*Annotations*:—*Distd.* *Mitchel v. Ede* (1840), 11 Ad. & El. 888. *Consd.* *Wilmshurst v. Bowker* (1844), 7 Man. & G. 882. *Distd.* *Walt v. Baker* (1848), 2 Exch. 1; *Turner, etc. v. Liverpool Docks Trustees* (1851), 6 Exch. 543; *Brown v. Hare* (1858), 27 L. J. Ex. 372; *Schotsmans v. L. & Y. Ry.* (1865), L. R. 1 Ex. 349. *Refd.* *Gosling v. Birnie* (1831), 7 Bing. 339; *Cheesman v. Exall* (1851), 6 Exch. 341; *Gabarron v. Kreeft*, *Kreeft v. Thompson* (1875), L. R. 10 Exch. 274. *Mentd.* *Watson v. Lane* (1856), 11 Exch. 769; *Delaney v. Fox* (1857), 2 C. B. N. S. 768; *Thorne v. Tilbury* (1858), 3 H. & N. 534.

1332. —.]—*MITCHEL v. EDE*, No. 1038, *ante*.

1333. — **Delivery of goods—Conditional on redelivery of seller's acceptances.**—*LOESCHMAN v. WILLIAMS*, No. 2216, *post*.

1334. — **Conditional on withdrawal of bills.**—*BISHOP v. SHILLITO* (1819), 2 B. & Ald. 329, n.; 106 E. R. 387.

*Annotations*:—*Expld.* *Hornblower v. Proud* (1819), 2 B. & Ald. 327. *Distd.* *Re Middleton*, *Ex p. Middleton* (1864), 3 De G. J. & Sm. 201.

1335. — **Conditional on payment of balance of price.**—*DUPONT v. BRITISH SOUTH AFRICA CO.* (1901), 18 T. L. R. 24.

*Annotation*:—*Refd.* *The Miramichi*, [1915] P. 71.

1336. — **Assignment on general account with factor.**—*O.* had been in the habit of shipping goods at Newry, consigned to *A.* at Liverpool, to be sold on *O.*'s account, & of thereupon drawing bills of exchange upon *A.*, frequently in anticipation of future consignments. On Jan. 5, 1819, there was due to *A.* a balance of £1,659 arising out of these transactions. On Jan. 6, *O.* shipped on board a ship of *C.*'s goods for Liverpool to the amount of £592; consigned them to *A.*, sending him the bill of lading & invoice; & at the same time drew on him a bill for £500. *A.* having refused to accept the bill, *O.* indemnified *C.*, who thereupon landed the goods at Newry, & redelivered them to *O.*:—*Held*: *A.* might sue *C.* in *assumpsit* for the non-delivery of the goods.—*ANDERSON v. CLARK* (1824), 2 Bing. 20; 130 E. R. 211.

*Annotation*:—*Apld.* *Bryans v. Nix* (1839), 4 M. & W. 775.

1337. — **Payment against delivery of invoice & bill of lading—Shipment "on account & at risk of" buyer—Indorsement of bill of lading to buyer.**—*B.* sold to *A.* wheat, the price to be paid by banker's draft on London at two months, to be remitted on receipt of invoice & bill of lading, which *B.* shipped by order of *A.*, to be carried to *M.* for the account & at the risk of *A.*, there to be delivered to *A.*; *B.* delivered the wheat to the master of the vessel, who took possession thereof; the master signed a bill of lading to deliver the wheat to the order of *B.*, who indorsed such bill of lading to *A.*, & made an invoice, & sent the invoice & bill of lading to *A.* in a letter, requiring *A.* to remit in course, which letter, with the invoice & bill of lading, were received by *A.* *A.* having received the bill of lading & invoice, & having failed to remit the banker's draft, *B.* assumed to revoke & rescind the sale, & caused the wheat to be stopped in its passage to *A.*, etc.:—*Held*: by the delivery of the wheat to the master of the vessel for the account & at the risk of *A.*, & the transmission of the indorsed bill of lading, *B.* had so parted with the property & right of possession, as not to be entitled to intercept the delivery.—*WILMSHURST v. BOWKER* (1844), 7 Man. & G. 882;

8 Scott, N. R. 571; 12 L. J. Ex. 475; 135 E. R. 358, Ex. Ch.; *reusg.* (1841), 2 Man. & G. 192.

*Annotations*:—*Apld.* *Key v. Cotesworth* (1852), 7 Exch. 595; *Re Chadwick*, *Ex p. Catling* (1873), 29 L. T. 431. *Refd.* *Milgate v. Kebble* (1841), *Drinkwater*, 225; *Sheridan v. New Quay Co.* (1858), 4 C. B. N. S. 618; *Fraser v. Witt* (1868), L. R. 7 Eq. 64; *Shepherd v. Harrison* (1869), L. R. 4 Q. B. 196.

1338. — **Payment against wharfinger's transfer note.**—*GODTS v. ROSE*, No. 1076, *ante*.

1339. — **Payment against delivery of mate's receipt.**—*SCHUSTER v. MCKELLAR*, No. 1323, *ante*.

1340. — **Payment against bill of lading—In hands of seller's agent.**—*Coals were sold at Hull, & shipped on board a vessel chartered by the buyer, to be paid for in cash against bill of lading in the hands of the seller's agent in London:—Held*: that no property passed to the buyer until the condition was fulfilled, & the price being unpaid, the seller was entitled to intercept the delivery.—*MOAKES v. NICOLSON* (1865), 19 C. B. N. S. 290; 34 L. J. C. P. 273; 12 L. T. 573; 144 E. R. 798.

*Annotations*:—*Apprvd.* *Shepherd v. Harrison* (1871), L. R. 5 H. L. 116. *Consd.* *Gabarron v. Kreeft*, *Kreeft v. Thompson* (1875), L. R. 10 Exch. 274. *Refd.* *The Kron-prinsessan Margareta, The Parana, etc.*, [1921] 1 A. C. 486.

1341. —.]—*SANDERS v. MACLEAN*, No. 1936, *post*.

1342. — **Cash against shipping documents—Payment not made within reasonable time.**—*RYAN v. RIDLEY & Co.*, No. 2369, *post*.

1343. — **—**—*Where in a c.i.f. contract provision is made for payment of cash against documents the presumption is that the retention of the documents until payment imports that the right of disposal of the goods is reserved by the seller, & the property in the goods does not pass until payment is made.—EASTWOOD & HOLT v. STUDEE* (1926), 31 Com. Cas. 251.

1344. **Intention to pass property on shipment—Possession of cargo & bill of lading withheld till actual payment.**—*The enemy character of goods seized as prize is to be determined by the general property as opened to any special proprietary right, & not by risk; & the fact that the contract between the vendor & the purchaser was entered into with reference to the law of some country other than England is immaterial, unless it be proved that such law differs in some material respect from English law.*

*In a case in which it appeared from the facts that the intention of the parties to the contract was that the property in the cargo should pass to the purchaser on shipment & be at his risk but that he was not intended to have possession of it, or of the bills of lading, until actual payment of the purchase price at the expiration of an agreed period of credit, which did not expire till after the ship had been captured:—Held*: the inference that the property in the cargo had passed to the purchaser before the capture was not displaced by the form of the bills of lading, which was ambiguous.

*If the seller deal with the bill of lading only to secure the contract price . . . the prima facie presumption in such a case appears to be that the property is to pass only on the performance by the buyer of his part of the contract, & not forthwith subject to the seller's lien. Inasmuch, however, as the object to be attained, namely, securing the contract price, may be attained by the seller merely reserving a lien, the inference that the property is to pass on the performance of a condition only is necessarily somewhat weak, & may be rebutted by the other circumstances of the case (LORD PARKER).—THE PARCHIM, [1918] A. C.*

*Sect. 1.—Transfer of property from seller to buyer:*  
*Sub-sect. 6, C. (a) & (b).]*

157; 87 L. J. P. 18; 117 L. T. 738; 34 T. L. R. 53; 14 Asp. M. L. C. 190, P. C.

*Annotations:—Consd.* The Derfflinger (No. 2) (1918), 87 L. J. P. C. 195; Eastwood & Holt v. Studer (1926), 31 Com. Cas. 251. *Reid.* Dynamit Act. v. Rio Tinto Co., [1918] A. C. 292; The Annie Johnson, The Kronprinsessan Margareta, [1918] P. 154; The Palm Branch, [1919] A. C. 272; The Kronprinsessan Margareta, The Parana, [1921] 1 A. C. 486. *Mentd.* The Dirigo, The Hallingdal, etc., [1919] P. 204.

*(b) Delivery of Bill of Exchange and Bill of Lading.*

*See Sale of Goods Act, 1893 (c. 71), s. 19 (3).*

**1345. Whether passing of property suspended—Delivery of bill of lading to buyer—With advice of bill of exchange.]**—Where the consignor of goods abroad advised the consignee by letter that he had chartered a certain ship on his account & inclosed him an invoice of the goods laden on board, which were therein expressed to be for account & risk of the consignee & also a bill of lading in the usual form, expressing the delivery to be made to order, etc., he paying freight for the said goods according to charter party; & the letter of advice also informed the consignee that the consignor had drawn bills on him at three months for the value of the cargo:—*Held:* the invoice & bill of lading sent to the consignee & the delivery of the goods to the captain vested the property in the consignee, subject only to be divested by the consignor's right to stop the goods *in transitu* in case of the insolvency of the other.—*WALLEY v. MONTGOMERY* (1803), 3 East, 585; 102 E. R. 721.

*Annotations:—Distd.* Mitchel v. Tede (1840), 11 Ad. & El. 888. *Consd.* Wilmshurst v. Bowker (1841), 2 Man. & G. 792. *Reid.* Shepherd v. Harrison (1871), L. R. 5 H. L. 116.

**1346.** —In 1845, defts., commission agents in London, wrote to plffs., merchants at Madras, as follows:—"at the request of Messrs. K. & L. of Glasgow, we beg to open a credit in your favour to the extent of £1,500, to be applied to the execution of an order they have given you for Madras handkerchiefs & for cost of which, as produced, you draw on us at the customary date, on forwarding bills of lading to our order." In consequence of this letter, two orders given by K. & L. were executed by plffs., who forwarded the goods & bills of lading to defts., & they accepted & paid bills drawn on them in accordance with the letter. In Feb. 1847, K. & L. wrote to plffs., inclosing patterns for a third order, & saying "you will draw for cost, & consign goods as before." Plffs. executed this order, & on Aug. 21 shipped the goods on account of K. & L. & sent to defts. the invoice & bill of lading inclosed in a letter, saying, "we have as usual drawn upon you at six months for the equivalent of the amount of invoice." The bill of lading stated the goods to have been "shipped by plffs., & to be deliverable to defts. or their assigns, on payment of freight." The invoice stated, that the goods were "consigned to defts. on account & risk of K. & L." The letter containing the bill of lading & invoice was received by defts. on Aug. 26, and the goods arrived in London on Oct. 21. On the same day, plffs.' agent received a bill drawn against the goods & caused it to be presented to defts. for acceptance, but they refused to accept it. On Oct. 27, K. & L. stopped payment. The goods were received by defts. under the bill of lading, & sold, & the proceeds retained by them. On Mar. 4, 1848, plffs. gave defts. notice that they claimed to stop the goods *in transitu*, defts. having refused to

accept the bills; & plffs. subsequently brought an action to recover the proceeds of the sale as money received for their use:—*Held:* (1) it was a question for the judge, & not for the jury, to decide whether, under the circumstances, the property in the goods vested absolutely in K. & L. or merely conditionally on the acceptance of the bill by defts.; (2) the contract was not subject to the condition, either precedent or subsequent, that defts. should accept the bill, but that the property in the goods vested absolutely in K. & L. upon the delivery on board the ship & transmission of the bill of lading to defts.; (3) if plffs. had intended to preserve their right of property in the goods until the bill was accepted, they should have transmitted the bill of lading indorsed in blank to an agent, to be delivered over only in case the bill was accepted.—*KEY v. COTESWORTH* (1852), 7 Exch. 595; 22 L. J. Ex. 4; 19 L. T. O. S. 145; 155 E. R. 1085.

*Annotations:—As to, (1) Reid.* Joyce v. Swann (1864), 17

403. *Generally, Mentd.* Torrance v. Bank of British North America (1873), L. R. 5 P. C. 246.

**1347.** —[—]—A firm of merchants in England employed a firm of merchants in South America as their agents to purchase goods & send them to England. The foreign firm drew bills on the English firm & sold them in South America, & with the proceeds purchased goods which they shipped to England, sending the bills of lading directly to the English firm, & at the same time advising them of the drawing of the bills, by means of which they had purchased the goods, & requesting them to carry the invoice price of the goods to their account. The English firm went into liquidation & the foreign firm also became bkpt. When the English firm stopped payment, a cargo of goods was *in transitu*, & some of the bills drawn for purchasing them had been accepted by the English firm, but not paid, & others had not been accepted. The trustee in the liquidation took possession of the cargo on its arrival. The creditors of the foreign firm claimed to have the goods appropriated to meet the bills drawn in respect of them:—*Held:* the foreign firm, whether regarded as the agents of the English firm or as vendors, had parted with all property in the goods, & had no power to direct the appropriation of the proceeds.—*Re TAPPENBECK, Ex p. BANNER* (1876), 2 Ch. D. 278; 45 L. J. Bcy. 73; 34 L. T. 199; 24 W. R. 476, C. A.

*Annotations:—Appld.* Phelps, Stokes v. Comber (1884), 26 Ch. D. 755. *Consd.* König v. Brandt (1901), 84 L. T. 748. *Reid.* The Kronprinsessan Margareta, The Parana, etc., [1921] 1 A. C. 486.

**1348.** —[—]—Defts. carried on business in London, & their practice was to sell in their own names goods shipped to them by P. & co. who carried on business abroad. P. & co. used to specify in advising drafts against what particular shipments same were drawn, so as to enable defts. to tell whether the particular shipments consigned to them did in fact cover the then outstanding drafts, but not to affect their right to treat all shipping documents as cover for the whole account between them & P. & co. P. & co. used likewise to draw upon plffs., who also carried on business in London, against shipments of goods, bills which plffs. accepted, P. & co. afterwards forwarding to them, as security, before the bills reached maturity, bills drawn by P. & co. on first class firms, among them being defts., accompanied by the shipping documents of the goods shipped by them to such firms, & on such firms accepting the bills plffs. would hand over to them the shipping documents

which otherwise would have been retained. Defts. having received instructions from P. & co. to sell certain goods at a specified price, entered into contracts for the sale thereof. Subsequently P. & co. wrote to the defts. that they had drawn upon them against the goods & the bills were specified. The bills were drawn to the order of pltf's. by P. & co. upon defts. for various sums, & were together intended to provide for part of the credit or advances made by pltf's. to P. & co. Bills of lading for the goods, indorsed in favour of defts., were afterwards forwarded to them by P. & co. Defts. took possession of the bills of lading & applied them in satisfying, so far as they would go, the contracts into which they had entered; but, becoming doubtful as to the financial position of P. & co.'s firm, they declined to accept the bills of exchange, & claimed to treat the proceeds of sale of the goods as available for payment of the general balance of account between themselves & P. & co.:—*Held*: there was no specific appropriation of the goods in favour of pltf's.; defts. were not compellable to accept the bills; & nothing had been done to defeat the primary right of defts., in whose custody the goods were, to deal with them for their own purposes & irrespective of any rights of pltf's.—*KÖNIG v. BRANDT* (1901), 84 L. T. 748; 9 Asp. M. L. C. 199, C. A.

1349. — Through seller's agent.]—*KEY v. COTESWORTH*, No. 1346, *ante*.

1350. — ———.]—*SHEPHERD v. HARRISON*, No. 1355, *post*.

1351. — ———.]—*Re TAPPENBECK, Ex p. BANNER*, No. 1347, *ante*.

1352. — ———.]—In fulfilment of a contract for the sale of a certain quantity of copper the sellers forwarded to the buyer a bill of lading indorsed in blank for copper shipped on defts.' ship, together with a draft for the price of the copper for acceptance. The buyer, who was insolvent, did not accept the draft, & delivered the bill of lading to pltf's. in fulfilment of a contract which he had, previously to obtaining possession of the bill of lading, made for the sale to them of copper, & they thereupon paid him the price of the copper. Pltf's. took the bill of lading in good faith, & without notice of the rights of the original sellers in respect of the copper. The sellers stopped the copper *in transitu*. In an action by pltf's. against defts. for non-delivery of the copper:—*Held*: the buyer having obtained possession of the bill of lading with the consent of the sellers, the transfer of it by him to pltf's. gave them a good title to the copper under Sale of Goods Act, 1893 (c. 71), s. 25 (2), & the sellers had no right to stop it *in transitu*.

However fraudulent the person in actual custody may have been in obtaining the possession, provided it did not amount to larceny by a trick, & however grossly he may abuse confidence reposed in him, or violate the mandate under which he got possession, he can by his disposition give a good title to the purchaser (*COLLINS, L.J.*).—*CAHN v. POCKETT'S BRISTOL CHANNEL STEAM PACKET CO.*, [1899] 1 Q. B. 643; 68 L. J. Q. B. 515; 80 L. T. 269; 47 W. R. 422; 15 T. L. R. 247; 43 Sol. Jo. 331; 8 Asp. M. L. C. 517; 4 Com. Cas. 168, C. A. *Annotations*:—*Consd. Oppenheimer v. Frazer & Wyatt*,

[1907] 2 K. B. 50; *Folkes v. King*, [1923] 1 K. B. 282. *Refd. Oppenheimer v. Attenborough*, [1907] 1 K. B. 510; *Lake v. Simmons*, [1926] 2 K. B. 51.

1353. — ———.]—In pursuance of a contract note, providing for cost, insurance & freight of a parcel of wood goods, the sellers in Christiania shipped the goods under a bill of lading to the order of their London agents, who forwarded it to the buyers at Exeter, & authorised them to retain it against their acceptance at four months, or cash less discount. The buyers elected to pay in cash; but their country cheque posted to London was not credited as paid until three days after the carrying vessel had been in collision with another vessel & the goods had been damaged. The carrying vessel put into a port of distress, where the goods were sold on behalf of underwriters, with whom the sellers' agents had effected a policy for the benefit of whom it might concern. The underwriters subsequently paid the buyers as for a total loss, & the sellers retained the proceeds of the cheque representing the invoice price of the goods. In an action of damage by collision brought against the other vessel by the owners of the goods in the carrying ship, the names of the buyers were given as pltf's., but the ct. held that the buyers had no right of action, as the property in the goods was not vested in them at the time of the collision. By leave the names of the sellers were added as pltf's., & the other vessel having been found alone to blame, the amount of the damage was referred to the registrar, who rejected the claim of the sellers suing on behalf of the underwriters on the ground that, as the sellers had been paid by the buyers the sound value of the goods they had not sustained any loss in respect of which subrogation could arise. This report was confirmed by the judge sitting in Admty.:—*Held*: the passing of the cheque from buyers to sellers did not deprive the underwriters of their right to recover the loss from the wrongdoer in the name of the sellers, who were the owners of the goods at the time of the collision.—*THE CHARLOTTE*, [1908] P. 206; 77 L. J. P. 132; 99 L. T. 380; 24 T. L. R. 416; 11 Asp. M. L. C. 87, C. A.

*See, now, Sale of Goods Act, 1893 (c. 71), s. 19 (3).*

1354. — Delivery of both bill of lading & bill of exchange.—To seller's agent.]—A., who resided at Manchester, contracted to buy of B., at Dumfries, a quantity of oak bark, to be shipped "for delivery at Liverpool." B. accordingly shipped the bark, to be delivered at Liverpool to defts., who were wharfingers & carriers there, to be by them forwarded to A. at Manchester. The bark was to be paid for in cash; & B. sent a bill of lading, making it deliverable to "A. or his assigns," together with a bill of exchange payable on demand, through his bankers, to the Manchester & Salford Bank, with instructions to present the bill for acceptance. The bank at Manchester were unable to find A., & accordingly they returned the bill of lading & draft to B. Before the bill of lading had been so returned, B., who was at Liverpool when the bark arrived there, believing from the representations of an agent of pltf., who had bought the bark of A., that the bill of lading had been duly handed over to A., assented to the bark being delivered to defts. for the purpose of its

#### PART IV. SECT. 1, SUB-SECT. 6.—C. (b).

1349 i. *Whether passing of property suspended—Delivery of bill of lading to buyer—Through seller's agent.*—Goods were shipped under a bill of lading deliverable to the order of the seller's agents. A bank paid the draft on the

purchaser, which was payable on demand, & obtained the bill of lading, which was indorsed in blank:—*Held*: the property in the goods passed to the bank on their taking up the draft, subject to an understanding with the vendors that it would deliver them to the purchaser on payment of the

draft.—*NASH v. GEORGE, DOUGHTY & CO.* (1911), 30 N. Z. L. R. 1122.—N.Z.

q. — — — With stipulation for acceptance by return of post.]—*BRODIE v. TODD & CO.* (1814), 17 Fac. Coll. 609.—SCOT.

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being carried to Manchester for pltf.; but, upon subsequently discovering that A. had not got the bill of lading or paid for the bark, B. claimed & received it from defts. —*Held*: under the circumstances, the property in the bark never passed to A., & consequently that B. had a right to countermand the delivery; & it was competent to defts., notwithstanding they had received the bark to be carried for pltf., to set up the title of B., in an action brought against them by pltf.—*SHERIDAN v. NEW QUAY CO.* (1858), 4 C. B. N. S. 618; 28 L. J. C. P. 58; 33 L. T. O. S. 238; 5 Jur. N. S. 248; 140 E. R. 1234.

*Annotations*:—*Refd.* *European & Australian Royal Mail Co. v. Royal Mail Steam Packet Co.* (1861), 30 L. J. C. P. 247; *Biddle v. Bond* (1865), 6 B. & S. 225; *Seagrave v. Union Marine Insee.* (1866), L. R. 1 C. P. 305; *Shepherd v. Harrison* (1869), 17 W. R. 609.

1355. ————*]*—(1) In taking a bill of lading, the vendor of the goods who ships them controls the possession of the captain, & makes him accountable to deliver the cargo according to its terms. It is the symbol of property, & the holder of it retains the property in himself. It is not inconsistent with a statement in the invoice that the goods are "shipped on account & at the risk" of the consignee. The *jus disponendi* is still reserved to the shipper through the medium of the bill of lading.

(2) The burden of showing the existence of a different state of things lies on the person who contradicts what would be the ordinary legal conclusion from the transaction.

(3) Where a bill of lading & a bill of exchange to cover the goods included in the bill of lading, are sent in a letter to a vendee of the goods, it is a well understood rule that the bill of exchange must be accepted, or the bill of lading cannot be retained. Where a bill of exchange is not accepted, but the bill of lading is retained, the bill of lading acquired in that manner gives no right of property to the person so acquiring it.

S., who was in good credit with P. & N., at Brazil, desired them to purchase cotton for him. Their agent in England was G. They did purchase the cotton, & sent it, the invoice described it as shipped on account & at the risk of S. The invoice & two bills of lading were enclosed in a letter to G., who forwarded the invoice & one of the bills of lading, together with a bill of exchange for the price of the cotton to S. in a letter in which they said: "We enclose bill of lading, etc., shipped by P. & N. on your account. We hand also the draft on your good selves for costs of the cotton, to which we beg your protection." S. wrote an answer making some complaints about the quality & price of the cotton, & after referring to some previous transaction, said that these circumstances stood in the way of his accepting the bill. He handed over the bill of lading to his brokers, who paid the freight, & obtained from the shipowners a delivery order; but before the cotton was actually delivered to the brokers of S., G. interposed, & on the authority of a duplicate bill of lading obtained delivery of the cotton:—*Held*: the property in the cotton had not, under these circumstances, passed to S., but remained with P. & N., whose agent was lawfully justified in taking possession of the cotton.—*SHEPHERD v. HARRISON* (1871), L. R. 5 H. L. 116; 40 L. J. Q. B. 148; 24 L. T. 857; 20 W. R. 1; 1 Asp. M. L. C. 66, H. L.

*Annotations*:—*As to* (1) *Consol. Cahn v. Pockett's Bristol Channel Steam Packet Co.* [1899] 1 Q. B. 643. *Refd.* *Gabarron v. Kreeft*, *Kreeft v. Thompson* (1875), L. R. 10 Exch. 274; *Banco de Lima v. Anglo-Peruvian Bank*

(1878), 8 Ch. D. 160. *As to* (3) *Distd. Re Tappenbeck, Ex p. Banner* (1876), 2 Ch. D. 278. *Apld.* *Mirabita v. Imperial Ottoman Bank* (1878), 3 Ex. D. 164. *Consol.* *Rew v. Payne*, *Douthwaite* (1885), 53 L. T. 932; *Cahn v. Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q. B. 643. *Distd.* *König v. Brandt* (1901), 84 L. T. 748. *Apld.* *Barton*, *Thompson v. Vigers* (1906), 110 L. T. 667, n. *Consol.* *The Kronprinsessan Margareta, The Parana*, [1921] 1 A. C. 486. *Refd.* *Banco de Lima v. Anglo-Peruvian Bank* (1878), 8 Ch. D. 160; *The Annie Johnson, The Kronprinsessan Margareta*, [1918] P. 154; *Guaranty Trust Co. of New York v. Hannay*, [1918] 2 K. B. 623; *Folkes v. King*, [1923] 1 K. B. 282. *Generally*, *Mentd. Re Yglesias, Ex p. Gomez* (1875), 10 Ch. App. 639; *Laurie & Morewood v. Dudin* (1926), 134 L. T. 309.

1356. ————*]*—*OGG v. SHUTER*, No. 1312, *ante*.

1357. ————*]*—P. shipped 600 tons of umber upon a vessel chartered for pltf. The bills of lading made the umber deliverable to the order of P. or assigns. Pltf. insured the umber. A bill of exchange drawn by P. on pltf., which had been discounted by deft.'s bank, to whom the bills of lading had been transferred, having been refused acceptance, a second bill was drawn by P. to the order of C. on pltf., & was given to defts. in exchange for the first bill, upon the terms that pltf. should accept & pay the second bill against the delivery of the bill of lading. The umber & the bill of exchange reached their destination at the same time, but pltf. declined to accept the bill. The umber was, therefore, entered at the custom house in deft.'s name. Subsequently pltf. tendered the amount of the bill of exchange & demanded the bill of lading, but defts. refused to give up the bill of lading; pltf. offered a guarantee for the freight, which offer was not accepted by defts., & they sold the cargo:—*Held*: the property in the umber passed to pltf., & pltf. was entitled to recover.

If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order & does so, not as agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property & that consequently there is no final appropriation & the property does not on shipment pass to the purchasers. When the vendor on shipment takes the bill of lading to his own order he has the power of absolutely disposing of the cargo (*COTTON, L.J.*).

If the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute . . . & until such acceptance or payment or tender, the property in the goods does not pass to the purchaser. . . . But if the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not, on payment or tender by the purchaser of the contract price, rest in him (*COTTON, L.J.*).—*MIRABITA v. IMPERIAL OTTOMAN BANK* (1878), 3 Ex. D. 164; 47 L. J. Q. B. 418; 38 L. T. 597; 3 Asp. M. L. C. 591, C. A.

*Annotations*:—*Consol.* *Arnhold Karberg v. Blythe, Green, Jourdain, Schneider v. Burgett & Newsam*, [1915] 2 K. B. 379. *Apld.* *The Annie Johnson, The Kronprinsessan Margareta*, [1918] P. 154. It is well known that these portions of the Act (*Sale of Goods Act*, 1893 (c. 71), s. 18, r. 5, s. 19 (1) (3)) were founded on the judgment of *Cotton, L. J.*, in *Mirabita v. Ottoman Bank* (*EVANS, P.*). *Refd.* *Dupont v. British South Africa Co.* (1901), 18 T. L. R. 24; *Biddell v. E. Clemens Horst*, [1911] 1 K. B. 934; *The Miramichi*, [1915] P. 71; *Guaranty Trust Co. of New York v. Hannay*, [1918] 2 K. B. 623; *The Parchim*, [1918] A. C. 157; *Wilcock v. Pinto*, [1925] 1 K. B. 30. *Re Nathan, Ex p. Stapleton* (1879), 10 Ch. D. 586.



**1358.** —[—]—A shipload of timber having been consigned to defts., the consignor sent the bill of lading, & other shipping documents, & also a bill of exchange, to pltf's., in pursuance of the usual course of business between him & them, to cover certain advances which they from time to time made to him. Pltf's. placed the shipping documents & bill of exchange relating to the cargo of timber in the hands of agents, who acted between pltf's. & defts. The agents at the request of pltf's. forwarded the documents to defts., in order to have the bill of exchange accepted by them. Shortly afterwards defts. informed the agents that the cargo was thoroughly out of condition, & that they could not take it in its then state. The agents replied that, unless defts. returned the bill of exchange accepted, they ought to send back the shipping documents. This defts. declined to do, as they had paid part of the freight, & intended to take possession of the cargo. Later on they stated that they had been compelled to remove the cargo under the rules of the dock co., but that, if the agents would repay them the freight & certain charges, & their profits on a portion of the cargo which they had sold, they would return the documents. The agents replied that the matter must be left in the hands of pltf's., the owners of the cargo. Defts. then returned to the agents the bill of exchange unaccepted, but retained the bill of lading as security against freight & charges. They offered to yield up the bill of lading on the freight & charges being refunded. Thereupon pltf's. commenced an action against defts., asking that they might be ordered to accept & deliver up the bill of exchange; & that it might be declared that, until such acceptance & delivery, defts. were not entitled to retain the bill of lading. They also asked for an injunction, receiver & damages. Owing to delay, caused by the fault of both parties, the action did not come on for hearing until about four years after its commencement:—*Held*: defts., having refused to accept the bill of exchange, were bound to have returned the shipping documents, which were only at their disposal on the condition that they should so accept the bill; & they wrongfully took possession of the cargo, & dealt with as its owners, although they had repudiated the contract, & refused to accept the bill of exchange, availing themselves of the bill of lading, which they had no right whatever to retain or make use of, to get that possession.—*REW v. PAYNE, DOUTHWAITE & Co.* (1885), 53 L. T. 932; 5 Asp. M. L. C. 515.

**1359.** — — — — — *To buyer direct.*—*SHEPHERD v. HARRISON*, No. 1355, *ante*.

**1360.** — — — — —[—]—*CAHN v. POCKETT'S BRISTOL CHANNEL STEAM PACKET CO.*, No. 1352, *ante*.

**1361.** — — — — — *Through seller's agent.*—*BARTON, THOMPSON & Co. v. VIGERS BROTHERS* (1906), 110 L. T. 667, n.; 19 Com. Cas. 175.

*Annotation*:—*Distd. Jordenon & Kahn v. London Hardwood Co.* (1913), 110 L. T. 666.

**1362.** — — — — —[—]—A contract was entered into by K., who carried on business at Riga, & deft., through the agency of J. & co., for the sale of certain timber to defts. c.i.f. London.

The contract was signed by J. & co. as agents for K., & provided (*inter alia*) for payment "by approved acceptances to seller's or authorised agent's draft." The bill of lading for the timber was sent by K. to J. & co., upon whom K. drew for the price. The draft was accepted & paid by J. & co., who sent the draft & shipping documents to defts., who kept the shipping documents & took delivery of the goods, but refused to accept the

draft on the ground that the goods which they claimed to reject were not in accordance with the contract. The goods were subsequently sold by order of the ct. for about one-third of their invoice price, & it was admitted that they were not in accordance with the contract. In an action by K. to recover the price of the goods & by J. & co. to recover the amount of the draft:—*Held*: J. & co. were not entitled to maintain the action against defts. in the absence of any contract between themselves & defts. that the draft would be accepted the fact that they had paid K. making no difference, as it could not be relied upon by defts. in answer to an action against them by K. on the contract.—*JORDESON & Co. & KAHN v. LONDON HARDWOOD CO., LTD.* (1913), 110 L. T. 666; 19 Com. Cas. 161.

**1363.** — — — — — *Delivery of boat's receipt to buyer—With advice of bill of exchange.*—*BRYANS v. NIX*, No. 1117, *ante*.

**1364.** — — — — — *Delivery of unindorsed bill of lading to buyer—With advice of bill of exchange.*—*B.*, a merchant in England, in June & July, 1830, sent orders for the purchase of corn to pltf's., in Russia, desiring them to draw upon H. & co., in London, for the amount, & he chartered a ship belonging to defts., & sent it to Russia to be freighted. On July 28, B. wrote a letter, cancelling the orders he had given. Upon Aug. 8, 1830, pltf's. informed B. that they had purchased a cargo for the ship, & should despatch it as soon as possible, addressed to H. & co., London, expressing a hope that he would approve of what they had done, notwithstanding his last-mentioned communication. The cargo was afterwards shipped, & pltf's. by letter informed B. that they had shipped it on his account, & that they had forwarded an indorsed bill of lading to H. & co., drawing upon them for part of the price, & upon him, B., for the residue; & they inclosed an unindorsed bill of lading to B. & an invoice of the wheat, in which it was stated to be bought for his order & on his account. The bills of exchange enclosed in this letter were dishonoured, whereupon pltf's. agent in London delivered the indorsed bill of lading to H. & co. On Oct. 2, B. confirmed the revocation of his order, & on Nov. 24, the agent of pltf's. in England gave notice to the agent of B. that he should retain the whole of the wheat for pltf's. B. afterwards became desirous of having the wheat, & the master of the vessel in which the wheat was shipped delivered it to B.'s orders, & not to H. & co. pursuant to the bill of lading. In an action brought against the shipowners for not delivering pursuant to pltf's. orders, it was contended, that pltf's. were entitled to recover nominal damages only, because the property in the wheat had actually vested in B. by the shipment:—*Held*: the property did not vest in B. absolutely upon the shipment, but only subject to a condition, that the bills were accepted, & in default of acceptance, it never did vest in him; & consequently, pltf's. were entitled to recover the value of the wheat at the time when it was delivered to B.'s order.—*BRANDT v. BOWLEY* (1831), 2 B. & Ad. 932; 1 L. J. K. B. 14; 109 E. R. 1389.

*Annotation*:—*Fold. Shepherd v. Harrison* (1869), L. R. 4 Q. B. 196. (*See* (1871), L. R. 5 H. L. 116.)

**Delivery of unstamped bill of lading.**—*See* No. 1340, *ante*.

**1365.** — — — — — *Delivery of bill of lading to buyer—& bill of exchange to seller's agent.*—*DANISH DAIRIES CO-OPERATIVE SOCIETY v. MIDLAND RY. CO.* (1892), 8 T. L. R. 212, D. C.

*Compare* AGENCY, Vol. I., p. 488, No. 1660.



*Sect. 1.—Transfer of property from buyer to seller: Sub-sect. 7, A., B., C. & D.]*

**SUB-SECT. 7.—TRANSFER OF BILLS OF LADING AND OTHER DOCUMENTS.**

*A. Bills of Lading.*

*See, generally, SHIPPING.*

*Whether passing property.]—See SHIPPING.*

*Reservation of right of disposal by seller.]—*

*See Sub-sect. 6, B. (a), ante.*

*B. Delivery Orders.*

**1366. Whether passing property—General rule.]**

—A consignee of goods delivering over to a third person the shipping note of such goods, & a delivery order on the wharfinger, to deliver such goods as soon as they arrive, does not pass the property in them so as to prevent a stoppage *in transitu* by the consignor.

I do not think that the giving the shipping note & delivery order to pltf., made a change of the property (*BURROUGH, J.*).—*AKERMAN v. HUMPHREY* (1823), 1 C. & P. 53; 171 E. R. 1099, N. P.

*Annotations:—Apld. Tucker v. Humphrey* (1828), 4 Bing. 516; *Jenkyns v. Usborne* (1844), 7 Man. & G. 678.

**1367. ———.]**—The giving of a delivery order does not, without some positive act done under it, operate as a constructive delivery of the goods to which it relates, nor deprive the owner of the goods, who gave it, of his right of lien for their price, even as against the claims of a third person who has *bonâ fide* purchased them from the original vendee.

S., the owner of sugars, sold them to B., to whom he gave a delivery order addressed to his agent A., & took a bill of exchange in payment of the price. B. sold the sugars to M., & transferred to him the delivery order. The sugars were in the warehouse of L., in whose books they were entered as received by him from A., on account of S." The sugars were weighed & invoiced by A. upon the order of S. Neither B. nor M. took any steps to act on the delivery order, till a rumour arose of B.'s insolvency, when M. presented the order to A., & received from him a fresh order, addressed to L., the warehouse keeper. Before the sugars could be actually delivered under this order, A. removed them, under the direction of S.:—*Held*: the possession of the goods had never been changed, & S. might still enforce upon them his lien as vendor.

A delivery order alone does not change the possession (*LORD CAMPBELL*).—*M'EWAN v. SMITH* (1849), 2 H. L. Cas. 309; 13 Jur. 265; 9 E. R. 1109, H. L.

*Annotations:—Consd. Cole v. North Western Bank* (1875), L. R. 10 C. P. 354. *Expld. Pooley v. G. E. Ry.* (1876), 34 L. T. 537. *Apld. Gillman, Spencer v. Carbutt* (1889), 61 L. T. 281. *Consd. Dublin City Distillery v. Doherty*, [1914] A. C. 823. *Refd. Kingsford v. Merry* (1856), 11 Exch. 577; *Gunn v. Bolekow, Vaughan* (1875), 10 Ch. App. 494, n.; *Rogers v. Lambert*, [1891] 1 Q. B. 318; *Folkes v. King*, [1923] 1 K. B. 282; *Lowther v. Harris*, [1927] 1 K. B. 393. *Menfd. Swan v. North British Australia Co.* (1862), 7 H. & N. 603.

**1368. ———.]**—*IMPERIAL BANK v. LONDON & ST. KATHARINE DOCKS CO.*, No. 2036, *post*.

**1369. ———.]**—A delivery order given by the vendor of goods is a mere promise to do something *in futuro*, & is not a representation upon which to found an estoppel.

A broker on Feb. 6, bought goods from defts.

on account of pltfs. without their authority & without ever informing them of the fact. On Mar. 22 he sold the same goods to pltfs. "on account of his principals" at a different price & upon different terms. He thereupon obtained from defts. a delivery order, which was marked with a reference to the contract of Feb. 6, & obtained payment from pltfs., upon giving them that order, under the contract of Mar. 22. He absconded with the money, & defts. refused to deliver the goods to pltfs. without payment under the contract of Feb. 6. Defts. carried on separate businesses as merchants, & as wharfingers, & the delivery order was given by them, as merchants directed to the superintendent of their business of wharfingers:—*Held*: defts. were not estopped from denying that the goods were the property of pltfs.—*GILLMAN, SPENCER & CO. v. CARBUTT & CO.* (1889), 61 L. T. 281; 37 W. R. 437; 5 T. L. R. 365, C. A.

**1370. ———.]**—*Before appropriation of goods to contract.*—Where pltfs. sold 10 out of 18 tons of flax, then lying in mats at defts.' wharf, at so much per ton, to be paid for by the vendee's acceptance at three months, & gave the vendee an order on defts., the wharfingers, to deliver 10 tons to vendee or order, which defts. entered in their books, but the quantity to be delivered was to be ascertained by the wharfinger's weighing it, the mats being of unequal quantities, so that a fraction of a mat might be required, & an allowance for tare & draft was to be made by the weight:—*Held*: the sale was not complete to pass the property, those acts not having been done by the wharfingers, nor any delivery made; & pltfs., upon the insolvency of the vendee, might countermand the delivery.—*BUSK v. DAVIS* (1814), 2 M. & S. 397; 5 Taunt. 622, n.; 105 F. R. 429.

*Annotations:—Fold. Shepley v. Davis* (1814), 5 Taunt. 617. *Distd. Swanwick v. Sothern* (1839), 9 Ad. & El. 895. *Consd. Boswell v. Kilborn* (1862), 15 Moo. P. C. C. 309. *Refd. Gillett v. Hill* (1834), 4 Tyr. 290; *Cowas-Jee v. Thompson* (1845), 5 Moo. P. C. C. 165; *Acraman v. Morrice* (1849), 8 C. B. 449.

**1371. ———.]**—*SHEPLEY v. DAVIS*, No. 1548, *post*.

**1372. ———.]**—Defts., warehousemen, held 618 quarters of maize belonging to A., who sold 200 quarters thereof to W., who sold them to pltfs., giving to the latter a delivery order which they lodged with defts. Defts. did not object to the order, nor did they make any acknowledgment to pltfs. of their title. Shortly afterwards, before any appropriation of the 200 quarters had taken place, A., as unpaid vendor, put a stop on delivery. In an action of detinue against the warehousemen:—*Held*: (1) the mere giving of the delivery order by the vendor & the handing of it to defts. by pltfs. was not sufficient without more to pass the property in the 200 quarters to pltfs. before severance from the bulk; (2) the mere receipt of the delivery order by defts. without objection did not estop them from denying that pltfs. were the owners of the 200 quarters.—*LAURIE & MOREWOOD v. DUDIN & SONS*, [1926] 1 K. B. 223; 95 L. J. K. B. 191; 134 L. T. 309; 42 T. L. R. 149; 31 Com. Cas. 96, C. A.

*Annotations:—As to (1) Consd. Re Wait*, [1927] 1 Ch. 606. *As to (2) Consd. Wait & James v. Midland Bank* (1926), 31 Com. Cas. 172.

**1373. ———.]**—*When lodged with warehouseman.*—A particular parcel of goods in the possession of a

**PART IV. SECT. 1, SUB-SECT. 7.—B.**

**1366 i. Whether passing property—General rule.]**—The giving of a delivery order by a vendor to a vendee does not of itself give the vendee such a possession of the goods as to defeat the vendor's lien.—*LE GUYT v. HARVEY*

(1884), 1 L. R. 8 Bom. 501.—*IND.*

**1366 ii. ———.]**—A delivery note "to the order" of the vendee is not such a document as will, by the endorsement of the vendee, transfer a right of property to the transferee & destroy the vendor's lien for the

price.—*M'EWAN v. SMITH* (1849), 6 Bell. Sc. App. 340; 21 Sc. Jur. 369. —*SCOT.*

*r. ——— No transfer made in company's books.]*—*ALLAN v. FERGUSON & WHITE* (1868), 12 N. B. R. (1 Han.) 149.—*CAN.*

warehouseman is sold at so much per hundred-weight, the weight of the whole being uncertain, to be paid by a bill of exchange. The vendor gives the purchaser an order to the warehouseman to weigh, & deliver the goods, which is lodged with the warehouseman; but before the goods are weighed the purchaser becomes insolvent. The vendor has a right to stop them *in transitu*.

The principle, I take to be, that while anything remains to be done to ascertain the price, the possession is not considered as transferred to the purchaser. Had the rosin been burnt in debts' warehouse without being weighed how could payment have been made according to the terms of the contract? If nothing remains to be done to ascertain the price, I allow that a delivery order lodged with the warehouseman is a sufficient transfer of the possession, although no entry for that purpose be made in his books (GIBBS, C.J.). —WITHERS *v.* LYSS (1815), 4 Camp. 237; Holt, N. P. 18; 171 E. R. 76, N. P.

*Annotation*:—*Distd.* Lackington *v.* Atherton (1844), 7 Man. & G. 360.

**1374.** Effect of local custom.]—GREAVES *v.* HEPKE, No. 1114, *ante*.

**1375.** — Goods transferred in wharfinger's books.]—SWANWICK *v.* SOTHERN, No. 1061, *ante*.

**1376.** — —.]—GILLETT *v.* HILL, No. 1063, *ante*.

**1377.** Rights of sub-purchaser—No greater than those of purchaser.]—M'EWAN *v.* SMITH, No. 1367, *ante*.

— Effect of bankruptcy.]—See BANKRUPTCY, Vol. V., p. 808, Nos. 6898–6900.

— Effect of acknowledgment by warehouseman or wharfinger.]—See Part VI., Sect. 2, sub-sect. 6, C.; Part VII., Sect. 4, sub-sect. 3, C., *post*.

Liability of indorser of delivery order for conversion.]—See TROVER.

Operation as estoppel.]—See ESTOPPEL, Vol. XXI., p. 323, Nos. 1206, 1207.

#### C. Dock Warrants.

**1378.** Whether passing property—As against bankrupt.]—Goods being entered in the books of the W. I. Dock co. in the name of A. he receives the usual cheque for them, which, having sold the goods to B., he indorses & delivers to him. B. sells the goods, delivers the cheque to C. on credit. On C.'s insolvency, A. cannot lawfully take possession of the goods, although they have continued to stand in his name, & the cheque has not been lodged with the Dock co.—SPEAR *v.* TRAVERS (1815), 4 Camp. 251; 171 E. R. 80, N. P.

*Annotation*:—*Consd.* Lucas *v.* Dorrien (1817), 7 Taunt. 278.

— —.]—See BANKRUPTCY, Vol. V., pp. 754, 755, Nos. 6501–6505.

**1379.** — Indorsement for valuable consideration.]—ZWINGER *v.* SAMUDA, No. 1436, *post*.

**1380.** — Delivery order communicated to wharfinger.]—*Qu.*: whether an indorsement of the delivery cheques or warrants of the West India Docks will pass the property in the goods therein mentioned. After a contract for the sale of goods, & a written order on the wharfinger for delivery, communicated to the wharfinger, & assented to by him, though no actual transfer be made in his books, the property passes to the

vendee.—LUCAS *v.* DORRIEN (1817), 7 Taunt. 278; 1 Moore, C. P. 29; 129 E. R. 112.

*Annotations*:—*Distd.* Lackington *v.* Atherton (1844), 7 Man. & G. 360; Kingsford *v.* Merry (1856), 26 L. J. Ex. 83. *Refd.* Farina *v.* Home (1846), 8 L. T. O. S. 277. *Mentd.* Barnett *v.* Brandao (1843), 6 Man. & G. 630.

**1381.** —.]—IMPERIAL BANK *v.* LONDON & ST. KATHARINE DOCKS CO., No. 2036, *post*.

#### D. Other Documents.

**1382.** Shipping note.]—AKERMAN *v.* HUMPHERY, No. 1366, *ante*.

**1383.** Invoice.]—TUCKER *v.* HUMPHREY, No. 2212, *post*.

**1384.** Transfer in warehouseman's books.]—KEERAN *v.* SAUNDERS (1837), 1 Jur. 261.

**1385.** Insurance policy—Along with bill of lading.]—BRITISH & INDIA STEAM NAVIGATION CO. *v.* DE MATTOS, DE MATTOS *v.* BRITISH & INDIA STEAM NAVIGATION CO., No. 1557, *post*.

**1386.** Warehouse warrant.]—On Jan. 13, M., a warehouseman, being possessed of a lot of Archangel mats lying in his warehouse, borrowed £700 of pltf., & gave bills of exchange for the amount, & at the same time delivered to pltf. a warehouse warrant in the following form: "Jan. 13, Warehouse warrant for 16,000 Archangel cargo mats, now lying in my warehouse, which I will deliver to the order of Mr. P. H. only, or hold on his account"; & also another document of the same date, purporting to give pltf. a general lien on the mats, with a discretionary power to sell them for pltf.'s benefit. On Mar. 4, M. committed an act of bkpcy., the mats being still in his warehouse; but on Feb. 19, & on several occasions between that date & Mar. 4, pltf. had demanded possession of them, which M. had refused to give. On Mar. 16, M. was adjudicated a bkpt., & deft., who was appointed assignee, claimed the goods in question, on the ground that no property in them passed to pltf., & that, there having been no change in the possession, there could be no lien, & that, if the property had been changed, the goods were nevertheless in the bkpt.'s order & disposition at the date of the bkpcy.:—*Held*: there had been a complete transfer of the property to pltf., & after pltf.'s demand on Feb. 19, there had been no consent on his part to the goods remaining in the bkpt.'s possession, & pltf. therefore was entitled to judgment.—HORNCASTLE *v.* THOMPSON (1867), 16 L. T. 774.

**1387.** Wharfinger's certificate.]—B. & co. sold some iron rails to the A. co. by a written contract, stipulating that payment should be made by buyers' acceptance of sellers' drafts against inspector's certificate of approval & wharfinger's certificate of each 500 tons being stacked ready for shipment. As the wharfinger's certificates were delivered, the A. co. accepted the drafts of B. & co., according to the contract, which B. & co. negotiated; but the rails remained in B. & co.'s possession. Pltf. advanced money to the A. co. on the security of some of the wharfinger's certificates, which were handed over to him with a written memorandum. The A. co. became insolvent, & their acceptances were consequently not paid. Pltf. filed a bill against B. & co. & the receiver of the estate of the A. co., claiming a lien on the rails in the hands of B. & co., in priority to their lien as vendors. The bill alleged that, according to the

#### PART IV. SECT. 1, SUB-SECT. 7.—D.

**1384 i.** Transfer in warehouseman's books.]—RANKIN *v.* MITCHELL (1869), 1 Han. 495.—CAN.

**1386 i.** Warehouse warrant.]—FRAZER

*v.* EVANS (1867), 6 N. S. W. S. C. R. 325.—AUS.

**1386 ii.** —.]—RICHARDSON *v.* GRAY (1869), 29 U. C. R. 360.—CAN.

**1386 iii.** —.]—ONTARIO BANK *v.* NEWTON (1869), 19 C. P. 258.—CAN.

**1386 iv.** —.]—(GOWANS *v.* CONSOLIDATED BANK OF CANADA (1878), 43 U. C. R. 318.—CAN.

**t.** Railway receipts.]—L. & Co. *v.* RAMDAS VITHALDAIS (1913), 1 L. R. 38 Bom. 255.—IND.

*Sect. 1.—Transfer of property from buyer to seller:*  
*Sub-sect. 7. D.; sub-sects. 8 & 9, A. (a) & (b).]*

custom of the iron trade, the wharfinger's certificates were, in fact, "warrants." Pltff. having moved for an injunction to restrain B. & co. from parting with the rails, or with the money which they might receive in respect of them, the Vice-Chancellor ordered B. & co. to pay the value of the rails into ct., to be kept *in medio* till the decision of the case:—*Held*: the giving of the acceptances in pursuance of the contract was not an absolute payment, but conditional on the acceptances being met; upon the insolvency of the acceptors the vendors' lien on the goods revived; & the fact of the vendors having negotiated the bills made no difference; the wharfinger's certificates were not documents of title, & their delivery passed no right to the goods; & no custom of trade could give them the effect of "warrants" or documents of title as against the vendors.—*GUNN v. BOLCKOW, VAUGHAN & Co.* (1875), 10 Ch. App. 491; 44 L. J. Ch. 732; 32 L. T. 781; 23 W. R. 739, L. J.

*Annotations*:—*Consd. Allen v. Royal Bank of Canada* (1925), 95 L. J. P. C. 17. *Reid. Re Defries, Eichholz v. Defries*, [1909] 2 Ch. 423.

SUB-SECT. 8.—BILLS OF SALE.

See *BILLS OF SALE*, Vol. VII., pp. 3 *et seq.*

SUB-SECT. 9.—RIGHTS AND LIABILITIES OF BUYER.

*A. Rights.*

(a) *In General.*

**1388. General rule.**—When a man has purchased an article he expects to have the control of it, & there must be some clear & explicit agreement to the contrary to justify the vendor in saying that he has not given the purchaser his licence to sell the article, or to use it wherever he pleases as against himself (*LORD HATHERLEY, C.*).—*BETTS v. WILLMOTT* (1871), 6 Ch. App. 239; 25 L. T. 188; 19 W. R. 369; *Goodeve's Patent Cases*, 61, L. C.

*Annotations*:—*Consd. Soc. Anon. des Manufactures de Glaces v. Tilghman's Patent Sand Blast Co.* (1883), 25 Ch. D. 1. *Apld. Badische Anilin und Soda Fabrik v. Isler*, [1906] 1 Ch. 605. *Consd. National Phonograph Co. of Australia v. Menck*, [1911] A. C. 336. *Reid. Scottish Vacuum Cleaner Co. v. Provincial Cinematograph Theatres & British Vacuum Cleaner Co.* (1915), 32 R. P. C. 353.

**1389.** —.]—The general principle, that is to say, the principle applicable to ordinary goods bought & sold, is not here in question. The owner may use & dispose of these as he thinks fit (*LORD SHAW*).—*NATIONAL PHONOGRAPH CO. OF AUSTRALIA, LTD. v. MENCK*, [1911] A. C. 336; 80 L. J. P. C. 105; 104 L. T. 5; 27 T. L. R. 239; 28 R. P. C. 229, P. C.

*Annotations*:—*Reid. Scottish Vacuum Cleaner Co. v. Provincial Cinematograph Theatres & British Vacuum Cleaner Co.* (1915), 32 R. P. C. 353. *Consd. National Phonograph Co. of Australia v. Menck*, [1911] A. C. 336. *Reid. Barker v. Stickney*, [1918] 2 K. B. 356; *Columbia Gramophone Co. v. Vanner* (1916), 33 R. P. C. 104; *Barker v. Stickney*, [1918] 2 K. B. 356; *Columbia Gramophone Co. v. Vanner*, [1916] 33 R. P. C. 239;

**1390. Right to resell.—Before payment.—Goods bought at auction.**—*SCOTT v. ENGLAND*, No. 2431, *post*.

**1391.** ——— **Action for price pending.**—*ANON.* (1875), 1 Char. Cham. Cas. 14; *Bitt. Prac. Cas.* 39.

**1392.** ——— **In small quantities.—Goods bought in bulk from manufacturer.**—A manufacturer selling to a dealer, in bulk, an article generally sold &

used in small quantities, without any restriction on its disposal, must be taken to authorise the dealer to sell the article in small quantities as being the manufacture of the person selling to him.—*CONDY & MITCHELL v. TAYLOR & Co.* (1887), 56 L. T. 891; 3 T. L. R. 665.

**1393.** ——— **At any price.**—As a general rule a trader may sell at any price whatsoever any goods, including goods of another's manufacture, which he either has in stock or expects to acquire, & may offer the same for sale by advertisement, although he thereby damages the trade of the manufacturer; & his motives for so doing cannot be inquired into.

*Deft.*, a retail dealer, advertised for sale in a newspaper a new piano of *pltfs.*' manufacture of a specified character at the price at which *pltfs.* supplied the same to the trade, & thereby caused other dealers to give up dealing with *pltfs.*, & he continued the advertisement after he ceased to have in stock any pianos of *pltfs.*' manufacture, & after *pltfs.* had refused to supply him, in the expectation of being able to acquire pianos of *pltfs.* from other dealers:—*Held*: (1) apart from any question of misrepresentation, *deft.* had a legal right to issue the advertisement; (2) though the advertisement amounted to an implied representation that *deft.* had in his possession a piano of the advertised description, such misrepresentation was not the cause of the damage to *pltfs.*' trade, & consequently gave no right of action.—*AJELLO v. WORSLEY*, [1898] 1 Ch. 274; 67 L. J. Ch. 172; 77 L. T. 783; 46 W. R. 245; 14 T. L. R. 168; 42 Sol. Jo. 212.

*Annotations*:—*As to* (2) *Apld. Spalding v. Gamage* (1917), 34 R. P. C. 289. *Reid. Spalding v. Gamage & Benetank* (1914), 110 L. T. 530; *Spalding v. Gamage* (1918), 35 R. P. C. 101.

**1394. Right to benefits.**—*Deft.*, an auctioneer, sold certain goods for *pltff.*, the owner, on premises occupied by *pltff.* & another, & in respect of which the latter owed the landlord rent. By the conditions of sale each lot was to be taken to be delivered at the fall of the hammer, after which time it was to remain at the exclusive risk of the purchaser. After the sale, & before the goods were removed, the landlord threatened to distrain on the goods, whereupon the auctioneer paid the rent, & deducted it from the amount the goods had realised, & paid over the balance to *pltff.*:—*Held*: the auctioneer was not justified, as against *pltff.*, in paying the rent, as, on the sale of each lot, the property passed to the purchaser, who would have had to bear the loss if the landlord had distrained.

Where a bargain & sale is completed with respect to goods, & everything to be done on the part of the vendor before the property should pass has been performed, then the property vests in the purchaser, although the vendor still retains his lien, the price of the goods not having been paid; & any accident happening to the things subsequently, unless it is caused by default of the vendor—any calamity befalling them after the sale is completed—must be borne by the purchaser, & by parity of reasoning, any benefit to them is his benefit, & not that of the vendor (*BLACKBURN, J.*).—*SWEETING v. TURNER* (1871), L. R. 7 Q. B. 310; 41 L. J. Q. B. 58; 25 L. T. 796; 36 J. P. 597; 20 W. R. 185.

**1395.** ———.]—A purchaser of shares in a ship, which at the time of the sale is on a voyage, is liable for the expenses of this voyage, & of the vessel's outfit for it, & is entitled to a share of the freight.

Part owners who do not dissent from the employment of a ship, & are aware that other part owners have dissented, are liable to bear the

expenses, & are entitled to receive the profits of the ship in the proportion which their shares bear to the number of shares in the ship, after the deduction of the shares of the dissentient part owners.—*THE VINDOBALA* (1888), 13 P. D. 42; 57 L. J. P. 37; 58 L. T. 353; 6 Asp. M. L. C. 250; *reversd.* on other grounds (1889), 14 P. D. 50, C. A.

**1396. Fixtures—Right of purchaser to remove.**—A trustee in liquidation of the affairs of the tenant for years of leasehold premises upon which were certain fixtures, sold the fixtures by auction, & subsequently, without any formal disclaimer, surrendered the premises to the landlord prior to the expiration of the term & before the purchaser of the fixtures had removed them. The landlord having let the premises with the fixtures thereon to an incoming tenant:—*Held*: the purchaser was nevertheless entitled to the fixtures, as the trustee, having sold them to him, could not deprive him of his right by afterwards surrendering the lease.—*SAINT v. PILLEY* (1875), L. R. 10 Exch. 137; 44 L. J. Ex. 33; 33 L. T. 93; 23 W. R. 753.

*Annotations*:—*Distd.* *Moss v. James* (1878), 38 L. T. 595. *Apld.* *Re Glasdir Copper Works, English Electro-Metallurgical Co. v. Glasdir Copper Works*, [1904] 1 Ch. 819. *Refd.* *Re Roberts, Ex p. Brook* (1878), 10 Ch. D. 100.

**1397. Patented articles.**—The right which the owner of a patented chattel has under his letters patent of making & using the patented chattel & licensing others to use the same, is a right of an incorporeal nature. It is a chose in action, at any rate not in possession, distinct from the right of property in the chattel itself, & incapable of seizure under a distress for rent.

Where, therefore, a patented chattel on the premises of a licensee was seized by the landlord of the licensee under a distress for rent, & sold under 2 Will. & Mar. Sess. 1, c. 5, to a purchaser who bought it with notice of the conditions on which the licensee had it, an injunction was granted at the instance of the patentee restraining the purchaser from using the chattel.—*BRITISH Mutoscope & Biograph Co., Ltd. v. HOMER*, [1901] 1 Ch. 671; 70 L. J. Ch. 279; 84 L. T. 26; 49 W. R. 277; 17 T. L. R. 213; 18 R. P. C. 177.

*Annotations*:—*Consd.* *National Phonograph Co. of Australia v. Menck*, [1911] A. C. 336. *Refd.* *Edwards v. Picard*, [1909] 2 K. B. 903; *Barker v. Stickney*, [1918] 2 K. B. 356.

**1398.** —.]—If a patentee sells the patented article & the purchaser uses it he does not infringe, because the law implies a licence by the patentee to the purchaser to sell or deal with the article as he pleases, unless at the time of the purchase the patentee imposed a condition. If a purchaser buys from a licensee to whose licence the patentee has attached conditions, nothing turns, so far as licence as distinguished from estoppel is concerned, on the question whether the purchaser knew of the conditions or not. If a person innocently uses a patented invention, not knowing that there is a patent, he is none the less an infringer; & if he buys from a licensee, not knowing that there are limits to the licence, he is equally an infringer. In this case, however, the patentee may be estopped from suing in certain circumstances, as, for instance, if he has acted in such a way as to lead the purchaser to suppose that the licence is not limited.—*BADISCHE ANILIN UND SODA FABRIK v. ISLER*, [1906] 2 Ch. 443; 75 L. J. Ch. 749; 95 L. T. 273; 22 T. L. R. 710, C. A.; *affg.*, [1906] 1 Ch. 605; 75 L. J. Ch. 411; 94 L. T. 367; 22 T. L. R. 326.

—.]—*See PATENTS*, Vol. XXXVI., pp. 678, 679, Nos. 1588–1590.

**1399. Right to monopoly of supply.**—Pltf. co. was a combination of salt manufacturers formed for the purpose of regulating supply & keeping up prices, & it had the practical control of the inland salt market. The members of the co. were entitled to be appointed as its distributors, *i.e.* agents to sell on behalf of the co. the salt which it had purchased from them. Defts., who had not joined the combination, agreed to sell to the co. for four years 18,000 tons of salt *per annum*, of which a certain proportion was to be table salt, at a fixed uniform price per ton, & undertook not to make any other salt for sale. They were to have the option of buying back the whole or a part of their table salt in each year at pltf. co.'s current selling price & were to be appointed distributors on the same terms as the co.'s other distributors. Defts. having sold salt in violation of this agreement, pltf. co. sued them for breach of contract. Defts. did not by their defence raise the issue of illegality, but they sought to rely on certain facts & documents admitted in evidence at the trial upon other issues as showing that the agreement was illegal as against public policy:—*Held*: having regard to the form of the pleadings, the surrounding circumstances could not be looked at for the purpose of determining the illegality of the agreement, & the agreement was not *ex facie* illegal.—*NORTH WESTERN SALT CO., LTD. v. ELECTROLYTIC ALKALI CO., LTD.*, [1914] A. C. 461; 83 L. J. K. B. 530; 110 L. T. 852; 30 T. L. R. 313; 58 Sol. Jo. 338, H. L.; *reversd.*, [1913] 3 K. B. 422, C. A.

*Annotations*:—*Consd.* *Rawlings v. General Trading Co.*, [1921] 1 K. B. 635. *Refd.* *A.-G. of the Commonwealth of Australia v. Adelaide S.S. Co.*, [1913] A. C. 781; *Evans v. Heathcote*, [1918] 1 K. B. 418; *Crown Milling Co. v. R.*, [1927] A. C. 394; *Palmolive Co. (of England) v. Freedman*, [1928] 1 Ch. 264. *Mentd.* *Kregor v. Hollins* (1913), 109 L. T. 225; *Montefiore v. Menday Motor Components Co.*, [1918] 2 K. B. 241; *Naylor, Benzon v. Krainische Industrie Gesellschaft*, [1918] 1 K. B. 331; *Lipton v. Powell*, [1921] 2 K. B. 51.

#### (b) Limitation by Special Agreement.

**1400. Trust to account for proceeds—Contract of sale by way of security.**—Pltf. executed a written contract of absolute sale of some goods to deft.; he afterwards sued deft. for a sum which he contended was due to him out of the proceeds of the goods as a balance after repaying the amount advanced by deft. on their security. Pltf. gave evidence that on the sum being demanded by pltf.'s agent as the balance out of the proceeds, deft. admitted the correctness of the amount, & said he would pay it over:—*Held*: though the sale was absolute in law, there was evidence that it was accompanied by a trust that deft. should account for the proceeds, & the facts showed a sufficient consideration for the account stated by deft. to entitle pltf. to recover the balance on the count for money due upon an account stated.—*HOWARD v. BROWNHILL* (1853), 2 C. L. R. 125; 23 L. J. Q. B. 23; 2 W. R. 701.

**1401. Conditional sale—Right to resell subject to condition.**—Where there is a conditional sale of a chattel, & it is delivered to the vendee, he may dispose of it to a third person on the same terms as those upon which he obtained it: but he may not sell it out & out until he acquires the absolute property in it by performance of the condition.—*CRAMER & Co. v. HARRISON* (1869), 19 L. T. 800.

**1402. Covenant not to resell without consent of third party—Not binding on assignor.**—(1) The enactment in Sale of Farming Stock Act, 1816 (c. 50), s. 11, that the assignee of any bkpt. shall not take or use any hay, straw, etc., on any farm of bkpt. in any other way than bkpt. ought to have done, is still in force, & applies to a trustee

**Sect. 1.—Transfer of property from buyer to seller:**  
**Sub-sect. 9, A. (b) & B.; sub-sect. 10, A.]**  
 in bkpey. or liquidation under Bkpey. Act, 1869 (c. 71).

A lessee was bound by the covenants in his lease not to sell the hay, straw, etc., grown on his farm without the consent of the landlord. The lessee became a liquidating debtor under Bkpey. Act, 1869 (c. 71), s. 125, & the trustee in the liquidation disclaimed the lease:—*Held*: the trustee was bound by Sale of Farming Stock Act, 1816 (c. 50), s. 11, notwithstanding the disclaimer & an injunction was granted to restrain him from selling the hay, straw, etc., grown on the farm.

(2) Such a covenant is a personal covenant & does not run with the land . . . nor does it run at common law with the chattels so as to bind the assignee of the chattels (*CHITTY, J.*).—*LYBBE v. HART* (1885), 29 Ch. D. 8; 54 L. J. Ch. 800; 52 L. T. 634; 1 T. L. R. 235, C. A.

**Annotations:**—*As to* (2) *Dbtd.* *Clegg v. Hands* (1890), 44 Ch. D. 503. *Generally, Mentd.* *Chapman v. Smith*, [1907] 2 Ch. 97.

**1403. Contract not to resell below certain price—Validity.]**—Pltfs., who were manufacturers of goods, sold them to wholesale traders under a contract whereby the purchasers bound themselves not to sell the goods for less than certain specified prices, & if they sold to the trade to procure a similar signed agreement from every retailer whom they supplied. The purchasers sold some of the goods to retail traders without procuring from them any such agreement as provided by the contract:—*Held*: the contract was not in restraint of trade, & the vendors could maintain an action in respect of the breach of it.—*ELLIMAN SONS & Co. v. CARRINGTON & SON, LTD.*, [1901] 2 Ch. 275; 70 L. J. Ch. 577; 84 L. T. 858; 49 W. R. 532; 45 Sol. Jo. 536.

**Annotations:**—*Folld.* *Dunlop Pneumatic Tyre Co. v. Selfridge* (1913), 29 T. L. R. 270. *Refd.* *North-Western Salt Co. v. Electrolytic Alkali Co.* (1912), 107 L. T. 439; *Palmolive Co. (of England) v. Freedman* (1927), 44 T. L. R. 86.

**1404. —.]**—In an action by manufacturers of toilet soap & similar articles to prevent a retailer selling their articles at less than a certain figure, in breach of a signed agreement:—*Held*: the agreement was not against public policy, & therefore illegal or void, merely because it sought to raise or maintain prices. An agreement having that result might yet be shown to be reasonable & fair, & not against public interest.—*PALMOLIVE CO. (OF ENGLAND), LTD. v. FREEDMAN* (1927), 97 L. J. Ch. 40; 44 T. L. R. 86; 71 Sol. Jo. 927, C. A.

**1405. — Effect of fraud.]**—Pltfs., who were manufacturers, sold their goods wholesale to factors upon the terms of an agreement which provided that factors should only sell pltfs.' goods to dealers who had signed a retailer's agreement in a form provided by pltfs. Both the factor's agreement & the retailer's agreement provided that pltfs.' goods should not be sold at less than the specified current list prices applicable respectively to factors & retailers, or to dealers on pltfs.' suspended list. Deft. co., who dealt in goods of the kind manufactured by pltfs., & who had been placed on pltfs.' suspended list, obtained pltfs.' goods from a dealer, who had signed the retailer's agreement, at less than the prescribed retail price. Deft. co. also employed H. & L., other defts., to obtain pltfs.' goods from certain factors, who had signed pltfs.' factor's agreement, by falsely representing themselves as independent dealers & dealing in fictitious names. Deft. co. paid the prescribed price to the factors through H. & L. & in their assumed names. In consequence of deft.

co. having obtained pltfs.' goods, pltfs. suffered damage in their business. In respect of both transactions pltfs. claimed against deft. co. for an injunction & damages:—*Held*: (1) the transaction between deft. co. & the retail dealer did not give pltfs. any cause of action against deft. co.; but (2) pltfs. were entitled to an injunction & damages in respect of the transactions between deft. co. & the factors on the ground that deft. co., in having by fraud induced the factors to sell to them pltfs.' goods contrary to the duty owed by the factors to pltfs., had interfered without justification with the contractual relations existing between pltfs. & the factors, thereby causing damage to pltfs.—*NATIONAL PHONOGRAPH CO., LTD. v. EDISON BELL CONSOLIDATED PHONOGRAPH CO., LTD.*, [1908] 1 Ch. 335; 77 L. J. Ch. 218; 98 L. T. 291; 24 T. L. R. 201, C. A.

**Annotations:**—*As to* (2) *Consd.* *G. W. K. v. Dunlop Rubber Co.* (1926), 42 T. L. R. 376. *Refd.* *British Cash & Parcel Conveyors v. Lamson Store Service Co.*, [1908] 1 K. B. 1006; *Pratt v. British Medical Assoc.*, [1919] 1 K. B. 244. *Generally, Mentd.* *Stott v. Gamble*, [1916] 2 K. B. 504; *Valentine v. Hyde*, [1919] 2 Ch. 129.

**1406. — Whether binding on sub-purchaser—With notice.]**—T. & co., manufacturers of tobacco, sold packet tobaccos subject to printed terms & conditions fixing a minimum price below which they were not to be sold, & containing the following proviso: "Acceptance of the goods will be deemed a contract between the purchaser & T. & co. that he will observe these stipulations. In the case of a purchase by a retail dealer through a wholesale dealer, the latter shall be deemed to be the agent of T. & co." T. & co. sold to N., who resold for his own profit to S. & co. S. & co. had notice of the conditions, but sold to the public at a price below the stipulated minimum:—*Held*: (1) there was no contract between T. & co. & S. & co. which T. & co. could enforce; & (2) conditions cannot be attached to goods so as to bind all purchasers with notice.—*TADDY & Co. v. STERIOUS & Co.*, [1904] 1 Ch. 354; 73 L. J. Ch. 191; 89 L. T. 628; 52 W. R. 152; 20 T. L. R. 102; 48 Sol. Jo. 117.

**Annotations:**—*As to* (2) *Apprvd.* *McGruther v. Pitcher*, [1904] 2 Ch. 306; *National Phonograph Co. of Australia v. Menck*, [1911] A. C. 336. *Refd.* *L. C. C. v. Allen*, [1914] 3 K. B. 642; *Barker v. Stickney*, [1919] 1 K. B. 121. *Generally, Mentd.* *The Lord Strathcona*, [1925] P. 143.

**1407. — — —.]**—Conditions cannot be imposed on a sale of goods so as to run with the goods & be enforceable against subsequent purchasers by the original vendor, even though the subsequent purchasers had notice of them at the time of their purchase.

Pltfs., who were manufacturers of rubber heel pads, sold them in boxes inside the lids of which were fixed certain printed conditions providing that the pads were not to be retailed at less than certain minimum prices, or resold except subject to the conditions as a term of the sale; & that the acceptance of the goods by any purchaser would be deemed to be an acknowledgment that they were sold to him on those conditions, & that he agreed with the vendors as agents of pltfs. in that respect to be bound by them. Deft. bought some of these pads from H., one of pltf.'s factors, & was reselling them, as pltfs. alleged, at less than the minimum prices:—*Held*: deft. had entered into no contract with pltfs., & pltfs. had no cause of action against him.—*MCGRUTHER v. PITCHER*, [1904] 2 Ch. 306; 73 L. J. Ch. 653; 91 L. T. 678; 53 W. R. 138; 20 T. L. R. 652; 48 Sol. Jo. 639, C. A.

**Annotations:**—*Distd.* *Badische Anilin und Soda Fabrik v. Isler*, [1906] 1 Ch. 605; *National Phonograph Co. of Australia v. Menck*, [1911] A. C. 336. *Refd.* *L. C. C. v. Allen*, [1914] 3 K. B. 642; *Barker v. Stickney*, [1919] 1 K. B. 121; *Lacteosoto v. Alberman*, [1927] 2 Ch. 117. *Mentd.* *The Lord Strathcona*, [1925] P. 143.



1. ———.] — **ABDUL AZIZ**  
**BEPARI v. JOGENDRA KRISHNA ROY**



**Sect. 1.—Transfer of property from buyer to seller:**  
*Sub-sect. 10, A. & B. (a).]*

**1414. — Sale subject to weighing—Accident before goods weighed.]—***SIMMONS v. SWIFT* No. 1042, *ante*.

**1415. — Payment & delivery of warrants.]—**On May 14, 1861, *pltf.*, a broker, bought for *deft.* at a public sale three lots of sugar in bags, the lots being respectively numbered 67, 68, & 69, the prompt day being July 20. By the terms of sale, payment was to be made either by cash on July 20, by acceptance at seventy days from the day of sale, or on delivery of the warrants, interest at the rate of 5 per cent. *per annum* being allowed to the expiration of seventy-three days from the day of sale if payment were made within twenty-one days. On May 25 *pltf.*, according to the usage of the trade, at the request of *deft.*, paid the price of lot 67, & obtained a warrant for it, & cleared it at the custom house. He at the same time, but without any special instructions from *deft.*, paid the price of lots 68 & 69, & obtained the warrants for the same. The effect of this payment was, that the risk of loss by fire was transferred from the seller to the buyer. It was proved to be the common course for brokers, when so employed to clear before prompt one of several lots of sugar in bags bought under one contract, to pay the price & obtain warrants for all the lots, the broker taking the discount under the conditions of sale. *Deft.* not only knew that this was the common course among brokers, & that it had been pursued in former instances in relation to sugars bought for him by *pltf.*; but he was informed by a clerk of *pltf.* shortly after May 25, that *pltf.* had so paid the price of lots 67 & 68, & obtained the warrants. On June 22 *deft.* sent instructions to *pltf.* to clear lot 68. On the same day, & before those instructions could in the usual course of business be acted upon, a fire broke out at the bonded warehouse where the sugars were deposited, & they were destroyed:—*Held*: *pltf.* was entitled to recover from *deft.* the money so paid by him in respect of lot 68 on May 25 as money paid to his use.—*SENTANCE v. HAWLEY* (1863), 13 C. B. N. S. 458; 1 New Rep. 323; 7 L. T. 745; 143 E. R. 182; *sub nom.* *HAWLEY v. SENTANCE*, 11 W. R. 311.

**1416. — Buyer accepting risk on receipt of bills of lading.]—**By an agreement in writing between *pltf.*s, therein described as “vendors,” & *deft.* therein described as “purchaser,” the vendors agreed to ship on board a vessel a cargo of fresh water ice, “to be dispatched with all speed to any ordered port in the United Kingdom, the vendors forwarding bills of lading to the purchaser; & upon receipt thereof, the purchaser takes upon himself all the risks & dangers of the seas, etc., & *deft.* agrees to buy & receive the said ice on its arrival at ordered port, & to pay for it in cash on delivery at the rate of 20s. per ton, weighed on board during delivery.” The ice having been duly shipped & dispatched, & the bill of lading forwarded to, & received by *deft.*, the vessel & cargo were subsequently lost on the voyage by risks & dangers of the seas within the meaning of the above agreement. *Pltf.*s. having,

therefore, brought an action against *deft.* to recover the value of the cargo:—*Held*: whether or not the property in the cargo passed to *deft.* on the receipt of the bills of lading, which the *ct.* said it was not necessary to decide, though they strongly inclined to hold that it did pass with all its risks, yet *deft.*, the purchaser, having agreed to “take upon himself all the risks & dangers of the seas,” etc., from the time he received the bills of lading, was liable to pay for the cargo according to a certain rate; & if, meantime, it perished through the perils of the seas, to pay for it according to a fair estimate of its value at the time it went down.—*CASTLE v. PLAYFORD* (1872), L. R. 7 Exch. 98; 41 L. J. Ex. 44; 26 L. T. 315; 20 W. R. 440; 1 Asp. M. L. C. 255, Ex. Ch.

*Annotations*:—*Apld.* *Martineau v. Kitching* (1872), L. R. 7 Q. B. 436. *Consd.* *Anderson v. Morice* (1876), 1 App. Cas. 713. *Distd.* *Stock v. Inglis* (1881), 52 L. J. Q. B. 30.

**1417. — Goods stored on premises of seller—At seller's risk for two months—Destruction by fire after two months.]—***Pltf.*s. sugar refiners, were in the habit of selling to brokers the whole of each filling of sugar, consisting of from 200 to 300 loaves or “titlers” each, the terms always being, “Prompt at one month; goods at seller's risk for two months,” the “prompt” day being the Saturday next after the expiration of one month from the sale. The titlers in each filling were stored on *pltf.*'s premises, & were from time to time fetched away by the purchasers or their sub-vendees, being weighed on their removal, each titler weighing from 38 to 42 lbs. If the whole of the lots contained in one sale note had not, which was frequently the case, been taken away on the “prompt” day payment was made by the purchaser, by bill or cash, at an approximate sum calculated on the probable weight, the actual price being afterwards adjusted on the whole filling being cleared. *Deft.*, who was an old customer of *pltf.*s, had bought four fillings, consisting of specific titlers, each marked, on the above terms, & had paid the approximate price of the four lots, & had fetched some of each lot away. A fire occurred on *pltf.*'s premises after the expiration of the two months from the dates of sale to *deft.*, destroying the whole contents of the warehouses. At the time of the fire *pltf.*s. had floating policies of insurance which covered goods on the premises “sold & paid for, but not removed”; but they had no agreement or understanding with their customers as to any insurance, & the amount insured, which *pltf.*s. received from the underwriters, was not sufficient to cover the loss of their own goods, exclusive of the titlers undelivered which they had sold to *deft.*:—*Held*: by the terms of the contract of sale, after the lapse of the two months, was in the buyer, & the loss was, therefore, his.

There is nothing to prevent the parties from agreeing that the property shall pass, & that the price shall afterwards be ascertained . . . the real question in all these cases is, whether the parties did intend that the property should pass (*COCKBURN, C.J.*).—*MARTINEAU v. KITCHING* (1872), L. R. 7 Q. B. 436; 41 L. J. Q. B. 227; 26 L. T. 836; 20 W. R. 769.

*Annotation*:—*Consd.* *The Parchim*, [1918] A. C. 157.

(1916), 20 C. W. N. 1224; 1 L. L. R. 44 Calc. 98.—*IND.*

*m.* ———.]—*SHOSHI MOHUN PAL CHOWDHRY v. NOBO KRISHTO PONDAR* (1878), 1 L. L. R. 4 Calc. 801.—*IND.*

*n.* ———.]—*HARVEY & Co. v. GOODFELLOW & Co.* (1895), 7 Nfld. L. R. 834.—*NFLD.*

*o.* ———.]—*WILSON v. KING* 4 J. R. N. S. 73.—*N.Z.*

*p.* ———.]—*Shipment of oysters in merchantable condition—Shipment bad on arrival.*—*BARNES v. WAUGH* (1906), 41 N. S. R. 38.—*CAN.*

*q.* ———.]—*Damage to sugar shipment.*—*DEGUIRE v. ANDREWS, BELL & Co.* (1907), 3 E. L. R. 139.—*CAN.*

*r.* ———.]—*Sale by sample—Enjorement of bill of lading.*—*MOORE v. LAIRD* (1908), 9 W. L. R. 199.—*CAN.*

*t.* ———.]—*Death of mare before payment.*—Where a chattel is sold under a lien not providing that the title, ownership & right of possession is to remain in the vendor until payment is made, & the subject matter of the

**1418. Price payable on delivery.]—**The *prima facie* rule of construction is that the parties intended that the risk should become that of the buyer, when, & not till, the whole lading was complete, so as to enable the shippers, by getting the shipping documents, to call on the buyer to accept & pay for the cargo; & there is nothing in this contract to rebut the presumption that such was the intention (BLACKBURN & LUSH, J.J.).—ANDERSON v. MORICE (1875), L. R. 10 C. P. 609; 44 L. J. C. P. 341; 33 L. T. 355; 24 W. R. 30; 3 Asp. M. L. C. 31, Ex. Ch.; *affd.* (1876), 1 App. Cas. 713, H. L.

*Annotations:—*Consd. Colonial Insee. of New Zealand v. Adelaide Marine Insee. (1886), 12 App. Cas. 128. *Reid.* Inglis v. Stock (1885), 10 App. Cas. 263; Ajum Goolam Hossen v. Union Marine Insee., Hajee Cassim Joosub v. Ajum Goolam Hossen, [1901] A. C. 362; Reliance Marine Insee. v. Duder, [1913] 1 K. B. 265; The Parchin, [1918] A. C. 157. *Mentd.* Pryce v. Monmouth Canal & Ry. (1879), 4 App. Cas. 197.

**1419. ———.]—**HOULDER BROTHERS & CO., LTD. v. PUBLIC WORKS COMR., PUBLIC WORKS COMR. v. HOULDER BROTHERS & CO., LTD., No. 1424, *post*.

**1420. ——— Purchase subject to completion of cargo—Loss before completion.]—**ANDERSON v. MORICE, No. 1418, *ante*.

**1421. ——— Acceptance by buyer of delivery warrant—Sale of undivided portion.]—**Defts. sold to plffs. 120,000 gallons of white spirit, being part of a larger quantity then lying in a certain tank belonging to a storage co., & handed to plffs. a delivery warrant, whereby the co. undertook to deliver that quantity of the spirit to plffs.' order. Subsequently to plffs.' acceptance of that warrant & before the quantity purchased had been severed from the bulk the spirit in the tank became deteriorated in quality:—*Held:* whether the property in the undivided portion of the larger bulk had passed or not, upon the acceptance of the delivery warrant the risk passed to the buyers, & the loss must be borne by them.—STERNS, LTD. v. VICKERS, LTD., [1923] 1 K. B. 78; 92 L. J. K. B. 331; 128 L. T. 402, C. A.

*Annotations:—*Distd. *Re* Wait, [1927] 1 Ch. 606. *Reid.* Laurie & Morewood v. Dudin, [1925] 2 K. B. 383.

**1422. Property vested in buyer—Subject to rescission in particular event—Loss due to accident—Risk attaches to seller.]—**HEAD v. TATTERSALL, No. 1256, *ante*.

**1423. Contract for sale with implied condition of fitness—Necessity for shipment of goods of stipulated character.]—**Where a contract for the sale of goods is made under such circumstances that there is an implied condition of fitness of the goods for a particular purpose, & it contains a provision that the goods are to be delivered abroad, but that the seller's responsibility is to cease upon shipment of the cargo, the seller's responsibility ceases only

upon shipment of goods of the stipulated character.—GILLESPIE BROTHERS & CO. v. CHENEY, EGGAR & CO., [1896] 2 Q. B. 59; 65 L. J. Q. B. 552; 12 T. L. R. 274; 40 Sol. Jo. 354; 1 Com. Cas. 373.

*Annotations:—*Consd. Manchester Liners v. Rea, [1922] 2 A. C. 74. *Reid.* Summer Permain v. Webb (1921), 91 L. J. K. B. 228.

**1424. C.i.f. contract — Liability of vendor.]—**(1) Where the consignor of goods under a c.i.f. contract executes an order received by him from another, he is, though a vendor, at the same time an agent, bound, for reward, to obtain the goods at the best price he reasonably can, & have them insured, carried, & delivered to his principal on the best terms he reasonably can. But where no commission is charged, the vendor takes upon himself the risk of a rise or fall in the price of the goods, or of freight for their carriage or of the rate of insurance, & there is not, as to either cost or freight or insurance, any trust or contract of agency between them (LORD ATKINSON).

(2) The fact that one-third of the price is not to be paid till the cargo has been delivered, though according to the authorities it does not prevent the property in the goods from vesting in the consignee, yet gives the consignor a direct interest in the safe carriage & delivery of the goods (LORD ATKINSON).—HOULDER BROTHERS & CO., LTD. v. PUBLIC WORKS COMR., PUBLIC WORKS COMR. v. HOULDER BROTHERS & CO., LTD., [1908] A. C. 276; 77 L. J. P. C. 58; 98 L. T. 684; 11 Asp. M. L. C. 61, P. C.

## B. Insurance.

### (a) In General.

**1425. Party protected by insurance—Presumed to take risk.]—**FRAGANO v. LONG, No. 1125, *ante*.

**1426. ———.]—**ANDERSON v. MORICE, No. 1418, *ante*.

**1427. ———.]—**Merchants, according to my experience, attach very great weight to a stipulation as to who is to insure, as showing who is to bear the risk of loss (BLACKBURN, J.).—ALLISON v. BRISTOL MARINE INSURANCE CO. (1876), 1 App. Cas. 209; 34 L. T. 809; 24 W. R. 1039; 3 Asp. M. L. C. 178, H. L.

*Annotations:—*Consd. Anderson v. Morice (1876), 1 App. Cas. 713. *Reid.* Smith, Hill v. Pymon, Bell, [1891] 1 Q. B. 742; Weir v. Girvin, [1900] 1 Q. B. 45; Reliance Marine Insee. v. Duder, [1913] 1 K. B. 265.

**1428. ——— Presumption rebuttable.]—**As to the first point relied upon for claimants, namely, that the goods were at the risk of & were insured by claimants, this, although a material consideration, is not decisive (EVANS, P.).—THE ANNIE JOHNSON, THE KRONPRINSESSAN MARGARETA, [1918] P. 154; 87 L. J. P. 127; 118 L. T. 721; 14 Asp. M. L. C. 301.

transaction, a mare, is, before the time for payment, killed through no neglect on the part either of the vendor or purchaser, the loss must fall upon the vendor.—SADYWRYK v. ACITEMYCZYK (1916), 34 W. L. R. 502; 10 W. W. R. 624.—CAN.

**a. — Oil dumped on railway station platform—& not received by purchaser.]—**Pursuant to deft.'s order plff. shipped oil consigned to deft. at R. where, under their contract, it was deliverable, & paid the freight, & mailed the bill of lading with the copy of the invoice attached to deft. who, however, never received the same. The oil was put off the railway cars on to the platform at R. station, there being no agent there, but deft. did not receive it:—*Held:* on arrival of the oil at R., it became deft.'s pro-

perty & was at his risk.—OIL CO., LTD. v. STRANG, [1921] 3 W. W. R. 118.—CAN.

**b. — Loss after goods put on railway.]—**DEORAJ v. MUNSHI RAM (1926), 1 L. R. 48 All. 622.—IND.

## PART IV. SECT. 1, SUB-SECT. 10.—B. (a).

**c. Goods ordered to be "shipped & insured"—Placed on deck where policy would not cover them—Purchaser not liable for price of goods lost.]—**ROOM v. LARGE (1870), 1 P. E. L. 310.—CAN.

**d. Vendor charging premium to purchase—Goods not insured—On whom risk falls.]—**CORBETT v. STRONACH (1883), 4 R. & G. 169.—CAN.

**e. Liability of purchaser for premiums**

*paid by vendor—Payment for goods by assumption by purchaser of vendor's liability under mortgage.]—*CHAPLAIN v. WILKINSON (1912), 20 W. L. R. 775; 4 D. L. R. 290.—CAN.

**f. Failure of seller to give immediate notice of shipment—Risk remains with seller.]—**A seller having shipped goods from London to Aberdeen by a steamer, did not send notice of shipment to the purchaser until the following day. The vessel having been lost on the passage:—*Held:* the seller's duty was to have given the purchaser immediate notice of shipment, so as to enable him to insure; & this not having been done, the risk remained with the seller.—FLEET BROTHERS v. MORRISON (1884), 16 Dunl. (Ct. of Sess.) 1122; 26 Sc. Jur. 607.—SCOT.

*Sect. 1.—Transfer of property from buyer to seller: Sub-sect. 10, B. (b) & (c). Sect. 2: Sub-sect. 1.]*

*(b) C.i.f. Contracts.*

**1429. Whether risk in buyer.**—TREGELLES v. SEWELL, No. 1119, *ante*.

**1430.** —.]—BARROW v. MYERS (1888), 52 J. P. 345; 4 T. L. R. 441, D. C.

*Annotation*:—Overd. Crozier, Stephens v. Auerbach, [1908] 2 K. B. 161.

**1431.** —.]—Deft. contracted to sell to pltf. certain wood goods, c.i.f. & ship them at a port in Sweden for an English port. The ships were to be addressed to pltf. at the English port & on their arrival he was to adopt their charterparties & bills of lading & pay the price. Deft. failed to perform the mass portion of his contract & pltf. commenced an action for damages in England & applied for leave to serve notice of the writ of summons upon deft. out of the jurisdiction under R. S. C., Ord. 1, r. 1 (e). The question then arose as to whether the breach had occurred within or outside the jurisdiction:—*Held*: upon the true construction of the contract all deft. had to do was to ship the goods on board at the Swedish port. Accordingly the breach occurred there & not at the English port & as no cause of action arose within the jurisdiction no leave to serve notice of writ of summons under R. S. C., Ord. 11, r. 1 (e), could be granted.

It is urged by pltf. that the price included not only the price of the goods, but covered also insurance & freight. No doubt the price set down does include these payments. But the seller here charges them as part of the price & arranges with the buyer that, if he will pay the captain his freight on arrival, credit shall be given for the amount (DAY, J.).—WANCKE v. WINGREN (1889), 58 L. J. Q. B. 519; 5 T. L. R. 696, D. C.

*Annotations*:—Apld. Crozier, Stephens v. Auerbach, [1908] 2 K. B. 161. *Refd.* Sanders v. Sadler (1906), 95 L. T. 872.

**1432.** —.]—Goods were sold under a c.i.f. contract by a foreigner carrying on business & resident abroad to purchasers in England who paid the price in exchange for a bill of lading. On inspection of the goods after their arrival in England the purchasers alleged that they were not of the description stipulated for in the contract & obtained leave to issue a writ of which notice was to be served, & was served, on deft. out of the jurisdiction claiming a return of the money paid or damages for breach of contract:—*Held*: the contract of sale being a c.i.f. contract the alleged breach had taken place out of the jurisdiction & that therefore the case did not fall within R. S. C., Ord. 11, r. 1 (e), & the writ & service must be set aside.—CROZIER, STEPHENS & Co. v. AUERBACH, [1908] 2 K. B. 161; 77 L. J. K. B. 873; 99 L. T. 225; 24 T. L. R. 409; 52 Sol. Jo. 325, C. A.

*Annotation*:—*Refd.* Biddell v. Clemens Horst Co., [1911] 1 K. B. 934.

*(c) Shipment f.o.b.*

**1433. Whether goods at buyer's risk.**—D. sold to B. 200 tons of German sugar "f.o.b. Hamburg;

payment by cash in London in exchange for bill of lading"; the price to be variable according to the percentage of saccharine matter, which was not to exceed or fall short of certain limits. B. resold to resp. the same quantity at an increased price, but otherwise upon similar terms. D. also sold to resp. 200 tons upon similar terms. To fulfil these contracts 390 tons, being 10 tons short, were shipped in bags on one vessel at Hamburg for Bristol, no bags being set apart for one contract more than the other. Each bag was marked with its percentage of saccharine matter, & bills of lading with marks corresponding to the bags were sent to D. to be retained till payment in accordance with the contracts. Resp. was insured in floating policies upon "any kind of goods & merchandises" between Hamburg & Bristol, & duly declared in respect of this cargo. The ship sailed from Hamburg for Bristol & was lost. After receiving news of the loss D. allocated 2,000 bags or 200 tons to B.'s contract, & 1,900 bags or 190 tons to the other contract. In an action upon the policies:—*Held*: the sales being "f.o.b. Hamburg" the sugar was at resp.'s risk after shipment; he had an insurable interest in it; & the underwriters were liable.—INGLIS v. STROCK (1885), 10 App. Cas. 263; 54 L. J. Q. B. 582; 52 L. T. 821; 33 W. R. 877; 5 Asp. M. L. C. 422, H. L.; *affg.* S. C. *sub nom.* STOCK v. INGLIS (1884), 12 Q. B. D. 564, C. A.

*Annotations*:—*Consd.* Wimble v. Rosenberg, [1913] 3 K. B. 743. *Distd.* Healy v. Howlett, [1917] 1 K. B. 337. *Refd.* Colley v. Overseas Exporters, [1921] 3 K. B. 302; Sterns v. Vickers, [1923] 1 K. B. 78; *Re* Wait, [1927] 1 Ch. 606. *Mentd.* *Re* London County Commercial Reinsurance Office, [1922] 2 Ch. 67.

**1434. Necessity for notice by seller—To enable buyer to insure—Sale of Goods Act, 1893 (c. 71), s. 32 (3).**—WIMBLE, SONS & Co. v. ROSENBERG & SONS, No. 1800, *post*.

**1435. — Loss before buyer bound to take delivery.**—By a contract in writing dated Oct. 6, 1920, the sellers sold to the buyers 200 tons of Dutch bran f.o.b. Rotterdam for Oct. shipment, the buyers finding freight room. The sellers were obliged to take the bran from their sellers early in Oct. & they sent it to Rotterdam so that it arrived there on Oct. 14. The buyers were unable to find freight room until Oct. 28, on which date loading began on their nominated steamer & until loading began the bran remained lying in the barges in which it had been sent to Rotterdam. When loading began it was found that the bran had heated & the buyers refused to accept any more than 384 bags which had already been put on board. The sellers contended that the buyers had no right to reject & that the bran remained at the risk of the buyers from Oct. 14, the date of its arrival at Rotterdam. Arbn. took place between the parties & the arbitrators now stated a case for the opinion of the ct. under Arbitration Act, 1889 (c. 49), s. 19:—*Held*: in answer to specific questions put to the ct., that the buyers were not bound to take delivery under the contract before Oct. 28, the day on which they began to

**PART IV. SECT. 1, SUB-SECT. 10.—B. (b).**

**1429 i. Whether risk in buyer.**—Pltf. entered into two contracts with deft. in Sydney, one to purchase at a fixed price per *millie* certain slates to be shipped from England, the other to purchase slates at a fixed price c.i.f., to be shipped from America. The vendor in both cases agreed to pay freight & insurance, & to pass entry & pay wharfage on receipt of cheque:—*Held*: the goods were at the risk of the vendor until delivered in Sydney.—LORIMER v. SLADE (1905), 5 S. R.

N. S. W. 71; 22 N. S. W. N. 34.—*AUS.*

**1429 ii.** —.]—BOWDEN BROTHERS & Co., LTD. v. LITTLE (1907), 4 C. L. R. 1364.—*AUS.*

**1429 iii.** —.]—NISSIM ISAAC BEKHOR v. HAJI SULTANALI SHAISTARY & Co. (1916), 1 L. R. 40 Bom. 11.—*IND.*

**1429 iv.** —.]—BUBBY HURRY & Co. v. HERTZ (M.) & Co., LTD. (1923), 1 L. R. 4 Lah. 215.—*IND.*

**1429 v.** —.]—BAL KISHAN-BASHISHAR NATH v. S. M. FAZAL ELAHI (1926), 1 L. R. 8 Lah. 173.—*IND.*

**1429 vi.** —.]—BIRKETT SPERLING

& Co. v. ENGHOLM & Co. (1871), 10 Macph. (Ct. of Sess.) 170; 44 Sc. Jur. 103.—*SCOT.*

**1429 vii.** —.]—DELAURIER & Co. v. WYLLIE (1889), 17 R. (Ct. of Sess.) 167; 27 Sc. L. R. 148.—*SCOT.*

**1429 viii.** —.]—McEWEN & Co. v. WEINBERG BROTHERS, [1915] C. P. D. 789.—*S. AF.*

**PART IV. SECT. 1, SUB-SECT. 10.—B. (c).**

**1433 i. Whether goods at buyer's risk.**—DAVIDSON v. LESLIE (1817), 1 Murr. 281.—*SCOT.*

load; until that date the goods were at the risk of the sellers & the sellers were not entitled to charge the buyers with any expenses connected with them; on the evidence the buyers had not in fact accepted more than the 384 bags which had been put on board & they were entitled in law to reject the remainder.—*CUNNINGHAM, LTD. v. MUNRO (R. A.) & Co., LTD.* (1922), 28 Com. Cas. 42, D. C.  
*Annotation:—Reid. Barker (Junior) v. Agius* (1927), 43 T. L. R. 751.

## SECT. 2.—TRANSFER OF TITLE.

### SUB-SECT. 1.—IN GENERAL.

*See Sale of Goods Act, 1893 (c. 71), s. 21.*

**1436. Effect of estoppel—Sale by pawnor—Entrusted with dock warrants by pawnee.]**—The pawnee of coffees, lodged in the West India Docks, & entered there in the pawnee's name, gave up to the pawnor certain delivery notes thereof called dock warrants, having indorsed them with an order for the delivery of the goods to —, in exchange, not for cash, which he might have had, but for a cheque for the debt on pawnor's banker, which cheque was dishonoured; the pawnor having contracted to sell the goods to plffs., received payment for them, & gave to plffs. the delivery notes, with the blank above deft.'s signature for the name of the person to whom they were to be delivered:—*Held*: (1) deft. having entrusted the pawnor with his signature to a blank, purporting to authorise the delivery of the goods, & enabled him thereby to induce faith to a contract for the sale of the goods, & to obtain payment for them from pltf., it must be considered that the contract of sale was deft.'s contract, & the payment, a payment to deft. (2) The ct. guarded against any inference that, according to a practice which has obtained since the erection of the West India Docks, an indorsement on these delivery notes or dock warrants was, of itself, & without making the wharfingers parties to the order, capable of transferring any property in the goods therein described.—*ZWINGER v. SAMUDA* (1817), 7 Taunt. 265; 1 Moore, C. P. 12; 1 Holt, N. P. 395; 129 E. R. 106.

**1437. — Sale by mortgagor—Mortgagee concealing charge.]**—An American ship, subject to a mtge. made in America, which vested the legal title to the ship in an American citizen, was sold in England. The evidence proved that the American law did not require notice of an incumbrance upon an American ship to be indorsed upon her register. There was conflicting evidence as to whether it was customary to make such indorsement, or whether purchasers in England were accustomed, from a clean register, to presume the non-existence of incumbrances. Notice of the incumbrance in question was, with the privity of the mtgee., intentionally kept of the ship's register, in order to facilitate her sale, from the proceeds of which the mtgee. was to be paid off:—*Held*: by intentionally concealing his charge, the mtgee. had disabled himself from setting up his legal title as against the purchaser for valuable

consideration with no direct notice of the incumbrance.

A ship is not like an ordinary personal chattel, it does not pass by delivery, nor does the possession of it prove the title to it (*TURNER, L.J.*).—*HOOPER v. GUMM, McLELLAN v. GUMM* (1867), 2 Ch. App. 282; 36 L. J. Ch. 605; 16 L. T. 107; 15 W. R. 464; 2 Mar. L. C. 481, L. C. & L. J.

*Annotations:—Reid. Alcock v. Smith*, [1892] 1 Ch. 233; *Republica de Guatemala v. Nunez*, [1927] 1 K. B. 669.

—.]—*See ESTOPPEL*, Vol. XXI., pp. 312, 323, 365, 372, 398, Nos. 1147, 1206–1208, 1425, 1472, 1589.

**1438. Contract cancelled—Goods remaining in possession of intended purchaser—Right of owner to sue in trover.]**—A contract for goods was put an end to by both parties, but the goods were in the possession of the intended purchaser. The value rising, he converted them to his own use, & offered the former price. The owner demanded the increased price; & on non-payment held deft. to bail "for goods sold & delivered." This does not prevent him from suing in trover.—*PARRY v. DAWSON* (1796), 3 Anst. 710; 145 E. R. 1015.

**1439. Sale to so called secretary of non-existent company—In belief of company's existence—Subsequent sale by secretary.]**—Plffs. having received an order for goods purporting to be signed by the secretary of a co. which really had no existence at the time, forwarded the goods to the order of the so called secretary in the belief that the co. existed. He sold the goods to defts. from whom plffs. sought to recover them:—*Held*: as there had been but one side to the contract into which plffs. had intended to enter there had in fact been no sale, & the property in the goods remained in plffs.—*STAR CORN MILLERS SOCIETY v. MOORE & Co.* (1886), 2 T. L. R. 751, C. A.

**1440. Goods obtained by larceny—Title of bona fide purchaser.]**—*YOUNG v. BOND* (1896), 12 T. L. R. 160.

**1441. — Sale of Goods Act, 1893 (c. 71), s. 21 (1).]**—Pltf., desiring to sell his motor car for £210, & being informed by N. that he had a friend H., who would probably buy it for that price, allowed N. to have possession of the car for the sole purpose of showing it & endeavouring to sell it to H. There was no such person as H., & N. represented that there was with the intention of obtaining the car for his own benefit. N. afterwards through an intermediary sold the car to defts. for £110. Before N. got possession of the car he had been convicted of theft & other offences, but that was not known to any of the parties. While N. was in possession of the car he obtained an appointment as car salesman to a firm of motor engineers. In an action by pltf. against defts. for the return of the car or its value & damages for its detention:—*Held*: (1) N. had obtained the car from pltf. by larceny by a trick, pltf. never having given any real consent to his having or passing the property therein, & pltf. should succeed in the action unless defts. had some valid defence thereto; (2) defts. could not set up the defence that under above Act they had acquired

### PART IV. SECT. 2, SUB-SECT. 1.

**g. Effect of estoppel.]**—The owners of logs, by contract in writing, agreed to sell & deliver them to K. the title not to pass until they were paid for. The logs being in custody of a boom co., orders were given to deliver them as agreed. E., a dealer in lumber, telephoned the owner asking if he had them for sale & was answered "No, I have sold them to K." E. then purchased a portion of

them from K. who did not pay the owner therefor & he brought an action of trover against E.:—*Held*: the owner having induced E. to believe that he could safely purchase from K. could not afterwards deny the authority of the latter to sell.—*PEOPLES BANK OF HALIFAX v. ESTEY* (1904), 34 S. C. R. 429.—*CAN.*

**h. —.]**—Sale of a chattel by a third person in the presence of & with the consent of the owner confers

a good title on the purchaser under Sale of Goods Act, R. S. c. 147, s. 23.—*WILLIE v. DELISLE* (1915), 30 W. L. R. 918; 21 D. L. R. 407.—*CAN.*

**k. Proof of title.]**—*LANG v. THOMSON* (1890), 16 V. L. R. 655.—*AUS.*

**l. Sale by person without authority.]**—*DUFFELL v. ERWIN* (1859), 18 U. C. R. 431.—*CAN.*

**m. Property in goods sold—Vesting**

**Sect. 2.—Transfer of title: Sub-sects. 1 & 2, A., B. & C.; sub-sects. 3 & 4.]**

a better title to the car than the seller had, inasmuch as, under sub-sect. 1 pltf. was not by his conduct precluded from denying the seller's authority to sell the car.—*HEAF v. MOTORISTS ADVISORY AGENCY, LTD.*, [1923] 1 K. B. 577; 92 T. J. K. B. 553; 129 L. T. 146; 39 T. L. R. 150; 67 Sol. Jo. 300.

**Annotation:—***As to (1) Consd. Lake v. Simmons*, [1926] 1 K. B. 366.

**1442. Possession of ship—Not proof of title.]—***HOOPER v. GUMM, McLELLAN v. GUMM*, No. 1437, ante.

**Agent's implied authority to pledge.]—***See AGENCY*, Vol. I., pp. 330–343, Nos. 467–549.

**Agent's implied authority to sell.]—***See AGENCY*, Vol. I., pp. 373–380, Nos. 803–844.

**Pledge by person other than true owner—Rights of true owner.]—***See PAWNS & PLEDGES*, Vol. XXXVII., p. 18, Nos. 145–148.

**Sale by grantor of bill of sale.]—***See BILLS OF SALE*, Vol. VII., pp. 143, 145–147, Nos. 790, 802–806.

**Transfer of bills of lading.]—***See SHIPPING*.

**SUB-SECT. 2.—COMMON LAW AND STATUTORY POWERS OF SALE.**

**A. Common Law Powers.**

**Sale by sheriffs.]—***See, generally, EXECUTION*, Vol. XXI., pp. 511 *et seq.*; *SHERIFFS*.

**Sale by executors & administrators.]—***See, generally, EXECUTORS*, Vol. XXIV., pp. 565 *et seq.*

**Sale by pawnees.]—***See PAWNS & PLEDGES*, Vol. XXXVII., pp. 14–16, Nos. 108–128.

**Sale by master of ship.]—***See SHIPPING*.

**B. Statutory Powers.**

**See Sale of Goods Act, 1893 (c. 71), s. 21 (2).**

**Trustee in bankruptcy.]—***See BANKRUPTCY*, Vol. V., pp. 966, 967, Nos. 7910–7914.

**Liquidator of company.]—***See COMPANIES*, Vol. X., p. 991, Nos. 6861, 6862.

**Administrator of convict's estate.]—***See CRIMINAL LAW*, Vol. XIV., p. 495, No. 5459.

**Persons impounding animals.]—***See DISTRESS*, Vol. XVIII., pp. 446, 447, Nos. 1827, 1829.

**Persons distraining for rent.]—***See DISTRESS*, Vol. XVIII., p. 350, Nos. 871–877.

**Sheriffs.]—***See EXECUTION*, Vol. XXI., pp. 511 *et seq.*

**Innkeepers.]—***See INNS & INNKEEPERS*, Vol. XXIX., pp. 22, 23, Nos. 286–295.

**Pawnbrokers.]—***See PAWNS & PLEDGES*, Vol. XXXVII., p. 24, Nos. 189, 190.

**Authority of agent to pledge under Factor's Acts.]—***See AGENCY*, Vol. I., pp. 330–340, Nos. 467–524.

**C. Orders of Court.**

**See ADMIRALTY, Vol. I., pp. 222, 223, Nos. 1488–1492; *INTERPLEADER*, Vol. XXIX., p. 483, Nos. 335–339, & *generally, PRACTICE*.**

*of property in purchaser—Goods remaining in stores of vendor.]—*The property in goods may be completely transferred to the vendee, even whilst it remains in the stores of the vendor.—*CULLEN & CO. TRUSTEES v. MILLER, FERGUS & CO. TRUSTEES* (1820), 1 Nfld. L. R. 216.—*NFLD.*

**PART IV. SECT. 2, SUB-SECT. 2.—C.**

**n. Effect of sale by court—Court without jurisdiction.]—**A judicial sale

of a vessel under the decree of a ct. without jurisdiction to order such sale, is an absolute nullity.—*JOHNSON v. THE BELLA* (1922), 68 D. L. R. 681; 21 Exch. C. R. 305.—*CAN.*

**PART IV. SECT. 2, SUB-SECT. 4.**

**a. Title of innocent transferee or pledgee—Against original seller.]—***UNITED STATES OF NORTH AMERICA v. BOYD* (1868), 15 Gr. 138.—*CAN.*

**p. ———.]—***BRETT v. FOOR-*

**SUB-SECT. 3.—SALE IN MARKET OVERT.**

**See Sale of Goods Act, 1893 (c. 71), s. 22 (1), (2); MARKETS, Vol. XXXIII., pp. 538, 539, 560–563, Nos. 152–156, 428–487.**

**SUB-SECT. 4.—SALE OR PLEDGE UNDER VOIDABLE TITLE.**

**See Sale of Goods Act, 1893 (c. 71), s. 23.**

**1443. Title of innocent transferee or pledgee—Innocence of transferee question for jury.]—**A., an agent for the sale of manures on commission, had been employed in that capacity by deft., a manure dealer, & being indebted to deft. on balance of account in a sum which he was unable to pay, it was arranged that he should obtain manures from other persons & send them to deft. in discharge of his debt. He accordingly purchased of pltf. a quantity of manure “at three months’ credit to sell again,” which by A.’s direction was sent by pltf. to A. at the F. station, where they were received & taken away by deft., to whom A. had forwarded the delivery note. On the trial of an action by pltf. against deft. to recover the value of the goods, the judge stopped deft.’s counsel from calling deft. as a witness, & told the jury that, if they thought A. represented himself to pltf. as an ordinary buyer on sale for profit, & that he was not so, but that he procured the goods for the purpose of handing them over to deft., that would be a fraud upon pltf., & he would be entitled to the verdict, even though deft. were no party to the fraud:—*Held*: that was a misdirection on the part of the judge, & the question of deft.’s *bona fides* in the matter ought to have been left to the jury.—*DANTEC v. ASHWORTH* (1866), 14 L. T. 488; 30 J. P. 695.

**1444. ——— Against person with equitable interest.]—**An assignment of goods at sea as a collateral security for a debt, & a subsequent indorsement of a bill of lading, are good as against the assignees of the assignor, who committed an act of bkpcy. between the assignment of the goods & the indorsement of the bill of lading. Goods delivered to a person claiming them wrongfully, who pays freight & other charges, cannot be detained for those expenses against the rightful owner.

As between a person who has an equitable lien & a third person, who purchases the thing for a valuable consideration, & without notice, the prior equitable lien shall not overreach the title of the vendee (*ASHURST, J.*).—*LEMPRIERE v. PASLEY* (1788), 2 Term Rep. 485; 100 E. R. 262.

**Annotations:—***Apld. Nichols v. Clent* (1817), 3 Price, 547. *Consd. Lucas v. Dorrien* (1817), 7 Taunt. 278; *Burn v. Carvalho* (1834), 1 Ad. & El. 883. *Refd. Walley v. Montgomery* (1803), 3 East, 585; *Belcher v. Oldfield* (1839), 6 Bing. N. C. 102; *Belcher v. Capper* (1842), 4 Man. & G. 502; *Peruvian Guano Co. v. Dreyfus* (1887), [1892] A. C. 170, n. *Mentd. Re Severn, Ex p. Tennyson* (1832), Mont. & B. 67.

**1445. ——— Sale by person having limited interest.]—**A. let a horse on hire to B. for one month, B. kept it for two months, & then sold it to C.:—*Held*: A. might recover the value of the

*SEN (Man.)* (1907), 7 W. L. R. 13.—*CAN.*

**q. ——— Facts sufficient to put buyer on inquiry.]—***WESBROOK v. WILLOUGHBY* (1895), 10 Man. L. R. 690.—*CAN.*

**r. Pretended sale of chattels.]—**A. stated in writing that he had sold certain chattels to B. & B. stated that he had bought them from A. There was no consideration. The documents purporting to transfer the chattels



horse from C., although C. had acted *bonâ fide*, & had paid B. the full value.

B. had only a limited interest, he, when he sold it, could give deft. no better title than he had got himself (BOSANQUET, J.).—SHELLEY v. FORD (1832), 5 C. & P. 313; 172 E. R. 991, N. P.

1446. ———.—]—PEASE v. GLOAHEC, THE MARIE JOSEPH, No. 2307. *post*.

1447. ———.—Against original seller—Title acquired before disaffirmance.]—A contract for the sale of goods, obtained by fraud on the part of the purchaser, is void only at the election of the vendor; & it is too late to declare such election after the goods have passed into the hands of a *bonâ fide* purchaser.—WHITE v. GARDEN (1851), 10 C. B. 919; 20 L. J. C. P. 166; 15 Jur. 630; 138 E. R. 364.

*Annotations*.:—**Consd.** Billiter v. Young (1856), 6 E. & B. 1. **Apld.** Babcock v. Lawson (1879), 4 Q. B. D. 394. **Refd.** Stevenson v. Newnham (1853), 13 C. B. 285; Kingsford v. Merry (1856), 11 Exch. 577; Hooper v. Lane (1857), 6 H. L. Cas. 443; Morewood & Bayne v. South Yorkshire Ry. & River Dun Co. (1858), 28 L. J. Ex. 114; Hardman v. Booth (1863), 32 L. J. Ex. 105; Biddle v. Bond (1865), 6 B. & S. 225; *Re* Overend, Gurney, *Ex p.* Oakes & Peck (1867), L. R. 3 Eq. 576; Marks v. Feldman (1869), L. R. 4 Q. B. 481; Bentley v. Vilmont (1887), 12 App. Cas. 471; *Re* Hirth, *Ex p.* Official Receiver (1899), 68 L. J. Q. B. 287. **Mentd.** *Re* Ward, *Ex p.* Ward (1882), 20 Ch. D. 356.

1448. ———.—]—A. obtains goods from B. under a contract of sale, procured by A. from B. by fraud. A. sells to C.; C. may retain the goods. Surely A. might recover the price from C. at which he sold to him; yet he would in so doing, take advantage of his own wrong . . . because of the right of the third person (BRAMWELL, B.).—HOOPER v. LANE (1857), 6 H. L. Cas. 443; 27 L. J. Q. B. 75; 30 L. T. O. S. 33; 3 Jur. N. S. 1026; 6 W. R. 146; 10 E. R. 1368, H. L.

*Annotations*.:—**Mentd.** Warburg v. Tucker (1858), 4 Jur. N. S. 1142; Bateman v. Preston (1861), 3 E. & E. 578; *Ex p.* Preston (1861), 3 De G. F. & J. 612; Ockford v. Preston, Chapman v. Same (1861), 6 H. & N. 466; Tyne Improvement Comrs. v. General Steam Navigation Co. (1866), 8 B. & S. 66; *Re* London Celluloid Co. (1888), 39 Ch. D. 190.

1449. ———.—]—A declaration containing a count in trover, another against defts. as warehousemen for refusing to deliver goods, & a third against them as carriers for refusing to deliver goods, is answered by a plea on equitable grounds disclosing the following facts:—that the goods had been sold to a person other than defts. & delivered by the sellers to defts. for the purpose of being delivered to pltf. under a contract induced by the buyer's fraud to which pltf. was privy, that the sellers, under a mistaken supposition that the *transitus* was still subsisting, obtained from defts. the redelivery of the goods to them, which was a breach of the contract between defts. & pltf., but that afterwards, & after action commenced, the sellers having discovered the fraud, & that pltf. was privy to it, did elect to rescind the contract & revert the property in the goods in themselves, & that this was done before any act was done by them affirming the contract or otherwise determining their election & that no interest had vested in any innocent person rendering it inequitable or unjust to rescind the contract.—CLOUGH v. LONDON & NORTH WESTERN RY. CO. (1871), L. R. 7 Exch. 26; 41 L. J. Ex. 17; 25 L. T. 708; 20 W. R. 189, Ex. Ch.

*Annotations*.:—**Refd.** Morrison v. Universal Marine Insee. (1873), L. R. 8 Exch. 197; R. v. Middleton (1873), L. R. 2 C. C. R. 38; Scarf v. Jardine (1882), 7 App. Cas. 345; James v. Young (1884), 27 Ch. D. 652; *Re* Murray, Dickson v. Murray (1887), 57 L. T. 223; Aaron's Reefs v.

Twiss, [1896] A. C. 273; Law v. Law, [1905] 1 Ch. 140; Abram S.S. Co. v. Westville Shipping Co., [1923] A. C. 773. **Mentd.** Rankin v. Potter (1873), L. R. 6 H. L. 83; Erlanger v. New Sombrero Phosphate Co. (1878), 3 App. Cas. 1218; Wakefield & Barnsley Banking Co. v. Normanton L. B. (1881), 44 L. T. 697; Allcard v. Skinner (1887), 36 Ch. D. 145; *Re* Railway Time Tables Publishing Co., *Ex p.* Sandys (1889), 42 Ch. D. 98; *Re* Snyder Dynamite Projectile Co., Skelton's Case (1893), 68 L. T. 210; Gordon v. Strett, [1899] 2 Q. B. 641; Cornall v. Henson, [1900] 2 Ch. 298; Boston Fruit Co. v. British & Foreign Marine Insee., [1906] A. C. 336; United Shoe Machinery Co. of Canada v. Brunet, [1909] A. C. 330; Armstrong v. Jackson, [1917] 2 K. B. 822; *It. v.* Paulson, [1921] 1 A. C. 271; Bennett v. Whitehead, [1926] 2 K. B. 380.

1450. ———.—]—S. was the agent of L., a wine merchant in Spain, & was induced by the fraudulent representations of three persons acting in collusion to enter into separate contracts with them for the sale of wine. S. transmitted the orders for the wine to L., who shipped the wines, & sent the bills of lading to S.; the bills of lading were handed by S. to the three persons respectively on account of the contracts entered into with them. The wine so obtained was deposited with defts., a dock co., who issued warrants for the same; some of the wine therein mentioned was made deliverable to the order of one of the three persons, & the rest to the order of another of them. The warrants were then pledged with pltf's. to secure advances. L. afterwards served notice upon defts. not to part with the wine; thereupon defts. refused to give up the wine when it was demanded of them by pltf's, who commenced actions claiming damages in addition to the value of the wines:—**Held**: as the wine had been obtained by fraud from S., the agent of L., with a power to sell, the property in it passed to the three persons, who before the fraudulent contract was annulled could confer a title upon pltf's., & L. must be barred upon pltf's. undertaking to account to him for the value of the wine after deducting their advances.—ATTENBOROUGH v. ST. KATHARINE'S DOCK CO. (1878), as reported in 3 C. P. D. 450; 26 W. R. 583, C. A.

*Annotations*.:—**Expld.** Henderson v. Williams, [1895] 1 Q. B. 521. **Refd.** Wright v. Freeman (1879), 40 L. T. 134; Rogers v. Lambert, [1891] 1 Q. B. 318. **Mentd.** R. v. Central Criminal Court JJ. (1886), 18 Q. B. D. 314; De Rothschild v. Morrison, Kekewich, Banque de Paris et de Pays Bas v. The Same, Banque de France v. The Same (1890), 24 Q. B. D. 750; Robinson v. Jenkins (1890), 24 Q. B. D. 275; *Ex p.* Mersey Docks & Harbour Board, [1899] 1 Q. B. 546.

1451. ———.—]—If A., fraudulently assuming the name of a person of credit & stability, buys, in person, & obtains delivery of, goods from B., the property in the goods passes to A., & he can therefore give a good title thereto to a third party who, acting *bonâ fide* & without notice, has given value therefor, unless in the meantime B. has taken steps to disaffirm the contract with A.—PHILLIPS v. BROOKS, LTD., [1919] 2 K. B. 243; 88 L. J. K. B. 953; 121 L. T. 249; 35 T. L. R. 470; 24 Com. Cas. 263.

*Annotations*.:—**Consd.** Lake v. Simmons, [1927] A. C. 487. **Refd.** *Sald v.* Butt, [1920] 3 K. B. 497.

1452. ———.—]—**Necessity for de facto contract.**]—Where the owner of goods suffers another to have possession of them, or of the documents which are the evidence of property therein, on a sale to him, obtained by means of fraudulent representation, & avoidable at the option of the owner, a sale or pledge by such party, before the owner has exercised his option, & without notice to the subsequent purchaser, is binding; but this is not so when a party has merely

had never left A.'s possession & they were admitted subsequently to have been made solely to prevent the said chattels from falling into the hands

of A.'s mtgee.:—**Held**: the property in the chattels did not pass to B. on the ground that, in the absence of consideration, the mere intention to

effect an illegal object did not deprive the real owner of his property where nothing was done under the documents purporting to transfer the



**Sect. 2.—Transfer of title: Sub-sects. 4, 5, 6, 7 & 8.]**

obtained the goods by means of false pretences, without any contract of sale to himself; as when he falsely & fraudulently represents that another person has authorised him to purchase the goods, & in such case, the original owner can recover the goods from a party to whom they have been sold or pledged by the person who fraudulently obtained them, before any notice of the fraud, or any disaffirmance of the transaction by the real owner.—*HIGGONS v. BURTON* (1857), 26 L. J. Ex. 342; 29 L. T. O. S. 165; 5 W. R. 683.

**Annotations:—***Consd. Johnson v. Credit Lyonnais Co.*, [1877] 3 C. P. D. 32. **Appld.** *Johnson v. Blumenthal* (1877), 3 C. P. D. 32. **Appld.** *Cundy v. Lindsay* (1878), 3 App. Cas. 459. **Consd.** *G. W. Ry. v. London & County Banking Co.*, [1901] A. C. 414. **Refd.** *Richards v. Johnson* (1859), 33 L. T. O. S. 206; *Gobind Chunder Sein v. Ryan* (1861), 9 Moo. Ind. App. 140; *Hardman v. Booth* (1863), 32 L. J. Ex. 105; *R. v. Central Criminal Court JJ.* (1886), 55 L. T. 486.

**1453. ————.]—Pltf.**, having had no previous dealings with the firm, & knowing them only by reputation, applied at the place of business of "Gandell & co." for orders for goods; the firm then consisting of Thomas Gandell only, & being managed by Edward Gandell, a clerk. On pltf. asking to see Messrs. Gandell, Edward Gandell presented himself & so conducted himself as to lead the pltf. to suppose that he was one of the firm of Gandell & co., & had authority to order goods on their behalf, which was not the fact. Pltf. sent goods, according to Edward Gandell's order, to the place of business of Gandell & co., an invoice being made out by Edward Gandell's direction, to the name of "Edward Gandell & co." Edward Gandell unknown to pltf. carried on business with Todd at another place; & the goods were, within three or four days of their delivery, pledged with deft., with a power of sale, to secure advances *bond fide* made by him to Gandell & Todd, & he sold them under the power without notice from pltf.:—**Held:** there was no contract of sale, inasmuch as pltf. intended to contract with Gandell & co. & not with Edward Gandell personally, & Gandell & co. were not contracting parties; no property therefore passed, & pltf. was entitled to recover the value of the goods from deft.—*HARDMAN v. BOOTH* (1863), 1 H. & C. 803; 1 New Rep. 240; 32 L. J. Ex. 105; 7 L. T. 638; 9 Jur. N. S. 81; 11 W. R. 239; 158 E. R. 1107.

**Annotations:—***Apprvd. & Appld. Hollins v. Fowler* (1875), L. R. 7 H. L. 757. **Follid.** *Cundy v. Lindsay* (1878), 3 App. Cas. 459. **Refd.** *Colo v. North Western Bank* (1875), L. R. 10 C. P. 354; *G. W. Ry. v. London & County Bank* (1901), 85 L. T. 152; *Oppenheimer v. Frazer & Watt*, [1907] 2 K. B. 50; *Whitehorn v. Davison*, [1911] 1 K. B. 463; *Phillips v. Brooks*, [1919] 2 K. B. 243; *Folkes v. King*, [1923] 1 K. B. 282; *Lake v. Simmons*, [1926] 1 K. B. 366; *Lowther v. Harris*, [1927] 1 K. B. 393. **Mentd.** *Arnold v. Cheque Bank*, *Arnold v. City Bank* (1876), 1 C. P. D. 578.

**1454. ————.]—The purchaser** of a chattel takes it, as a general rule, subject to what may turn out to be informalities in the title. By a purchase in market overt the title obtained is good against all the world. If not so purchased, though purchased *bond fide*, the title obtained may not be good against the real owner. Where the original owner has parted with the chattel to A. upon a *de facto* contract, though there may be circumstances which enable that owner to set aside that contract, the *bond fide* purchaser from A. will obtain an indefeasible title. The question, therefore, in many such cases will be, was there a con-

tract between the original owner & the intermediate person. L. was a manufacturer in Ireland; Alfred Blenkarn, who occupied a room in a house looking into Wood Street, Cheapside, wrote to L., proposing a considerable purchase of L.'s goods, & in his letter used this address—"37, Wood Street, Cheapside," & signed the letters, without any initial for a Christian name, with a name so written that it appeared to be "Blenkiron & co." There was a respectable firm of that name, "W. Blenkiron & co.," carrying on business at 123, Wood Street. L. sent letters, & afterwards supplied goods, the letters, the goods, & the invoices accompanying the goods, being all addressed to "Messrs. Blenkiron & co., 37, Wood Street." The goods were received by Blenkarn at that place, & disposed of to defts., who were entirely ignorant of the fraud:—**Held:** no contract was made with Blenkarn, even a temporary property in the goods never passed to him, so that he never had a possessory title which he could transfer to defts., who were consequently liable to pltf. for the value of the goods.

If it turns out that the chattel has come into the hands of the person who professed to sell it, by a *de facto* contract, that is to say, a contract which has purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title, even although afterwards it should appear that there were circumstances connected with that contract, which would enable the original owner of the goods to reduce it, & to set it aside, because these circumstances so enabling the original owner of the goods, or of the chattel, to reduce the contract & to set it aside, will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced (*LORD CAIRNS, C.*).—*CUNDY v. LINDSAY* (1878), 3 App. Cas. 459; 38 L. T. 573; 42 J. P. 483; 26 W. R. 406; 14 Cox, C. C. 93; *sub nom. LINDSAY & CO. v. CUNDY*, 47 L. J. Q. B. 481, H. L.; *affg. S. C. sub nom. LINDSAY v. CUNDY* (1877), 2 Q. B. D. 96, C. A.; & *reversg. LINDSAY v. CUNDY* (1876), 1 Q. B. D. 348.

**Annotations:—***Distd. Attenborough v. London & St. Katharine's Dock Co.* (1878), 3 C. P. D. 450. **Appld.** *Babcock v. Lawson* (1879), 4 Q. B. D. 394. **Consd.** *Bentley v. Vilmont* (1887), 12 App. Cas. 471. **Distd.** *King's Norton Metal Co. v. Edridge, Merrett, King's Norton Metal Co. v. Roberts* (1897), 14 T. L. R. 98. **Appld.** *Re International Soc. of Auctioneers & Valuers, Bailiff's Case*, [1898] 1 Ch. 110. **Distd.** *Whitehorn v. Davison*, [1911] 1 K. B. 463. **Consd.** *Phillips v. Brooks*, [1919] 2 K. B. 243. **Appld.** *Nanka-Bruce v. Commonwealth Trust*, [1926] A. C. 77. **Refd.** *Re Reed, Ex p. Barnett* (1876), 3 Ch. D. 123; *Moyce v. Newington* (1878), 4 Q. B. D. 32; *Il. v. Central Criminal Court JJ.* (1886), 18 Q. B. D. 314; *Henderson v. Williams*, [1895] 1 Q. B. 521; *G. W. Ry. v. London & County Banking Co.*, [1901] A. C. 414; *Folkes v. King*, [1923] 1 K. B. 282; *Greer v. Downs Supply Co.*, [1927] 2 K. B. 28; *Lake v. Simmons*, [1927] A. C. 487.

**1455. ————.]—A person who** obtains goods under a contract of sale by false pretences can, until the contract is disaffirmed, give a good title to the goods to a *bond fide* purchaser for value.—*KING'S NORTON METAL CO., LTD. v. EDRIDGE, MERRETT & CO., LTD., SAME v. ROBERTS* (1897), 14 T. L. R. 98, C. A.

**1456. ————.]—CAHN v. POCKETT'S BRISTOL CHANNEL STEAM PACKET CO., No. 1352, ante.**

**1457. ————.]—These goods were** *de facto* sold to L. by applt., & so far as resps. were concerned they were honestly & for value bought by them from L. Suppose it to be the case that applt. defrauded by L. to whom he had sold the

chattels & where the illegal purpose for which the said documents were issued was not carried out.—

*SANDERS v. HRDMAN* (1914), 29 W. L. R. 460, 916; 7 W. W. R. 133; 18 D. L. R. 481; 8 W. W. R. 664.—**CAN,**

**t. ———.]—MORRISON v. ROBERTSON**, [1908] S. C. 332; 45 Sc. L. R. 264; 15 S. L. T. 607.—**SCOT.**

goods could have treated the transaction as voidable on that account & sued L. for remission accordingly that cannot in law form a ground of impeachment as against buyers in good faith & for value from the person, like L., then vested in the goods by a *de facto* contract (*per* CUR.).—*NANKA-BRUCE v. COMMONWEALTH TRUST*, [1926] A. C. 77; 94 L. J. P. C. 169; 134 L. T. 35, P. C.

**1458. — Proof of absence of good faith—Onus on seller.**—Where the contract for sale of a chattel is voidable by the seller as against the buyer on account of fraud practised by the buyer upon the seller, & before any election to avoid the sale by the seller, the buyer pledges the chattel to secure an advance, the *onus* lies on the seller who seeks to avoid the sale, & recover the chattel from the pledgee, of proving that the pledgee took the chattel with notice of the fraud or otherwise than in good faith.—*WHITEHORN BROTHERS v. DAVISON*, [1911] 1 K. B. 463; 80 L. J. K. B. 425; 104 L. T. 234, C. A.

*Annotations*:—*Distd. Heap v. Motorists' Advisory Agency*, [1923] 1 K. B. 577. *Reid. Talbot v. Von Bork*, [1911] 1 K. B. 854; *Bradley & Cohn v. Ramsay* (1912), 106 L. T. 771; *Mehta v. Sutton* (1913), 108 L. T. 214; *Folkes v. King*, [1923] 1 K. B. 282; *Lowther v. Harris*, [1927] 1 K. B. 393. *Mentd. Blundell-Leigh v. Attenborough*, [1921] 3 K. B. 235; *Lake v. Simmons*, [1926] 1 K. B. 366.

**1459. — Subsequent sale to party having notice.**—*PEIRCE v. LONDON HORSE & CARRIAGE REPOSITORY, LTD.*, [1922] W. N. 170, C. A.

**1460. — Goods fraudulently obtained by pledgor from pledgee.**—D. & co. deposited certain goods with pltf.s. as security for an advance; they afterwards obtained possession of the goods by fraudulently representing to pltf.s. that they had sold them to defts., & would hand over to pltf.s. the money to be received in payment. D. & co. obtained an advance from defts., & deposited the goods, with a power of sale, with them:—*Held*: as pltf.s. had parted with their special property in the goods to D. & co., they could not recover them in an action from defts. who had obtained them *bonâ fide* & for a good consideration.—*BABCOCK v. LAWSON* (1880), 5 Q. B. D. 284; 49 L. J. Q. B. 408; 42 L. T. 289; 28 W. R. 591, C. A.

*Annotations*:—*Reid. Nash v. De Freville*, [1900] 2 Q. B. 72; *Farquharson v. King* (1902), 71 L. J. K. B. 667.

#### SUB-SECT. 5.—EFFECT OF BANKRUPTCY.

*See* BANKRUPTCY, Vol. V., pp. 637, 638, 686, 687, Nos. 5731, 5735, 5730, 6072, 8074, 6075.

#### SUB-SECT. 6.—REVESTING OF PROPERTY IN STOLEN GOODS.

*See* Sale of Goods Act, 1893 (c. 71), s. 24; Larceny Act, 1916 (c. 50), s. 45; CRIMINAL LAW, Vol. XV., pp. 617–621, Nos. 6464–6509; MARKETS, Vol. XXXIII., p. 563, Nos. 479–487; TROVER.

#### SUB-SECT. 7.—DISPOSITION BY SELLER IN POSSESSION.

*See* Sale of Goods Act, 1893 (c. 71), s. 25 (1); Factors Act, 1889 (c. 45), s. 8.

**1461. Pledge to warehouseman—Prior sale to third party.**—A merchant sold wine stored in the

cellars of a warehouseman, & afterwards pledged the wine to the warehouseman for advances made in good faith without notice of the sale:—*Held*: the pledge conferred no title to the wine.—*NICHOLSON v. HARPER*, [1895] 2 Ch. 415; 64 L. J. Ch. 672; 73 L. T. 19; 59 J. P. 727; 43 W. R. 550; 11 T. L. R. 435; 39 Sol. Jo. 524; 13 R. 567.

#### SUB-SECT. 8.—DISPOSITION BY BUYER IN POSSESSION.

*See* Sale of Goods Act, 1893 (c. 71), s. 25 (2); Factors Act, 1889 (c. 45), s. 9.

**1462. Buyer in possession by consent of owner—Title of bonâ fide transferee or pledgee.**—Factors Act, 1877 (c. 39), s. 4, provides that, where any goods have been sold or contracted to be sold, & the vendee obtains the possession of the documents of title thereto from the vendor, any sale, pledge, or disposition of such goods or documents by such vendee so in possession shall be as valid & effectual as if such vendee were an agent or person entrusted by the vendor with the documents within the meaning of the principal Acts as amended by the Act itself, provided the person to whom the sale, pledge, or other disposition is made has not notice of any lien or other right of the vendor in respect of the goods.

It is not necessary, in order that the above-mentioned sect. should be applicable, that there should be a memorandum of the contract for sale of the goods so as to satisfy the Stat. Frauds; it is sufficient that there should be a *de facto* contract for sale, the vendee under which has obtained from the vendor possession of the documents of title to the goods; & a sale by such a vendee will give to a *bonâ fide* purchaser without notice a good title to the goods, free from any lien or other right of the original vendor in respect thereof.—*HUGILL v. MASKER* (1889), 22 Q. B. D. 364; 58 L. J. Q. B. 171; 60 L. T. 774; 37 W. R. 390, C. A.

—*Pledge for antecedent debt.*—*See* AGENCY, Vol. I., p. 337 *et seq.*

**1463. —**—*ROBINSON v. RESTELL* (1890), 12 T. L. R. 174.

—*See* AGENCY, Vol. I., pp. 335, 336, Nos. 495–500.

**1464. Buyer in possession under hire-purchase agreement—Title of bonâ fide purchaser.**—*HORTON v. GIBBINS* (1897), 13 T. L. R. 408, D. C.

*See, also*, BAILMENT, Vol. III., pp. 92, 93, 97, 98, Nos. 241, 242, 245, 262–267.

**1465. Pledge of warehouseman's warrant of part of goods in bulk.**—*CAPITAL & COUNTIES BANK, LTD. v. WARRINER* (1896), 12 T. L. R. 216; 1 Com. Cas. 314.

*Annotation*:—*Föld. Ant. Jurgens Margarinefabrieken v. Dreyfus*, [1914] 3 K. B. 40.

—*W. & J. claimants in an interpleader issue were the owners of a large quantity of wheat deposited in a warehouse of the B. Dock Authority at A. By three separate contracts, dated respectively Sept. 25, Oct. 1 & Oct. 13, 1925, they sold 250, 750, & 250 quarters out of the bulk of the wheat to R. The sales were on credit, R. giving bills for the price of each parcel purchased. R. took delivery of 400 quarters only of the total*

#### PART IV. SECT. 2, SUB-SECT. 7.

a. *Application of Sale of Goods Act, 1895, s. 27 (1).*—The above sect. applies only in cases in which the relation of vendor & purchaser continues between the parties to the first sale, & not to cases in which, the first sale having been completed by delivery, a different relation is subsequently created be-

tween the parties to it under another contract, as where the goods are bailed or leased back to the vendor.—*MITCHELL v. JONES* (1905), 24 N. Z. L. R. 932.—N.Z.

#### PART IV. SECT. 2, SUB-SECT. 8.

b. *Buyer in possession conditionally on payment—Transfer to purchaser*

*taking with notice of condition—Whether property vests.*—Pltf. sold to F. certain goods, taking notes in payment, a written agreement being entered into that unless the notes were promptly paid the property should not vest. F. sold the property to deft., giving him notice of pltf.'s claim. The notes not being paid:—*Held*: pltf. was

*Sect. 2.—Transfer of title: Sub-sects. 8, 9 & 10. Parts V. & VI. Sect. 1: Sub-sects. 1 & 2.]*

amount sold to them, the remaining 860 quarters being left in the warehouse unseparated from the bulk, & they pledged the 850 quarters to the M. Bank, resps. in the interpleader issue, to secure an overdraft. Payment for the first 250 quarters was duly made by R. to claimants, but their subsequent bills were dishonoured, & claimants instructed the Dock Authority not to allow any of the remaining 850 quarters to leave the warehouse. R. then became insolvent. Claimants had by sales to various other purchasers disposed of the whole of their wheat in the warehouse except the 850 quarters which had been sold to R.'s claimants, as unpaid vendors, & the M. Bank as pledgees, both claimed the 850 quarters, & at the instance of the Dock Authority an interpleader issue was ordered to be tried to decide which of them was entitled. W. & J. being named as claimants in the issue & the bank as resps.:—*Held*: as soon as the whole of the wheat other

than that sold to R. had been delivered to the other purchasers, & that sold to R. remained alone in the warehouse, that sold to R. became by the process of exhaustion ascertained goods within Sale of Goods Act, s. 16, & the property in the wheat passed to R. & their pledge to the bank became effective.—*WAIT & JAMES v. MIDLAND BANK* (1926), 31 Com. Cas. 172.

**SUB-SECT. 9.—EFFECT ON TITLE OF DISTRESS FOR RENT.**

*See DISTRESS*, Vol. XVIII., p. 354, Nos. 915–917.

**SUB-SECT. 10.—EFFECT ON TITLE OF WRITS OF EXECUTION.**

*See Sale of Goods Act*, 1893 (c. 71), s. 26 (1) (2); *BANKRUPTCY*, Vol. V., pp. 809 *et seq.*; *COUNTY COURTS*, Vol. XIII., p. 515, Nos. 612, 643; *EXECUTION*, Vol. XXI., pp. 491 *et seq.*

## Part V.—Interpretation of the Contract.

*See Sale of Goods Act*, 1893 (c. 71), ss. 55, 62, &, generally, *DEEDS*, Vol. XVII., pp. 242 *et seq.*

**1467. Construed like other written contracts.]—**Pltfs. contracted to supply defts. with goods, "delivering on Apr. 17, complete May 8." Pltfs. made no delivery on Apr. 17, & defts. on the following day rescinded the contract, & refused subsequent tenders of the goods. Pltfs. having brought an action for non-acceptance:—*Held*: (1) if on the true construction of the contract pltfs. were bound to commence the delivery on Apr. 17, defts. were entitled to rescind for the failure to deliver on that day.

(2) The rule of construction applicable in general to all written contracts is, that they are to be construed according to the real intention of the parties, to be collected from the language they have used; that effect is to be given, if possible, to every word used, & that every word is to be interpreted according to its natural & ordinary meaning, unless such construction would be contrary to the manifest intention of the parties, or would necessarily lead to some contradiction or absurdity. But this rule, though applicable to contracts in general, must be received with some qualification, when the contract or a portion of the contract in question consists of an incomplete sentence, ambiguous in its terms, & upon which a literal construction of every word would either be impracticable, or would leave the contract indeterminate & uncertain. Such is the case with the contract in question, which I think is to be construed according to what we can collect to have been the substantial intention of the parties, applying our common sense, & such knowledge as we may possess, to the language in which they have expressed themselves (*KELLY, C.B.*).—*CODDINGTON v. PALEOLOGO* (1867), L. R. 2 Exch. 193; 36 L. J. Ex. 73; 15 L. T. 581; 15 W. R. 961.

*Annotations:—As to* (1) *Reid. Corcoran v. Proser* (1873),

entitled to replevy the goods.—*WEEKS v. LALOR* (1859), 8 C. P. 239.—*CAN.*

*c. — Sale to bona fide purchaser for value—Whether property passes.]—PURTLE v. HENEY* (1896), 33 N. B. R. 607.—*CAN.*

*d. — — — — —.]—DELANEY v. DOWNEY* (1912), 21 W. L. R. 577;

2 W. W. R. 599; 4 D. L. R. 474.—*CAN.*

*e. — — — — —.]—LANSTON MONOTYPE CO. v. NORTHERN PUBLISHING CO.* (1922), 67 D. L. R. 140; 63 S. C. R. 482; [1922] 2 W. W. R. 529.—*CAN.*

### PART V.

*f. Meaning of words — Question*

22 W. R. 222; *Hartley v. Hymans*, [1920] 3 K. B. 475.

**1468. Position of contracting party—Whether principal or agent.]—PENNELL v. ALEXANDER, No. 2306, *post*.**

— — — — —.]—*See, generally*, *AGENCY*, Vol. I., pp. 620 *et seq.*

**1469. Unqualified proposal & acceptance—Construed as contract for whole.]—**A proposal to receive tenders for certain things to be sold, specifying no limitation or qualification, & an acceptance, also specifying no limitation or qualification, is a contract for the whole.

Defts. advertised that offers would be received for old Portland stone of Westminster Bridge. Pltfs. made an offer for the stone of a particular quality, which was accepted:—*Held*: this was a contract for the purchase of all the stone of that quality.—*THORN v. PUBLIC WORKS COMRS.* (1863), 32 Beav. 490; 55 E. R. 192.

**1470. Admissibility of evidence—As to identity of vendor—Person named on invoice not contracting party.]—**Parol evidence is admissible to show that a person, whose name appears at the head of an invoice as vendor, is not in fact a contracting party.—*HOLDING v. ELLIOTT* (1860), 5 H. & N. 117; 29 L. J. Ex. 134; 1 L. T. 381; 8 W. R. 192; 157 E. R. 1123.

— *As to custom.]—See, generally*, *CUSTOM & USAGES*, Vol. XVII., pp. 40–50, Nos. 444–556.

— — — — —.]—*See, generally*, *DEEDS*, Vol. XVII., pp. 331–348, Nos. 1425–1588.

**Effect of custom on contract.]—See, generally, *CUSTOM & USAGES*, Vol. XVII., pp. 39 *et seq.***

**Subject-matter of contract.]—See Part II., Sect. 5, ante.**

**Price.]—See Part II., Sect. 7, ante.**

**Conditions & warranties.]—See Part III., ante.**

*for jury.]—FILSCHIE v. HOGG* (1874), 35 U. C. R. 94.—*CAN.*

*g. Identity of vendor — Sale on credit—Representation by purchaser—To whom credit given.]—NORTH AMERICAN TRANSPORTATION & TRADING CO. v. OLSEN* (Y. T.) (1905), 1 W. L. R. 518.—*CAN.*

## Part VI.—Performance of the Contract.

## SECT. 1.—GENERAL DUTIES OF SELLER AND BUYER.

## SUB-SECT. 1.—IN GENERAL.

See Sale of Goods Act, 1893 (c. 71), s. 27.

**1471. Duty of seller to deliver—Seller leaving premises on which goods are lying—Goods left behind.**—A tenant was bound either to consume the hay on the demised premises, or for every load of hay removed to bring two loads of manure. On quitting possession of the premises, he sold part of a rick of hay then left standing to a purchaser, without mentioning his liability to bring manure. The incoming tenant refused to allow the purchaser to take away the hay until the manure was brought. After an interval of a month, during which time the hay had been considerably damaged, the latter consented that it should be removed; the purchaser, however, then refused to accept or pay for the same:—*Held*: although the bringing on the manure was not a condition precedent to the carrying off the hay, as between the landlord & tenant, still, that after the tenant had a right to refuse to permit the hay to be removed till after the manure was brought on, & as the vendor had not enabled the purchaser to remove the hay in the first instance, he was not entitled to recover the price.—*SMITH v. CHANCE* (1819), 2 B. & Ald. 753; 106 E. R. 540.

*Annotation*:—*Mentd.* Westropp v. Elligott (1884), 9 App. Cas. 815.

**1472.** —.]—(1) On a contract for the manufacturing & supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted & paid for a portion of the goods, gives notice to the vendor not to manufacture any more as the purchaser has no occasion for them & will not accept or pay for them, the vendor having been desirous & able to complete the supply, such vendor may, without manufacturing & tendering the rest of the goods, maintain an action against the purchaser for breach of the contract. Proof of such notice by the purchaser will entitle pltf. to recover, on a count alleging that he was ready & willing to perform the contract, & that deft. refused to accept the residue of the goods, & prevented & discharged pltf. from supplying them, & from further executing the contract. Such notice is a prevention, though there be no other act of obstruction.

(2) Where, by the terms of such a contract, the goods were to be delivered at stated periods, but they were not all delivered at the respective times, the purchasers not countermanding them, but requesting, from time to time, that the supply might be delayed, & finally the purchasers refused to accept any more:—*Held*: damages might be given for the whole quantity remaining on hand, though consisting in part of quantities which, without being actually countermanded, had, by desire of the purchasers, been kept back at the times appointed for delivery; & the jury were properly directed to give such damages as would

leave pltf. in the same situation as if debts. had fulfilled their contract.—*CORT v. AMBERGATE, ETC.*, Ry. Co. (1851), 17 Q. B. 127; 20 L. J. Q. B. 460; 17 L. T. O. S. 179; 15 Jur. 877; 117 E. R. 1229.

*Annotations*:—*As to* (1) *Distd.* *Reid v. Hoskins, Avery v. Bowden* (1856), 3 Jur. N. S. 238. *Consd.* *British & Benningtons v. N. W. Cachar Tea Co.*, [1923] A. C. 48. *Reid.* *Kent v. Godts* (1855), 26 L. T. O. S. 88; *Danube & Black Sea Ry. & Kustendjie Harbour Co. v. Xenos*, *Xenos v. Danube & Black Sea Ry. & Kustendjie Harbour Co.* (1861), 11 C. B. N. S. 152; *Byrne v. Van Tienhoven* (1880), 5 C. P. D. 344; *Taylor v. Oakes, Roncoroni* (1922), 127 L. T. 267. *Generally, Reid.* *Hochster v. De Lautour* (1853), 1 C. L. R. 846. *Mentd.* *Johnson v. Raylton* (1881), 7 Q. B. D. 438.

**1473. Duty of buyer to accept.**—*CORT v. AMBERGATE, ETC.*, Ry. Co., No. 1472, *ante*.

**1474.** — *Performance of part of contract delayed.*—Deft. entered into two contracts, each of which was for the purchase from pltf. of 4,500 quarters of Russian oats, more or less, "shipment by steamer or steamers during Feb. Should ice at loading port prevent shipment within stipulated time, shipment to be made immediately after re-opening of the navigation." Pltf. shipped on board one steamer 4,511 quarters to answer the first contract, & 1,130 quarters to answer in part the second contract. Pltf. also shipped on board another steamer a sufficient quantity of oats to complete the second contract. The shipment on the first steamer was made in time; that on the second steamer was made too late:—*Held*: deft. was bound to accept the 1,130 quarters in part fulfilment of the second contract, notwithstanding that the other shipment on account of that contract was made too late.—*BRANDT v. LAWRENCE* (1876), 1 Q. B. D. 344; 46 L. J. Q. B. 237; 24 W. R. 749, C. A.

*Annotations*:—*Distd.* *Reuter v. Sala* (1879), 4 C. P. D. 239. *Reid.* *Ballantine v. Cramp & Bosman* (1923), 129 L. T. 502.

**1475. What constitutes compliance with duty—Performance at convenient time—Before midnight of stipulated day.**—*STARTUP v. MACDONALD*, No. 1891, *post*.

*Impossibility of performance.*—See CONTRACT, Vol. XII., pp. 392, 399, Nos. 3201, 3228.

*Performance prevented by other party.*—See CONTRACT, Vol. VII., pp. 431, 433, Nos. 3489, 3507.

## SUB-SECT. 2.—DELIVERY AND PAYMENT CONCURRENT CONDITIONS.

See Sale of Goods Act, 1893 (c. 71), s. 28.

**1476. General rule.**—In an action for the non-delivery of hops, sold under the following contract, "Of E. Y. 30 pockets Sussex hops, Springett's, 5 pockets, Kenward's, 78s. Springett's to wait orders":—*Held*: the contract imported a sale for ready money, & parol evidence was not admissible to show, that, by the usual course of dealing between the parties, the hops were sold on a credit of six months.—*FORD v. YATES* (1841), 2 Man. &

made on delivery.—*CHRISTIE v. BURNETT* (1886), 10 O. R. 609.—CAN.

**1476 ii.** —.]—*MODERN CLOAK CO. v. BRUCE MANUFACTURING CO.*, [1924] 1 D. L. R. 434.—CAN.

**1476 iii.** —.]—A sale of goods on a written contract, for a fixed price, making no mention of a term of payment, implies a ready-money bargain

## PART VI. SECT. 1, SUB-SECT. 1.

*h. Duty of seller to maintain title until delivery.*—*MCARTHUR (J. D.) CO., LTD. v. ALBERTA & GREAT WATERWAYS Ry. Co. (Alta.)*, [1923] 3 W. W. R. 48.—CAN.

*k.* —.]—*CAINE v. SCHULTZ*, [1927] 1 W. W. R. 600; 38 B. C. R. 332.—CAN.

## PART VI. SECT. 1, SUB-SECT. 2.

**1476 i. General rule.**—When there is no actual agreement as to price or time for payment, the law will supply the deficiency by importing into the bargain a promise by the buyer to pay a reasonable price, & by implying in the absence of evidence to the contrary, that payment should be

*Sect. 1.—General duties of seller and buyer: Sub-sects. 2 & 3.]*

G. 549; Drinkwater, 109; 2 Scott, N. R. 645; 10 L. J. C. P. 117; 133 E. R. 866.

*Refd.* Brown v. Byrne (1854), 18 Jur. 700; *Field v. Lelean* (1861), 6 H. & N. 617. *Mentd.* Humfrey v. Dale (1858), 5 Jur. N. S. 191; Howard v. Sheward (1866), 15 W. R. 45.

1477. —.].—A. contracted to buy of B. certain cement, in casks & bags, at a given price, for cash; B. agreeing to allow A. 3s. 6d. for each cask, & 2s. 6d. for each bag, that should be returned perfect. In an action by A. against B. for not accepting & paying for the casks & bags, the declaration averred that A. duly paid B. for the said cement, & for the casks & bags; & that, although A. was ready & willing, & tendered & offered, to return the casks & bags, B. refused to accept or pay for them. B. pleaded that A. did not duly pay B. for the said cement, casks, & bags, & that A. was not ready & willing to return the casks & bags to B. within a reasonable time:—*Held*: (1) a payment of the price of the cement by A. after an action brought against him, was a payment according to the contract, so as to entitle him to complain of a breach of the contract on the part of B.; (2) A. was not bound to prove that he was ready to return all the casks & bags, the allegation being in this respect divisible.—NELSON v. PATRICK (1847), 3 C. B. 772; 16 L. J. C. P. 98; 8 L. T. O. S. 316; 136 E. R. 309.

1478. —.].—GODTS v. ROSE, No. 1076, *ante*.

1479. —.].—Deft. ord. red a meal in a restaurant; he made no verbal representation at the time as to his ability to pay, nor was any question asked him with regard to it. After the meal he said that he was unable to pay, & that he had, as was the fact, only one halfpenny in his possession:—*Held*: he could not be convicted of the offence of obtaining goods by false pretences, but he was liable to be convicted of obtaining credit by means of fraud.

No one can doubt that deft. did incur a debt or liability; he ordered goods under circumstances which implied a promise to pay for them. Then did he obtain credit? We are of opinion that he did. The prosecutor might have said that he would not furnish him with the goods until he paid the price, or he might have insisted on payment in actual exchange for each article as it was supplied, but he did neither; he furnished the goods under circumstances which passed the possession & property in them, relying on the readiness & ability of deft. to pay. It does not seem to matter that the period of credit was a short period; he trusted deft. & parted with his goods without insisting on prepayment or upon interchangeable payment. We think therefore that credit was obtained (LORD RUSSELL, C.J.).—R. v. JONES, [1898] 1 Q. B. 119; 67 L. J. Q. B. 41; 77 L. T. 503; 46 W. R. 191; 14 T. L. R. 79; 42 Sol. Jo. 82; 19 Cox, C. C. 87, C. C. R.

*Annotations*:—*Mentd.* R. v. Edwards (1898), 42 Sol. Jo. 472; R. v. Benson, [1908] 2 K. B. 270; R. v. Muirhead

under which the seller cannot demand the price without offering delivery, & the purchaser cannot demand delivery without offering the price; & where the subject sold is of such bulk that delivery can only be made in parcels the seller is entitled, on delivery of each parcel, to payment of a proportionate part of the price.—HALL & SONS v. SCOTT (1860), 22 Dunl. (Ct. of Sess.) 413; 32 Sc. Jur. 182.—SCOT.

1476 *iv*. —.].—Where no time of payment is fixed in a contract of sale, the parties are presumed to have intended that the price shall be paid on delivery.—COTTON v. ARNOLD & Co. (1907), 3 Buch. A. C. 162; 17 C. T. R. 767.—S. AF.

1481 *i*. *Exceptions to general rule—Delivery preceding payment—Delivery on credit.*—Delivery & payment of the price are not concurrent conditions in a contract of sale by credit.—

(1908), 1 Cr. App. Rep. 189; R. v. Brownlow (1910), 4 Cr. App. Rep. 131; R. v. Manchester Local Profiteering Committee, *Ex p.* L. & Y. Ry. (1920), 88 L. J. K. B. 1089.

1480. *Exceptions to general rule—Delivery preceding payment—Delivery on credit—Postponement of delivery until payment.*—A broker purchases goods on commission at a month's credit, & pays duties on them & sends them to the place of the purchaser's abode, consigned to his own order; the seller being fearful of the purchaser's credit, procures the broker to delay the arrival of the goods till the month's credit is expired, & to tender them to the buyer on payment of the price, whereupon they are refused:—*Held*: the broker can neither recover the price, duties nor commission in an action for money paid.—HURST v. HOLDING (1810), 3 Taunt. 32; 128 E. R. 13.

1481. —.].—Contract for the purchase of a cargo of olive oil, delivered on the quay, alongside the vessel; to be removed from the quay by the purchasers after passing the scale, & to be at their risk from the time of weighing. Payment to be made by cash for one half the amount of the invoice, the remainder by bills at four months. The true construction of such a contract is, that the goods should be delivered to the purchasers at the quay, & that the cash should not be paid till after the completion of the delivery of the goods, by their having been weighed & the invoice made out. Therefore, no action lies by the seller against the broker for a breach of duty in delivering the goods to a purchaser, who became bkpt., without receiving payment of the cash at the time of the delivery.—GOWER v. JONES (1831), 1 L. J. K. B. 10.

1482. —.].—A contract for the sale of 30 bales of goats' wool at a certain price per lb., contained the following stipulation, "Customary allowance for tare & draft, & to be paid for by cash in one month, less 5 per cent. discount":—*Held*: (1) the vendee was entitled to have the goods delivered to him immediately, or within a reasonable time, but was not bound to pay for them until the expiration of the month; (2) there being no ambiguity in the language of the contract, evidence was not admissible, to show, that, by the usage of the particular trade, vendors selling under such contracts, were not bound to deliver the goods without payment.—SPARTALI v. BENECKE (1850), 10 C. B. 212; 19 L. J. C. P. 293; 15 L. T. O. S. 183; 138 E. R. 87.

*Annotations*:—*As to* (1) *Distd.* Godts v. Rose (1855), 17 C. B. 229. *As to* (2) *Dtd.* Humfrey v. Dale (1858), 5 Jur. N. S. 191; *Field v. Lelean* (1861), 6 H. & N. 617. *Refd.* Kirchner v. Venus (1859), 12 Moo. P. C. C. 361; Myers v. Sarl (1860), 3 E. & E. 306.

1483. —.].—*Assumpsit* on an agreement by pltf's. to sell to defts. cable bars at a certain price per ton, "the said goods to be delivered forthwith to defts. at the works, & the said price to be paid by defts. in cash in fourteen days from the time of the making of the said contract." Breach: non-payment after fourteen days. On demurrer to a plea:—*Held*: on the contract thus set forth, the delivery was meant to precede the payment, & a readiness on pltf.'s part to deliver the goods was a condition precedent.—STAUNTON

SNAGPROOF, LTD. v. BRODY (Alta.), [1922] 3 W. W. R. 432; 69 D. L. R. 271.—CAN.

1. — *Admissibility of oral evidence—Course of dealing.*—When a contract for the sale of goods is reduced to writing & no time mentioned for payment of the price fixed & as by implication of law payment to be concurrent with delivery, oral evidence of a contrary course of dealing is inadmissible.—OCKERBY & Co., LTD. v.



*v. WOOD* (1851), 16 Q. B. 638; 16 L. T. O. S. 486; 15 Jur. 1123; 117 E. R. 1025.

*Annotation*.—*Mentd. Hudson v. Hill* (1874), 43 L. J. C. P. 273.

**1484.** — *Delivery followed by weighing.*]

—*GOWER v. JONES*, No. 1481, *ante*.

**1485.** — *Delivery preceding delivery of other goods by buyer.*]—The terms of a contract being as follows, "April 1, 1826, sold W. P. one bale of sponge, at 10s. a pound, & bought of them yellow ochre at £5 a ton, to be delivered on or before Apr. 24":—*Held*: the delivery of the ochre by Apr. 24 to the extent of the price of the sponge, was a condition precedent to the delivery of the sponge.—*PARKER v. RAWLINGS* (1827), 4 Bing. 280; 12 Moore, C. P. 529; 5 L. J. O. S. C. P. 174; 130 E. R. 775.

**1486.** — ———.]—*Pltfs., Messrs. A. & co. & defts., entered into the following contract, "Bought of Messrs A. & co. about 30 packs of Cheviot fleeces, ewes & hogs; & agreed to take the under mentioned noils [coarse woollen cloths], also agreed to draw for £250 on account at three months." The quantity & quality of the noils were then specified:—Held: this was one entire contract, & A. & co. could not sue for the non-delivery by deft. of the noils, without averring the delivery or tender to deft. of the fleeces.*—*ATKINSON v. SMITH* (1845), 14 M. & W. 695; 15 L. J. Ex. 59; 153 E. R. 655.

**1487.** — *Evidence—Variation of written contract.*]—*FORD v. YATES*, No. 1476, *ante*.

**1488.** — ———.]—*Trade usage—To disprove exception.*]—*SPARTALI v. BENECKE*, No. 1482, *ante*.

**1489.** — ———.]—*Course of dealing.*]—*KING v. REEDMAN*, No. 1966, *post*.

**1490.** — *"Terms cash."*]—*NELSON v. PATTRICK*, No. 1477, *ante*.

**1491.** — ———.]—*GODTS v. ROSE*, No. 1076, *ante*.

**1492.** *Payment against delivery of shipping documents.*]—A. sold goods to B. to be delivered f.o.b. at Liverpool, for Trieste. The goods were placed by A. on board a steamer, to be delivered to the order of B. By the custom of the trade, where goods are sold, to be delivered f.o.b., the price is not payable until production of a bill of lading or some other document giving evidence of their being on board. The owners of the steamer refusing to give out the bill of lading until a greatly increased amount of freight was paid, & B. when informed of that fact, declining to have anything to do with the matter, A., who the jury found had not contracted to pay the freight, was unable to comply with the custom by producing the bill of lading:—*Held*: B. by his conduct dispensed with the strict compliance with the custom, & consequently A. was entitled to maintain an action for the price of the iron without producing a bill of lading.—*GREEN v. SCHEL* (1800), 7 C. B. N. S. 747; 29 L. J. C. P. 213; 2 L. T. 745; 6 Jur. N. S. 827; 8 W. R. 663; 141 E. R. 1009.

**1493.** — ———.]—In a contract for the sale of a cargo of timber it was stipulated that the buyers should accept bills on receipt of "all" the shipping documents. The sellers were unable to supply more than three of five parts of the bill of lading. In an action for the price of the cargo the jury found that the insertion of the word "all" had not

altered the rights of the parties, & as the term "shipping documents" had only a wide & not a strict technical sense, the sellers had been entitled to payment on furnishing three out of the five parts of the bill of lading.—*CEDERBERG v. BORRIES, CRAIG & Co.* (1885), 2 T. L. R. 201.

**1494.** ———.]—Where a contract for the sale of goods provides that payment is to be made . . . on the arrival of the goods against shipping or railway documents, the purchaser on the arrival of the goods & on the production of the shipping or railway documents cannot inspect the bulk with the sample before payment. The right to reject subsequently if the goods are not in accordance with the sample is not impaired by the payment.—*POLENGHI BROTHERS v. DRIED MILK Co., LTD.* (1904), 92 L. T. 64; 53 W. R. 318; 21 T. L. R. 118; 49 Sol. Jo. 120; 10 Com. Cas. 42.

*Annotations*.—*Apld. Biddell v. E. Clemens Horst Co.*, [1911] 1 K. B. 214. (See [1912] A. C. 18.) *Refd. Aron v. Compton Wegimont*, [1921] 3 K. B. 435; *Ballantine v. Cramp & Bosman*, (1923) 129 L. T. 502.

**1495.** ———.]—*E. CLEMENS HORST Co. v. BIDDELL BROTHERS*, No. 1801, *post*.

**1496.** ———.]—*ARNHOLD KARBERG & Co. v. BLYTHE, GREEN, JOURDAIN & Co., THEODOR SCHNEIDER & Co. v. BURGETT & NEWSAM*, No. 1813, *post*.

**1497.** ———.]—*MULLER, MACLEAN & Co. v. LESLIE & ANDERSON*, [1921] W. N. 235.

#### SUB-SECT. 3.—"READINESS AND WILLINGNESS" TO PERFORM DUTY.

See Sale of Goods Act, 1893 (c. 71), s. 28.

**1498.** *General rule.*]—In an action for the non-delivery of corn at S. pursuant to an agreement whereby deft., in consideration that pltf. had bought of him a certain quantity at a fixed price, undertook to deliver it to pltf. at S. within one month from the time of the sale, pltf. must aver a tender of the price or what is equivalent thereto; for the delivery of the corn & the payment of the price were concurrent acts to be done by the parties respectively at the same time; & each must aver performance or an offer to perform his part before he can maintain an action against the other.—*MORTON v. LAMB* (1797), 7 Term Rep. 125; 101 E. R. 890.

*Annotations*.—*Expld. Rawson v. Johnson* (1800), 1 East, 203. *Consd. Waterhouse v. Skinner* (1801), 2 Bos. & P. 447. *Refd. Smith v. Woodhouse* (1806), 2 Bos. & P. N. R. 233; *Levy v. Herbert* (1817), 1 Moore, C. P. 56; *Pickford v. Grand Junction Ry.* (1841), 2 Ry. & Can. Cas. 592. *Mentd. Beer v. Beer* (1852), 16 Jur. 223.

**1499.** ———.]—*Assumpsit* on an agreement "to give yearly free to pltf. during three years 20 tons of coals, to be put free on board ship at Cardiff for the use of pltf." Breach, that defts. did not give pltf. yearly or at any time during the three years 20 tons of coals, etc., in the terms of the contract:—*Held*: bad for want of an averment by pltf. that he was ready & willing to receive the coals, & he had named a ship on which deft. was to deliver them.—*ARMITAGE v. INSOLE* (1850), 14 Q. B. 728; 19 L. J. Q. B. 202; 14 L. T. O. S. 439; 14 Jur. 619; 117 E. R. 280.

*Annotations*.—*Apld. Sutherland v. Allhusen* (1860), 14 L. T. 866. *Refd. Budgett v. Binnington* (1890), 23 Q. B. D. 320.

*FABRICIUS* (1915), 17 W. A. L. R. 93. —*AUS.*

**1492 i.** *Payment against delivery of shipping documents.*]—*JOUBERT & JOUBERT v. CORONA MANUFACTURING Co.*, [1922] V. L. R. 644.—*AUS.*

*m. Application of rule—Wrongful removal of goods without payment—*

*After purchase at auction.*]—*SMITH v. HAMILTON* (1869), 29 U. C. R. 394. —*CAN.*

#### PART VI. SECT. 1, SUB-SECT. 2.

**1498 i.** *General rule.*]—Wherever there are concurrent obligations under a sale of goods, the party who seeks

to recover against the other must show that he has always been ready & willing to perform the obligations upon him.—*STUART & Co. v. CLARKE*, [1917] 4 W. W. R. 1049; 11 Alta. L. R. 551; 36 D. L. R. 254.—*CAN.*

**1498 ii.** ———.]—*STRONG & DOWLER v. HEUER (Alta.)*, [1917] 2 W. W. R. 27, 764; 35 D. L. R. 396.—*CAN.*



*Sect. 1.—General duties of seller and buyer: Sub-sect. 3. Sect. 2: Sub-sect. 1.]*

**1500.** —[By a memorandum of agreement, A. agreed to sell to B. certain lands therein described, & all the mines, beds, & veins of coal, etc. under same, at a certain price; & A. agreed to purchase from B. all coal that he might from time to time require, at a fair market price:—*Held*: these were concurrent acts; & B. could not sue A. for not taking the coal, without averring performance or a readiness to perform his part of the agreement.—*BANKART v. BOWERS* (1866), L. R. 1 C. P. 484.

**1501. Must continue after tender.**—[To an action of debt for 20 quarters of malt tender & refusal is a bad plea, without saying *uncore prist.*—*BRIKHED v. WILSON* (1536), 1 Dyer, 24 b; 73 E. R. 52.

**1502. Whether other allegations necessary—Tender.**—[If A. agree to buy of B. & B. to sell to A. goods at a certain price, to be delivered between such a day & such a day; & B. fail to deliver the goods within the time, it is sufficient for A. in declaring upon the contract to aver that he was during all the time, & still is ready & willing to receive & pay for the goods; without making any allegation of an actual tender & refusal.—*WATERHOUSE v. SKINNER* (1801), 2 Bos. & P. 447; 126 E. R. 1377.

*Annotations:—Refd. Pickford v. Grand Junction Ry.* (1841), 8 M. & W. 372.

**1503.** —[In an action for the non-delivery of malt, which debt. had undertaken to deliver on request at a certain price, it is sufficient for pltf. in his declaration to aver such request, & that he was ready & willing to receive the malt & to pay for it according to the terms of the sale, but that debt. refused to deliver it, without averring an actual tender of the price.—*RAWSON v. JOHNSON* (1801), 1 East, 203; 102 E. R. 79.

*Annotations:—Apld. Waterhouse v. Skinner* (1801), 2 Bos. & P. 447. *Distd. Squier v. Hunt* (1816), 3 Price, 68. *Refd. Levy v. Herbert* (1817), 1 Moore, C. P. 56; *Pickford v. Grand Junction Ry.* (1841), 8 M. & W. 372.

**1504.** —[In an action upon an agreement, whereby A. was to deliver to B., weekly, 200 tons of iron mine, in tram waggons to be provided by B., the declaration alleged that A. was ready & willing, & tendered & offered to deliver to B. the quantity weekly in tram waggons to be provided by B., of which B. had notice, but that he refused to take the said iron mine:—*Held*: the allegation of tender was immaterial, & not traversable.—*JACKSON v. ALLAWAY* (1844), 6 Man. & G. 942; 7 Scott, N. R. 875; 13 L. J. C. P. 84; 2 L. T. O. S. 328; 8 Jur. 63; 134 E. R. 1174.

*Annotations:—Apld. Levey v. Goldberg.* [1922] 1 K. B. 688. *Refd. Wilkinson v. Gaston* (1846), 10 Jur. 804; *Wallis v. Warren* (1849), 18 L. J. Ex. 449.

**1505.** —[In *assumpsit* for not accepting a quantity of guano, the declaration alleged that

ptf. were ready & willing to deliver the guano to debt. according to the terms of the contract:—*Held*: it was not necessary for ptfs. to aver a tender or offer to deliver, or debt. dispensed with a tender.—*BOYD v. LEIT* (1845), 1 C. B. 222; 2 Dow. & L. 847; 14 L. J. C. P. 111; 4 L. T. O. S. 333; 135 E. R. 524.

**1506.** —**Request to deliver.**—[Where in consideration of the purchase of hay by pltf. of debt., the latter promised to deliver to & suffer pltf. to take it away as he wanted it, when requested, an allegation that debt., after suffering pltf. to take away a part, sold & disposed of the residue to other persons, supersedes the necessity of alleging a request to deliver, etc., the residue.—*BOWDELL v. PARSONS* (1808), 10 East, 359; 103 E. R. 811.

*Annotations:—Refd. Lovelock v. Franklyn* (1846), 8 Q. B. 371; *Hochster v. De La Tour* (1853), 2 E. & B. 678; *Frost v. Knight* (1870), L. R. 5 Exch. 322. *Mentd. Vigers v. St. Paul's Dean & Chapter* (1849), 19 L. J. Q. B. 84.

**1507.** —**Appropriation of specific goods by seller.**—*DUNLOP v. GROTE*, No. 2427, *post*.

**1508. Both parts of allegation necessary.**—[In an action upon a contract for not accepting goods which pltf. had contracted with debt. to deliver, at a certain place, it is not sufficient for pltf. to aver that he was "ready" to deliver, without also stating that he was "willing" to do so.—*GRANGER v. DACRE* (1844), 12 M. & W. 431; 1 Dow. & L. 573; 13 L. J. Ex. 93; 2 L. T. O. S. 314; 152 E. R. 1265.

**1509. Non-performance of condition by other party—Notice of requirements.**—[*GREAT NORTHERN RY. CO. v. HARRISON*, No. 1607, *post*.

**1510.** —[*PORRETT & SON, LTD. v. ARAMAYO*, No. 1568, *post*.

**1511. Sufficiency of allegation—General allegation of performance.**—[A declaration stated, that debt. had contracted to sell, & pltf. to purchase & accept from debt., a large quantity of iron, etc., & pltf. avers performance of all conditions precedent, & that all things have been done & happened to entitle pltf. to have & receive the whole of the quantity of iron; & that although debt. had delivered a part of the iron, & that although a reasonable time had elapsed, & although pltf. was ready & willing to accept & receive the residue of the iron, of which debt. had due notice, yet debt. had not delivered the residue of the iron in pursuance of the contract:—*Held*: the general allegation of performance, & of all things having happened to entitle pltf. to receive the whole of the iron, contained a sufficient statement that pltf. was ready & willing to pay for the residue of the iron on delivery.—*BENTLEY v. DAWES* (1854), 9 Exch. 666; 2 C. L. R. 1070; 23 L. J. Ex. 220; 23 L. T. O. S. 82; 156 E. R. 285.

**1512. Goods unascertained—Resale by seller—Whether inconsistent with "readiness & willingness."**—[In an action for not accepting oil, the

**1502i. Whether other allegations necessary—Tender.**—*SHRIRAM RUPRAM v. MADANGOPAL GOWARDHAN* (1903), 1 L. R. 30 Calc. 865.—*IND.*

**1506 i.** —**Request to deliver.**—[Upon an agreement to deliver wheat for pltf. at A.'s mill, pltf. averred in his declaration "that he was always willing to accept the wheat at the place aforesaid, & to have paid debt. for the same at the rate in that behalf aforesaid, whereof debt. had notice":—*Held*: declaration good & pltf. need not prove, under this agreement, a request on his part to debt. to deliver, or that he was at the mill to accept delivery.—*WRIGHT v. WEED* (1849), 6 U. C. R. 140.—*CAN.*

**1506 ii.** —[*NUGENT v. DAVIES*, [1923] 1 D. L. R. 1040; 53 O. L. R. 458.—*CAN.*

**1506 iii.** —[*ROBERTSON, GLADSTONE & CO. v. KUSTURY MULL* (1869), 3 B. L. R. 103.—*IND.*

**n.** —**Price & time of payment.**—[In an action for the non-delivery of wood according to contract, the declaration was held bad on special demurrer, for not stating the price to be paid, nor that the wood was to be paid for either on delivery or on a certain day, nor that pltf. was ready & willing to pay for it.—*MADDOCK v. STOCK* (1830), 4 U. C. R. 118.—*CAN.*

**o.** —**Ability to deliver.**—*TAYLOR*

*v. TRAVIS* (1857), 3 All. 445.—*CAN.*

**1509 i. Non-performance of condition by other party—Notice of requirements.**—[*VANCOUVER MILLING & GRAIN CO. v. C. C. RANCH CO., LTD.*, [1924] 2 D. L. R. 569; [1924] 2 W. W. R. 150; 20 Alta. L. R. 307; *affd.*, [1925] 1 D. L. R. 185.—*CAN.*

**1511 i. Sufficiency of allegation—General allegation of performance.**—[*GIBSON v. GIBSON* (1846), 3 U. C. R. 41.—*CAN.*

**1511 ii.** —[*BOARD OF ORDINANCE v. LEWIS* (1854), 7 Ir. Jur. 17.—*IR.*

**p.** —**Failure to tender owing to mistake in date of payment.**—*BEALE*

declaration stated a contract to purchase 40 tons of oil the last 10 tons whereof, "to be delivered in all Dec., to be paid for on delivery"; with an averment of readiness to deliver "in the month of Dec.," & a traverse of that averment. It appeared that the contract was not for any specific oil, that no particular oil had been appropriated, & that the brokers on each side had arranged for the previous deliveries. On Dec. 11, deft.'s brokers wrote to him to know when he would receive the last 10 tons; he directed a delivery to certain parties; but this was not communicated to pltf. & on Dec. 22, deft. stopped payment, towards the end of the month, upon which deft.'s brokers wrote to pltf. to the effect that the oil would not be received; & he then, before the end of the month, resold at a loss, & wrote to deft., demanding the difference:—*Held*: he was entitled to recover, the jury finding that he would have been ready to deliver the oil contracted for if deft., or his brokers, had required it & offered the money.—*BAKER v. FIRMINGER* (1859), 28 L. J. Ex. 130.

*Annotation*:—*Apld.* *Levey v. Goldberg*, [1922] 1 K. B. 688.

**1513. Necessity for notice of readiness & willingness.**—Contract for the sale by pltf. to defts. of 100 tons of lard, at the price of 44s. 6d. per cwt. *ex* quay &/or warehouse in Liverpool, to be delivered in equal proportions during the months of Mar. & Apr. then next ensuing. "Payment to be made in cash, before delivery if required, in fourteen days, less 2½ per cent., from dates of notices of readiness to deliver." Declaration, setting out the contract, & averring that pltf. in pursuance thereof, delivered in Mar., & defts. accepted about one-half of the lard in part fulfilment, & afterwards that pltf. gave due & proper notice that they were ready to deliver the remainder yet defts. did not accept the other half, or any part thereof. Pleas, traversing the averment of due & proper notice, & of readiness & willingness to deliver the remainder of the lard. At the trial, there being no evidence that pltf. delivered the remainder of the lard, or gave notice of readiness & willingness to deliver it during Apr., the judge directed a nonsuit:—*Held*: the nonsuit was right.—*DAVIES v. McLEAN* (1873), 28 L. T. 113; 37 J. P. 198; 21 W. R. 264.

**1514. At time of delivery of each instalment.**—*BRAITHWAITE v. FOREIGN HARDWOOD CO.*, No. 2496, *post*.

**1515. Effect of declaration of insolvency of one party.**—A mere declaration of insolvency by one party to a contract does not entitle the other party to put an end to the contract; but if the declaration is made in such circumstances as to show that the insolvent either cannot, or does not intend to carry out the contract, it is open to the solvent contractor to rescind the contract.—*MESS v. DUFFUS & Co.* (1901), 6 Com. Cas. 165.

**1516. Repudiation of contract by purchaser.**—By three contracts in writing dated in Sept., July, & Sept., 1919, applts. agreed to buy from the several resps., who were three firms of tea growers in India, their 1919-1920 crops of tea at prices to be regarded by the rate of exchange, delivery to be made in bonded warehouses in London, but the contracts did not bind the sellers to deliver by any particular date; any dispute under the contracts to be settled by arbn. Early in 1920

several ships carrying consignments of tea under these contracts arrived in London, but, owing to the congestion at that port, were diverted by the Shipping Controller to various out ports in England & Scotland, where a further delay occurred owing to the congestion, & consequently, the sellers, at the date of the repudiation hereinafter mentioned, were not ready to deliver the teas in London. In May, 1920, the parties verbally agreed that the buyers would accept delivery of the diverted consignments at the out ports instead of London with an allowance of ¾d. per lb., but this agreement was unenforceable by reason of its non-compliance with Sale of Goods Act, 1893 (c. 71), s. 4. In July, 1920, the buyers repudiated their liability to accept the tea discharged at out ports under any of the three contracts on the ground that a reasonable time for delivery under those contracts had expired, & the sellers accepted this repudiation by asking for an arbitrator. The arbitrator found that a reasonable time for delivery of the tea under the said contracts had not expired, & awarded damages against the buyers for breach of contract:—*Held*: (1) the parol contract of May did not operate as an implied rescission of the original contracts, there being no evidence of any intention to rescind; (2) the buyers having wrongfully repudiated the contracts, the sellers were not bound to prove that they were ready & willing at the date of the repudiation to deliver the teas in London, & the awards ought to stand.—*BRITISH & BENINGTONS, LTD. v. NORTH WESTERN CACHAR TEA CO., LTD.*, *BRITISH & BENINGTONS, LTD. v. BAINTHOORIE (DOOARS) TEA CO., LTD.*, *BRITISH & BENINGTONS, LTD. v. MAZDAHEE TEA CO., LTD.*, [1923] A. C. 48; 92 L. J. K. B. 62; 128 L. T. 422; 28 Com. Cas. 265; 13 Lloyd, L. R. 67, II. L.; *affg.* S. C. *sub nom.* *NORTH WESTERN CACHAR TEA CO., LTD. v. BRITISH & BENINGTONS, LTD.*, *BAINTHOORIE (DOOARS) TEA CO., LTD. v. SAME*, *MAZDAHEE TEA CO., LTD. v. SAME* (1921), 10 Lloyd, L. R. 381, C. A.

*Annotations*:—*As to* (1) *Apld.* *Rose & Frank Co. v. Crompton*, [1925] A. C. 445. *Refd.* *Larrinaga v. Société Franco-Américaine des Phosphates de Médulla* (1922), 27 Com. Cas. 160.

## SECT. 2.—DELIVERY.

### SUB-SECT. 1.—IN GENERAL.

*See* Sale of Goods Act, 1893 (c. 71), s. 29.

**1517. Necessity for delivery—Ship at sea.**—Assignment of a ship at sea for a valuable consideration may be good against assignees of bkpts., though no possession is taken thereof; but if of goods at land, otherwise.—*BOURNE v. DODSON* (1740), 1 Atk. 154; Barn. Ch. 200; 26 E. R. 100, L. C.

*Annotations*:—*Distd.* *Ryall v. Rolle* (1749), 1 Atk. 165. *Refd.* *Worseley v. Demattos & Slader* (1758), 1 Burr. 467.

**1518. — Goods on land.**—*BOURNE v. DODSON*, No. 1517, *ante*.

**1519. — Share of ship.**—Sale of a share of a ship is good without actual delivery.—*ADDIS v. BAKER* (1794), 1 Anst. 222; 145 E. R. 854.

**1520. — Action on guarantee to pay for goods.**—On a guarantee to pay for goods sold & delivered to a third person, what such person has said respecting the goods sold to him, is not evidence to

*v.* *HUGGINS & FINLEY*, [1918] S. A. L. R. 15.—*AUS.*

*q. Must arise within reasonable time.*—*CARTER v. BINGHAM* (1872), 32 U. C. R. 615.—*CAN.*

*r. Must be substantial.*—*The*

readiness & willingness on the part of pltf. must be substantial, something on which deft. may act, not a readiness & willingness concealed in pltf.'s mind.—*COMMERCIAL BANK v. MUDOSOODUN CHOWDRY* (1866), 1 Ind. Jur. N. S. 17.—*IND.*

## PART VI. SECT. 2, SUB-SECT. 1.

*t. Necessity for delivery.*—Pltf. agreed with one M. for the purchase of a quantity of timber upon certain terms, but failed to pay the price agreed upon. M. afterwards refused the money, & sold & delivered the

**Sect. 2.—Delivery: Sub-sects. 1 & 2, A., B. & C.]**

charge the person giving the guarantee; the delivery of them must be proved.—**EVANS v. BEATTIE** (1803), 5 Esp. 26; 170 E. R. 726, N. P.

**Annotation:—Mentd.** Carmarthen & Cardigan Rly. v. Manchester & Milford Rly. (1878), L. R. 8 C. P. 485.

**1521. — Action on price.]—Deft.** cannot be held to special bail on an affidavit stating him to be indebted to pltf., in so much for goods bargained & sold, without also saying delivered.—**HOPKINS v. THORNE** (1810), 12 East, 398; 104 E. R. 150.

**Annotations:—Apld.** Lascar v. Morioseph (1823), 1 Bing. 357. **Mentd.** Hargreave v. Hayes (1855), 24 L. J. Q. B. 281.

**1522. — —.]—Deft.** cannot be held to special bail on an affidavit, stating him to be indebted to pltf. in a certain sum, for goods sold, unless it be also stated that they were delivered.—**LASCAR v. MORIOSEPH** (1823), 1 Bing. 357; 2 L. J. O. S. C. P. 14; 130 E. R. 144; *sub nom.* **LOISADA v. MORIOSEPH**, 8 Moore, C. P. 366.

**Annotation:—Expld.** Hargreaves v. Hayes (1855), 1 Jur. N. S. 521.

**1523. — To complete contract.]—A.** not knowing that B. was a horse dealer, made a verbal bargain with him on a Sunday for the purchase of a horse. The price, which was above £10, was then specified, & B. warranted the horse to be sound. It was not delivered, however, until the following Tuesday, when the money was paid:—**Held:** there was not any complete contract until the delivery of the horse, & consequently the contract was not void within Sunday Observance Act, 1677 (c. 7), s. 2, but assuming it to be void, the purchaser having no knowledge of the fact that the vendor was exercising his ordinary calling on the Sunday, had not been guilty of any breach of the law, & therefore was entitled to recover back the price of the horse.—**BLOXSOME v. WILLIAMS** (1824), 3 B. & C. 232; 5 Dow. & Ry. K. B. 82; 2 L. J. O. S. K. B. 224; 107 E. R. 720.

**Annotations:—Consd.** Fennell v. Ridler (1826), 5 B. & C. 406; Smith v. Sparrow (1827), 4 Bing. 84; *Re* Mahmoud & Isphani, [1921] 2 K. B. 716. **Refd.** Begbie v. Levi (1830), 1 Cr. & J. 180; Brightman v. Tate, [1919] 1 K. B. 463; Elder v. Kelly (1919), 88 L. J. K. B. 1253; Witham & Butterworth v. Lindley (1920), 37 T. L. R. 75.

**1524. — Trover.]—No** doubt, in the case of a sale of goods, taking possession is not necessary, & the purchaser may maintain trover without delivery; but suppose a father said to a son, I give you this chair, & the son did not take it, could he maintain trover? (**KNIGHT-BRUCE, V.-O.**).—*Re* **ACRAMAN, Ex p. CASTLE** (1842), 3 Mont. D. & De G. 117; 12 L. J. Bey. 30; 7 Jur. 47, Ct. of R.

**1525. Distinction between “to be delivered” & “to be taken.”]**—**NEILL v. WHITWORTH**, No. 1599, *post*.

**1526. Bankruptcy of seller before delivery—Contract of sale bona fide—Buyer’s right to delivery.]—B. & C.** by verbal communing, agreed to make advances to A. on the security of a ship he had nearly completed building on his own account, provided A. entered into an absolute contract of sale of the vessel. An unqualified contract of sale was completed by which A. agreed to complete & deliver to B. & C. the vessel for a price to be paid in two instalments, with power to B. & C. in the event of A. failing to complete the contract

to enter into possession of the vessel & complete it, or sell it. In a correspondence between A. & B. & C. & a shipbroker & others subsequent to the contract & for the purpose of getting a purchaser for the vessel, the ship was called A.’s ship; but no letters were written to any persons who were induced by their means to deal with the ship upon the footing of its being the property of A. From the date of the contract B. & C. gave, by cheques at various dates, advances to A., taking a receipt on account of the purchase of the ship; at the same time bills for like amounts were accepted by A. The advances equalled the full price of the ship. Before it was completed or delivered A.’s estate was sequestrated. The bills accepted by A. were paid by B. & C. In a question between A.’s trustee & B. & C.:—**Held:** where there was an absolute *bona fide* contract of sale of an article which was not delivered before the bkpcy. of the seller, the right of the buyer under the contract to have delivery could not be defeated by proof that the character of buyer had been conferred on him merely for the purpose of his having a security for money intended to be advanced to him.—**M’BAIN v. WALLACE & Co.** (1881), 6 App. Cas. 588; 45 L. T. 261; 30 W. R. 65, H. L. **Annotation:—Refd.** Seath v. Moore (1884), 11 App. Cas. 358, n.

**Delivery without payment of purchase-money—Whether possession amounts to larceny.]—See** **CRIMINAL LAW**, Vol. XV., pp. 873, 874, Nos. 9591–9597.

**SUB-SECT. 2.—WHAT CONSTITUTES DELIVERY.****A. In General.**

**1527. Payment of earnest—Tender of balance.]—JAMES v. PRICE** (1773), Lofft, 219; 98 E. R. 619.

**1528. Marking of goods by purchaser—On vendor’s premises.]—ANDERSON v. SCOT** (1806), 1 Camp. 235, n.; 170 E. R. 941, N. P.

**Annotations:—N.E.** Proctor v. Jones (1826), 2 C. & P. 532. **Distd.** Boulter v. Arnott (1833), 3 Tyr. 267. **Consd.** Saunders v. Topp (1849), 4 Exch. 390. **Refd.** Marshall v. Green (1875), 45 L. J. Q. B. 153.

**1529. Delivery of key—Of vendor’s warehouse.]—ELLIS v. HUNT**, No. 2167, *post*.

**1530. Constructive delivery—Words forming part of parol contract.]—It** is no objection to a constructive delivery of goods, that it is made by words, parcel of the parol contract of sale.—**ELMORE v. STONE** (1809), 1 Taunt. 458; 127 E. R. 912.

**Annotations:—Consd.** Wright v. Percival (1839), 8 L. J. Q. B. 258. **Refd.** Edan v. Duffield (1814), 1 Q. B. 302; Blenkinsop v. Clayton (1817), 1 Moore, C. P. 328; Howe v. Palmer (1820), 3 B. & Ald. 321; Carter v. Toussaint (1822), 5 B. & Ald. 855; Proctor v. Jones (1826), 2 C. & P. 532; Smith v. Surman (1829), 9 B. & C. 561; Beaumont v. Brengert (1847), 5 C. B. 301; Holmes v. Hoskins (1854), 9 Exch. 753; Marvin v. Wallis (1856), 6 B. & R. 720; Coombs v. Bristol & Exeter Rly. (1858), 3 H. & N. 510; Castle v. Swardor (1860), 5 H. & N. 281; Martin v. Reid (1862), 11 C. B. N. S. 730; Langton v. Waring (1865), 81 C. B. N. S. 316; Dublin City Distillery v. Doherty, [1914] A. C. 823.

**1531. Goods not yet appropriated—Sub-sale by buyer—Order for delivery given by buyer to sub-purchaser.]—A.** having 40 tons of oil secured in the same cistern, sold 10 tons to B. & received the price, & B. sold the same to C. & took his acceptance for the price at four months, & gave him a

timber to one C. Upon replevin brought:—**Held:** no delivery having been made to pltf., he could not recover.—**HENRY v. COOK** (1858), 8 C. P. 29.—**CAN.**

**Cattle.]—The** marking & weighing of cattle by a purchaser does not constitute delivery under Sale of Goods Act, 1893.—**BONNER v. WHELAN** (1905), 39 I. L. T. 24.—**IR.**

of goods.]—**WEST v. RUTLEDGE** (1878), 1 P. & B. 674.—**CAN.**

**c. Actual delivery.]—Where** goods are by the order for sale to be delivered at a railway depot at M., billed to the purchaser at S., & the vendor subsequently sees some of the goods at S., & the purchaser knows

**PART VI. SECT. 2, SUB-SECT. 2.—A.****a. Marking good by purchaser—**

**b. Marking of goods by seller—Notice of marking to purchaser in view**

written order for delivery on A., who wrote & signed his acceptance upon the said order; but no actual delivery was made of the 10 tons which continued mixed with the rest in A.'s cistern: yet held, that this was a complete sale & delivery in law of the 10 tons by B. to C.; nothing remaining to be done on the part of the seller, though as between him & A., it remained to be measured off: & therefore, that the seller could not upon the bkpcy. of the buyer, before his acceptance became due, countermand the measuring off & delivery in fact of the 10 tons to the buyer: nor were the goods *in transitu*, so as to enable the seller to stop them.—*WHITEHOUSE v. FROST* (1810), 12 East, 614; 104 E. R. 239.

*Annotations*:—*Distd.* Wallace v. Breeds (1811), 13 East, 522. *Distd.* White v. Wilks (1813), 5 Taunt. 176. *Distd.* Busk v. Davis (1814), 2 M. & S. 397. *Consd.* Dublin City Distillery v. Doherty, [1914] A. C. 823. *Distd.* Laurle & Morewood v. Duffin, [1926] 1 K. B. 223; *Reid.* Austen v. Craven (1812), 4 Taunt. 644; *Shepley v. Davis* (1814), 1 Marsh. 252; *Jones v. Moore* (1841), 4 Y. & C. Ex. 351; *Cowas-Jee v. Thompson* (1845), 5 Moo. P. C. C. 165; *Sterns v. Vickers*, [1923] 1 K. B. 78.

1532. Goods on premises of third party—Third party ordered to permit removal.]—*SALTER v. WOOLLAMS*, No. 1648, *post*.

1533. Handing over for experimental trip—Immediate return required.]—*BEALE v. MOULE* (1843), 2 L. T. O. S. 227.

1534. Shipment on purchaser's ship.]—By A.'s order, goods were consigned to him from South America, & were shipped on board his own ship. Bills of lading were sent to A. & bills for the value of the goods were forwarded by the consignor to D. the same being drawn in D.'s favour upon A. & professing to be on account of the goods consigned. After the bills of lading arrived, but before the bills of exchange were accepted or the cargo reached England, A. became bkpt. The assignees of A. took possession of the cargo; & D. petitioned to establish a specific lien upon the cargo in respect of the bills, but, two actions at law having been previously tried between the parties, in both of which the assignees were successful, the ct. ordered the petition to stand over, petitioners being at liberty to institute proceedings at law or in equity within six weeks, otherwise the petition to be dismissed.

The shipment of the coffee . . . was as completely a delivery to bkpts. as if it had been placed in their own hands. He could not hold that any contract of lien could be taken to have existed, or that if any such contract had been shown, the coffee could be held to be otherwise than in the reputed ownership of bkpts. Still there was enough to induce him to say that he would not preclude petitioners from attempting to establish their title at law or in equity (*KNIGHT-BRUCE, V.-C.*).—*Re HIGGINSON, Ex p. CARRUTHERS* (1849), 3 De G. & Sm. 570; 13 L. T. O. S. 9; 13 Jur. 276; 64 E. R. 611.

*Annotation*:—*Reid.* Frith v. Forbes (1862), 31 L. J. Ch. 793.

1535. Pretended sale—Possession subsequently obtained for another purpose.]—Where there is a pretended sale of goods between two persons, but a secret understanding between them that what appears on the instrument is not to operate as a sale, & the pretended vendee afterwards gets possession of the goods for another purpose, that is not a delivery in pursuance of the contract, & the property does not pass.

A. being indebted, received an advance of money

from B. on the security of her goods. To prevent the goods being seized by the landlord, A. signed a paper, which on the face of it was a sale to B. The goods were afterwards delivered to him to keep for A. B. sold them:—*Held*: he was liable to A. for their value in an action of trover.—*LOTT v. BOOTH* (1852), 19 L. T. O. S. 203.

1536. Delivery to person authorised by purchaser—Servant sent with cart.]—A. sends his servant with a horse & cart to B. to purchase coals for him, & to bring them back. The bare delivery of the coals into the servant's hands, as between him & his master, gives him the exclusive possession of them; but that exclusive possession is determined by his depositing them in his master's cart. From that time the possession of them is in A.—*R. v. REED* (1854), *Dears. C. C.* 257; 2 C. L. R. 607; 23 L. J. M. C. 25; 22 L. T. O. S. 263; 18 J. P. 71; 18 Jur. 66; 2 W. R. 190; 6 Cox, C. C. 284; 169 E. R. 717, C. C. R.

*Annotations*:—*Apld.* R. v. Mallison (1902), 66 J. P. 503. *Mentd.* R. v. Pratt (1851), 2 W. R. 497.

1537. — At purchaser's premises.]—Where under a contract the seller is required to deliver goods at the buyer's premises, he fulfils his obligation if he delivers them there to a person who apparently has authority to receive them, taking care to see that no unauthorised person receives them. If, therefore, the goods are received by an apparently respectable person, who has obtained access to the buyer's premises, & who signs for the goods in the buyer's absence & misappropriates them, the loss must fall on the buyer & not on the carrier or seller.—(*GALBRAITH & GRANT, LTD. v. BLOCK*, [1922] 2 K. B. 155; 91 L. J. K. B. 649; 127 L. T. 521; 38 T. L. R. 669; 66 Sol. Jo. 596, D. C.)

#### B. Delivery subject to Conditions.

1538. Delivery subject to presentation of delivery warrant—Meaning of presentation.]—*BARTLETT v. HOLMES*, No. 1642, *post*.

1539. Delivery into purchaser's receptacles—Pending arbitration—Purchaser refusing to submit to arbitration.]—Upon a dispute arising between plffs. & defts. as to the terms upon which some wool had been sold by the latter to the former, defts., acting under the direction of a third person, who told him that plffs. had consented to submit the dispute to arbn., packed the wool in plffs.' sheets, & loaded it upon a truck at a railway station, but subsequently, on learning that plffs. refused to consent to the arbn., took it away again:—*Held*: the delivery was conditional merely, & was not sufficient to take the case out of Stat. Frauds.—*CAWTHRA v. BILLIAT* (1863), 3 F. & F. 850.

1540. Acceptance of bill by purchaser.]—*SAKS v. TILLEY*, No. 1040, *ante*.

#### C. Goods Remaining on Vendor's Premises.

1541. Goods packed in purchaser's receptacles—Deposit on seller's premises—Goods not to be taken until paid for.]—A. agrees to sell goods to B. who pays a certain sum of money as earnest; the goods are packed in cloths furnished by B. & deposited in a building belonging to A. till B. shall send for them, but A. declares at the same time that they shall not be carried away till he is paid. This is not a delivery to B.—*GOODALL v. SKELTON* (1794), 2 Hy. Bl. 316; 126 E. R. 570.

*Annotation*:—*Foldd.* Boulter v. Arnott (1833), 1 Cr. & M. 333.

they are there, there is good delivery, even though the goods were sent from M. to R. & reforwarded to S.—*JOHNSON v. CHOMYSZYN* (1916), 34 W. L. R. 389.—*CAN.*

#### PART VI. SECT. 2, SUB-SECT. 2.—B.

d. *Pro forma delivery*—Actual delivery only on payment of cash.]—*SCOTTON v. BRIDGE & Co., LTD.* (1919), 19 N. S. W. L. R. 70; 36 N. S. W.

W. N. 27.—*AUS.*

e. *Payment before delivery*.]—*LEE & RUTHERFORD v. CANADIAN PUGET SOUND LUMBER & TIMBER CO., LTD.* (1924), 34 B. C. R. 557.—*CAN.*





**1555. — Order for "about" quantity required—Trade usage.]**—Under a contract to sell & deliver goods in a warehouse in Liverpool, the giving a delivery order of "about" the quantity is a sufficient delivery, evidence of a known usage of warehouse keepers not accepting delivery orders in any other form being admissible.—**MOORE v. CAMPBELL** (1854), 10 Exch. 323; 2 C. L. R. 1084; 23 L. J. Ex. 310; 156 E. R. 467.

**Annotations:—***Refd.* **Humfrey v. Dale** (1858), 31 L. T. O. S. 328. **Mentd.** **Noble v. Ward** (1867), L. R. 2 Exch. 135; **Ogle v. Vane** (1867), 7 B. & S. 855; **Tyers v. Rosedale & Ferryhill Iron Co.** (1873), L. R. 8 Exch. 305; **Stewart v. Eddowes**, **Hudson v. Stewart** (1874), L. R. 9 C. P. 311.

#### *F. Scaborne Goods.*

**1556. Goods placed on lighter sent by purchasers.]**—If a cornfactor purchase a ship laden with corn, & send his lighter to fetch it from the ship to his wharf, a delivery of the corn on board the lighter puts it into the possession of the cornfactor although the lighterman never delivers it at the factor's wharf.—**R. v. SPEARS** (1798), 2 Leach, 825; 2 East, P. C. 568.

**Annotations:—***Apld.* **R. v. Johnson & Wright** (1851), 5 Cox, C. C. 372. *Fold.* **R. v. Reed** (1854), 23 L. J. M. C. 25. **Mentd.** **R. v. Walsh** (1812), 4 Taunt. 258.

**1557. Demand of freight on arrival—No stipulation in contract.]**—A. contracted to supply to B. 1,000 tons of coals, delivered at Rangoon, at 45s. per ton, alongside craft, etc., as might be directed by B.; payment, one-half of invoice value by bill at three months, on handing bills of lading & policy of insurance to cover the amount, or in cash at 5 per cent. discount, at A.'s option, & the balance in cash on right delivery at Rangoon. A. chartered a ship, & in pursuance of his contract shipped on board 1,166 tons of coals, & delivered to B. the bill of lading & a policy of insurance covering half the invoice price, & B. paid to A. the half invoice price. On the voyage the ship became disabled, & part of the coals were obliged to be thrown overboard; & the master chartered another vessel, & transhipped the residue, 850 tons, on board of her, at 45s. per ton freight to Rangoon. On arrival at Rangoon the master of the latter vessel offered the coals to B.'s agent on payment of the 45s. per ton freight. This offer being refused, the master put up the coals for auction, & B.'s agent *bond fide* bought them at a price of £1 5s. a ton:—**Held:** (1) the property in the coals passed to B. on A.'s shipping the coals on board & delivering to B. the bills of lading & policy of insurance; & A. having done this was entitled to retain the half of the invoice price that had been paid to him; (2) A. was bound to have delivered to B. at Rangoon so much of the coals as had escaped the sea risk & arrived there; (3) the offer of the coals at Rangoon on the terms of paying 45s. per ton freight was not a delivery by A. according to his contract, consequently A. was not entitled to demand from B. any part of the residue of the invoice price; (4) *semble*, B. might sue A. for the non-delivery at Rangoon, & recover as damages the difference between £1 5s. per ton, which B. actually paid to get the coals, & the £1 2s. 6d. which B. was to have paid under the contract.—**BRITISH & INDIA STEAM NAVIGATION Co. v. DE MATTOS**, **DE MATTOS v. BRITISH & INDIA STEAM NAVIGATION Co.** (1861), 4 New Rep. 67; 12 W. R. 560; *sub nom.* **CALCUTTA & BURMAH STEAM NAVIGATION Co. v. DE MATTOS**, **DE MATTOS**

**v. CALCUTTA & BURMAH STEAM NAVIGATION Co.**, 33 L. J. Q. B. 214; 10 L. T. 246; 2 Mar. L. C. 11, Ex. Ch.

**Annotations:—***As to* (1) **Refd.** **Dupont v. British South Africa Co.** (1901), 18 T. L. R. 24. *Generally, Refd.* **Houlder v. Public Works Comrs.**, **Public Works Comrs. v. Houlder**, [1908] A. C. 276. **Mentd.** **Pletts v. Beattie** (1896), 65 L. J. M. C. 86.

**1558. Carriage by specified routes—Variation of routes—Validity of tender of goods—Effect of custom.]**—By a contract dated Mar. 27, 1916, in the printed form of contract for cost, freight, & insurance issued by the Rubber Trade Assocn. of London, Apr. 1913, with the necessary additions thereto written in, *appts.* agreed to sell to resps. 25 tons of plantation rubber, *c.i.f.*, "to be shipped during the months of Mar./Apr. 1916, by vessel or vessels, steam or motor, from the East to New York direct &/or indirect, with liberty to call &/or tranship at other ports"; any question regarding quality to be settled by *arbn.*, which was to be demanded & held within a certain time "after the arrival of the vessel"; samples to be taken in the presence of representatives of buyers & sellers, & "failing sellers naming their representatives on or before arrival of vessel," the buyers' samples to be accepted; & payment to be by "cash against documents in London on or, at buyers' option, before arrival of vessel or vessels at port of discharge."

The sellers made a declaration under the contract of 15 tons as having been shipped per steamship via Seattle under a through bill of lading, which stated that the goods were shipped at Singapore for New York via Seattle, a port on the Pacific coast of the United States, whence they would be sent by rail to New York.

The buyers objected to this declaration as irregular, upon the ground that the rubber was to be conveyed by sea to New York. The dispute was referred to *arbn.* under a clause in the contract, & the arbitrators found that after the outbreak of war great difficulty was experienced in obtaining space for shipments from the East, & in consequence in Oct. 1915, shipments to the eastern States of the United States, which had before gone the whole distance to New York by water, began to be made by steamer to a port on the western seaboard of the United States, whence they were transmitted by rail to destination; that at the date of the contract this route from the East by sea & rail from the Pacific seaboard was well known to those engaged in the trade as one of the usual routes for rubber sold on contracts in the form of the one in question; that there was, at the date of the contract, such a course of business established as would make it within the contemplation of the parties that the rubber might come by this route; & that goods forwarded by such a route would be a good tender under the contract. They accordingly awarded that the tender was good, & that the buyers were bound to accept the same:—**Held:** the contract provided for a sea carriage from the port of loading to New York; the usage, assuming it was a usage, found by the arbitrators was inconsistent with the terms of the contract, & therefore was not applicable thereto; & the tender was not a good tender & the buyers were not bound to accept the same.—**Re SUTRO (L.) & Co. & HEILBUT, SYMONS & Co.**, [1917] 2 K. B. 348; *sub nom.* **SUTRO & Co. v. HEILBUT, SYMONS & Co.**, 86

*into purchaser's bags—Condition not performed.*—**BLACK v. INCORPORATION OF BAKERS, GLASGOW** (1867), 6 Macph. (Ct. of Sess.) 136; 40 Sc. Jur. 77.—**SCOT.**

**k. — Bailies of goods servants of grantors of order.]**—**DOBELL, BECKETT & Co. v. NEILSON** (1904), 7 F. (Ct. of Sess.) 281.—**SCOT.**

**1. Warrant delivered to purchaser**

*—After endorsement with delivery order—Trade usage.*—**BURNS, PHILP & Co. v. DINGLE & Co.** (1923), 23 S. R. N. S. W. 240; 40 N. S. W. W. N. 26.—**AUS.**



**Sect. 2.—Delivery: Sub-sect. 2, F. & G.; sub-sect. 3, A., B. & C.]**

L. J. K. B. 1226; 116 L. T. 545; 33 T. L. R. 869; 14 Asp. M. L. C. 34; 23 Com. Cas. 21, C. A. 1559. ———— **"Direct or indirect."**—

G. W. & co. sold to P. B. & co. in London a quantity of Coromandel nigerseed "shipment from Bombay &/or a port or ports on the Coromandel coast during Feb. &/or Mar. 1925, by a steamer or steamers direct or indirect with or without transshipment *via* Suez Canal." The steamer by which sellers intended to ship the seed was delayed, & in order to effect shipment within the contract period the sellers dispatched the seed on a steamer which was on an outward voyage from London to Calcutta & which would in due course return from Calcutta to London. The buyers refused to accept the seed when tendered, on the ground that shipment had not been made in accordance with the contract; & the dispute was referred to arbn. The Committee of Appeal of the Incorporated Oil Seed Assoc. now stated a case under s. 19, Arbitration Act, 1889 (c. 49), for the opinion of the ct. on the question whether the tender of the sellers was a good tender or not:—**Held:** the tender was a valid tender if in the opinion of the Committee of Appeal the steamer was on a voyage to London at the time when the seed was loaded on board.—**WOODROFFE (GORDON) & Co., LTD. v. PRODUCE BROKERS NEW CO. (1924), LTD. (1925),** 31 Com. Cas. 54, D. C.

**G. Delivery to Third Person.**

**1560. By order of purchaser.]**—Goods supplied to a third person by the desire of deft., may be recovered under a count for goods sold & delivered to deft.—**HANFORD v. HANFORD (1838),** 1 Will. Woll. & H. 200.

**1561. ———.]**—Declaration for goods sold & delivered to deft., will be supported, at least after verdict, by proof of a sale of them to deft., & a delivery by his order to a third person.

A sale to one person, & a delivery by his order to another, is a delivery to him (**COLERIDGE, J.**).—**HANCOCK v. HANCOCK (1838),** 2 Jur. 419.

**SUB-SECT. 3.—PLACE OF DELIVERY.**

**A. In General.**

See Sale of Goods Act, 1893 (c. 71), s. 29 (1).

**1562. Condition to load f.o.b. at a certain port—**

**PART VI. SECT. 2, SUB-SECT. 2.—G.**

**m. Assent of purchaser—Agent of seller taking possession & marking goods for purchaser.]**—**CROOKSHANK v. WHITE (1811),** 1 Kerr, 367.—**CAN.**

**n. ——— After notice of delivery.]**—The warehouseman of certain bales of wool, at the request of the sellers, sent to them a transfer return acknowledging that he had received the wool specified in the return from such sellers on account of the purchasers. The terms of the transfer return were communicated to & acted upon by the purchasers:—**Held:** there had been a complete delivery of the wool to the purchasers.—**COURT v. MOSENTHAL & Co. (1896),** 13 S. C. 127.—**S. AF.**

**PART VI. SECT. 2, SUB-SECT. 3.—A.**

**o. Residence or place of business of manufacturer.]**—In the absence of a contract express or implied so to do, the maker of an article is not bound to deliver it to the person for whom it is made elsewhere than at the residence or place of business of the maker. In order to entitle himself to recover the

contract price of the article he need only notify the person for whom it has been made that it has been completed & is ready for delivery.—**HERTLE v. JENNY (1915),** 49 N. S. R. 6.—**CAN.**

**p. ——— Sale of wheat by farmer.]**—Where no place for delivery is specified in a wheat agreement, the proper place for delivery is the grower's farm.—**CALGARY GRAIN CO. v. NORDNESS (Alta.), [1917]** 2 W. W. R. 713; 35 D. L. R. 794.—**CAN.**

**q. Place of goods at time of sale—Or place of production.]**—In the absence of any agreement as to delivery, goods, agreed to be sold are to be delivered at the place at which they are at the time of agreement for sale, or, if not then in existence, at the place at which they are to be produced.—**DADABHAI NAHSI v. SALEMAN DASSI (1868),** 5 Bom. A. C. 126.—**IND.**

**r. ———.]**—In the case of a sale of specific goods, in the absence of agreement as to the place of delivery, they must be delivered at the place where they were at the time of sale. If the goods were ordered to be manufactured they must in the absence of

**Right of parties to waive.]**—An English firm sold a quantity of wool to buyers in the United States by a written contract under which delivery was to be f.o.b. Liverpool. The buyers claimed to be entitled to waive the condition in the contract as to delivery & to take delivery of the wool before it was put on board ship:—**Held:** a term of a contract as to the mode of delivery is not a condition entirely for the benefit of either party to the contract, & neither party can waive such term without the consent of the other party, & therefore the buyers were not entitled to demand delivery of the wool otherwise than on board ship at Liverpool.—**MAINE SPINNING CO. v. SUTCLIFFE & Co. (1917),** 87 L. J. K. B. 382; 118 L. T. 351; 34 T. L. R. 154.

**1563. Direction to carrier to deliver at certain place—Delivery at place agreed between carrier & consignee.]**—Although the consignor of goods directs a carrier to deliver them to the consignee at a particular place, the carrier may deliver them wherever he & the consignee agree.

Pltf. having sold corn by sample, to be delivered to the purchaser at his mill, at B., sent the corn by defts., railway carriers, paying the freight to B. station, & an extra sum for cartage from B. to the mill. In pursuance of general orders previously given by the consignee to defts., but not communicated to pltf., defts. left the wheat at their station at B., & advised the consignee of its arrival, who examined it, but left it there for two months, & afterwards refused to take it. The wheat was deteriorated in quality during that time:—**Held:** defts. were not liable to an action by pltf. for not delivering at the mill, as the non-delivery there was pursuant to the orders of the consignee, & it made no difference in this respect that pltf. could not recover the price of the wheat from the purchaser in consequence of there being no acceptance of the wheat within the meaning of Stat. Frauds.

**Semble:** the rights of pltf. & the purchaser were not affected by the non-delivery at the mill.—**LONDON & NORTH WESTERN RY. CO. v. BARTLETT (1861),** 7 Il. & N. 400; 31 L. J. Ex. 92; 5 L. T. 399; 26 J. P. 107; 158 E. R. 529; *sub nom.* **BARTLETT v. LONDON & NORTH WESTERN RY. CO.,** 8 Jur. N. S. 58; 10 W. R. 109.

**Annotations:—Refd.** **McKean v. McIver (1870),** 24 L. T. 559; **Metcalfe v. Britannia Ironworks Co. (1876),** 1 Q. B. D. 613; **Bethell v. Clark (1887),** 19 Q. B. D. 553.

**For purposes of jurisdiction of Mayor's Court.]**—See **MAYOR'S COURT, Vol. XXXIV., p. 531, No. 46.**

agreement, be delivered at the place of manufacture.—**GOLDBLATT v. MERWE (1902),** 19 S. C. 373.—**S. AF.**

**t. ———.]**—In the absence of agreement or clear proof of custom to the contrary, the delivery of goods sold should be made at the place where they were when sold.—**GILSON v. PAYN (1899),** 16 S. C. 286.—**S. AF.**

**a. Goods sold f.o.b. a particular place.]**—**BURTON BEIDLER & PHILLIPS Co. v. LONDON STREET RY. CO. (1904),** 24 C. L. T. 337; 7 O. L. R. 717; 3 O. W. R. 686.—**CAN.**

**b. ———.]**—In absence of evidence showing a different intention, goods sold f.o.b. any particular place must arrive at that place before delivery is complete.—**STEPHENS BROTHERS v. BURCH (1909),** 2 Alta. L. R. 68.—**CAN.**

**c. Notification of delivery—Where delivery not made personally to purchaser.]**—Where by an agreement pltf. is to deliver not personally to defts., but on certain parts of a road, a certain quantity of timber to build certain bridges, he must notify defts. of the delivery before he can sue for the

*B. Place Uncertain.*

See Sale of Goods Act, 1893 (c. 71), s. 29 (1).

**1564. Duty of seller to request buyer to name place.**—When no place is fixed for the delivery of goods to pltf., deft., who pleads a tender, must show that he first applied to him to appoint the place.—*HARVEY v. JACKSON* (1876), 1 Freem. K. B. 433; 3 Keb. 673; 84 E. R. 945.

**1565. Duty of buyer to name ship.**—*WACKERBARTH v. MASSON*, No. 1631, *post*.

**1566.** —.]—*ARMITAGE v. INSOLE*, No. 1499, *ante*.

**1567.** —.]—*Assumpsit* on a contract for the sale of 50 tons of bicarbonate of soda at "£11 per ton in 1 cwt. kegs; or, if taken in 10 cwt. casks, the price to be 10s. less per ton; free on board, to be delivered in equal monthly quantities during Apr., May & June 1865." Averment, that defts. duly delivered divers portions of the goods according to agreement, & that pltf. was not required by defts. to accept delivery of the residue. Breach, non-delivery of the residue. Plea, that defts. were ready & willing to deliver the said residue according to the agreement, whereof pltf. had notice, & that pltf. was not ready & willing to accept, & would not accept, & did not require delivery of the same:—*Held*: before defts. were bound to deliver the goods, pltf. was bound to name the ship or the place where he desired the goods to be delivered, & a tender of the goods by defts. was not a condition precedent to their delivery, or to the ship or place being named by pltf.—*SUTHERLAND v. ALLHUSEN* (1866), 14 L. T. 666; 2 Mar. L. C. 319.

**1568.** —.]—Pltfs. agreed to construct & deliver f.o.b., at the port of London, for defts. a steam launch by a fixed date. The launch was not in fact ready to be delivered until three months after the agreed date, but defts. did not during that time notify to pltfs. that there was any vessel at the port of London on board of which they required the launch to be delivered:—*Held*: as defts. were not ready & willing to take delivery before pltfs. were ready & willing to deliver, defts. were not entitled to deduct from the price the agreed damages for delay in delivery.

Before they [defts.] can claim these damages they must show that they were ready & willing to take delivery, & that they gave notice to pltfs. of the name of the vessel (*WILLIAMS, L.J.*).—*FORREST & SON, LTD. v. ARAMAYO* (1900), 83 L. T. 335; 9 Asp. M. L. C. 134, C. A.

**1569.** —.]—Unascertained goods were sold f.o.b. The seller sent them to the port of shipment, but, owing to the failure of the buyer to name an effective ship, he was prevented from putting them on board:—*Held*: this default of the buyer did not have the effect of placing the seller in the same position as if he had put the goods on board, & in the absence of an agreement that the price should be payable on a day certain irrespective of delivery he could not sue for the price.—*COLLEY v. OVERSEAS EXPORTERS*, [1921] 3 K. B. 302; 90 L. J. K. B. 1301; 126 L. T. 58; 37 T. L. R. 797; 26 Com. Cas. 325.

*C. Shipment to Named Port.*

**1570. Delivery refused at named port—Ship proceeding to another port—Conditions providing for carriage beyond destination—Vessel touching at named port.**—Pltfs. bought from defts. under a c.i.f.

contract, for delivery in London, 100 tons of block gambier, which defts. declared per their steamship *Selandia* sailing from Singapore. The block gambier had been shipped under a bill of lading making it deliverable in Copenhagen. On the arrival of the vessel in London defts., not having received the bill of lading, gave pltfs. delivery orders against payment, but when these were presented delivery was refused, & the vessel took the goods on to Copenhagen. More than a month later the goods were delivered to pltfs. in London. Meanwhile, pltfs. had suffered loss by a fall in the market. Pltfs. also bought under a c.i.f. contract, for delivery in London, a parcel of pepper from G. M. & co., who had bought it from defts. & who declared it per the same vessel sailing on the same voyage. The bill of lading provided for delivery at Copenhagen, & it was indorsed by defts. "To be delivered in London" & was then handed to pltfs. against payment. Delivery in London was refused, & the pepper was carried on to Copenhagen & thence back to London. Meantime, there had been a fall in the market, with a resulting loss to pltfs. The conditions in both bills of lading provided that the ship might carry the goods beyond their destination, & that the shipowners were not to be responsible for loss arising from late or wrong delivery or overcarriage. In an action by pltfs. to recover from defts. the amount of the loss:—*Held*: as in the case of the block gambier defts. did not deliver a bill of lading answering the requirements of the contract they could not in that case rely upon the conditions in the bill of lading, & as in the case of both the block gambier & the pepper the conditions did not apply where the vessel had actually been in the port of destination of the goods for the purpose of delivering cargo, defts. were liable for the loss.—*SARGANT & SONS v. EAST ASIATIC CO., LTD.* (1915), 85 L. J. K. B. 277; 32 T. L. R. 119; 21 Com. Cas. 344. *Annotations*:—*Distd. Broken Hill Proprietary Co. v. Peninsular & Oriental Steam Navigation Co.*, [1917] 1 K. B. 688. *Refd. Monte Video Gas & Dry Dock Co. v. Clan Line Steamers* (1921), 37 T. L. R. 866.

**1571. War declared by country in which port lies—Port not yet in hands of enemy.**—By a contract of sale made in June, 1914, the sellers sold to the buyers about 10,000 cases of bean oil shipped afloat from an Oriental port by steamer or steamers, direct or indirect, & with or without transshipment, at the price therein named, cost, freight, & insurance to Antwerp. The buyers were to pay the full amount of provisional invoice made out on net shipping weights by cash without discount against shipping documents on or before arrival of steamer or steamers in Antwerp or three months after notice of arrival of documents in London, whichever might happen first. In July, 1914, the sellers declared to the buyers in part fulfilment of the contract 3,000 cases of bean oil which had been shipped on the *Glencarn*, a British vessel, for Antwerp, & rendered to the buyers provisional invoices showing the amount due computed in accordance with the contract. Early on Aug. 4, 1914, war broke out between Belgium & Germany, & the following midnight between Great Britain & Germany. On Aug. 5, 1914, the sellers notified the buyers in writing that the documents relating to the 3,000 cases had arrived in London & asked for payment on Aug. 27 in accordance with the contract. On Aug. 18, 1914, the sellers tendered the shipping documents to the

price.—*WATSON v. GORREN* (1850), 6 U. C. R. 542.—*CAN.*

*d. Agreement to deliver "at" shed—Whether delivery within eighty feet of*

*shed sufficient.*—*GODERICH TOWN v. HOLMES* (1902), 32 S. C. R. 211.—*CAN.*

**PART VI. SECT. 2, SUB-SECT. 3.—B. e. Right of buyer to name port—**

*Shipment "to a direct port" of country of delivery—Port to be named on signing bill of lading.*—*KNOX v. MAYNE* (1873), 1 R. 7 C. L. 557.—*IR.*

*Sect. 2.—Delivery: Sub-sect. 3, C., D. & E.; sub-sect.*

buyers. At that date Antwerp was still in possession of the Belgians. The ship had since war broke out been seized by the Germans & detained at Hamburg. The buyers did not take up the documents & contended that they were discharged from their obligation to do so by reason of the seizure of the ship by the Germans:—*Held*: as between the buyers & sellers there was no illegality in tendering documents calling for delivery at Antwerp, which at the time had not fallen. Nor was there any illegality in calling upon the ship-owner to deliver at Antwerp, for if he could have got his ship there it would have been perfectly legal to do so, & the fact that it had become impossible did not prevent the tender of the documents from being valid: therefore, the buyers were not discharged from their obligations to take up the documents.—*Re WEIS & Co., LTD. & CREDIT COLONIAL ET COMMERCIAL, ANTWERP*, [1916] 1 K. B. 346; *sub nom.* WEISS (C.) & Co., LTD. *v.* CREDIT COLONIAL ET COMMERCIAL, ANTWERP, 85 L. J. K. B. 533; 114 L. T. 108; 13 Asp. M. L. C. 242; 21 Com. Cas. 186.

*Annotation*:—*Reid*, Manbre Saccharine Co. *v.* Corn Products Co., [1919] 1 K. B. 198.

*Bills of lading*.]—*See SHIPPING.*

*Charterparties*.]—*See SHIPPING.*

*D. Licence to Enter on Vendor's Premises to Take Goods.*

**1572. Whether licence implied.**]—When the lessor excepted the trees & afterwards had an intention of selling them, the law gave him & them who would buy power as incident to the exception to enter & show the trees to those who would have them.—*LIFORD'S CASE* (1614), 11 Co. Rep. 46 b; 77 E. R. 1206; *sub nom.* STAMPE *v.* CLINTON (*alias* LIFORD), 1 Roll. Rep. 95.

*Annotations*:—*Apld.* *Hewitt v. Isham* (1851), 7 Exch. 77. *Consd.* *Kursell v. Timber Operators & Contractors* (1926), 95 L. J. K. B. 569. *Reid*, *Legh v. Heald* (1830), 1 B. & Ad. 622; *Bailey v. Stephens* (1862), 12 C. B. N. S. 91; *Re Londesborough, Spicer v. Londesborough*, [1923] 1 Ch. 500. *Mentd.* *Russell v. Gulwel* (1599), Cro. Eliz. 657; *Pembroke v. Syms* (1600), Cro. Eliz. 781; *Bowles's Case* (1615), 11 Co. Rep. 79 b; *Magdalen College, Cambridge, Case* (1616), 11 Co. Rep. 66 b; *Smith v. Bole* (1618), Cro. Jac. 458; *Whistler v. Paslow* (1619), Cro. Jac. 487; *Berry v. Heard* (1631), Cro. Car. 242; *Jemmot v. Cooley* (1667), 2 Keb. 270; *R. v. Rochester (Bp.) & Clark* (1675), 2 Mod. Rep. 1; *St. David's (Bp.) v. Lucy* (1699), 1 Ld. Raym. 539; *Parker v. Kett* (1701), 12 Mod. Rep. 466; *Rosewell v. Prior* (1701), 1 Ld. Raym. 713; *Mitchel v. Reynolds* (1711), 1 P. Wms. 181; *Turner v. Cordwell* (1735), Cunn. 129; *Wallis v. Pain* (1739), 2 Com. 633; *Bradly v. Strachy* (1740), Barn. Ch. 399; *Walton v. Tryon* (1751), Amb. 130; *A. G. v. Duplessis* (1752), Park. 144; *Paul v. Paul* (1760), 1 Wm. Bl. 255; *Jefferson v. Durham (Bp.)* (1797), 1 Bos. & P. 105; *Ford v. Racster* (1815), 4 M. & S. 130; *Herring v. St. Paul (Dean & Chapter)* (1819), 3 Swan. 492; *Pace v. Fagg* (1829), 4 Man. & Ry. K. B. 277; *Garland v. Carlisle* (1837), 11 Bl. N. S. 421; *Hey v. Moorhouse* (1839), 6 Bing. N. C. 52; *Elliott v. Bishop* (1854), 10 Exch. 496; *Barnett v. Guildford* (1855), 11 Exch. 19; *Mather v. Fraser* (1856), 2 K. & J. 536; *Walmesley v. Milne* (1859), 7 C. B. N. S. 115; *Delacherols v. Delacherols* (1864), 4 New Rep. 501; *Sumner v. Bromilow* (1865), 11 Jur. N. S. 481; *Ite Thomas, Ex p. Willoughby D'Eresby* (1881), 44 L. T. 781; *Goodhart v. Hyett* (1883), 25 Ch. D. 182; *Eastern Construction Co. v. National Trust Co. & Schmidt*, [1914] A. C. 197; *L'willbach Colliery Co. v. Woodman*, [1915] A. C. 634.

**1573.** —.]—A licence is not implied by law to the purchaser of goods, though sold under an execution or distress, to enter upon the premises of the former owner & take them away, although they have remained there with his assent. To support a plea of leave & licence to an action of trespass for taking away goods under such cir-

cumstances, there must be proof of an express agreement that the purchaser should enter on the premises & take the goods.—*WILLIAMS v. MORRIS* (1841), 8 M. & W. 488; 11 L. J. Ex. 126; 151 E. R. 1131.

**1574.** —.]—I do not . . . mean to say that supposing A. had a right to grant B. permission to dig & carry away cinders from the cinder tip anything beyond a licence to enter upon the land for the purpose of taking away the cinders would be conferred by the agreement (*WILLIAMS, J.*).—*SMART v. JONES* (1864), 15 C. B. N. S. 717; 3 New Rep. 648; 33 L. J. C. P. 154; 10 L. T. 271; 10 Jur. N. S. 678; 12 W. R. 430; 143 E. R. 966.

**1575.** —.]—Where an auctioneer sells by auction standing corn with the straw, for an unnamed principal, the price to be paid at once, & the crop to be removed immediately after it has arrived at maturity at the purchaser's expense, there is a contract by the auctioneer to give the purchaser all proper authority to enter upon the land, & to cut & carry away the corn & straw, but there is no actual warranty of the validity of the title of his principal to sell.—*WOOD v. BAXTER* (1883), 49 L. T. 45, D. C.

*Annotations*:—*Apld.* *Payne v. Eldsen* (1900), 17 T. L. R. 161; *Benton v. Campbell, Parker*, [1925] 2 K. B. 410.

**1576. Express agreement—Not in writing—Whether valid as licence.**]—To trespass for seizing & impounding pltf.'s horse & cart, deft. pleaded that they were encumbering & doing damage to his close & grass. Pltf. replied, that deft. agreed to sell, & sold to pltf., & pltf. agreed to buy, & then bought of deft. the grass in the said close, with liberty to enter with his horse & cart & to take away the same:—*Held*: (1) pltf. was bound to prove a valid contract binding in law; & as the contract in question was not in writing, it was not available in support of the replication; (2) this contract might have been pleaded as a licence.—*CARRINGTON v. ROOTS* (1837), 2 M. & W. 248; *Murp. & H. 14*; 6 L. J. Ex. 95; 1 Jur. 85; 150 E. R. 748.

*Annotations*:—*As to* (1) *Reid*, *Reade v. Lamb* (1851), 6 Exch. 130; *Leroux v. Brown* (1852), 12 C. B. 801; *Williams v. Lake* (1859), 6 Jur. N. S. 45; *Williams v. Wheeler* (1860), 8 C. B. N. S. 299; *Britain v. Rossiter* (1879), 11 Q. B. D. 123.

**1577. Revocability.**]—Goods which were upon pltf.'s land were sold to deft.; by the conditions of sale, to which pltf. was a party, the buyer was to be allowed to enter & take the goods:—*Held*: after the sale pltf. could not countermand the licence.—*WOOD v. MANLEY* (1839), 11 Ad. & El. 34; 3 Per. & Dav. 5; 9 L. J. Q. B. 27; 3 Jur. 1028; 113 E. R. 325.

*Annotations*:—*Distd.* *Williams v. Morris* (1841), 8 M. & W. 488. *Consd.* *Wood v. Leadbitter* (1845), 13 M. & W. 838; *Taplin v. Florence* (1851), 10 C. B. 744; *Cornish v. Stubbs* (1870), L. R. 5 C. P. 334. *Reid*, *Salter v. Woollams* (1841), 2 Man. & G. 650; *Mollor v. Watkins* (1874), L. R. 9 Q. B. 400; *Jones v. Tankerville*, [1909] 2 Ch. 440. *Mentd.* *Vaughan v. Hampson* (1875), 33 L. T. 15.

**1578.** —.]—*JONES (JAMES) & SONS, LTD. v. TANKERVILLE (EARL)*, No. 2657, *post*.

*E. Delivery of Samples for Adulteration Tests.*

*See* *FOOD & DRUGS*, Vol. XXV., pp. 72, 99, Nos. 16-22, 225-227.

## SUB-SECT. 4.—TIME OF DELIVERY.

*A. In General.*

*See* *Sale of Goods Act*; 1893 (c. 71), s. 29 (2), (4).

**1579. Arrival on or before particular date—Con-**

## PART VI. SECT. 2, SUB-SECT. 3.—D.

**1. Express agreement—For removal of timber—Right to remove by most direct &**

*available route—Though full enjoyment*

## PART VI. SECT. 2, SUB-SECT. 4.—A.

**g. Extension of time—By purchaser for own benefit—Necessity for consent**

**tract to be void on non-arrival—Whether non-arrival amounts to breach of contract.]—**Contract in London for the sale of tallow from a particular ship, on arrival, to be taken from the King's landing scale; if it should not arrive on or before a given day, the bargain to be void.

The ship was wrecked off the coast of Scotland, but the cargo was saved, & might have been forwarded to the port of London by the given day: the vendors resold the tallow in Scotland; the purchasers did not offer them any indemnity if they would bring the tallow to London:—*Held*: under these circumstances, the vendors were not answerable for the non-delivery of the tallow.—*IDLE v. THORNTON* (1812), 3 Camp. 274; 170 E. R. 1380, N. P.

*Annotations*:—*Distd.* Thornton v. Jones (1816), 2 Marsh. 287. *Refd.* Barnett v. Javeri, [1916] 2 K. B. 390.

**1580. Extension of time—New agreement.]—**The declaration alleged that pltf. was lawfully possessed of a house for the residue of a term of six years, & of certain goods, furniture, etc. therein, & that pltf. agreed to assign the lease of the house to deft. at a certain price, & the furniture, etc. at a valuation, possession to be delivered on a certain day; & averred that she was, from the time of making the agreement, ready & willing to assign her interest in the house, & to deliver up possession of the goods at a fair appraisement. Deft. pleaded pleas traversing the readiness & willingness to assign the interest in the house, & to deliver up the furniture. It was proved at the trial that the greater part of the house & furniture were destroyed by fire shortly after the agreement, & before the time for its completion. The agreement provided that either party making default should pay to the other £500 as liquidated damages. After the making of the agreement, but before the day for its completion arrived, the parties agreed, by an indorsement on the former agreement, to enlarge the time for its performance for a few days:—*Held*: this amounted to a fresh agreement.—*BACON v. SIMPSON* (1837), 3 M. & W. 78; Murp. & H. 309; 7 L. J. Ex. 34; 150 E. R. 1064.

*Annotations*:—*Refd.* Gwynne v. Davy (1840), 1 Man. & G. 857. *Mentd.* Tharpe v. Stallwood (1843), 7 J. P. 400.

**1581. — Implied from subsequent events.]—**On June 15, 1874, deft. bought of pltf. 100 tons of pig iron, to be delivered, "25 tons at once, & 75 tons in July next." By the end of July, 75 tons in all had been delivered. There was no evidence of any request by deft. to pltf. before the end of July to delay the delivery of the last 25 tons; but it was proved that in Oct. deft. verbally requested pltf.'s manager to deliver them, in consequence of which they were forwarded in the course of the same month to deft., but he declined to receive them. In an action against deft. for refusing to accept the 25 tons, deft. pleaded, amongst other pleas, that pltf. were not ready & willing to deliver the iron according to the contract:—*Held*: inasmuch as the vendors were not shown to have withheld the delivery of the 25 tons in consequence of a request by the vendee before the expiration of the agreed time, viz., in July, the action was not maintainable upon the original contract; & that the subsequent conversation with the vendors' manager could not be relied upon either as a new contract or as an arrangement for an altered time of delivery.—

*PLEVINS v. DOWNING* (1876), 1 C. P. D. 220; 45 L. J. Q. B. 695; 35 L. T. 263; 40 J. P. 791.

*Annotations*:—*Apld.* Hartley v. Hymans, [1920] 3 K. B. 475. *Distd.* Sheikh Mohammad Habib Ullah v. Bird (1921), 37 T. L. R. 405.

**1582. — Implied from conduct of buyer.]—**On Apr. 27, A., who sold flour on commission for deft., a miller, verbally contracted to sell pltf. 150 sacks at 29s. per sack, no time being named for delivery. Deft. repudiating A.'s authority, on the ground that his instructions to him limited him to 30s. per sack, disputes arose between the parties; & eventually, on June 8, deft. agreed to deliver the flour, which he accordingly did, & sued for & recovered the price. Pltf. then commenced an action against deft. in the county ct. to recover the difference between the contract price & the price at which he had been obliged to purchase other flour, on deft.'s default. The judge found that the flour had not been delivered within a reasonable time; but he held that either pltf. must be considered to have allowed deft. an extension of time for the performance of the original contract, or that the delivery of the flour had relation to a new contract taking effect from the time when deft. signified his intention to execute the order; & that deft. was entitled to judgment:—*Held*: the decision of the county ct. judge was correct.—*WILLIAMS v. WHEELER* (1860), 8 C. B. N. S. 299; 141 E. R. 1181.

*Annotation*:—*Refd.* Gibson v. Holland (1865), Har. & Luth. 1.

**1583. — After expiry of time fixed for delivery.]—**Under a contract for the sale of goods to be delivered within a certain period of time the buyer's right to require delivery within that period may be waived even after that period has expired; but it would seem that, where the contract is within Sale of Goods Act, 1893 (c. 71), s. 4, the waiver must be evidenced by writing. Where, after the expiration of the period of delivery fixed by a contract for the sale of goods, the buyer by his letters & conduct leads the seller to entertain the belief that the contract still subsists & to act upon that belief at serious expense to himself, a new agreement may be implied that the period for delivery is extended & that delivery may take place within a reasonable time of which notice is to be given by the buyer to the seller. By a contract coming within Sale of Goods Act, 1893 (c. 71), s. 4, & duly made in writing, pltf. agreed to sell to deft. 11,000 lb. of cotton yarn, delivery to begin in Sept. 1918, & to be at the rate of 1,100 lb. per week, failure to deliver within the stipulated time to render the contract liable to cancellation by deft., & incomplete deliveries not to be taken into account. Delivery should have been completed by Nov. 15, 1918. Pltf. delivered no yarn till Oct. 26, 1918, when he delivered 550 lb., & thereafter on various dates from the end of Nov. 1918, to the end of Feb. 1919, he delivered seven further quantities averaging upward of 500 lb. each. During all this period & the early part of Mar. 1919, deft. by his letters complained of the delay & asked for better deliveries, but thereby led pltf. to entertain the belief that the contract still subsisted, & to act upon that belief at expense to himself. On Mar. 13, 1919, deft., having given no previous notice requiring delivery in any reasonable time, wrote to pltf. cancelling the order, & he thereupon refused to take any further quantity

*of seller.]—*A promisee is not entitled for his own purposes & without the consent of the promisor to extend the time for performance which had been agreed to by the parties to the contract.—*MUTHAYA MANIAGARAN v.*

*LEKKU REDDIAR* (1914), 1 L. R. 37 Mad. 412.—*IND.*

*h. Waiver of delivery within time fixed—After expiry of period—By acceptance of goods—Right in damages for non-delivery at agreed date.]—**SUTHER-*

*LAND v. MONTROSE SHIPBUILDING CO.* (1860), 22 Dunl. (Ct. of Sess.) 665; 32 Sc. Jur. 262.—*SCOT.*

*k. — Where condition for retention of goods to avoid all warranties.]*

**Sect. 2.—Delivery: Sub-sect. 4, A., B., C. & D.]**

of the yarn. Pltf. brought an action against deft. for damages for refusing to take the remainder of the yarn:—*Held*: although time was of the essence of the contract with respect to delivery which should, *prima facie*, have been completed by Nov. 15, 1918, yet deft. by his letters, though written after that date, had waived his right to insist that the period for delivery terminated on that date; deft. was also thereby estopped from alleging that that period terminated on that date; the letters between the parties implied a new agreement that delivery might be made within an extended & reasonable period, of which notice was to be given by deft. to pltf., & as deft. had given no such notice, no period had been fixed within which pltf. should make delivery; & in these circumstances deft. had no right to cancel on Mar. 13, 1919, & pltf. was entitled to damages to be assessed as at that date.—*HARTLEY v. HYMANS*, [1920] 3 K. B. 475; 90 L. J. K. B. 14; 124 L. T. 31; 36 T. L. R. 805; 25 Com. Cas. 365.

*Annotation*:—*Consd. Levey v. Goldberg*, [1922] 1 K. B. 688.

**1584. — Express agreement.**—A colliery co. agreed by contract in writing to deliver 25,000 tons of coal in equal monthly instalments of from 1,000 to 2,000 tons to be shipped into colliery vessels, the time for loading as per colliery guarantee; provided that if from stoppage of their works through strikes the colliery co. should be prevented from delivering the full quantities, the purchasers should have the option of cancelling the contract so far as related to coals to be delivered during the stoppage. The colliery guarantee provided that the vessel in this case should be loaded in sixteen days, demurrage to be at the rate of £13 per day. The sixteen days expired on Mar. 31, 1898; on Apr. 9 a strike occurred at the colliery & on May 24 the colliery co. wrote to say they could not load the vessel:—*Held*: there had been a breach of contract on May 24 & not before; & the purchasers were not bound to exercise their option for the benefit of the vendors.—*UNION S.S. Co., LTD. v. DAVIS & SONS, LTD.* (1899), 81 L. T. 246, 249; 15 T. L. R. 477; 8 Asp. M. L. C. 574; 4 Com. Cas. 298, C. A.

**1585. — Failure to deliver within extended time.**—Where, in a contract for the sale of goods which are to be delivered by a specific date, time is of the essence of the contract, & the vendor fails to deliver by that date, & the purchaser after such failure elects not to avoid the contract but agrees with the vendor to substitute a later date, the failure to deliver by such later date constitutes a breach of the contract. If the purchaser, having already resold the goods before delivery to himself, has to fulfil such contract of resale by means of other goods, & thereby makes a greater profit than if there had been no breach, this fact does not reduce the damages which he is entitled to recover from his vendor.—*MOHAMMAD HABIB ULLAH (SHEIK) v. BIRD & Co.* (1921), 37 T. L. R. 405, P. C. —*See, further, CONTRACT, Vol. XII., pp. 356, 357, Nos. 2962-2970.*

**1586. Delivery to be made at reasonable hour.**—*STARTUP v. MACDONALD*, No. 1891, *post*.

**1587. Waiver of delivery within time 'fixed'—After expiry of period.**—*HARTLEY v. HYMANS*, No. 1583, *ante*.

**1588. Contract for delivery within reasonable time—After future date—Whether contract for**

**delivery at fixed time—Within Sale of Goods Act, 1893 (c. 71), s. 51.]**—Above sect., sub-sect. 3, provides that "where there is an available market for the goods in question the measure of damages" (for non-delivery) "is *prima facie* to be ascertained by the difference between the contract price & the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver":—*Held*: the rule in sub-sect. 3 that, if no time was fixed for delivery, the measure of damages was to be ascertained by the difference between the contract price & the market or current price of the goods at the time of the refusal to deliver, did not apply where the breach is an anticipatory breach. *Qu.*: whether a contract for delivery within a reasonable time is a contract for delivery at a "fixed time" within sub-sect. 3.—*MILLETT v. VAN HECK & Co.*, [1921] 2 K. B. 369; 90 L. J. K. B. 671; 125 L. T. 51; 37 T. L. R. 411; 65 Sol. Jo. 356, C. A.

*Annotation*:—*Reid. Ellis' Trustee v. Dixon-Johnson*, [1924] 1 Ch. 342.

**Reasonable time.**—*See Nos. 1596-1599, post.*

### B. Whether Time Essence of Contract.

*See Part III., Sect. 2, sub-sect. 4, ante.*

### C. What Amounts to Performance Within Time.

**1589. Sending off on day fixed.**—Contract to deliver pheasants on Oct. 1. It is sufficient if they be sent off on that day, though they do not arrive till afterwards.—*HONEYWOOD v. STONE* (1814), 2 Chit. 142.

**1590. Allowance of time for unloading—"In all April or sooner"—Delivery late in month.**—Where a quantity of barley was sold upon a contract to "deliver alongside a sloop or warehouse at G. or H., at the buyer's option, in all Apr. or sooner," & the barley was brought into dock at G. on Apr. 29:—*Held*: the contract was broken, inasmuch as it would then have taken four days to unload the vessel & deliver the cargo into the buyer's possession.—*COX v. TODD* (1825), 7 Dow. & Ry. K. B. 131; 4 L. J. O. S. K. B. 34.

**1591. — Within last fourteen days of March—Delivery late on last day—Time for completion before midnight.**—*STARTUP v. MACDONALD*, No. 1891, *post*.

**1592. Time at seller's option—Exercise of option—Whether seller bound.**—*GATH v. LEES* (1865), 3 H. & C. 558; 159 E. R. 650.

*Annotation*:—*Distd. Borrowman v. Free* (1878), 4 Q. B. D. 500.

**1593. Seaborne goods—Delay through loss or stranding of vessel—Ultimate delivery.**—Pltfs. effected an insurance on profit on a cargo per the *Giovanni Albanese*. The policy had a printed clause attached, which, as it stood originally, ran as follows: "Warranted free from all average & without benefit of salvage; but to pay a loss on such portion as does not reach its destination in the said ship," but that latter words, viz. "in the said ship," had been deleted. The cargo was bought under a contract which stated that it was "expected to arrive per sailer from Fray Bentos & to discharge at Ayr as per charterparty, Aug., Sept., Oct. 1905, shipment." The contract also contained the following clause: "In case of non-arrival, this contract to be void, & should the vessel from any

—*BERLIN MACHINE WORKS, LTD. v. RANDOLPH & BAKER, LTD.* (1917), 45 N. B. R. 201.—*CAN.*

1. *Delivery on Sunday.*—Where

def. was sued for damages for non-delivery of goods & contended that he was not bound to deliver on Sunday:—*Held*: delivery on Sunday was not unlawful, &, in the absence of custom

to the contrary, deft. was bound to deliver the goods on that day if they had not already been delivered.—*JALCHAND BALKISSAN v. KERSTEN* (1890), 1 L. R. 15 Bom. 338.—*IND.*



unforeseen circumstances be prevented from delivering the whole of the cargo originally shipped this contract to be void as regards the undelivered portion." The cargo was loaded in the *Giovanni Albanese* in Sept. 1905, but in the course of the voyage the vessel became a total loss, & the sellers gave plffs. notice that the cargo would not come forward as it has been abandoned to the underwriters. Part of the cargo was, however, reshipped, brought by another vessel to this country, where it arrived in Mar. 1906, but plffs. declined to accept it. In an action on the policy:—*Held*: (1) the parties had elected to choose one of the two forms in which an insurance on profits is effected, the form chosen did not require that the goods should be brought to their destination in the ship in which they were loaded, & consequently there had been no loss of that portion of the cargo which was tendered to plffs., as it had arrived at its destination within the attached clause, although it did not arrive in the original ship; (2) further, the delay that occurred in not delivering the cargo till Mar. 1906, was not such a delay as frustrated the adventure.—*WYLLIE v. POVAH* (1907), 23 T. L. R. 687; 12 Com. Cas. 317.

1594. ———.—*Re* CARVER & Co. & SASSOON & Co., No. 1896, *post*.

1595. ———.—Loading of further cargo.]—*Re* CARVER & Co. & SASSOON & Co., No. 1896, *post*.

———Conditions as to time of shipment.]—*See* Part III., Sect. 2, sub-sect. 3, *ante*.

#### D. Where Time Not Fixed.

*See* Sale of Goods Act, 1893 (c. 71), s. 29 (2).

1596. General rule.—Delivery must be within reasonable time.]—A., the proprietor of a lead mine, called the Bog Mine, situate near Shrewsbury, sold to B., a lead merchant in London, by a written contract, "200 tons of Bog Mine lead, at £22 per ton, deliverable in the river Thames." The broker who made the contract stated at the time, in answer to a question by B., that the lead was ready for shipment. A few days afterwards B. applied to the broker to know whether A. would agree to allow the freight or insurance from Gloucester or Liverpool, to which A. agreed, but B. subsequently required the lead to be delivered in London. It appeared that Gloucester & Liverpool were the usual ports of shipment for London; but the Bog Mine lead was first brought by barges down the Severn from Shrewsbury to Gloucester. The lead was delayed a considerable time in this part of its transit by the lowness of the water, & when it arrived in London, B. refused to receive it, the price having fallen considerably. In an action by A. against B. for not accepting the lead, B. pleaded that plff. was not ready to

deliver it within a reasonable time, on which issue was joined. The broker stated, in addition to the above facts, that he had understood from A. that the lead was at Shrewsbury. The judge stated to the jury that it might be taken for granted that the understanding of the parties was, that the lead was ready for shipment at Gloucester or Liverpool; that this was confirmed by deft.'s application as to the freight & insurance; & if they thought it ought to have arrived in a shorter time, if ready for shipment at Gloucester or Liverpool, deft. was entitled to a verdict:—*Held*: (1) the parol representation of the broker, that the lead was ready for shipment, was admissible in evidence, not to vary the written contract, but as one of the data from which the reasonableness of the time was to be determined; (2) the direction of the judge was warranted by the evidence.—*ELLIS v. THOMPSON* (1838), 3 M. & W. 445; 1 Horn & H. 131; 7 L. J. Ex. 185; 150 E. R. 1219.

*Annotations*:—As to (1) *Refd.* *Lockett v. Nicklin* (1848), 2 Exch. 93; *Duncan v. Topham* (1849), 8 C. B. 225; *Hurst v. Usborne* (1856), 18 C. B. 144.

1597. ———.—A sale of 12 puncheons of spirits distilled from molasses was bargained for, & 4 puncheons delivered. The buyer continued urging the delivery of the remainder, but the sellers delayed, until after an Act of Parliament was passed on Dec. 18, 1795, prohibiting distillation of spirits from molasses, & annulling all bargains or contracts for the delivery of such. The sellers refused to furnish the spirits, & in action, stated this defence, that having had three months to deliver, & the Act of Parliament having been passed in the interval, they were not bound:—*Held*: from the correspondence adduced, the sellers were bound to deliver the remaining puncheons within reasonable time, & therefore before Dec. 18, 1795, the date of the passing of the Act.—*PHILIPS v. BLAIR & MARTIN* (1801), 4 Pat. App. 256, H. L.

1598. ———.—*BUDDLE v. GREEN*, No. 1635, *post*.

1599. ———.—Defts. contracted to sell to plffs. cotton to arrive at L. per ship from C. to be of a certain quality, with this stipulation: "the cotton to be taken from the quay." Defts. on its arrival warehoused the cotton, & sent plffs. a delivery order. They refused to accept:—*Held*: this was a stipulation introduced in favour of the seller, & not a condition precedent, upon the performance of which the vendee could insist; & the contract amounted to a contract to deliver at a reasonable time & circumstances, the article to be at the buyer's charge from the time of its landing on the quay.—*NEILL v. WHITWORTH* (1866), L. R. 1 C. P. 684; Har. & Ruth. 832; 35 L. J. C. P. 304; 12 Jur. N. S. 761; 14 W. R.

#### PART VI. SECT. 2, SUB-SECT. 4.—D.

1596i. General rule.—Delivery must be within reasonable time.]—*PISSE v. TASMANIAN ORCHARDISTS & PRODUCERS CO-OPERATIVE ASSOCN., LTD.* (1919), 15 Tas. L. R. 67.—*AUS.*

1596ii. ———.—*LUXFER PRISON Co. v. McLEOD* (1908), 8 W. L. R. 627; 1 Sask. L. R. 75.—*CAN.*

1596iii. ———.—*HEINTZMAN & Co. v. RUNDLE* (1912), 20 W. L. R. 202; 5 Sask. L. R. 121; 4 D. L. R. 688.—*CAN.*

1596iv. ———.—In an action for damages for breach of contract:—*Held*: no time being fixed for payment or delivery by a contract for the purchase & sale of certain goods, the construction of law is, the seller will deliver on payment of the price, & the buyer will pay the price on receiving the goods, & either party is competent

to call upon the other within a reasonable time, to fulfil his part of the agreement, if ready to fulfil his own.—*JUGGUNATH v. BECK* (1870), 2 N. W. 60.—*IND.*

1596v. ———.—Where a contract for sale & delivery "as required" of goods is silent as to time, the law will imply that the specification requiring delivery must be made within a reasonable time after the contract; also, that the contract must be completed within a reasonable time after specification, & such reasonable time for delivery may be explained; & controlled by a trade custom or usage.—*ROSS BROTHERS, LTD. v. SHAW & Co.*, [1917] 2 L. R. 367.—*IR.*

1596vi. ———.—*BRITISH MOTOR BODY CO., LTD. v. THOMAS SHAW (DUNDEE), LTD.*, [1914] S. C. 922.—*SCOT.*

1596vii. ———.—Where no time for delivery is mentioned in the contract of sale, & the vendor fails to deliver within a reasonable time, the purchaser is entitled to wait till the goods are tendered & then repudiate the agreement, & is not bound to make any demand for delivery.—*FEDERAL TOBACCO WORKS v. BARRON & Co.*, [1904] T. S. 483.—*S. AF.*

1596viii. ———.—*GRAF & Co. v. BASSA* (1925), 46 N. L. R. 1.—*S. AF.*

m. Written contract.—Shipment within reasonable time sufficient.]—Where a written order for the purchase of goods makes no mention as to the time for delivery, the shipment of the goods within a reasonable time is sufficient.—*MOORE v. CANADIAN FAIRBANKS CO.* (1913), 14 D. L. R. 49; 41 N. B. R. 485; 13 E. L. R. 517.—*CAN.*

n. What is



**Sect. 2.—Delivery: Sub-sect. 4, D., E., F. & G.]**

844; *sub nom.* NIELL v. WHITWORTH, 14 L. T. 670; 2 Mar. L. C. 352, Ex. Ch.

**1600. Duty to find purchaser—On arrival at named port.]—**ATKINSON v. BUCKLE (1615), Jenk. 324; 3 Bulst. 152; 145 E. R. 236.

**1601. Written contract—Parol evidence—Adding condition as to time.]—**(1) If a written contract for the sale of goods specifies no time for delivering them, in an action for not delivering them, it is not competent for deft. to give parol evidence that it was a condition of sale that the goods should be taken away immediately, or that by the usage of trade where goods are sold to be delivered at a distant day, the time is always mentioned in the written contract.

(2) Although the purchaser of goods neglects, after notice, to carry them away, the seller has no right on that account to resell them.—GREAVES v. ASHLIN (1813), 3 Camp. 426; 170 E. R. 1433, N. P.

*Annotations:—As to (1) Apud, Ford v. Yates (1841), 2 Man. & G. 549. Referred, Startup v. Macdonald (1841), 2 Man. & G. 395; Spallall v. Benecke (1850), 10 C. B. 212; Harnor v. Groves (1855), 3 W. R. 168. Generally, Menid. Rye v. Purcell, [1926] 1 K. B. 446.*

**1602. ——— Representation that goods were ready for shipment—Data determining reasonableness of time.]—**ELLIS v. THOMPSON, No. 1596, ante.

**E. Delay Caused by Vendor.**

**1603. Timber prevented from being felled within time—Performance not enforced after time.]—**In a contract for the purchase of timber, time is of the essence of the contract; & if, by difficulties improperly raised by the vendor, the timber is prevented from being felled & carried away at the time limited by the agreement, the ct. will not afterwards enforce the performance of the contract.—ARKWRIGHT v. STOVELD (1824), Coop. Pr. Cas. 499; 3 L. J. O. S. Ch. 49; 47 E. R. 618.

**1604. Misquotation in invoice.]—**Deft., a Liverpool cotton merchant, on Apr. 2, 1872, authorised pltf.s, merchants at Liverpool & Bombay, to purchase 100 bales Salem's cotton at 8d. per lb., to be shipped by sailing vessel, & to draw for invoice amount at six months' sight; which drafts deft. engaged to accept, with shipping documents attached, & to pay same. On Apr. 22, pltf.s wrote from Bombay that the Salem's cotton would be shipped as soon as it arrived there. On June 14, pltf.s wrote again from Bombay, inclosing invoice of 100 bales Salem's cotton, at 8½d. per lb., & informing deft. that they had drawn upon him at six months' sight for the amount. On July 2, before receiving pltf.s' letter & invoice of June 14, deft. wrote to pltf.s' Liverpool house that he had waited more than a reasonable time, & that he declined to have anything more to do with the cotton. On July 10, deft. received pltf.s' letter & invoice of June 14, & wrote again to pltf.s' Liverpool house, calling attention to the price charged in the invoice, & refusing acceptance of their draft. The following day pltf.s apologised for what they called the clerical error in the price, said they were prepared to rectify the mistake, & also tendered other cotton shipped at the time deft. wished. Deft. refused to have anything more to do with the matter. In an action for payment for this cotton:—*Held:* under the circumstances pltf.s could not recover.—JEFFERSON v. QUERNER (1874), 30 L. T. 867.

LYON v. CREATI (1892), 18 V. L. R. 629.—AUS.

**O. ———.]—**The reasonableness of time cannot depend upon circumstances

unknown to the buyer, & which were undisclosed to him by the seller.—ADLER v. DE WAAL (1887), 8 N. L. R. 87.—S. AF.

**F. Delay Caused by Purchaser.**

**1605. Failure to supply plans as required.]—**On Nov. 28, 1844, deft. contracted to supply pltf. with 150 tons of cast iron girders, according to drawings to be provided by pltf.'s architect, 50 tons to be delivered on or before Dec. 31, 1844; 50 tons, on or before Jan. 28, 1845; & 50 tons, on or before Mar. 31, 1845, provided the drawings for the first 50 tons were delivered within three days, & the drawings for the remainder, within three weeks. Some plans were sent to deft. on Dec. 5, & on Dec. 16, an order was given to him for girders, amounting to about 14 tons. On Mar. 13, after deft. had declined to perform the contract, by reason of the delay, further plans were furnished, & a further order given for girders, amounting to about 50 tons, & the girders ordered on Dec. 16 were demanded. The jury found that the drawings were not delivered within a reasonable time:—*Held:* the contract was entire; & as pltf. had failed to furnish drawings for the whole 150 tons, within a reasonable time, he could not maintain an action for any non-delivery of girders.—KINGDOM v. COX (1848), 5 C. B. 522; 17 L. J. C. P. 155; 10 L. T. O. S. 328; 12 Jur. 336; 136 E. R. 982.

**1606. Ships sent out by purchaser—One ship not having sufficient capacity.]—**In *assumpsit* by the sellers against the buyers for the breach of two contracts for the shipment, at a foreign port, of two several quantities of rye meal, the declaration stated, that, "after the making of the contracts, & before the performance of them, or of any part thereof it was agreed between pltf.s. & defts. that the two contracts should be deemed & taken to be, & to operate as, one contract & should be performed as if same had been one contract for the amount of the two quantities of meal":—*Held:* this allegation was not sustained by proof that the buyers had sent out three vessels to receive the meal, the first of which was not of capacity sufficient to take on board the quantity mentioned in the first contract, & they had received a separate bill of lading of the cargo brought home by that vessel, & accepted a bill drawn on them for the stipulated proportion of that particular cargo. By two contracts, entered into at different times, defts. engaged to ship at Cronstadt, for pltf.s., 250 tons & 350 tons respectively of rye meal—each contract stipulating that the shipment should be made at the first open water, allowing a fair & reasonable time for the arrival out of the vessel & getting the goods down to Cronstadt; that payment should be made one-third at three months from the date of bill of lading; but that, should the vessel not arrive in time for the goods to be shipped before June 30, or the sellers not be able to procure a ship by that date, the sellers should draw for the remainder as specified. In an action by the buyers against the sellers for the breach of these two contracts, defts. pleaded, amongst other pleas, that pltf.s. were not, at & after the arrival of the vessels at Cronstadt, & from thence at & until a fair & reasonable time had elapsed for getting the goods down to Cronstadt, ready & willing to buy & accept & pay for the meal, in manner & form as alleged; & that pltf.s. had not performed the contracts & promises in all things on their part to be performed, in manner & form as alleged:—*Held:* the circumstance of the buyers having sent out three vessels, neither of which was of capacity sufficient to take on board the quantity

**P. Extension of time without time fixed—Delivery within reasonable time.]—**CURRAN v. O'LEARY (1907), 5 E. I. R. 80.—CAN.

mentioned in either contract, & which arrived at the port of loading at different times, did not entitle defts. to a verdict upon these two issues; but the buyers were entitled to maintain an action against the sellers, although they had not sent out one vessel to receive the quantity mentioned in each contract.—*MENIAEFF v. READE, READE v. MENIAEFF* (1849), 7 C. B. 139; 18 L. J. C. P. 145; 12 L. T. O. S. 376; 137 E. R. 57.

**1607. Order for goods "as required"—Failure to give notice of requirements.**—A contract under seal recited that defts., a railway co., were "desirous of being supplied with 350,000 sleepers of Dantzic or Memel timber." This contract was based upon a specification, prepared by the co., in which it was stated, that, "the number of sleepers required under this specification is 350,000; one-half will have to be delivered in 1847, & the remainder by Midsummer, 1848"; that, "the deliveries are to be made either by stacking the sleepers upon a wharf, or properly loading them into a boat or barge, or other vessel, as may be directed by the resident engineer"; & that the payments were to be made upon the engineer certifying the due delivery of each cargo. By the contract, plffs. covenanted to supply the co. with 350,000 sleepers of the quality & description mentioned, & to deliver them within the times mentioned in the specification, "as & when, & in such quantities, & in such manner, as the engineer of the co. should, by order or requisition in writing, from time to time, within the period limited by the specification, direct or require." The engineer was to be at liberty, at any time before the complete execution of the contract "by the delivery of the whole number of 350,000 sleepers," to alter their size, form, or construction, or to vary the times of delivery "of any of the sleepers which should not then have been delivered." Defts., in consideration of the premises, covenanted to pay to plffs., "for or in respect of the sleepers hereinbefore contracted to be supplied," a certain price, upon their engineer certifying the due delivery of each cargo. It was further agreed that £2,000 of the price should be retained by the co. until two months after their engineer should have certified that "the whole of the 350,000 sleepers hereinbefore agreed to be supplied by the contractors, shall have been supplied":—*Held*: this was a positive contract by plffs. to supply, & by defts. to take & to pay for, the whole number of 350,000 sleepers; & plffs. were entitled to notice of the times when the sleepers would be required.

The third plea traversed an averment in the declaration that defts. had notice that plffs. were ready & willing to supply the sleepers, & alleged that defts. had no notice of any sleepers being ready for them at the port of delivery:—*Held*: the allegation of readiness & willingness was unnecessary, for, plffs. were not bound to deliver until they received the orders or directions of the co.'s engineer.—*GREAT NORTHERN RY. CO. v. HARRISON* (1852), 12 C. B. 576; 22 L. J. C. P. 49; 19 L. T. O. S. 259; 16 Jur. 565; 138 E. R. 1032, Ex. Ch.

*Annotations*:—*Refd.* *Glenn v. Leith* (1853), 1 C. L. R. 569; *M'Intyre v. Belcher* (1863), 14 C. B. N. S. 654; *Clarke v. Watson* (1865), 18 C. B. N. S. 278.

**1608. Request for postponement of shipment.**—Count on a contract by plff. to deliver to deft. at C. a cargo in Mar. Breach, that deft. would not

accept, or pay for, the goods. Pleas: (a) *Non assumpsit*; (b) That plff. was not ready or willing to deliver at C. in Mar. Issue thereon. At the trial, it appeared that deft. had by letter requested plff. to postpone the shipment for deft.'s convenience; that the ship arrived in C. on the evening of Mar. 31, & consequently that the cargo was not ready for delivery till Apr. The judge, on plff.'s application, amended the count by inserting an averment that, at deft.'s request, plff. delayed the shipment, & deft. promised to accept a delivery of that shipment with reasonable speed, & exonerated plff. from delivering in Mar. Deft. objected to the amendment being made, & requested a postponement of the trial, which the judge refused. Thereupon deft. refused to alter his plea, or appear further; & the jury, under the judge's direction, assessed the damages. On a motion for a new trial:—*Held*: whether the discretion of a judge at *nisi prius* in making an amendment to raise the real point in controversy, & in imposing terms, be reviewable in banc or not, it was in this case properly exercised; no injustice being suggested to have been sustained by deft. in consequence of the refusal to postpone the trial, the discretion of the judge in that respect ought not to be reversed.—*TENNYSON v. O'BRIEN* (1855), 5 E. & B. 497; 26 L. T. O. S. 59; 119 E. R. 565.

*Annotation*:—*Refd.* *Savage v. Canning* (1867), 16 W. R. 133.

**1609. Demand for inspection—No expert sent to inspect goods.**—Resps. sold to appls. a quantity of iron. Before delivery was completed appls. informed resps. that they would require inspection before accepting delivery of the iron which was still undelivered; & it was agreed that appls. should send an expert to inspect the iron at the works of the manufacturer. Appls., though repeatedly requested by resps. to do so, failed to send an inspector as arranged, & the iron remained undelivered. Ultimately applt. repudiated the contract on the ground of delay & claimed damages for failure to deliver. The judge before whom the claim was tried, gave judgment for appls. On appeal, judgment was reversed & judgment was entered for resps., & appls. now appealed to the House of Lords:—*Held*: whether the contract was originally a contract to deliver within a fixed time or to deliver within a reasonable time, resps.' obligation to have the iron dispatched from the works was suspended until appls. had sent their inspector, an event which never happened; & by demanding inspection appls. had extended the time allowed for delivery, & such extended time had not expired when appls. repudiated the contract.—*POTTS (W.) & CO., LTD. v. BROWN, MACFARLANE & CO., LTD.* (1924), 30 Com. Cas. 64, 11 L. J.

**Duty of purchaser to name ship.**—See Nos. 1565–1569, *ante*.

#### G. Particular Terms.

**1610. "When requested."**—*BOWDELL v. PARSONS*, No. 1506, *ante*.

**1611. "Directly."**—A contract to be performed "directly," means, to be performed, not "within a reasonable time," but "speedily," or, at least, "as soon as practicable."

On Feb. 18, plff. wrote to deft., offering to supply him with linseed cake at £10 15s. per ton; on Feb. 19, deft. replied, "I can take 5 tons at £10 10s.,

q. Failure to remove goods within reasonable time.]—*DOLAN v. BAKER* (1905), 10 O. L. R. 259; 3 O. W. R. 833; 5 O. W. R. 229.—*CAN.*

#### PART VI. SECT. 2, SUB-SECT. 4.—F.

**16071. Order for goods "as required"—Failure to give notice of requirements.**—*NICKERSON v. GARDNER* (1853), 12

U. C. R. 219.—*CAN.*

**160711.** —[—]—*SANSCHAGRIN v. ECHO FLOUR MILLS CO., LTD.* [1922] 3 W. W. R. 694; 70 D. L. R. 380; 32 Man. L. R. at p. 255.—*CAN.*

**Sect. 2.—Delivery: Sub-sect. 4, G.; sub-sects. 5 & 6, A. & B.]**

but it must be put on board directly"; & on Feb. 22, pltf. again wrote: "I shall ship you 5 tons best cakes to-morrow":—*Held*: this correspondence did not prove a contract on the part of deft. to accept cake "to be delivered within a reasonable time."—*DUNCAN v. TOPHAM* (1849), 8 C. B. 225; 18 L. J. C. P. 310; 13 L. T. O. S. 304; 137 E. R. 495.

*Annotations*:—*Refd.* British & American Telegraph Co. v. Colson (1871), L. R. 6 Exch. 108; Taylor v. Jones (1875), 1 C. P. D. 87. *Mentd.* *Re* Imperial Land Co. of Marseilles, Harris' Case (1872), 7 Ch. App. 587; Evans v. Nicholson (1875), 32 L. T. 778; Household Fire Insee. v. Grant (1879), 4 Ex. D. 216; Grundy v. Townsend (1888), 36 W. R. 531.

**1612. "As required."**—*GREAT NORTHERN RY. Co. v. HARRISON*, No. 1607, *ante*.

**1613.** —. —.]—To an action for not delivering iron sold by deft. to pltf. under a contract "to be delivered as required," deft. pleaded, that pltf. did not, within a reasonable time, request deft. to deliver the iron. Replication, that pltf., so soon as the iron was required by him, requested deft. to deliver it. On demurrer to the replication:—*Held*: the plea was bad, since deft. was bound to inquire of pltf. whether he would have the iron, before he could rescind the contract on the ground that he was not, within a reasonable time, required to deliver it.—*JONES v. GIBBONS* (1853), 8 Exch. 920; 1 C. L. R. 461; 22 L. J. Ex. 347; 1 W. R. 438; 155 E. R. 1626.

*Annotations*:—*Expld.* Pearl Mill Co. v. Ivy Tannery Co. [1919] 1 K. B. 78. *Refd.* Hartley v. Hyman, [1920] 3 K. B. 475. *Mentd.* Kensington & Knightsbridge Electric Lighting Co. v. Notting Hill' Electric Lighting Co. (1918), 87 L. J. K. B. 565.

**1614.** —. —.]—*PEARL MILL Co. v. IVY TANNERY Co.*, No. 2547, *post*.

**1615. "As soon as possible."**—A contract by a manufacturer to furnish certain specified goods "as soon as possible," means, within a reasonable time, regard being had to the manufacturer's ability to produce them, & the orders he may already have in hand.—*ATTWOOD v. EMERY* (1856), 1 C. B. N. S. 110; 26 L. J. C. P. 73; 5 W. R. 19; 140 E. R. 45; *sub nom.* *ATWOOD v. EMERY*, 28 L. T. O. S. 85.

*Annotations*:—*Distd.* Bergheim v. Blaenavon Iron & Steel Co. (1875), 32 L. T. 451. *Expld.* Hydraulic Engineering Co. v. McHaffie (1878), 4 Q. B. D. 670.

**1616.** —. —.]—Pltfs., in July, 1877, contracted with J. to make for him a machine, to be delivered at the end of Aug. Defts. contracted with pltfs. to make "as soon as possible" part of the machine called a "gun." Defts. were aware that the machine was wanted by J. at the end of Aug., but they did not finish the "gun" until the latter part of Sept. J. then refused to accept the machine from pltfs. The delay on the part of defts. was owing to the circumstance that at the time of undertaking to manufacture the "gun" they had not a foreman competent to prepare certain patterns, without which it could not be made:—*Held*: defts. had committed a breach of their contract, & pltfs. were entitled to recover damages for the loss of profit upon the contract with J., & for the expenditure uselessly incurred by them in making other parts of the machine.—

*HYDRAULIC ENGINEERING Co. v.* (1878), 4 Q. B. D. 670; 27 W. R. 221, C. A.

*Annotations*:—*Consd.* Hammond v. Bussey (1887), 20 Q. B. D. 79. *Refd.* Verlest's Administratrix v. Motor Union Insee., [1925] 2 K. B. 137; *Re* Hall & Pim (Junior) (1927), 137 L. T. 585.

**1617. "Not ready to sail."**—In a contract for the sale of flour free on board the first class steamer T., from S. to C., it was stipulated that the vessel was "to sail from L. to S., on or before Dec. 1, 1855, accidents excepted; if such should happen; & the vessel not be ready to sail on Dec. 4, buyers to have the option of cancelling the contract." The vessel was prevented from sailing from L. on Dec. 1, by an accident, & she was not ready to sail until six o'clock in the evening of Dec. 4, when she was prevented by stress of weather, & did not sail till the following day:—*Held*: the meaning of the contract was, that if she were prevented sailing by an accident on Dec. 1, the buyers should not have the power to cancel the contract if she were "ready to sail" on Dec. 4, although she did not actually sail until after that day.—*SMYTH v. SCHILIZZI* (1856), 4 W. R. 460.

**1618. "During the season."**—Sale of coal, "cost, freight, and insurance to Cronstadt, including craft risk to St. Petersburg town . . . shipment to be made during the season":—*Held*: "during the season" referred not to the average or ordinary time during which the river was closed by ice, but to the actual time at which in that particular year it was closed.—*LESSING v. HORSLEY* (1891), 7 T. L. R. 352, C. A.

**1619. "Expected ready to load."**—A clause in a contract that a ship is "expected ready to load" at a given date does not mean that the ship must be in such a position, whether that position be known to the parties or not, that she will, according to all probable reckoning, be able to load by the date indicated. It means that there must be an honest belief, founded on reasonable grounds, in the minds of the sellers making the representation that she will be able to load at that date. Where such a representation was made, & there were no reasonable grounds for making it, & the ship was not ready to load until a long time afterwards, there was a breach of condition entitling the buyers to avoid the contract.—*SANDAY & Co. v. KEIGHLEY, MAXTED & Co.* (1922), 91 L. J. K. B. 624; 127 L. T. 327; 38 T. L. R. 561; 66 Sol. Jo. 437; 15 Asp. M. L. C. 596; 27 Com. Cas. 296, C. A.

**SUB-SECT 5.—PROOF OF DELIVERY.**

**1620. Entries in books—By servants in usual course of business—Entry by deceased servant.**—If a tradesman uniformly obliges his servants to subscribe in his books an account of the goods they deliver, proof of the subscription of a servant who is dead is evidence of the delivery of the goods contained in the account subscribed.—*PRICE v. TORRINGTON (EARL)* (1703), Holt, K. B. 300; 2 Ld. Raym. 873; 1 Salk. 285; 90 E. R. 1065.

*Annotations*:—*Apld.* Doe d. Patteshall v. Turford (1832), 3 B. & Ad. 890. *Consd.* Brain v. Preece (1843), 11 M. & W. 773. *Apld.* Rawlins v. Hickards (1860), 28 Beav. 370; Mellor v. Walmesley, [1905] 2 Ch. 164. *Consd.* Mercer v. Donne, [1905] 2 Ch. 538. *Refd.* Chambers v. Bernascone (1834), 1 Cr. M. & R. 347; Poole v. Dicas (1835), 7 C. & P.

**431.—IND.**

a. "Arrive." — *MONTGOMERY v. MIDDLETON* (1862), 13 I. C. L. R. 173; 14 Ir. Jur. 370.—*IR.*

**PART VI. SECT. 2, SUB-SECT. 5.**

b. *Delivery to purser of steamer—Evidence of similar parcel of goods seen*

**PART VI. SECT. 2, SUB-SECT. 4.—G.**

**1615 i. "As soon as possible."**—*BONNER-WORTH Co. v. GEDDES BROTHERS* (1921), 64 D. L. R. 257; 50 O. L. R. 196.—*CAN.*

r. "On or about."—*LOOKHART v. WILKIN (circa 1862)*, Mac. 120.—*N.Z.*  
t. *Shipment at seller's option during*

*August–September.*—The terms, "shipment at seller's option during Aug.–Sept.," in a contract, do not mean that the seller has an optional period of two separate months in which he can deliver, but they refer merely to the character of the delivery.—*MAC-KERTICH v. NOBO COOMAR RAY* (1903), 1 L. R. 30 Cal. 477; 7 C. W. N.

79; Doe d. Padwick v. Skinner (1848), 3 Exch. 84; Doe d. Kinglake v. Bevis (1849), 7 C. B. 456; Turner v. Hutchinson (1861), 25 J. P. 149; Smith v. Blakey (1867), L. R. 2 Q. B. 326; The Henry Coxon (1878), 3 P. D. 156; Sturla v. Freecia (1880), 5 App. Cas. 623; Haines v. Guthrie (1884), 13 Q. B. D. 818; Lyoll v. Kennedy (1887), 56 L. T. 647; Wolsey v. Pethick (1908), 1 B. W. C. C. 411; Mills v. Mills (1920), 36 T. L. R. 772; Young v. Grierson (Graham) (1924), 11 R. P. C. 548; Jones v.

**1621. — Witness having no clear recollection of actual event.**—When a boy went to pltf.'s warehouse with a cart, & delivered a letter, containing an order for some wine, & a clerk swore that he had removed on the day in question from his master's cellar some wine corresponding in quantity & quality with that mentioned in the order, that he had made an entry of this in the day-book according to the usual course of the business, that he himself had superintended the packing of the wine, & that the word "nil" would have been entered in the day-book, if it had not been sent according to the order:—*Held*: sufficient evidence of a delivery to the boy, although the witness had no recollection of seeing the wine given to the boy, or put into the cart.—SHEPPARD v. RADFORD (1839), 3 J. P. 770.

**1622. — By person other than witness.**—To prove the delivery of goods in the shop of a trader, an entry made in his books, though not by the witness, under what circumstances it may be evidence.—DIGBY v. STEDMAN (1795), 1 Esp. 328; 170 E. R. 373, N. P.

**1623. — Accounts of stock in excise books.**—*Qu*: whether accounts of stock kept in the excise books are evidence between third parties, as to the delivery of goods?

Copies of such accounts may be given in evidence. *Semle*, on the ground that the originals are public books, but in such case, the copies produced must be proved by a witness, who has examined them with the originals, & can swear to their accuracy.—DUNBAR v. HARVIE (1820), 2 Bli. 351; 4 E. R. 356, H. L.

**1624. Sub-sale by purchaser.—Removal of goods by sub-purchaser.**—After a bargain & sale of a stack of hay between the parties on the spot, evidence that the vendee actually sold part of it to another person, by whom, though against the vendee's approbation, it was taken away, is sufficient to warrant the jury in finding a delivery to & acceptance by the vendee, thereby taking the case out of Stat. Frauds.—CHAPLIN v. ROGERS (1801), 1 East, 192; 102 E. R. 75.

*Annotations*:—*Distd.* Blenkinsop v. Clayton (1817), 7 Taunt. 597; Howe v. Palmer (1820), 3 B. & Ald. 321. *Consd.* Maberley v. Sheppard (1833), 10 Bing. 99; Morton v. Tibbett (1850), 15 Q. B. 428. *Appld.* Marshall v. Green (1875), 1 C. P. D. 35; Rawlinson v. Mort (1905), 93 L. T. 555. *Refd.* Smith v. Surman (1829), 9 B. & C. 561; Eddar v. Dnafield (1841), 5 Jur. 317; Hilton v. Tucker (1888), 57 L. J. Ch. 973.

**1625. Hearsay evidence.—Reference to evidence of another.**—If a person says, I will pay you money, if A. says it is due, & A. being applied to, says it is due, but is dead at the time of the action brought, what he had said respecting the debt, is evidence.—DANIEL v. PITT (1806), 1 Camp. 366, n.; 6 Esp. 74; Peake, Add. Cas. 238; 170 E. R. 988, N. P.

*Annotations*:—*Refd.* Sybray v. White (1836), 1 M. & W. 435. *Mentd.* R. v. Mallory (1884), 13 Q. B. D. 33.

**1626. Goods sent abroad on agent's order—**

*on wharf at destination of ship.*—PETER v. LARA (1914), 48 N. S. R. 202; 20 D. L. R. 786.—CAN.

*c. Burden of proof.*—Where the delivery of goods after a sale is as consistent with deft.'s account of the transaction, delivery on approval, as it is with pltf.'s, the trial judge is in

error in regarding the delivery as a fact which requires explanation & throws the burden on deft.—JOHNSON v. DURANT (1905), 37 N. S. R. 471.—CAN.

*d. — Where buyer's admission of delivery discredited.*—WESTERN OIL Co., LTD. v. SMITH (Sask.), [1927] 4

*Received & used abroad by purchaser.*—Proof that pltf. sent goods to deft., resident in a foreign country, upon the order of merchants residing in London, & that deft. received & used the goods, is *prima facie* evidence of goods sold & delivered to deft.—BENNETT v. HENDERSON (1819), 2 Stark. 550.

**1627. Copies of accounts in excise books.**—DUNBAR v. HARVIE, No. 1623, *ante*.

**1628. Accounts specifying goods supplied.—Passed by managing committee of company.—Evidence of amount supplied.**—Pltf. brought his action for goods supplied in 1866 to a mining co. conducted on the cost-book principle, of which co. deft. was a shareholder. The last change of partners was in Dec. 1865. To prove his claim, pltf. proved an order by the purser to supply goods, gave general evidence of supply, & put in evidence accounts specifying the amount supplied, submitted by the purser to & passed by the managing committee of the co. It appeared also that payments had been made in 1866, which pltf. had appropriated to a debt incurred before Dec. 1865:—*Held*: (1) there was evidence of the amount supplied; (2) pltf. was justified in his appropriation.—GEAKE v. JACKSON (1867), 36 L. J. C. P. 108; 15 L. T. 509; 15 W. R. 338.

#### SUB-SECT. 6.—GOODS IN POSSESSION OF THIRD PERSON.

##### A. In General.

*See Sale of Goods Act, 1893 (c. 71), s. 29 (3).*

**1629. Position of third person.—Agent of purchaser.**—WOOD v. TASSELL, No. 1634, *post*.

**1630. Delivery directed to named person.—Forged order.—Liability of bailee.**—A. directs the London Dock co. to deliver a quantity of hides belonging to him in their custody to B., supposing that B. has purchased them from him, the dock co. delivers them upon an order purporting to be the order of B., but which is a mere forgery; B. in fact not having purchased the goods. The dock co. are liable to A., although he neglected to apply to B. till four months afterwards, when the supposed time of credit expired. & although A. might, after discovering the fraud, have recovered possession of his hides from another person.—LUBBOCK v. INGLIS (1815), 1 Stark. 104.

**Stoppage in transitu.—Possession of carriers, wharfingers or other bailees.**—*See Part VII., sect. 4, sub-sect. 3, C., post.*

##### B. Duties of Seller and Buyer.

**1631. Duties of seller.—To secure delivery to purchaser.—Warehoused goods.—Transfer of name.**—Where, in a contract for the sale of sugar, there is the following term: "free on board a foreign ship," the seller is not bound to deliver it into the hands of the purchaser, or to transfer it into his name in the books of the warehouse where it lies, but only to put it on board a foreign ship, which it is the duty of the purchaser to name.—WACKERBARTH v. MASSON (1812), 3 Camp. 270; 170 E. R. 1378, N. P.

*Annotation*:—*Appld.* Malne Spinning Co. v. Sutcliffe (1918), 87 L. J. K. B. 382.

D. L. R. 1123; [1927] 3 W. W. R. 574.—CAN.

#### PART VI. SECT. 2, SUB-SECT. 6.—B.

*a. Duties of seller.—To secure delivery to purchaser.—Usage of trade to contrary.*—RANKIN v. GODDARD (1858), 4 All. 155.—CAN.

**Sect. 2.—Delivery: Sub-sect. 6, B. & C.; sub-sect. 7, A. (a), (b), (c) & (d).]**

**1632.** *S. P. WETHERELL v. COAPE* (1812), 3 Camp. 272, n.; 170 E. R. 1379.

**1633.** ———— *SMITH v. CHANCE*, No. 1471, ante.

**1634.** ———— *By giving delivery order.*—Pltf. bought of deft., & paid for, hops which lay at the warehouse of F., having been placed there by a party who had sold them to deft. After the sale, pltf. was informed that the hops were at F.'s, had them weighed there, & took away part. Some days after, he applied for the residue; but they had been taken away in the meantime by a creditor of the first seller. Deft. had not given pltf. a delivery order, nor had he demanded one:—*Held*: F. had the residue of the hops in his possession as agent to pltf., & deft. was not liable to pltf. for the non-delivery of them; therefore, pltf. having brought *assumpsit* for the non-delivery, & deft. having pleaded that he did deliver; a misdirection to leave it to the jury whether deft. ought to have given pltf. a delivery order.—*WOOD v. TASSELL* (1844), 6 Q. B. 234; 115 E. R. 90.

**1635.** ———— *Within reasonable time.*—Where there is a contract for the sale of goods, although described as lying in the possession of wharfingers, carriers, etc., subject to their lien for charges, yet there is an implied undertaking on the part of the seller that they shall be delivered to the purchaser, on his application, within a reasonable time, & readiness to pay the charges thereon; & if, upon such application, the delivery is refused, the seller will be liable for damages to the purchaser.—*BUDDLE v. GREEN* (1857), 27 L. J. Ex. 33.

**1636.** ———— *To secure responsibility of third party for goods.*—*CLARKE v. HUTCHINS*, No. 1795, post.

**1637.** ———— *Procuring goods to be booked.*—A delivery of goods at a wharf is not sufficient to charge the purchaser, unless the seller procures them to be booked, or takes a receipt for them, or delivers them in such a manner as to furnish a remedy over against the wharfinger.

A delivery of goods to a carrier or wharfinger with due care & diligence is sufficient to charge the purchaser; but he has a right to require, that in making this delivery due care & diligence shall be exercised by the seller (*LORD ELLENBOROUGH, C.J.*).—*BUCKMAN v. LEVI* (1813), 3 Camp. 414; 170 E. R. 1429, N. P.

**1638.** ———— *Taking receipt.*—*BUCKMAN v. LEVI*, No. 1637, ante.

**1639.** ———— *To pay charges.*—*BUDDLE v. GREEN*, No. 1635, ante.

**1640.** ———— *To sign delivery order—Regulation of dock company.*—Wine was entered in the books of the London Dock Co. in the name of S., who was clerk to pltf.s, a firm of wine merchants. The bills of lading for the same wine were in the hands of H., who was consignee of the wine from Spain. A request by H. for the return of part of the wine to him was refused by pltf.s. until H. returned to pltf.s. an acceptance of theirs which had been given for part of the wine in question. H. then exhibited the bills of lading to the dock co., & the solrs. of the latter wrote to pltf.'s solrs., intimating that they must deliver the wine to H., although entered in the name of S., unless an order were

obtained by pltf.s. restraining such delivery. By the printed regulations of the dock co. it is provided that orders for delivery cannot be acted upon unless signed by the party in whose name the goods stand in the co.'s books. Pltf.s. filed a bill for an injunction against the co. & H.; & praying for costs against both defts. An injunction was granted; & afterwards by arrangement, upon the bill of exchange being returned, the wine was ordered to be delivered up to deft.—*WRIGHT v. LONDON DOCK CO.* (1858), 32 L. T. O. S. 117; 4 Jur. N. S. 1134; on appeal (1859), 32 L. T. O. S. 364, L. J.J.

**1641.** *Duties of buyer—To pay duties.*—*WINKS v. HASSALL*, No. 2062, post.

**1642.** ———— *To present warrant—Meaning of "presentation."*—A. contracted to sell 1,000 tons of iron to B., & indorsed & delivered to him a document in the following form, addressed to A., & signed by certain ironmasters: "We hold at your disposal 1,000 tons of grey forge pig iron, of 2,240 lb. to the ton, which we engage to deliver to your order, free of all charge, into boats, on the presentation of this document, duly indorsed by you":—*Held*: "presentation" meant "delivering up" the document to the ironmasters; & consequently, that a plea that deft. could not & did not procure the iron according to the tenor & effect thereof, was not sustained by proof that the document had been shown to the ironmasters, & they refused to deliver the iron unless the document was previously left with them.—*BARTLETT v. HOLMES* (1853), 13 C. B. 630; 1 C. L. R. 159; 22 L. J. C. P. 182; 21 L. T. O. S. 104; 17 Jur. 858; 1 W. R. 334; 138 E. R. 1347.

#### *C. Attornment by Third Person.*

*See Sale of Goods Act, 1893 (c. 71), s. 29 (3).*

**1643.** *Position pending attornment.*—Goods were shipped by pltf. from abroad to this country, on the verbal order of deft., at a price exceeding £10. They were sent to a shipping agent of pltf.'s in London, who received them & warehoused them with a wharfinger, informing deft. of their arrival. The wharfinger handed to the shipping agent a delivery warrant, whereby the goods were made deliverable to him or his assignees by indorsement, on payment of rent & charges. The agent indorsed & delivered this warrant to deft., who kept it for several months, & notwithstanding repeated applications, did not pay the price of or charges upon the goods, nor return the warrant, but said he had sent it to his solr., & that he intended to resist payment, for that he had never ordered the goods; & that they would remain for the present in bond:—*Held*: there was no such delivery to & acceptance by deft. of the goods, as to satisfy Stat. Frauds, s. 17.

This warrant is no more than an engagement by the wharfinger to deliver to the consignee, or anyone he may appoint; & the wharfinger holds the goods as the agent of the consignor, who is the vendor's agent, & his possession is that of the consignee, until an assignment has taken place, & the wharfinger has attorned, so to speak, to the assignee, & agreed with him to hold for him. Then, & not till then, the wharfinger is the agent or bailee of the assignee, & his possession that of the assignee, & then only is there a constructive delivery to him (*PARKE, B.*).—*FARINA v. HOME*

**1.** ———— *By finding limits of permits for cutting on sale of growing timber.*—Where pltf.s. were to supply ties, but defts. were to obtain permits for the cutting of such ties, the burden

of finding limits where such ties can be obtained is on defts.—*KELLY & CLOSE v. NEPIGON CONSTRUCTION CO.* (1912), 23 O. W. R. 298; 4 O. W. N. 279; 8 D. L. R. 116.—*CAN.*

#### **PART VI. SECT. 2, SUB-SECT. 6.—C.**

**g. Necessity for attornment.**—*CHECKIK v. PRICE* (Man.) (1911), 18 W. L. R. 253.—*CAN.*



(1846), 16 M. & W. 119; 16 L. J. Ex. 73; 8 L. T. O. S. 277; 153 E. R. 1124.

—*Apld.* Saunders v. Topp (1849), 4 Exch. 390; Meredith v. Melgh (1853), 2 E. & B. 361. *Consd.* Castle v. Sworder (1861), 6 H. & N. 828; Dublin City Distillery v. Doherty, [1914] A. C. 823. *Refd.* Knights v. Wiffen (1870), L. R. 5 Q. B. 660.

1644. —.]—GODTS V. ROSE, No. 1076, *ante*.

1645. Position after attornment.]—FARINA v. HOME, No. 1643, *ante*.

1646. How effected.]—POULTON & SON v. ANGLO-AMERICAN OIL CO., LTD., No. 2077, *post*.

1647. Refusal to acknowledge purchaser's title—Allegation of usage of trade—Property not passing until remeasurement of goods.]—A warehouseman who, on receiving an order from the seller of malt to hold it on account of the purchaser, gives a written acknowledgment that he so holds it, cannot set up as a defence for not delivering it to the purchaser, that by the usage of trade the property in malt sold is not transferred till it is remeasured, & that before the malt in question was remeasured the seller became bkpt.—STONARD v. DUNKIN (1809), 2 Camp. 344; 170 E. R. 1178, N. P.

*Annotations* :—*Consd.* Hawes v. Watson (1824), 2 B. & C. 540. *Apld.* Gosling v. Birnie (1831), 7 Bing. 339; Holl v. Griffin (1833), 10 Bing. 246; Woodley v. Coventry (1863), 2 New Rep. 35. *Distd.* Biddle v. Bond (1865), 6 B. & S. 225. *Apld.* Knights v. Wiffen (1870), L. R. 5 Q. B. 660; Henderson v. Williams, [1895] 1 Q. B. 521. *Consd.* Laurie & Morewood v. Dudin, [1925] 2 K. B. 383.

1648. Order by seller to third party to permit removal.]—A. sells to B. a rick of hay, standing on land in the occupation of C., at an entire price, undertaking to deliver it to B. before a certain day, upon request, B. engaging to take it away on or before that day; C. having previously acknowledged the hay to be the property of A., & consented that it should remain on the premises until that day. A. gives an order to C. to permit B. to remove the hay, which C. refuses to do :—*Held* : a sufficient delivery of the hay, as between A. & B.—SALTER v. WOOLLAMS (1841), 2 Man. & G. 650; Drinkwater, 146; 3 Scott, N. R. 59; 10 L. J. C. P. 145; 133 E. R. 906.

*Annotations* :—*Refd.* Taplin v. Florence (1851), 15 Jur. 402; Wood v. Baxter (1883), 49 L. T. 45.

1649. Refusal to attorn—Liability in trover.]—Where plffs. sold goods to T., who paid for them, & was to take them away, but deft. becoming possessed of the place in which the goods were deposited, plffs.' attorney, accompanied by T., demanded them of deft., telling him that they belonged to plffs., & that they had sold them to T.; to which deft. answered that he would not deliver them to any person whatsoever, & afterwards plffs. repaid the money to T. & brought trover against deft. :—*Held* : this demand & refusal were sufficient evidence of a conversion to support the action, & a new demand by plffs. after they had repaid the money to T. was not necessary.—PATTISON v. ROBINSON (1816), 5 M. & S. 105; 105 E. R. 990.

Whether third person can dispute bailor's title generally.]—*See* BAILMENT, Vol. III., pp. 100, 101, Nos. 281–285.

h. —.]—RUBBI v. HARVEY (1908), 25 S. C. 312; 18 C. T. R. 296.—S. AF.

PART VI. SECT. 2, SUB-SECT. 7.—A. (a).

k. Change of place of delivery at request of buyer—Liability for extra freight.]—SYMMERS v. LIVINGSTONE (1885), 10 A. R. 355.—CAN.

l. Option of buyer to increase or

reduce distance of delivery—Corresponding increase or reduction of freight—Usage of trade.]—It is the usage of the trade, if oats are to be delivered at a certain point on the railway, at a certain price, with an option to the buyer to direct delivery at points either this side or beyond the place of delivery, that the freight should be either added or deducted as the case might be.—SUMNER v. THOMPSON (1899), 31 N. S. R. 481.—CAN.

SUB-SECT. 7.—EXPENSES IN CONNECTION WITH DELIVERY.

A. Particular Expenses.

(a) Freight.

*See* Sale of Goods Act, 1893 (c. 71), s. 29 (5); &, generally, SHIPPING.

(b) Demurrage.

*See* Sale of Goods Act, 1893 (c. 71), s. 29 (5); SHIPPING.

(c) Liability for Extraordinary Traffic.

*See* Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23; Locomotives Act, 1898 (c. 29), s. 12 (1) (c); &, generally, HIGHWAYS, Vol. XXVI., pp. 467–470, Nos. 1808–1828.

(d) Other Expenses.

*See* Sale of Goods Act, 1893 (c. 71), s. 29 (5).

1650. Expenses borne by both parties—Customary commission of agent—Sale of colonial produce.]—Where colonial produce is sold, through the intervention of a broker; by the usage of trade in London, which was held to be valid, he is entitled in all instances, if there be no express stipulation to the contrary, to  $\frac{1}{2}$  per cent. commission from the purchaser as well as from the seller.—ETCKE v. MEYER (1813), 3 Camp. 412; 170 E. R. 1429, N. P.

1651. Expenses borne by purchaser—River dues—Ship provided by purchaser.]—A special Act imposes certain river dues in respect of goods carried on the river Ribble, for every time of passing certain lines, without saying by whom they are to be paid. Harbours, Docks & Piers Clauses Act, 1847 (c. 27), which is incorporated with the special Act, provides, by sect. 42, that rates in respect of goods shipped or unshipped within the limits of the harbour, dock or pier shall be paid, in case the goods are to be shipped, before shipment, or in case they are to be unshipped, before removal from the premises of the undertakers. In the case of coals which A. had sold to B. & contracted to deliver on board a ship to be provided by B. :—*Held* : even if sect. 42 of the general Act be applicable to dues under sect. 71 of the special Act, A. was not liable to the co. for such dues; & A. was not the shipper of coals so as to be "owner" within the interpretation clause of the general Act.—RIBBLE NAVIGATION CO. v. HARGREAVES (1856), 17 C. B. 385; 25 L. J. C. P. 97; 26 L. T. O. S. 259; 139 E. R. 1122.

1652. — Cost of dredging—To enable ship to come alongside wharf.]—Applts. purchased from resps. a cargo of oil in bulk to be shipped by a named steamer & to be delivered by the steamer into buyers' storage tanks, & the buyers undertook to receive the oil from the steamer through their pipe lines at the discharging berth. By a contract between the buyers & a dock co. the preferential use of a certain wharf in the Thames was granted to the buyers, & facilities for pipe lines to the storage tanks were also given to them, & the dock co. agreed to clear out a berth to enable a steamer

PART VI. SECT. 2, SUB-SECT. 7.—A. (d).

m. Expenses borne by purchaser—Customs duty.]—Plffs. bought from deft. certain coal, shipped to deft. at Toronto from a foreign port, & then lying on board the vessel in the Welland Canal. A sale note was given, stating only the quantity & price, & the time by which it was to be taken out of the vessel :—*Held* : deft. was not obliged



*Sect. 2.—Delivery: Sub-sect. 7, A. (d). B. (a), (b) & (c); sub-sect. 8, A.]*

350 feet long to lie safely alongside, but the purchasers had no right as between themselves & the dock co. to have vessels of greater length than 350 feet at the wharf. The sellers knew that the buyers' pipe lines were at that wharf, & they contracted with reference to that place of discharge. The steamer named in the contract of sale was 471 feet long & could not, therefore, lie at the berth. Dredging operations had accordingly to be undertaken, & then the steamer came alongside & delivered her cargo. The sellers did not know that the berth was too short for the steamer, & the buyers did not know the length of the steamer, though both parties might by inquiry have ascertained these facts:—*Held*: on the true construction of the contract the buyers undertook to procure for the sellers the right to have the steamer at the berth for the purpose of discharging there, & if the dredging operations were necessary in order to get the consent of the dock co. to the steamer coming alongside, the expenses of dredging must be borne by the buyers as being an expense necessary to enable them to perform their contract.—*Re SHELL TRANSPORT & TRADING CO. & CONSOLIDATED PETROLEUM CO.* (1904), 20 T. L. R. 517; 48 Sol. Jo. 509.

**1653. — Cost of stevedoring.]**—Where the consignees of two cargoes of coal sold them to the Govt. on c.i.f. terms, the latter guaranteeing their discharge, "cost of stevedoring to be paid by the Govt.," & it appeared that the consignees had previously to the knowledge of the purchasers agreed with the shipowners to effect the discharge, "steamer paying 1s. per ton towards cost of same":—*Held*: the finding of the cts. below that the purchasers' contract had been fulfilled by payment of the said cost less the stipulated contribution by the shipowners would not be disturbed.—*WHITE v. WILLIAMS*, [1912] A. C. 814; 82 L. J. P. C. 11; 107 L. T. 99; 28 T. L. R. 521; 12 Asp. M. L. C. 208; 17 Com. Cas. 309, P. C.

**1654. — Storage—Consignee not ready to take delivery.]**—Goods were shipped at Antwerp for delivery at Southampton under a bill of lading by which freight was payable before delivery. The bill of lading also contained the following clause: "The goods to be taken from alongside by the consignees as soon as the vessel is ready to discharge & to receive the same as fast as the steamer can deliver . . . or otherwise they may be landed, put into lighters, or stored by the steamer's agents . . . in either case at the expense of the consignees." At Southampton the consignees were not ready to take delivery when the steamer discharged, nor did they then pay the freight, whereupon the shipowners stored the goods in a warehouse, giving the warehousemen notice that the goods were landed for ship's purposes, were to be held for the shipowners, & were not to be delivered without their, the shipowners', instructions accompanied by their release for the freight. No amount of freight was mentioned in the notice so given to the warehousemen:—*Held*: the storage of the goods in the warehouse by the shipowners was not a warehousing of them under

M. S. Act, 1894 (c. 60), so as to entitle the consignees to obtain delivery by depositing under sect. 495, sub-sect. 2, of the Act the amount of the freight with the warehousemen.—*DENNIS & SONS, LTD. v. CORK S.S. CO., LTD.*, [1913] 2 K. B. 393; 82 L. J. K. B. 660; 108 L. T. 726; 29 T. L. R. 489; 12 Asp. M. L. C. 337; 18 Com. Cas. 177.

### *B. Particular Contracts.*

#### *(a) C.i.f. Contracts.*

*See Sale of Goods Act, 1893 (c. 71), s. 29 (5).*

**1655. Expenses borne by seller—Expenses included in price—Buyer may take credit.]**—*IRELAND v. LIVINGSTON*, No. 1677, *post*.

**1656. — — — — —.]**—*WANCKE v. WINGREN*, No. 1431, *ante*.

**1657. — London charges.]**—(1) Goods were sold "cost, freight, & insurance to Buyers' Wharf, Victoria Docks, London." The goods were discharged in London elsewhere than at Buyers' Wharf, & under the "London Clause" in the bill of lading certain charges were paid:—*Held*: these London charges fell upon the seller, & not upon the buyer.

(2) Where goods are sold at a price to cover freight & insurance to London or any named port, payment by acceptance on receiving shipping documents, the seller fulfils his contract when he puts the goods on board ship & hands to the consignee shipping documents & policy of insurance in conformity with the contract, & in such a case the consignee would be liable to pay any charges in the nature of wharfage charges on the goods.

Even if the goods do not come forward to their destination under the ordinary c.i.f. contract, the consignee, having received the shipping documents & the policy of insurance, has his remedy either against the ship or on the policy (*BRUCE, J.*).—*ACME WOOD FLOORING CO. v. SUTHERLAND INNES CO.* (1904), 9 Com. Cas. 170.

**1658. Expenses borne by buyer—Wharfage dues—After shipment & delivery of documents by seller.]**—*ACME WOOD FLOORING CO. v. SUTHERLAND INNES CO.*, No. 1657, *ante*.

**Incidence of risk.]**—*See Part IV., Sect. 1, sub-sect. 10, ante.*

#### *(b) F.o.b. Contracts.*

*See Sale of Goods Act, 1893 (c. 71), s. 29 (5).*

**1659. General rule.]**—(1) Goods contracted to be sold & delivered "free on board," to be paid for by cash or bills, at the option of the purchasers, were delivered on board, & receipts taken from the mate by the lighterman, employed by the sellers, who handed the same over to them. The sellers apprised the purchasers of the delivery, who elected to pay for the goods by a bill, which the sellers having drawn, was duly accepted by the purchasers. The sellers retained the mate's receipts for the goods, but the master signed the bill of lading in the purchasers' names, who, while the bill they accepted was running, became insolvent:—*Held*: trover would not lie for the goods, for on their delivery on board the vessel, they were no longer *in transitu*, so as to be stopped by the sellers; & the retention of the receipts by the sellers was immaterial, as after their election to be paid by a

to pay the import duties.—*BROWN v. BROWNE* (1851), 9 U. C. R. 312.—*CAN.*

**n. — Cost of rafting timber.]**—*JACKSON v. EVANS* (1870), 21 C. P. 33.—*CAN.*

**o. Expenses borne by seller—Cost of capturing & poundage of horses escaped after sale but before delivery.]**—

*CROSS v. MOHR & SAUER* (Sask.) (1921), 62 D. L. R. 707.—*CAN.*

**PART VI. SECT. 2, SUB-SECT. 7.—B. (b).**

**1659 i. General rule.]**—*PULLAN v. SPEZMAN* (1921), 51 O. L. R. 386; 67 D. L. R. 365.—*CAN.*

**1659 ii. —.]**—In a contract for sale

& delivery of goods f.o.b. it is the duty of the purchaser to provide freight or ships for the carriage of the goods.—*BURCH & CO., LTD. v. CERRY & CO.*, [1920] N. Z. L. R. 69.—*N.Z.*

**p. Liability of purchaser for warehouse charges while awaiting shipment.]**—*HOWLAND v. BROWN* (1855), 13 U. C. R. 199.—*CAN.*

**q. Where buyer charterer of vessel**

bill, the receipts of the mate were not essential to the transaction between the seller & purchaser.

(2) It is proved beyond all doubt, indeed it is not denied, that when goods are sold in London "free on board," the cost of shipping them falls on the seller, but the buyer is considered as the shipper (LORD BROUGHAM).—COWAS-JEE v. THOMPSON (1845), 3 Moo. Ind. App. 422; 5 Moo. P. C. C. 165; 18 E. R. 560.

*Annotations*.—As to (1) *Distd. Berndtson v. Strang* (1867), L. R. 4 Eq. 481. *Apld. Schotsmans v. L. & Y. Ry.* (1867), 2 Ch. App. 332; *Refd. Meyer v. Dresser* (1864), 16 C. B. N. S. 646. As to (2) *Fold. Browne v. Hare* (1859), 4 H. & N. 822.

1660. —.]—Delivery "free on board" only means "the price shall be that which we stipulate for, & you shall not have to pay for the waggons or carts necessary to carry the clay from the place where it is dug; we will bear all those charges & put it free on board the ship, the name of which you are to furnish" (BACON, C.J.).—*Re COCK, Ex p. ROSEVEAR CHINA CLAY CO.* (1879), 11 Ch. D. 560; 40 L. T. 730; 4 Asp. M. L. C. 144; *on appeal*, 11 Ch. D. 565, C. A.

*Annotations*.—*Refd. Kendal v. Marshall, Stevens* (1883), 11 Q. B. D. 356; *Bethell v. Clark* (1887), 19 Q. B. D. 553; *Jobson v. Roppenheim* (1905), 2 T. L. R. 468; *Kemp v. Ismay, Imrie* (1909), 100 L. T. 996.

1661. —.]—If the goods dealt with by the contract were specific goods, it is not denied but that the words "free on board," according to the general understanding of merchants, would mean more than merely that the shipper was to put them on board at his expense; they would mean that he was to put them on board at his expense on account of the person for whom they were shipped; & in that case the goods so put on board under such a contract would be at the risk of the buyer whether they were lost or not on the voyage (BRETT, M.R.).—*STOCK v. INGLIS* (1881), 12 Q. B. D. 564; 53 L. J. Q. B. 356; 51 L. T. 449; 5 Asp. M. L. C. 294, C. A.; *on appeal, sub nom. INGLIS v. STOCK* (1885), 10 App. Cas. 263, H. L.

*Annotations*.—*Apld. Wimble v. Rosenberg*, [1913] 3 K. B. 743. *Consd. Healy v. Howlett*, [1917] 1 K. B. 337. *Refd. Colley v. Overseas Exporters*, [1921] 3 K. B. 302. *Mentd. Re London County Commercial Reinsurance Office*, [1922] 2 Ch. 67; *Sterns v. Vickers*, [1923] 1 K. B. 78; *Re Walt*, [1927] 1 Ch. 606.

**Incidence of risk.**—See Part IV., Sect. 1, subsect. 10, B. (c), *ante*.

#### (c) Other Contracts.

1662. "Net proceeds" payable to vendor.]—Where by a bill of lading, goods were to be delivered "to depts., net proceeds paid to pltf., or to his assigns, he or they paying freight for the said goods as per charterparty":—*Held*: the freight was to be paid by deft., & the net proceeds to be paid pltf. were what remained after such freight & other charges had been satisfied.—*THOMSON v. ADAM* (1821), 5 Moore, C. P. 280; 2 Brod. & Bing. 450; 129 E. R. 1040.

1663. Sale "from the deck."]—A cargo of ice was consigned to pltf., & before the ship came into

harbour defts. purchased the cargo, with a condition that the ice was to be taken from the ship's deck by them:—*Held*: the contract "from the deck" meant that the vendor should pay all that was necessary in order to enable the purchaser to remove the cargo from the deck & harbour dues charged to be paid before goods could be removed were payable by the vendor.—*PLAYFORD v. MERCER* (1870), 22 L. T. 41; 3 Mar. L. C. 335.

### SUB-SECT. 8.—DELIVERY OF WRONG QUANTITY OR OF MIXED GOODS.

#### A. Delivery of Lesser Quantity.

See Sale of Goods Act, 1893 (c. 71), s. 30 (1).

1664. Whether buyer need accept.]—*LEVY v. GREEN*, No. 1727, *post*.

1665. —.]—*MORGAN v. GATH*, No. 1865, *post*.

1666. Contracts for two quantities.—Second quantity residue after delivery of first.—Short delivery in both quantities.]—Pltfs., who expected to receive 576 bales of cotton from Madras, contracted to sell 202 bales thereof to C., then 123 to defts., then again 154 to defts., & then 97 to G. By these contracts the buyers were to take what arrived deliverable. Only 275 bales arrived deliverable. Pltfs. delivered 60 to C., 30 to G., & 33 to defts. under their first contract; they then tendered the remaining 152 to defts., in fulfilment of their second contract, which defts. refused to accept. In an action on the second contract with defts.:—*Held*: such contract meant that pltfs. were to deliver & defts. to accept the residue, up to 154, beyond 123; & though pltfs. had broken their first contract with defts., they had fulfilled their second, & were entitled to succeed.—*ARBUTHNOT v. STRECKEISEN* (1866), 35 L. J. C. P. 305.

1667. Whether pro tanto execution of contract.]

—(1) In a contract for the sale & delivery of unascertained goods c.i.f. the shipment of a quantity of such goods substantially less than the quantity contracted to be sold is not a substantial or *pro tanto* execution of the contract. *Qu.*: whether in such a contract the shipment of the full quantity would be, in the absence of any agreement to the contrary, a sufficient appropriation of the goods to vest the property in such goods in the purchaser.

(2) Where such goods are insured by the vendor in his own name at their invoice price, together with an addition for "profit" & are lost during the voyage, the purchaser is not entitled to recover from the vendor the sum paid to him by the underwriters under this "profit" insurance.—*HARLAND & WOLFF, LTD. v. BURSTALL (J.) & CO.* (1901), 81 L. T. 324; 17 T. L. R. 338; 9 Asp. M. L. C. 184; 6 Com. Cas. 113.

*Annotations*.—As to (1) *Consd. Shipton, Anderson v. Weil*, [1912] 1 K. B. 574. *Refd. Williams v. Manlissallan* (1923), 29 Com. Cas. 42.

—*Liability for loading charges.*—By universal usage, the duty & expense of putting goods on board a ship lies on the ship, & that a contract to deliver goods l.o.b. cannot be construed as relieving a charterer of that burden when he happens to be the buyer of the goods.—*CLENAIRNOCK IRON & STEEL CO., LTD. v. COOPER & CO.* (1895), 22 L. (Ct. of Sess.) 672; 32 Sc. L. 11. 546; 3 S. L. T. 36.—*SCOT*.

*r. Export duty.—Liability of seller.*—*BOWHILL COAL CO. v. TOBIAS* (1902), 5 F. (Ct. of Sess.) 262; 40 Sc. L. 11. 234; 10 S. L. T. 510.—*SCOT*.

### PART VI. SECT. 2, SUB-SECT. 8.—A.

1664 i. Whether buyer need accept.]—*MCPHAIL v. CLEMENTS* (1884), 1 Man. L. R. 165.—*CAN*.

1664 ii. —.]—*RICHARDSON v. ROSECOE & RIGG* (1837), 15 Sh. (Ct. of Sess.) 952.—*SCOT*.

t. — Under c.i.f. contract.—*Shortage due to loss within contemplation of parties.—Peril of the sea.*—Under a c.i.f. contract the possibility of loss of the goods is within the contemplation of the parties & where a loss was due to a peril of the sea, the buyer is not entitled to refuse to accept

delivery by reason of the tender of a less quantity than that stipulated for in the contract.—*PIESSE v. TASMANIAN ORCHARDISTS & PRODUCERS CO-OPERATIVE ASSOC., LTD.* (1919), 15 Tas. L. R. 67.—*AUS*.

1667 i. Whether pro tanto execution of contract.]—Where the seller has tendered a quantity substantially less than he contracted to sell, the buyer may reject the whole; & it is only when the excess or deficiency is so slight as to be negligible that the ct. will apply the maxim *De minimis non curat lex*.—*FARLEY & FARLEY v.*

**Sect. 2.—Delivery: Sub-sect. 8, A. & B.]**

**1668. Effect of acceptance of goods—Liability for part retained.]—**BRAGG v. COLE, No. 1741, *post*.

**1669. — — —.]—**A. contracted to sell & deliver to B. a large quantity of bark. He delivered a small part only, & failed to complete his contract. B. never returned the part delivered:—*Held*: A. was entitled to set off the value of that part against B.'s demand.—SHIPTON v. CASSON (1826), 5 B. & C. 378; 8 Dow. & Ry. K. B. 130; 4 L. J. O. S. K. B. 199; 108 E. R. 141.

**1670. — — —.]—**MORGAN v. GATH, No. 1865, *post*.

**1671. Acquiescence in incomplete performance—What amounts to.]—**A written contract was entered into for the purchase of "200 or 300" tons of coals, to be sent by the "*Navigator* or other vessel." The vendor, residing at Stockton-on-Tees, on Dec. 31, 1838, shipped 127 tons of coals by the *George & Henry*, & on that day wrote to the vendee at Southampton, to state what he had done, & that he should draw on him for the amount. The *George & Henry* was sunk at sea on Jan. 6, 1839, which fact the vendor, on Jan. 10, communicated to the vendee. The vendor's bill was not presented to the vendee until after he knew of the loss, & he then refused to accept it, but he did not by any other act repudiate the contract as performed by the vendor:—*Held*: his silence, after receiving the vendor's statement of the mode in which he had performed the contract, operated either as an admission by him that the contract was duly performed, or as evidence of acceptance of the substituted performance for that originally contracted for.—F. CHARDSON v. DUNN (1841), 2 Q. B. 218; 1 Gal. & Dav. 417; 10 L. J. Q. B. 282; 6 Jur. 126; 114 E. R. 85.

*Annotations*:—*Refd.* Brown v. Hare (1858), 27 L. J. Ex. 372. *Mentd.* Seagrave v. Union Marine Insec. (1866), L. R. 1 C. P. 305.

**1672. Trade custom—Short delivery made good.]—**THE MARY & ELLEN, LIVINGSTON v. RALLI (1856), 6 L. T. 661.

**1673. — "Bales."]**—Pltfs. contracted with defts. for 1,170 bales of gambier, "now on passage from Singapore, & expected to arrive at London, viz. per R. 805 bales, per L.A.D. 365":—*Held*: this was a warranty that such goods were on board; & the ships having arrived with 1,170 packages of smaller size than bales, pltfs. were entitled to maintain an action against defts., evidence was admissible to show what the word "bales" meant by the custom of the trade.—GORRISSON v. PERRIN (1857), 2 C. B. N. S. 681; 27 L. J. C. P. 29; 3 Jur. N. S. 867; 5 W. R. 709; 140 E. R. 583; *sub nom.* GORRISSON v. PERRIN, 29 L. T. O. S. 227. *Annotation*:—*Consd.* Corkling v. Massey (1873), L. R. 8 C. P. 395.

**1674. — "Garden weight."]**—LISTER & BIGGS v. BARRY & Co. (1886), 3 T. L. R. 99.

**1675. Order for goods of specified quality—What amounts to performance by seller—Full amount not obtainable.]—**Pltf. wrote to deft., "I have bought 100 cheese, 30 of which are very fine, 80 lbs. a cheese. The remainder are not so large. On receipt of your order I will forward sample." Deft. replied, "You may send me 6 cheddar cheese as a sample." Pltf. sent 6 with a letter, saying, "I was obliged to change one of the cheese, fearing

it would not bear carriage." Deft. afterwards wrote, "If remainder are as good as sample, you may send me 30 more. You may also send sample of the smaller ones, & say the lowest price for cash." Pltf. replied, "Your favour to hand. I will send the cheese to-morrow. I could not say less than 78s., they ought to be 80s." Pltf. then forwarded to deft. 12 larger cheeses, & 6 smaller ones, which deft. refused to accept, as he said, on account of badness of quality:—*Held*: he was bound to accept the 12 larger ones, but not the 6 smaller ones, as the contract for the larger ones did not mean 30 absolutely, but as many of the lot of 30 as were of the same quality as the samples previously sent, & as the 6 smaller ones were sent as samples merely, which deft. was not bound to keep.—SYMES v. HUTLEY (1860), 2 L. T. 509.

**1676. — — —.]—**Deft., who resided at Liverpool, gave to pltfs., who carried on business at Pernambuco, an order to purchase 100 bales of cotton of a specified quality, in the following terms: "I beg to confirm my letter of Feb. 23, & hope you will have executed fully all the cotton ordered, & consider still in force. If executed, please regard this as a new order for 100 more." Pltfs., acting on this order, purchased in the market, & paid for, 94 bales of the specified cotton. No direct evidence was given as to the then state of the Pernambuco market; but the circumstances of the case rendered it reasonable to infer that pltfs., in purchasing 94 bales, had done all that was practicable. Deft. declined to pay for these bales on the ground that his order had been inadequately performed:—*Held*: the order must be construed with reference to the state of market for which it had been given, & it had been substantially complied with.—JOHNSTON v. KERSHAW (1867), L. R. 2 Exch. 82; 36 L. J. Ex. 44; 15 L. T. 485; 15 W. R. 354.

*Annotation*:—*Consd.* Ireland v. Livingston (1872), L. R. 5 H. L. 395.

**1677. Order to purchase at certain price—Sellers unable to obtain amount demanded at named price.]**

(1) L. wrote to J. & co. at Mauritius, desiring them to ship him 500 tons of sugar at 26s. 9d., to cover freight & insurance: adding, "50 tons more or less of no moment, if it enables you to get a suitable vessel. I should prefer the option of sending vessel to London, Liverpool, or the Clyde; but if that is not compassable, you may ship to either Liverpool or London." L. & co. could only procure, at the price mentioned, nearly 400 tons, which they purchased from several different persons, & shipped in one vessel to Liverpool. L. refused the cargo, & wrote to cancel the order so as to prevent any further shipment:—*Held*: under the circumstances L. was bound to accept the cargo.

(2) The terms at a price, "to cover cost, freight & insurance, payment by acceptance on receiving shipping documents," are very usual, & are perfectly well understood in practice. The invoice is made out debiting the consignee with the agreed price, or the actual cost & commission, with the premiums of insurance, & the freight, as the case may be, & giving him credit for the amount of the freight which he will have to pay to the shipowner on actual delivery, & for the balance a draft is drawn on the consignee which he is bound to accept, if the shipment be in conformity with his

LOUGHMAN, [1917] N. Z. L. R. 588.—N.Z.

v. WOODS (1908), 39 N. B. R. 111.—CAN.

R. 157; 14 D. L. R. 801; 6 Sask. L. R. 302.—CAN.

**1668 i. Effect of acceptance of goods—Liability for part retained.]—**EMACK

a. — With knowledge of shortage.] — VICTOR MANUFACTURING Co. v. REGINA TRADING Co. (1913), 26 W. L.

b. Shortage arising from faulty estimate of purchaser.]—CLARK v. WHITE (1879), 3 S. C. R. 309.—CAN.

contract, on having handed to him the charter-party, bill of lading, & policy of insurance (BLACKBURN, J.).—IRELAND v. LIVINGSTON (1872), L. R. 5 H. L. 395; 41 L. J. Q. B. 201; 27 L. T. 79; 1 Asp. M. L. C. 389, H. L.; & *reusq.* (1870), L. R. 5 Q. B. 516, Ex. Ch.; & *resig.* (1866), L. R. 2 Q. B. 99.

*Annotations*:—As to (1) *Refd.* Johnston v. Kershaw (1867), L. R. 2 Exch. 82. As to (2) *Consd.* Biddell v. E. Clemens Horst Co., [1911] 1 K. B. 934; Arnhold Karberg v. Blythe, Green, Jourdain, Theodor Schneider v. Burgett & Newsam, [1916] 1 K. B. 495; Johnson v. Taylor, [1920] A. C. 144. *Refd.* Dufourcet v. Bishop (1886), 18 Q. B. D. 373; Dupont v. British South Africa Co. (1901), 18 T. L. R. 24; Ströms Bruks Aktie Bolag v. Hutchison, [1905] A. C. 515; Landauer v. Craven & Speeding, [1912] 2 K. B. 94; Groom v. Barber, [1915] 1 K. B. 316; Manbre Saccharine Co. v. Corn Products Co., [1919] 1 K. B. 198; Wilson, Holgate v. Belgian Grain & Produce Co., [1920] 2 K. B. 1; Diamond Alkali Export Corp. v. Bourgeois, [1921] 3 K. B. 443. *Generally, Mendt.* Imperial Ottoman Bank v. Cowan (1874), 31 L. T. 336; Jefferson v. Querner (1874), 30 L. T. 867; *Re Tappenbeck, Ex p. Banner* (1876), 24 W. R. 476; Cassaboglou v. Gibb (1883), 11 Q. B. D. 797; Lindsay, Gracie v. Barter (1885), 2 T. L. R. 4; Loring v. Davis (1886), 32 Ch. D. 625; Bank of England v. Vagliano, [1891] A. C. 107; Swan v. Mellen (No. 2) (1892), 36 Sol. Jo. 668; Furness, Withy v. White, [1894] 1 Q. B. 483; Schofield v. Londesborough, [1896] A. C. 514; Miles v. Haselhurst (1906), 23 T. L. R. 142; Houlder v. Public Works Comm., Public Works Comm. v. Houlder, [1908] A. C. 276; Kepitigalla Rubber Estates v. National Bank of India, [1909] 2 K. B. 1010; The Kronprinzessin Cecilie (1915), 32 T. L. R. 139; Weigall v. Runciman (1916), 85 L. J. K. B. 1187; Macmillan v. London Joint Stock Bank, [1917] 2 K. B. 439; Gould v. S. E. & C. Ry., [1920] 2 K. B. 186; Weiss, Biheller & Brooks v. Farmer, [1923] 1 K. B. 226; Finn v. Shelton Iron, Steel & Coal Co. (1924), 131 L. T. 213; Westminster Bank v. Hilton (1926), 136 L. T. 315; Sassoon v. International Banking Corp., [1927] A. C. 711.

**1678. General contract for supply for certain period—Failure to supply amount called for—Such amount not unreasonable or impossible.**—Under a general contract to supply oil at certain prices for a certain period the vendors were held liable for breach of contract in failing to supply oil in amounts called for, such amounts having been held not unreasonable & not impossible to supply.—WINTER v. STANDARD OIL CO. OF NEW YORK, [1920] 3 W. W. R. 271, P. C.

**Whether amounting to cheating or obtaining on false pretences.**—See CRIMINAL LAW, Vol. XV., pp. 977–979, 987, Nos. 10,933, 10,951–10,954, 10,965, 10,968, 11,055.

#### B. Delivery of Greater Quantity.

See Sale of Goods Act, 1893 (c. 71), s. 30 (2).

**1679. General rule—Buyer need not accept.**—LOVAT v. PARSONS (1774), 1 Cowp. 61; 98 E. R. 967.

**1680. ———.**—The declaration stated that deft., carrying on business at Liverpool, sent & delivered to pltf., carrying on business at New Orleans, an order to purchase cotton for deft., viz. if they, pltf., could purchase cotton at such price as to stand in, laid down in Liverpool, all charges included, Liverpool fair 9½d. per lb., good fair 10d. per lb., then pltf. were to purchase cotton to the extent of 200 bales, & if at ½d. per lb. under those prices, 300 bales; if a ¼d. per lb. under those prices, 400 bales; & to draw bills of

exchange on deft. for the amount of the price. The declaration then averred that pltf. accepted the order, & promised to perform all things therein contained to be by them performed, & in consideration of the premises deft. promised to accept & receive the cotton to be purchased by pltf. in pursuance of the order, & to accept any bill drawn by pltf. on deft. for the price of the cotton. The declaration then averred that pltf. did purchase a large quantity, to wit 206 bales of Liverpool fair cotton, at such a price as to stand in 9½d. per lb. laid down in Liverpool, all charges included: it then stated the shipping of the cotton, that pltf. drew a bill for the amount, that afterwards, to wit on etc., the said cotton arrived in Liverpool, & then was ready to be delivered to deft., of all which he had notice; & pltf. afterwards, to wit, on etc., requested deft. to accept the said cotton, & to accept the said bill of exchange, which was then presented to deft. for acceptance. Breach, that deft. did not nor would accept the cotton so purchased, or any part of it, & did not nor would accept the bill, or pay or satisfy pltf. for the said cotton:—*Held*: the declaration was ill, as it did not sufficiently show that pltf. were ready & willing to deliver the 200 bales only.—DIXON v. FLETCHER (1837), 3 M. & W. 146; Murp. & H. 342; 150 E. R. 1092.

*Annotation*:—*Refd.* Levy v. Green (1859), 1 E. & E. 969.

**1681. Effect of acceptance of goods—Buyer liable only for part retained.**—Deft. ordered of pltf. two dozen of port & two dozen of sherry, with the understanding that, if it were not approved, he should return it. Pltf. sent him four dozen of port & four dozen of sherry. Deft. was not satisfied with its quality, & returned the whole, except one bottle of the port & one dozen of the sherry, with a letter to pltf., in which he stated that his order was for two dozen of each kind of wine; that he should not have refused to keep the four dozen if the quality had suited him, but that, as it did not, he returned the four dozen of port, minus one bottle, which he had tasted, & three dozen of the sherry:—*Held*: deft. was liable only for the price of the wine he actually kept.—HART v. MILLS (1846), 15 M. & W. 85; 15 L. J. Ex. 200; 153 E. R. 771.

*Annotation*:—*Refd.* Levy v. Green (1857), 8 E. & B. 575.

**1682. Amounts to new contract.**—CUNLIFFE v. HARRISON, No. 1111, *ante*.

**1683. Selection from larger quantity—To meet requirements of contract.**—A contract for the sale of cotton of a given quality is not performed on the part of the seller, by a tender of a larger quantity, out of which the buyer is required to select those bales which answer the description of the cotton contracted for.—RYLANDS v. KREITMAN (1865), 19 C. B. N. S. 351; 144 E. R. 823.

**1684. Waiver of objection to delivery.**—FRANGOPULO & Co. v. LOMAS & Co. (1902), 18 T. L. R. 461, C. A.

**1685. Excess unimportant—Whether buyer may reject whole.**—SHIPTON, ANDERSON & Co. v. WEIL BROTHERS & Co., No. 1703, *post*.

#### PART VI. SECT. 2, SUB-SECT. 8.—B.

**1679 i. General rule—Buyer need not accept.**—SHANNON v. BARLOW (1864), 15 I. C. L. R. 478.—IR.

**c. Effect of acceptance of goods—Whether agreement to purchase excess implied.**—Where goods are delivered in excess of the quantity purchased, an agreement to purchase the excess will not be inferred unless the conduct of the purchaser in retaining the goods amounts to an acceptance thereof.—DONALDSON v. MORRIS, [1912] C. P. D. 338.—S. AF.

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**1684 i. Waiver of objection to delivery.**—Defts., with the knowledge that a consignment of goods was in excess of the quantity ordered by them, made no objection on that ground, though negotiations took place for a reduction in price, on account of delay, etc., but took into stock fifteen out of twenty-five cases sent. The other ten cases remained in bond till they were sold to pay duties:—*Held*: there was evidence on which a waiver of any objection as to the excess was properly found.—GOODYEAR RUBBER CO. v. FOSTER (1882), 1 O. R. 242.—CAN.

**d. Effect of retention of bill of lading after rejection of goods.**—When the buyer of goods exercises his right, under Sale of Goods Act, R. S. M. 1902, c. 152, s. 30, to reject the goods because the seller delivered a quantity larger than that contracted for & also delivered goods contracted for mixed with goods of a different description not included in the contracts, the retention by the buyer of the bill of lading creates no liability on his part.—SCHWEIGER v. VINEBERG (1910), 19 Man. L. R. 328.—CAN.

**Sect. 2.—Delivery: Sub-sect. 8, C.]****C. Latitude Allowed as to Quantity.**

See Sale of Goods Act, 1893 (c. 71), s. 30.

**1886. Use of "about" & "more or less"—****Seller may not go outside margin.]—**CROSS v. EGLIN, No. 1700, *post*.

**1887. ——— Unless qualifying provisions.]—**REUTER v. SALA, No. 1827, *post*.

**1888. ———.]—**By a contract for the sale of 4,000 tons of meal the sellers were allowed to tender for delivery within "2 per cent., more or less." The sellers considerably exceeded that allowance & the buyers refused to take delivery:—*Held*: the ct. would not make further variation; & the buyers were entitled to refuse to take delivery, since where there is a limited variation in the amount to be delivered expressed between the parties to a contract it should be adhered to, unless it be no more than a matter of a few pounds or ounces in the case of tons or hundredweights.—PAYNE & ROUTH v. LILLICO & SONS (1920), 36 T. L. R. 569.

**1889. ——— Right of seller to keep within margin.]—**Re THORNETT & FEHR & YUILLS, LTD., No. 2551, *post*.

**1890. ——— Words of estimate.]—**A club established for the supply of coal to its members, by their rules, duly certified, appointed a secretary & treasurer. The duty of the secretary was, amongst other things, to receive the members' subscriptions, & pay them to the treasurer, & when necessary, to write to such merchant as the members might select for tenders for coals, to be delivered at the members' houses, & when the tender was accepted by the club, to draw up an agreement for the merchant to sign. The duty of the treasurer was, amongst other things, to pay the coal merchant as soon after every delivery as he should receive an order, signed by the secretary & chairman, & such order was to be given on the next Thursday night after each delivery. Pltf. having made a tender, which was accepted, to supply coals to the club, entered into a written agreement, signed by himself & the secretary, to supply 100 tons, "more or less," to be delivered at the members' residences, & he delivered 127 tons according to the directions given by the secretary. When the time for payment arrived there was only sufficient money in the hands of the treasurer, owing to the default of the secretary, to satisfy a portion of pltf.'s claim: that amount was paid to him, & he sued deft., a member of the club, for the residue:—*Held*: (1) deft. was liable. (2) the delivery of 127 tons was according to the contract, which specified "100 tons, more or less."—COCKERELL v. AUCOMPT (1857), 2 C. B. N. S. 440; 26 L. J. C. P. 194; 3 Jur. N. S. 844; 5 W. R. 633; 140 E. R. 489.

*Annotations:—As to (1) Reid. Dean v. Mellard (1863), 15 C. B. N. S. 19; De Vries v. Corner (1865), 13 L. T. 636; Royal Albert Hall Corpn. v. Winchelsea (1891), 7 T. L. R. 362.*

**1891. ———.]—**Deft., a wool buyer, purchased of pltf.s, sheep farmers, a quantity of wool,

described in the written contract simply as "your wool." A previous conversation had taken place between the parties, in which pltf.s. had stated that, besides their own clip of wool, they had purchased the clips of four or five neighbouring farmers, whose names were specified, & that altogether the quantity amounted to "2,300 stones, a hundred stones more or less":—*Held*: (1) in an action against the defts. for not accepting the wool, that evidence of this conversation was admissible to explain what was meant by the term "your wool"; (2) this conversation was not thereby made part of the contract, so that the quantity specified became an ingredient in the contract, & the contract was performed by pltf.s. sending all the wool which they then had, amounting to 2,505 stones.—MACDONALD v. LONGBOTTOM (1860), 1 E. & E. 987; 29 L. J. Q. B. 256; 2 L. T. 606; 6 Jur. N. S. 724; 8 W. R. 614; 120 E. R. 1181, Ex. Ch.

*Annotations:—As to (1) Consd. Mumford v. Gethling (1859), 7 C. B. N. S. 305. Apld. Newell v. Radford (1867), L. R. 3 C. P. 52. Consd. Buxton v. Rust (1872), L. R. 7 Exch. 279; Bank of New Zealand v. Simpson, [1900] A. C. 182. Reid. Cullen v. O'Meara (1867), 15 W. R. 1174; Crane v. Powell (1868), 17 W. R. 161; Hefield v. Meadows (1869), L. R. 4 C. P. 595; Roden v. London Small Arms Co. (1876), 46 L. J. Q. B. 213; Cunningham v. Dunn (1878), 3 C. P. D. 443; McCollin v. Gilpin (1881), 6 Q. B. D. 516; Plant v. Bourne (1897), 76 L. T. 820; Kroll v. Henry, [1903] 2 K. B. 740; G. W. Ry. & Mid. Ry. v. Bristol Corpn. (1918), 87 L. J. Ch. 414.*

**1892. ———.]—**A. M., on behalf of the firm of M. & co., merchants in Q., of which he was a member, entered into the following contract with R. M.:—"R. M. sells, & Messrs. M. & co. buy all of the spars manufactured by R. M., say about 600 red pine spars, averaging by culler's measurement in Q. 16 inches, at the sum of, etc., delivered free of charge in Q. The above spars will be out of the lot manufactured by J. B., the lengths of which, according to his specification, I am satisfied with." The lot manufactured by J. B. was found to consist of 603 spars, of which only 496 averaged 16 inches:—*Held*: M. & co. were bound to accept the 496 spars at the rate agreed on, the words "say about 600 red pine spars" being words of expectation & estimate only, & not amounting to a warranty.—MCCONNELL v. MURPHY (1873), L. R. 5 P. C. 203; 28 L. T. 713; 21 W. R. 609, P. C.

**1893. ———.]—**Pltf.s., having been informed by S., a commission agent, that defts. had a quantity of old iron in their yard for sale, "about 150 tons," wrote to defts., "we are buyers of good wrought scrap iron, free of light & burnt iron, for our American house, & understand from S. that you have for sale about 150 tons. We can offer you 80s. per ton." There were three intermediate letters relating to the place of delivery & expense of carting, & then defts. wrote, "we accept your offer of the 14th & 19th inst. for old iron, viz., 80s. per ton. We delivering alongside vessel in one of the London docks. Please let us know when you can send a man here to see it weighed, & also inform us where to send it." Before S. saw pltf.s. he had seen a heap of iron in the yard of defts., who were builders, & said, "you seem to

**PART VI. SECT. 2, SUB-SECT. 8.—C.**

**1890 i. Use of "about" & "more or less"—***Words of estimate.]—*JONES v. NEW ZEALAND TRUST & LOAN CO., LTD. (1900), 19 N. Z. L. R. 449.—N.Z.

**1890 ii. ———.]—**A steel co. entered into a written contract with the contractors for the Forth Bridge to supply "the whole of the steel required for the Bridge except 12,000 tons" at

certain prices "the estimated quantity of steel to be 30,000 tons, more or less":—*Held*: under the contract the contractors were bound to take the whole steel required for the Bridge, the mention of 30,000 tons being merely by way of estimate.—TANCRED, ARROL & Co. v. STEEL CO. OF SCOTLAND (1890), 17 R. (Ct. of Sess.) (H. L.) 31; 27 Sc. L. R. 463.—SCOT.

**1890 iii. ———.]—**DE VILLIERS v. NICHOLLAS & Co. (1907), 24 S. C.

208.—S. AF.

**e. ——— Words of expectation.]—**STOKES v. HART (1887), 8 N. S. W. L. R. (Law) 447; 4 N. S. W. W. N. 114.—AUS.

**f. ——— Reasonable departure allowed.]—**CANADA LAW BOOK CO. v. BOSTON BOOK CO. (1922), 66 D. L. R. 209.—CAN.

**g. ———.]—**Where a vendor sold "about 500 bags of wheat":—*Held*: he bound himself to deliver 500



have about 150 tons there." The reply was, "Yes, or more." Defts. only delivered forty-four tons, that being the quantity of the heap in the yard, & plffs. recovered £50 damages in an action for short delivery:—*Held*: (1) the words "about 150 tons" were merely words of estimate & expectation & there was no warranty as to quantity, & therefore defts. were not bound to deliver 150 tons; (2) the subject-matter of the contract was not 150 tons of iron, but the iron which S. had seen in defts.' yard.—*MCLAY & Co. v. PERRY & Co.* (1881), 44 L. T. 152.

*Annotations*:—*As to* (1) *Distd.* *Tebbitts v. Smith* (1917), 33 T. L. R. 260. *As to* (2) *Apld.* *Re Harrison & Micks, Lambert*, [1917] 1 K. B. 755.

**1694.** ———.]—Buyers verbally agreed with a seller to purchase the remainder of a cargo of wheat ex *Clodmore* which the seller estimated at 5,400 quarters. At the same time of the verbal agreement the buyers stipulated that they should have the whole of the remainder of the cargo. On the same day the seller sent to the buyers a contract in writing by which he sold to the buyers "the remainder" of the cargo "more or less about 5,400 quarters Manitoba wheat . . . at Hull ex *Clodmore*." The buyers accepted delivery of about 5,400 quarters. The sellers had, in fact, made a miscalculation, & at the time of the sale he had 574 quarters more than 5,400 quarters in hand. Rules & conditions were indorsed on the written contract, of which condition 3 was as follows: "The word 'about' when used in reference to quantity shall mean within 5 per cent. over or under the quantity stated." The buyers contended that, having regard to the conditions, the most they could be compelled to accept was 5,400 quarters, plus 270 quarters, i.e. plus 5 per cent. on the 5,400 quarters:—*Held*: the words "more or less about 5,400 quarters" were merely words of estimate; the subject-matter of the contract was a sale of the whole of the remainder of the cargo, the governing words being "remainder"; & the buyers must accept the remainder, although it amounted to more than 5,400 quarters with a margin of 5 per cent.—*Re HARRISON & MICKS, LAMBERT & Co.*, [1917] 1 K. B. 755; *sub nom.* *HARRISON v. MICKS, LAMBERT & Co.*, 86 L. J. K. B. 573; 116 L. T. 606; 33 T. L. R. 221; 14 Asp. M. L. C. 76; 22 Com. Cas. 273, D. C.

*Annotation*:—*Follid.* *Tebbitts v. Smith* (1917), 33 T. L. R. 508.

**1695.** ——— Evidence to explain—*Mercantile usage.*]—*CROSS v. EGLIN*, No. 1700, *post*.

**1696.** ———.]—Plffs. sold to defts. upon the terms of the conditions & rules of the London Dried Fruit Asscn., "about 4,000" cases of currants, to be shipped per steamer to London. By one of the rules of the Asscn. "about" in reference to quantity of packages meant not more than 5 per cent. more or less:—*Held*: a tender of bills of lading for 4,202 cases was not a good tender.—*LOMAS & Co. v. BARFF, LTD., FRANGOPULO & Co. v. LOMAS & Co.* (1901), 17 T. L. R. 437; *on appeal, sub nom.* *FRANGOPULO & Co. v. LOMAS & Co.* (1902), 18 T. L. R. 461, C. A.

**1697.** ———.]—Defts. sold to plffs. "about" 18,500 tons of Northumberland coal under two contracts, deliveries to be in as nearly equal monthly instalments as possible over a given period. Defts. having so far made the deliveries

in approximately equal quantities, delivered as their last monthly instalment a shipment of 455 tons short. In an action by the purchasers for damages for short delivery:—*Held*: there is a custom of the Newcastle coal trade that the word "about" gives to the vendors an option up to 5 per cent. in either direction, & the custom being proved, defts. had made no default in fulfilling their contracts, inasmuch as the word "about" referred to the total amounts to be delivered under each contract respectively, & not merely to the "last instalment."—*SOCIÉTÉ ANONYME L'INDUSTRIELLE RUSSO-BELGE v. SCHOLEFIELD & SON* (1902), 7 Com. Cas. 114, C. A.

**1698.** ——— Local trade custom.]—Resps. agreed to supply to applts. "the whole of the steel required by you," for certain works then in course of construction. The contract was made subject to certain general terms & conditions, which contained the clause "The estimated quantity of steel we understood to be 30,000 tons more or less."—*Held*: (1) resps. were entitled to supply all the steel required in excess of the estimated quantity of 30,000 tons, & the contract was not qualified or affected by the clause stating that the estimated quantity was "30,000 tons more or less"; (2) & evidence of an alleged custom in the Glasgow steel trade, as to the interpretation of contracts containing such a clause, was not admissible.—*TANCHRED, ARROL & Co. v. STEEL CO. OF SCOTLAND* (1890), 15 App. Cas. 125; 62 L. T. 738, H. L.

*Annotations*:—*As to* (1) *Reffd.* *Kensington Electric Lighting Co. v. Notting Hill Electric Lighting Co.* (1918), 82 J. P. 197. *Generally, Mentd.* *Caledonian Insce. v. Gilmour*, [1893] A. C. 85; *Bourne v. Keane*, [1919] A. C. 815.

**1699.** ——— Goods deliverable by instalments—*Application to particular instalment.*]—*SOCIÉTÉ ANONYME L'INDUSTRIELLE RUSSO-BELGE v. SCHOLEFIELD & SON*, No. 1697, *ante*.

**1700.** Considerable excess—*Duty of seller to show excess contemplated by buyer.*]—Plffs. agreed to purchase of defts. "about 300 quarters, more or less," of foreign rye, shipped on board the *A. E.* at Hamburg, at a certain price, subject to the vessel's safe arrival with the goods on board, & being unsold at Hamburg. The ship brought 350 quarters, & defts. refused to deliver any part unless plffs. would accept the whole. Plffs. abandoned the contract, & brought an action to recover back a sum of money which they had paid for 300 quarters:—*Held*: by the words "about," & "more or less," the parties could not be taken to have contemplated so large an excess as fifty over 300 quarters; at all events it lay on defts. to show that such an excess above the quantity named was in contemplation; & if from the obscurity of the contract they were unable to do so, their defence failed; *semble*: evidence of merchantile men as to the effect of the words "about," & "more or less," in such a contract, was not admissible.—*CROSS v. EGLIN* (1831), 2 B. & Ad. 106; 9 L. J. O. S. K. B. 145; 109 E. R. 1083.

*Annotations*:—*Reffd.* *Gwillim v. Daniell* (1835), 1 Gale, 143. *Mentd.* *Maxwell v. Deare* (1854), 23 L. T. O. S. 1.

**1701.** "Not less than"—*Words of contract not expectation.*]—*Assumpsit* on the following contract. "J. S.," deft., "sold to L. & co.," plffs., "what he may pull, up to Jan. 6, say not less than 100 packs, of combing skin at 7½d. per lb. delivered

bags with a reasonable allowance for short delivery.—*JOUBERT BROTHERS v. ABRAHAMSON*, [1920] C. P. D. 103.—S. AF.

*h.* Two margins allowed—*Delivery of one above minimum.*]—A delivery of

201 head was held to satisfy a contract to sell "between two to three hundred head cows."—*YEAST v. KNIGHT & WATSON (Alta.)*, [1919] 2 W. W. R. 467.—CAN.

*k.* "Estimated at"—*Whether de-*

*livery of more or less permitted.*]—*SERVIL v. BROWN* (1884), 5 N. S. W. L. R. (Law) 289; 1 N. S. W. W. N. 19.—AUS.

*l.* "Approximately"—*Slight & unimportant excesses allowed.*]—*BRITISH*



**Sect. 2.—Delivery: Sub-sect. 8, C., D. & E.]**

in M., allowing 3 months' interest for cash, in clean & dry condition. B. Dec. 12/48." Averments that deft. was a puller or preparer for sale of combingskin, which is a kind of wool. Mutual promises. Breach, that deft. did not deliver 100 packs. On demurrer:—*Held*: the words "say not less than 100 packs" were not mere words of expectation, showing what the parties supposed the quantity would prove to be, but amounted to a contract to deliver at least that quantity; & the breach was well assigned.—*LEEMING v. SNAITH* (1851), 16 Q. B. 275; 20 L. J. Q. B. 164; 16 L. T. O. S. 362; 15 Jur. 988; 117 E. R. 884.

*Annotations*:—*Consd.* *McConnel v. Murphy* (1873), L. R. 5 P. C. 203. *Refd.* *Morris v. Levison* (1876), 1 C. P. D. 155.

**1702. "Any less number that may arrive."**—Defts. contracted to buy of pltf. "115 bales, containing 18,440, or any less number that may arrive, East India hides, shipped per "Ontario, Calcutta to Hamburg, & to be delivered in London, at 11½d. per lb. round, but the wrappers to be charged at 8d. per lb." The ship having been compelled by stress of weather to put back to Calcutta, 18 of the bales were found to be damaged, & were sold. The remaining 97 bales arrived, but defts. refused to accept them:—*Held*: the words "or any less number that may arrive," applied to the number of bales, & not merely to the number of hides, & consequently defts. were liable for not accepting the 97 bales.—*BECKH v. PAGE* (1860), 7 C. B. N. S. 861; 141 E. R. 1054, Ex. Ch.

**1703. Trifling excess—Disregarded.**—Under a contract for the sale of a cargo of wheat weighing 10 per cent. more or less than 4,500 tons, the sellers tendered a cargo weighing 55 lbs. more than the maximum quantity of 4,950 tons. The sum payable for the 55 lbs. at the contract price would have been about 4s., but the sellers never claimed payment thereof. The buyers rejected the whole cargo solely upon the ground that the quantity tendered was 55 lbs. in excess of the contract quantity:—*Held*: as the quantity in excess was so trifling & the sellers had not claimed the price thereof, the sellers had substantially performed the contract, & the buyers were not entitled to reject the cargo under Sale of Goods Act, 1893 (c. 71), s. 30 (2), which provides that, "where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer . . . may reject the whole."—*SHIPTON, ANDERSON & Co. v. WEIL BROTHERS & Co.*, [1912] 1 K. B. 574; 81 L. J. K. B. 910; 106 L. T. 372; 28 T. L. R. 269; 17 Com. Cas. 153.

**1704. ———.**—*PAYNE & ROUTH v. LILICO & SONS*, No. 1688, *ante*.

**1705. Two margins allowed—Seller must deliver up to maximum—Buyer need not accept more than minimum.**—*DOE v. BOWATER* (W. H.), LTD., [1916] W. N. 185.

**1706. Two margins estimated—Whether seller must deliver minimum.**—Deft. agreed by letter to sell & deliver to pltf. "quantity salved Australian basils estimated 8/10 tons at 13-7/8d. per lb.," but failed to deliver more than 6 tons 3 cwt. 2 qr. In an action by pltf. against deft. for damages for breach of contract:—*Held*: deft. was not bound to deliver a minimum quantity of 8 tons

& therefore the action failed.—*TEBBITTS BROTHERS v. SMITH* (1917), 33 T. L. R. 508, C. A.

**D. Quantity Specified by Reference to Particular Standard or Circumstances.**

**1707. Quantity ascertained by reference to particular standard—Ascertainment of standard rendered impossible—By buyer.**—If a party entitled under a contract to receive a profit from another, by his own act so confounds the measure of that which he was to receive, that it can be no longer ascertained, he vacates his whole claim.

A. agreed to find sufficient coals for B.'s engine, to draw water from A.'s mine, & B.'s little coal, as they then stood. B. sunk to a lower seam, in draining which he drained the other two seams, but consumed for his engine more coal than before:—*Held*: A. was no longer bound to furnish any coal, because B. had destroyed the measure of sufficiency.—*PRINGLE v. TAYLOR* (1809), 2 Taunt. 150; 127 E. R. 1034.

*Annotation*:—*Mentd.* *Harper v. Hedges*, [1923] 2 K. B. 314.

**1708. Quantity ascertained by reference to particular circumstances—Amount manufactured—Specified quantity mentioned.**—*Assumpsit* on an agreement, by which deft. agreed to sell, & pltf. to purchase, all the naphtha which deft. might make from June 1 next, for & during the term of two years, say from 1,000 to 1,200 gallons per month, at the rate of 2s. 6d. per gallon, etc.; & it was agreed, that, should pltf. be desirous of dissolving the contract before the expiration of the term, he should be at liberty so to do, on giving deft. three months' notice. The declaration averred that the quantities of naphtha that deft. ought to have made during a period of ten months, under the agreement, at the rate of from 1,000 to 1,200 gallons per month, & to have sold & delivered to pltf., amounted to a much larger quantity than he had sold & delivered, viz. 7,000 gallons more; yet that deft. had not sold & delivered same to him:—*Held*: the declaration could not be sustained.—*GWILLIM v. DANIELL* (1835), 2 Cr. M. & R. 61; 1 Gale, 143; 5 Tyr. 644; 4 L. J. Ex. 174; 150 E. R. 26.

*Annotations*:—*Distd.* *Leeming v. Snaith* (1851), 16 Q. B. 275. *Apprvd.* *McConnel v. Murphy* (1873), L. R. 5 P. C. 203. *Mentd.* *Morris v. Levison* (1876), 1 C. P. D. 155.

**1709. ——— Buyer's requirements.**—By an agreement under seal, pltf. engaged, during the period of three years, to supply defts., a gas co. incorporated by Act of Parliament, with such quantities of pipes, etc., as should, from time to time, during the period, be required by defts., at given prices:—*Held*: pltf. was bound to supply all such pipes as the co. might reasonably require for all such works as they were actually carrying on under the authority of their Act.—*WHITEHOUSE v. LIVERPOOL GAS CO.* (1848), 5 C. B. 798; 17 L. J. C. P. 237; 136 E. R. 1093.

**1710. ——— Right to insist on quantities expressly stipulated for.**—By a contract made between the Eastern Counties Ry. co. & defts., it was, amongst other things, provided that defts. should supply & the co. should purchase, subject to the terms & to the extent thereafter mentioned, all the coke that should be required by the co. for working their railways between London & Cambridge & London & Colchester. By the fourth clause the co. engaged to take from defts. 550 tons & 100 tons of coke weekly during the

*WHIG PUBLISHING CO., LTD. v. EDDY* (E. B.) CO., LTD. (1921), 59 D. L. R. 77.—CAN.

**PART VI. SECT. 2, SUB-SECT. 8.—D.**  
m. Quantity ascertained by refer-

ence to particular circumstances—*Buyer's requirements*—For purpose of buyer's business.—By the terms of an agreement between a coal master & a co. for the manufacture of coal oil, the former became bound to supply to the

latter as much canal coal, within certain limits, as they should "require":—*Held*: this did not mean as much as they should demand, but as much as they should require for the purpose of their manufacture.—*NORTH BRITISH*

period of seventeen years; & they further agreed, that if they should require more than those quantities for the working of their railways they would take same from defts., with a proviso that, if they should require less than the stipulated quantities, the supply should be reduced accordingly, upon their giving defts. three months' notice. By the eleventh clause, the co. engaged that "so long as defts. should punctually & duly supply the coke & so long as same should be of the best quality they would abstain from making purchases of coke for their lines of railway aforesaid from any other persons:—"*Held*: the readiness & willingness of the co. to take from defts. all the coke they required for the purpose of their railways was not a condition precedent to their right to insist upon being supplied with the quantities expressly stipulated for; & consequently, the fact of the co. having bought coke from other persons afforded no answer to an action by them against defts. for a failure to deliver the quantities contracted for.—*EASTERN COUNTIES RY. Co. v. PHILIPSON* (1855), 16 C. B. 2; 24 L. J. C. P. 140; 25 L. T. O. S. 84; 139 E. R. 653.

*Annotation*:—*Mentd. Kidner v. Stimpson* (1918), 34 T. L. R. 434.

1711. ———.]—*TANCRED, ARROL & Co. v. STEEL CO. OF SCOTLAND*, No. 1698, *ante*.

1712. ———.]—II. being about to erect a factory for the purpose of carrying on the business of manufacturing explosives under the name of deft. co., appointed a manager to have sole charge of the business. The manager's office was used as the office of the co. The manager, without express authority from H., entered into a contract for the purchase by the co. from pltf's. of all the co.'s "requirements" of nitric & sulphuric acid, estimated at 500 & 750 tons respectively, during twelve months from the date of the contract. Subsequently the manager gave notice to pltf's. to deliver 15 tons under the contract. The co. never started business, & the undertaking was abandoned by H. within the twelve months. The acceptance of the 15 tons was refused. In an action by pltf's. against the co. for breach of contract to purchase 500 & 750 tons:—*Held*: the manager had been held out by H. as having authority to enter into the contract, & the contract was binding on H., but by the contract the co. had only agreed to buy such acid as might be required, & none having been in fact required, there had been no breach, except as to the 15 tons for which H. was liable to pay.—*BERK (F. W.) & Co., LTD. v. INTERNATIONAL EXPLOSIVES CO.* (1901), 7 Com. Cas. 20.

1713. ———.]—*A.-G. v. STEWARDS & Co., LTD.* (1901), 18 T. L. R. 131, H. L.; *reversq. S. C. sub nom. STEWARDS & Co., LTD. v. R.* (1900), 17 T. L. R. 111, C. A.

*Annotations*:—*Refd. Berk v. International Explosives Co.* (1901), 7 Com. Cas. 20; *Kensington & Knightsbridge Electric Lighting Co. v. Notting Hill Electric Lighting Co.* (1918), 87 L. J. K. B. 565.

1714. ———.]—*Action for breach of contract to deliver—Necessity for averring purpose for which goods are to be used.*—*WOOD v. COPPER MINERS' Co., No. 2534, post.*

1715. ———.]—*"All waste as it comes from stills"—During occupancy of premises.*—Pltf. agreed to let, & defts. to take, for one year, at a stipulated rent, certain works & buildings; & pltf. agreed to supply to defts. the whole of the chlorine still

waste as it came from their stills, neither adding to nor taking anything from "same," at the rate of 2s. 6d. for every 21 cwt. of waste so supplied, with the understanding that defts. were to have the option of a lease of the premises for seven or fourteen years at the same rent, if they should feel disposed so to do, within three months from the date thereof. Pltf. agreed not to use or injure or part with any of the still waste except to defts., so long as they should hold the works:—*Held*: defts. were bound to accept & pay for the whole of pltf.'s chlorine still waste during the year or such further term as they should hold the works, & it was no answer to an action for not accepting it, that defts.' manufacture failed & was discontinued, & the chlorine still waste proved useless, & was no longer necessary for their manufacture.—*BEALEY v. STUART* (1862), 7 H. & N. 753; 31 L. J. Ex. 281; 8 Jur. N. S. 389; 158 E. R. 672.

#### *E. Sale of a "Cargo."*

1716. *Meaning of "cargo"—Whole cargo.*—Deft. ordered of pltf's. "a small cargo of lathwood of about the following lengths, etc., in all about 60 cubic fathoms," & pltf's. accepted the order. Pltf's. not being able to procure a vessel of the exact size, chartered a vessel to deft.'s port, loaded with 83 fathoms. On the arrival of the vessel pltf's. agent unloaded, measured, & set apart timber to answer deft.'s order & tendered him a bill of lading for that quantity, & a draft for acceptance; but deft. declined to accept on the ground that the cargo was in excess of the order. In an action for non-acceptance of the goods:—*Held*: "cargo" meant a whole cargo, & not a parcel of a cargo, & pltf's. had not complied with the order so as to entitle them to maintain the action.—*KREUGER v. BLANCK* (1870), L. R. 5 Exch. 179; 23 L. T. 128; 18 W. R. 813; 3 Mar. L. C. 470; *sub nom. KRENGER v. BLANCK*, 39 L. J. Ex. 160.

*Annotations*:—*Distd. Ireland v. Livingston* (1872), L. R. 5 H. L. 395. *Refd. Cassabogion v. Gibb, Livingstone* (1883), 52 L. J. Q. B. 538.

1717. ———.]—Pltf's. sold to deft. "a cargo of from 2,500 to 3,000 barrels, seller's option, American petroleum . . . to be shipped from New York . . . & vessel to call for orders off coast for any safe floating port in the United Kingdom, or on the Continent between Havre & Hamburg, both inclusive, buyer's option." Pltf's. chartered a vessel, on which were placed 3,000 barrels of petroleum, & a bill of lading was signed making them deliverable to pltf's., but as this quantity did not constitute a full cargo, 300 additional barrels were placed on board, which were marked with a different mark, & for which a separate bill of lading was signed. Pltf's. gave notice to deft. of the shipment of the 3,000 barrels & were ready to order the vessel from its port of call to any port of delivery within the contract, & there to deliver to deft. the 3,000 barrels & to take the 300 barrels themselves, or to deliver to deft. at any such port 2,750 barrels as the mean between 2,500 & 3,000, but deft. refused to accept either the 3,000 barrels or any other quantity. Pltf's. having brought an action for non-acceptance:—*Held*: on the true construction of the contract, "cargo" meant the entire load of the vessel which carried it; deft. was therefore not bound to accept part of a cargo; & the action was not maintainable.—*BORROWMAN v. DRAYTON* (1876), 2 Ex. D. 15; 46

*OIL & CANDLE CO. v. SWANN* (1868), 6 Macph. (Ct. of Sess.) 835; 40 Sc. Jur. 444.—*SCOT.*

*Within contemplation*

*of parties.*—*VON MEHREN & Co. v. EDINBURGH ROPERIE & SAIL CLOTH CO., LTD.* (1902), 4 F. (Ct. of Sess.) 232.—*SCOT.*

*o. ——— Usual requirements.*—*BLACKLOCK & MACARTHUR, LTD. v. KIRK*, [1919] S. C. 57; [1918] 2 S. L. T. 267.—*SCOT.*

**Sect. 2.—Delivery: Sub-sect. 8, E. & F.; sub-sect 9, A.]**

L. J. Q. B. 273; 35 L. T. 727; 25 W. R. 194; 3 Asp. M. L. C. 303, C. A.

**Annotations:—***Apld.* *Re* Harrison & Micks, Lambert, [1917] 1 K. B. 755. *Distd.* Paul v. Pim, [1922] 2 K. B. 360. *Refd.* Caffin v. Aldridge (1895), 1 Com. Cas. 181.

**1718. — Unless contrary intended.]—**Where a buyer contracts for a "cargo" & mentions the quantity, unless something plainly shows the contrary to be intended, the governing word is "cargo," & the buyer is bound to take the cargo, whatever the quantity may be.—*LEVI & BROWSE ISLAND GUANO CO., LTD. v. BERK & CO.* (1886), 2 T. L. R. 898, C. A.

**Annotations:—***Apld.* *Re* Harrison & Micks Lambert, [1917] 1 K. B. 755. *Refd.* Caffin v. Aldridge (1895), 1 Com. Cas. 181.

**1719. "All hemp shipped on seller's account"—****"Not exceeding three hundred tons"**—Contract confined to hemp shipped on seller's account.]—A. sold to B. all the hemp that might be shipped on board certain vessels at Riga, not exceeding 300 tons by C. the agent of the concern. C. shipped on board of these vessels only 71 tons of hemp on account of A., but upwards of 300 tons on account of other persons:—*Held:* the contract must be confined to such hemp as C. should ship as agent to A., & A. was not answerable to B. for more than the 71 tons.—*HAYWARD v. SCOUGALL* (1809), 2 Camp. 56; 150 E. R. 1080, N. P.

**Annotation:—***Distd.* Fischel v. Scott (1854), 15 C. B. 69.

**1720. Quantity less than estimated.]—**By the bought & sold notes, the sale purported to be of "the cargo of A., as it stands, of about 1,300 quarters of I. corn, at 30s. per quarter. The quantity to be taken from the bill of lading by the measurement, to be calculated at 220 quarters the 100 kilos., payment in cash on handing the shipping documents & the policy of insurance, less two months' interest." By the bill of lading 1,667 quarters appeared to have been shipped, & payment was made upon that quantity; but only 1,614 quarters were delivered on the ship's arrival:—*Held:* the contract was for the purchase of the cargo as it stood, whether more or less than the quantity in the bill of lading; & *pltf.* was not entitled to any return of the price paid, on the quantity turning out to be less than that mentioned in the bill of lading, although *pltf.* had paid the price on the quantity as stated in the bill of lading.—*COVAS v. BINGHAM* (1853), 2 E. & B. 836; 2 C. L. R. 212; 23 L. J. Q. B. 26; 18 J. P. 569; 18 Jur. 596; 118 E. R. 980; *sub nom.* BINGHAM v. COVAS, 22 L. T. O. S. 97; 2 W. R. 37.

**Annotations:—***Distd.* Tamvaco v. Lucas (1859), 1 E. & E. 581. *Apld.* Tully v. Terry (1873), L. R. 8 C. P. 679. *Refd.* Livingston v. Rall (1855), 25 L. T. O. S. 143; British & India Steam Navigation Co. v. De Mattos, De Mattos v. British India Steam Navigation Co. (1864), 12 W. R. 560.

**1721. Quantity more than estimated.]—***Re* HARRISON & MICKS, LAMBERT & CO., No. 1694, *ante*.

**1722. "About five hundred tons"—**To form complete cargo of ship—Ship unable to carry five hundred tons—Whether contract for as much as ship can carry.]—A contract for the sale of nitrate of soda was in these terms:—"Sold, for, etc., about 500 tons of nitrate of soda, etc., to be ready for delivery on, etc."; & it then proceeded to state, "It is understood that the above nitrate of soda

is to form the full & complete cargo of the *J.P.*, 345 tons register, now on her passage, etc., to proceed to, etc., & there load. In the event of the *J.P.* being unable to prosecute her voyage, then the sellers to deliver another cargo of about equal, quantity," etc. The only ground on which the seller was to be excused was the loss of the *J.P.*, or other vessel substituted for her, on the homeward voyage. The *J.P.* could not carry 500 tons:—*Held:* the contract was for about 500 tons at all events, & not for a less amount, being the whole that the *J.P.* could carry.—*BOURNE v. SEYMOUR* (1855), 16 C. B. 337; 24 L. J. C. P. 202; 25 L. T. O. S. 162; 1 Jur. N. S. 1001; 3 W. R. 511; 139 E. R. 788.

**Annotation:—***Mentd.* Kelsall v. Marshall (1856), 26 L. J. C. P. 19.

**1723. Quantity more than ordered—**Quantity ordered set apart to answer contract—Whether whole cargo may be demanded.]—*KREUGER v. BLANCK*, No. 1716, *ante*.

**1724. —————.]—***BORROWMAN v. DRAYTON*, No. 1717, *ante*.

*F. Delivery of Mixed Goods.*

*See* Sale of Goods Act, 1893 (c. 71), s. 30 (3).

**1725. Proviso for rejection of unmerchantable goods—**Obligation of buyer to accept merchantable part.]—Under a contract to purchase 300 tons of Campeachy logwood, at £35 per ton, etc. to be of real merchantable quality; & such as might be determined to be otherwise by impartial judges to be rejected; the vendee is bound to take so much of the wood tendered as turned out to be of the sort described, at the contract price; though it appeared at the time that a part, which was afterwards ascertained to be 16 out of the 300 tons, was of a different & inferior description.—*GRAHAM v. JACKSON* (1811), 14 East, 498; 104 E. R. 693.

**1726. Right of buyer to reject whole cargo—**Where mixture above average.]—In an action on a contract for the sale of 1,200 quarters of "beans," it appeared that one-fifth part of the cargo was composed of peas, the same being an unusual & undue mixture of peas:—*Held:* the delivery of such a cargo was not a compliance with the contract for the sale of "beans."—*ALEXANDER v. HOOKER* (1847), 8 L. T. O. S. 451.

**1727. — Other articles of distinct character.]—**Deft., a retail dealer at Peterborough, ordered of *pltf.*, who were wholesale dealers at Bristol, certain specified articles of earthenware, with a caution that the order was not to be exceeded. *Pltf.*s. sent by railway a crate containing not only the articles ordered, but others of a distinct character; & they forwarded an invoice to *deft.* in which the price of each item was given, & *deft.* was charged as debtor to *pltf.*s. for a lumped total. On the receipt of the invoice *deft.* refused to receive the crate, & it remained at the railway station. *Pltf.*s. having brought an action for goods sold to recover the price of the articles ordered:—*Held:* *deft.* had a right to reject the whole on account of the articles sent in excess, & *pltf.*s. could not maintain this action.—*LEVY v. GREEN* (1859), 1 E. & E. 969; 28 L. J. Q. B. 319; 33 L. T. O. S. 241; 5 Jur. N. S. 1245; 7 W. R. 486; 120 E. R. 1174, Ex. Ch.

**Annotations:—***Distd.* Mellor v. Street (1866), 15 L. T. 223. *Apld.* Jackson v. Rotax Motor & Cycle Co., [1910] 2 K. B. 937. *Refd.* Mollett v. Robinson (1870), 39 L. J. C. P. 293;

**PART VI. SECT. 2, SUB-SECT. 8.—F.**

**p. Right of buyer to reject whole consignment—**Other goods substituted for some of those purchased.]—*WEIL v. COLLIS LEATHER CO., LTD.*, [1925] 4 D. L. R. 815.—*CAN.*

**q. —————.]—**A contract for the sale of a lot of goods as a whole cannot be enforced where the seller substitutes an article for one of those purchased. In such case the buyer is justified in rejecting the whole.—

*PERFECT FIT GARMENT CO., LTD. v. ARRON BROTHERS*, [1926] 2 D. L. R. 532; 58 N. S. R. 445.—*CAN.*

**r. — Other goods of different description.]—***DALLING v. ESTABROOKS*

*Grimoldby v. Wells* (1875), 44 L. J. C. P. 203. *Mentd. Coekle v. London & South Eastern Ry.* (1870), L. R. 5 C. P. 457.

**1728. — Sale of cargo as per bills of lading—Cargo including smuggled goods.]**—The sellers sold “the cargo” of maize shipped “per s.s. *Rijn*, consisting of about 2,813 French tons, or what steamer carries as per” certain bills of lading. On arrival of the ship it was discovered that she had on board, in addition to the maize, 58 tons of tobacco which, without the knowledge of the sellers, had been smuggled on board, & was not mentioned in the bills of lading. The buyers rejected the maize on the ground that the cargo carried was not “the cargo” contracted for. The arbitrators found that the contract was for the sale of the cargo of maize actually on board at the time when the contract was entered into as comprised in the bill of lading, & awarded that the buyers were not entitled to reject:—*Held*: the arbitrators were right.—*PAUL, LTD. v. PIM & Co.*, [1922] 2 K. B. 360; 91 L. J. K. B. 556; 38 T. L. R. 95; 66 Sol. Jo. 93; 27 Com. Cas. 98.

**1729. Right of buyer to reject goods not in accordance with contract.]**—*LEVY v. GREEN*, No. 1727, *ante*.

**1730. Tender of bill of lading covering other goods—Right of buyer to demand clear bill of lading.]**—C., a firm in Scotland, through agents in London, purchased of the firm of B., carrying on business in Turkey, 1,400 quarters of rye, to be shipped free on board at a port in the Levant, & to be delivered at a port in Europe, to be indicated by & to the consignees of C. The grain was to be paid for by a bill to be drawn by B. on & accepted by C. B. shipped the rye on a vessel chartered by them, but finding that the ship could carry a larger cargo than the rye bought by C. would furnish, filled up the spare space with 78 quarters of maize. B. shipped the two descriptions of grain together by one charterparty & one bill of lading, which latter document was indorsed with orders to deliver the cargo to the agents in London of B. to whom they forwarded the shipping documents with an invoice for the rye made out to C. Before the arrival of the vessel at the port indicated by C., B. informed C. of the fact of there being other grain on board beside that purchased by them, & intimated their, B.’s, willingness to retain the 78 quarters of maize themselves & bear all charges in respect of it. The two descriptions of grain were stowed on board in such a manner that either lot might have been got at & delivered on shore without interfering with the other. C., however, insisted on having a clean, that is to say a separate, bill of lading for the grain they had bought, alleging that they had made a sub-sale at a profit, & could not fulfil their contract without such a document to hand over to their buyers, & they consequently refused to accept the bill drawn by B. upon them until a clean & separate bill of lading of the 1,400 quarters of rye was furnished. Between the time of entering into the contract of sale & the arrival of the ship at the port indicated by C., the market price of rye had fallen considerably below that at which the 1,400 quarters had been invoiced to C. On the arrival of the ship at such port the master held the whole of the grain under a general lien for freight. B. thereupon offered to C. the bill of lading for the two kinds of grain indorsed with a delivery order in favour of

C. of the grain they had bought, & at the same time tendered to C. a sum admittedly more than sufficient to discharge any lien upon the maize alone. C., however, refused to accept the bill of lading in this form, or to take the money proffered. In an action by B. against C., for refusing to accept the grain; & in an action by C. against B. for non-delivery of the rye, alleging as damage C.’s loss of profit upon the sub-sale & expenses to which C. had been put in a reference between their firm & their sub-vendees on a claim by the latter for damages against C. for non-delivery of the rye, in which *arbn.* an award had been made against C.:—*Held*: (1) in the first action, there had been a sufficient offer by B. to deliver the rye to C. & a refusal by C. to accept, & consequently B. was entitled to recover damages against C. for non-acceptance; (2) in the second action, C.’s refusal to accept when an offer reasonably sufficient to satisfy & fulfil the contract had been made by B., disentitled C. to recover.—*IMPERIAL OTTOMAN BANK v. COWAN*, *COWAN v. IMPERIAL OTTOMAN BANK* (1873), 29 L. T. 52; 21 W. R. 770; 2 Asp. M. L. C. 57; *on appeal* (1874), 31 L. T. 336, Ex. Ch.

**Whether admixture of inferior goods indictable.]**—*See CRIMINAL LAW*, Vol. XV., p. 906, Nos. 11,144–11,146.

#### SUB-SECT. 9.—INSTALMENT DELIVERIES.

##### A. In General.

*See Sale of Goods Act*, 1893 (c. 71), s. 31.

**1731. When vendor may sue for price of instalments.]**—Where, by a contract of sale, the vendor agreed to deliver 250 bushels of wheat within a specific time, & delivered part, but not the residue:—*Held*: he might, after the time mentioned in the contract had expired, recover from the purchaser the value of the wheat delivered to & retained by him.

Where there is an entire contract to deliver a large quantity of goods consisting of distinct parcels within a specified time, & the seller delivers part, he cannot before the expiration of that time bring an action to recover the price of that part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered. But if he retain the part delivered after the seller has failed in performing his contract the latter may recover the value of the goods which he has so delivered (*PARKE, B.*).—*OXENDALE v. WETHERELL* (1829), 9 B. & C. 386; 4 Man. & Ry. K. B. 429; 7 L. J. O. S. K. B. 264; 109 E. R. 143.

*Annotations*:—*Apprvd. & Apld.* Colonial Insee. of New Zealand *v. Adelaide Marine Insee.* (1886), 12 App. Cas. 128. *Distd.* *Howell v. Evans* (1926), 134 L. T. 570. *Reid.* *James v. Cotton* (1831), 7 Bing. 266; *Kingdom v. Cox* (1848), 5 C. B. 522; *Parkin v. South Hetton Coal Co.* (1907), 97 L. T. 98.

**1732. Whether purchaser bound to accept delivery by instalments.]**—*REUTER v. SALA*, No. 1827, *post*.

**1733. —.]**—*HONCK v. MULLER*, No. 1774, *post*.

**1734. Whether purchaser entitled to demand delivery by instalments.]**—*REUTER v. SALA*, No. 1827, *post*.

**1735. Delivery must be by reasonable instalments.]**—*CODDINGTON v. PALEOLOGO*, No. 1467, *ante*.

(F. L.) & Co., [1925] 3 D. L. R. 1129.—*CAN.*

t. —.]—*TARLING v. O'Riordan* (1878), 2 L. R. Ir. 82.—*IR.*

**1729 i. Right of buyer to reject goods not in accordance with contract.]**—

*AITKEN, CAMPBELL & Co., LTD. v. BOULLEN & GATENBY*, [1908] S. C. 490.—*SCOT.*

#### PART VI. SECT. 2, SUB-SECT. 9.—A.

##### a. Whether purchaser entitled to

*demand delivery by instalments—Provision for delivery as required.]*—*GERROW v. HUGHES* (1918), 42 O. L. R. 621; 14 O. W. N. 123; 43 D. L. R. 307.—*CAN.*

**1735 i. Delivery must be by reasonable instalments.]**—In a contract for delivery

*Sect. 2.—Delivery: Sub-sect. 9, A. & B.]*

1736. Agreement to accept by instalments—Shipment by steamer or steamers.]—BRANDT v. LAWRENCE, No. 1474, *ante*.

1737. ——— Delivery as required.]—JACKSON v. ROTAX MOTOR & CYCLE CO., No. 1895, *post*.

1738. ——— Failure to require.]—EASTERN COUNTIES RY. CO. v. PHILIPSON, No. 1710, *ante*.

1739. ——— Inferred from conduct of purchaser.]—CHAMPION v. SHORT, No. 1922, *post*.

1740. ———.]—A. contracts to sell to B. 50 tons of hemp, to be shipped from Cronstadt, or St. Petersburg; the ship's name to be declared as soon as known, & to arrive before Dec. 31. On Sept. 5, A. gives notice to B. that the hemp was shipped on board the *Liveley*; on Sept. 20 he sends a second notice, that if the quantity did not come by the *Liveley*, he would make it up from the cargo of another vessel. On Sept. 29 A. gives a third notice, that 20 tons would come by the *Liveley*, & the rest by another ship. B. accepts the 20 tons, but refuses to receive any more:—*Held*: B. was bound to receive the remainder of the hemp, unless he could show that he had sustained some special damage by A.'s non-performance of the precise terms of the contract.—THORNTON v. SIMPSON (1816), 6 Taunt. 556; Holt, N. P. 164; 2 Marsh. 267; 128 E. R. 1151, N. P.

Annotation:—*Refd.* Borrowman v. Free (1878), 4 Q. B. D. 500.

1741. ———.]—Where debt. agreed to purchase a lot of trees for a certain sum, & pay for the same according to conditions of sale, & afterwards felled & carried away part of them without making such payment & refused to pay until the remainder had been delivered:—*Held*: the exors. of the vendor having failed to establish a count on the special contract, might recover the value of the trees taken by debt. under counts for goods sold & delivered as debt., by such taking, had disaffirmed the entirety of the contract.—BRAGG v. COLE (1821), 6 Moore, C. P. 114.

1742. ———.]—RICHARDSON v. DUNN, No. 1671, *ante*.

1743. ———.]—Pltfs. contracted to sell to debt. 200 tons of brimstone "to be delivered *ex* the first parcel of brimstone we have in the Tyne on our account." On June 24 a ship arrived in the Tyne with a large cargo of brimstone. Pltfs., having obtained leave from the owner to dispose of 50 tons on their own account, tendered the 50 tons to debt., who wished to cancel the contract, & refused to receive them. Another vessel having subsequently arrived in the Tyne with brimstone, pltfs. having in like manner obtained permission of the owner to dispose of it on their own account, on July 11 tendered 150 tons to debt. in fulfilment of the contract. This portion also debt. declined to accept. Debt. never objected to the brimstone being offered to him in two deliveries:—*Held*: pltfs. had sufficiently tendered the brimstone pursuant to their contract to entitle them to recover in an action against debt. for refusing to accept it.—LEIDEMANN v. GRAY (1857), 26 L. J. Ex. 162; 3 Jur. N. S. 219; *sub nom.* GRAY

v. LEIDERMANN, 28 L. T. O. S. 341; 5 W. R. 294, Ex. Ch.

1744. ——— Inferred from circumstances.]—COLONIAL INSURANCE CO. OF NEW ZEALAND v. ADELAIDE MARINE INSURANCE CO., No. 1113, *ante*.

1745. ——— No provision as to amounts of instalments.]—Defts. contracted to buy from pltf. from 5,000 to 6,000 tons of iron ore, to be delivered at Cardiff "during the months of June, July, Aug. & Sept." It appeared from the correspondence between the parties which led to the contract that pltf. had arranged with correspondents at Carthage for the supply & shipment of the ore. By July 28, 4,023 tons of ore were delivered to & accepted by defts., & on July 29, the *Nero* arrived with 767 tons more, notice at the same time being given to defts. of her readiness to discharge. There was considerable delay in discharging the *Nero*, she having made an exceptionally short voyage, & for her detention beyond the lay days, pltf. had to pay demurrage to the extent of £150, which he now sought to recover from defts. The jury found that the tender was a reasonable one, but defts. contended that the quantity ought to have been distributed rateably over the four months, & that, not being bound to accept the *Nero's* cargo till Sept., they were not liable to pay the demurrage sued for:—*Held*: the contract gave the option to either party to deliver or to demand the amount contracted for; & as no provision was made for exercising the option at any given time, whether in the first month or the last, pltf. could not tell, until the option was exercised, how many tons should be delivered in any month; also that the circumstances showed that the parties could not have contemplated equal monthly quantities.—CALAMINUS v. DOWLAIS IRON CO., LTD. (1878), 47 L. J. Q. B. 575.

*B. Non-Payment for Instalments.*

See Sale of Goods Act, 1893 (c. 71), s. 31 (2).

Right to payment.]—See CONTRACT, Vol. XII., p. 166, No. 1213.

1746. Presumption of repudiation by purchaser—Refusal to pay for first instalment.]—Deft. contracted to sell to pltfs. 250 tons pig iron at 56s. per ton, half to be delivered in two, the remainder in four weeks; payment, net cash fourteen day after delivery of each parcel. The market was rising, & notwithstanding urgent demands by pltfs., the delivery of the first 125 tons was not completed for nearly six months. Pltfs. refused to pay for the first parcel, claiming a right to set off the loss they had sustained from being obliged to procure other iron in consequence of debt.'s default; but they still urged the delivery of the second parcel. Debt., treating the refusal to pay as a breach & an abandonment of the contract by pltfs., declined to deliver any more. There was no suggestion of inability on the part of pltfs. to pay, & the price of the first parcel was ultimately paid:—*Held*: the mere refusal to pay for the first parcel did not, under the circumstances, warrant debt. in treating the contract as abandoned, & refusing to deliver the remainder, & pltfs. were entitled to damages for the breach.—FREETH v.

by instalments it is the duty of the seller to deliver the goods within the contract period in reasonable instalments.—CONNELLY BROTHERS v. KAHN & HUGGINS, LTD., [1922] N. Z. L. R. 299.—N.Z.

b. Agreement to accept by instalments—Time not fixed—Delivery within reasonable time.]—PICTURESQUE ATLAS CO. v. BRADBURY (1893), 19 V. L. R.

439.—AUS.

c. ——— Unsatisfactory deliveries—Continued acceptance under protest.]—DOMINION LUMBER CO. v. HODGSON & KING (1919), 48 D. L. R. 712.—CAN.

**PART VI. SECT. 2, SUB-SECT. 9.—B.**

d. Right to withhold delivery of further instalments—Until payment

made—No time fixed for payment.]—BOYD v. SULLIVAN (1888), 15 O. R. 492.—CAN.

e. Right to payment on delivery of each instalment.]—ALLEN v. TOS (1900), 18 N. Z. L. R. 762.—N.Z.

f. Whether amounting to repudiation—Refusal to pay until reduction made for short weight.]—Where a contract was entered into to deliver a



BURR (1874), L. R. 9 C. P. 208; 43 L. J. C. P. 91; 29 L. T. 773; 22 W. R. 370.

**Annotations.**—*Distd.* Mersey Steel & Iron Co. v. Naylor, Benzon (1884), 9 App. Cas. 434. *Refd.* Morgan v. Bain (1874), L. R. 10 C. P. 15; Rhymney Ry. v. Brecon & Merthyr Tydfil Ry. (1900), 83 L. T. 111; Workman, Lloyd Brazleho, [1908] 1 K. B. 968; Newsom v. [1918] 1 K. B. 271; Payzu v. Saunders, [1919] 581; Pearl Mill Co. v. Ivy Tannery Co., [1919] 78. *Mentd.* General Billposting Co. v. Atkinson, [1910] A. C. 118; Dennis v. Tunnard & Moore (1911), 56 Sol. Jo. 162.

**1747.** — **Vendor's winding up pending.**—*Resps.* bought from applt. co. 5,000 tons of steel of the company's make, to be delivered 1,000 tons monthly, commencing Jan. 1881, payment within three days after receipt of shipping documents. In Jan. the co. delivered part only of that month's instalment, & in the beginning of Feb. made a further delivery. On Feb. 2, shortly before payment for these deliveries became due a petition was presented to wind up the co. *Resps. bond fide* under the erroneous advice of their solr. that they could not without leave of the ct. safely pay pending the petition objected to make the payments then due unless the co. obtained the sanction of the ct. which they asked the co. to obtain. On Feb. 10 the co. informed *resps.* that they should consider the refusal to pay as a breach of contract releasing the co. from any further obligations. On Feb. 15, an order was made to wind up the co. by the ct. A correspondence ensued between *resps.* & the liquidator, in which the *resps.* claimed damages for failure to deliver the Jan. instalment & a right to deduct those damages from any payment then due; & said that they always had been & still were ready to accept such deliveries & make such payments as ought to be accepted & made under the contract subject to the right of set off. The liquidator made no further deliveries & brought an action in the name of the co. for the price of the steel delivered. *Resps.* counterclaimed for damages for breaches of contract for non-delivery:—*Held:* upon the true construction of the contract, payment for a previous delivery was not a condition precedent to the right to claim the next delivery; *resps.* had not by postponing payment under erroneous advice acted so as to show an intention to repudiate the contract or so as to release the co. from further performance.—*MERSEY STEEL & IRON CO. v. NAYLOR, BENZON & CO.* (1884), 9 App. Cas. 434; 53 L. J. Q. B. 497; 51 L. T. 637; 32 W. R. 989, H. L.; *affg.*, 9 Q. B. D. 648, C. A.

**Annotations.**—*Distd.* Dickenson v. Fenshaw (1892), 8 T. L. R. 271. *Consd.* Booth v. Bowron (1892), 8 T. L. R. 611; Cornwall v. Henson, [1900] 2 Ch. 298. *Refd.* Soc. Generale de Paris v. Milders (1883), 49 L. T. 55; Rhymney Ry. v. Brecon & Merthyr Tydfil Junction Ry. (1900), 69 L. J. Ch. 813; Ebbw Vale Steel, etc. Co. v. Blaenau Iron, etc. Co. (1901), 6 Com. Cas. 33; Millar's Karri & Jarrah Co. (1902) v. Weddel, Turner (1908), 100 L. T. 128; Biddell v. E. Clemens Horst (1910), 103 L. T. 661; Dennis v. Tunnard & Moore (1911), 56 Sol. Jo. 162; Inverkip S.S. Co. v. Bunge, [1917] 2 K. B. 193; Veithardt & Hall v. Rylands (1917), 116 L. T. 706; Ertel Bieber v. Rio Tinto Co., Dynamit Act. v. Rio Tinto Co., Vereinigte Kongs & Laurahutte Act. v. Rio Tinto Co., [1918] A. C. 260; Morris v. Baron, [1918] A. C. 1; *Re* Rubel Bronze & Metal Co. & Vos, [1918] 1 K. B. 315; Payzu v. Saunders, [1919] 2 K. B. 581; *Re* Lavey, *Ex p.* Trustee, [1920] 1 K. B. 674; Martin v. Stout, [1925] A. C. 359; Tyldesley U. D. C. v. Leigh U. D. C. (1925), 23 L. G. R. 243. *Mentd.* Eberle's Hotels & Restaurant Co. v. Jonas (1887), 18 Q. B. D. 459; Pratt v. Inman (1889), 43 Ch. D. 175; Sovereign Life Assce. v. Dodd, [1892] 1 Q. B. 405; Christie v. Taunton, Delmar, Lane, *Re* Taunton, Delmar, Lane, [1893] 2 Ch. 175; Gueret v. Audouy (1893), 62 L. J. Q. B. 633; *Re* Hett, Naylor (1894), 10 T. L. R. 412; *Re* Auriferous Properties (No. 2), [1898] 2 Ch. 428; *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546; General Billposting Co. v. Atkinson,

[1909] A. C. 118; Bank Line v. Capel, [1919] A. C. 435; Bradley v. Newsom, [1919] A. C. 16; Ruffy-Arnell, etc. Co. v. R., [1922] 1 K. B. 599; *Re* City Life Assce., [1926] Ch. 191.

**1748.** — **Refusal to pay cash on delivery.**—*Booth v. Bowron* (1892), 8 T. L. R. 641.

**1749.** — **Refusal to pay increased instalment—Unqualified agreement to pay—Damages payable to vendor.**—*Pltfs.* entered into a contract with buyers in Calcutta to manufacture & ship machinery by instalments over several months at agreed prices, but subject to a stipulation that should the cost of labour or wages increase, there should be a corresponding increase in the purchase price. The buyers were also to open a "confirmed irrevocable credit" in favour of *pltfs.* with a bank in this country, & to pay for each shipment as it took place. In pursuance of this arrangement *defts.*, who were the buyers' bankers in London, wrote to *pltfs.* stating that they would pay bills drawn on the buyers to the extent of £70,000, the bills to be accompanied by documents & to be received before Apr. 14, 1921, "this to be considered a confirmed irrevocable credit." *Pltfs.* shipped two instalments under the contract & received payment under the letter of credit. The buyers then found that the invoices included an increase in the purchase price on account of wages & material, & instructed *defts.* only to pay so much of the next invoices as represented the original prices. *Defts.* accordingly refused to pay the bill presented on the next shipment & *pltfs.* then cancelled the contract, claiming damages from *defts.* as on a repudiation by the buyers:—*Held:* the credit being irrevocable, the refusal of *defts.* to take & pay for the particular bills on presentation of the proper documents constituted a repudiation of the contract as a whole, & *pltfs.* were entitled to damages so reckoned. The basis of this form of banking facility is that the buyer is taken, as between himself & the banker, to accept the seller's invoices, as correct. Any adjustment must be made by way of refund by the seller & not by way of retention by the buyer.—*URQUIHART LINDSAY & CO. v. EASTERN BANK, LTD.*, [1922] 1 K. B. 318; 91 L. J. K. B. 274; 126 L. T. 534; 27 Com. Cas. 124.

**Annotation.**—*Mentd.* Prosperity v. Lloyds Bank (1923), 39 T. L. R. 372.

**1750.** **Right to withhold delivery of further instalments—Until payment made.**—*Declaration* that it was agreed that *pltf.* should purchase of *deft.* 30,000 tons of coal & that *deft.* should ship the same on board certain vessels for a period of six months from Aug. 1, & should load each vessel within twenty-four hours after notice that the vessel was ready to be loaded at the T. docks. *Averment* that all conditions were performed necessary, etc., yet *deft.* broke the agreement in this that he did not load a certain screw steamer as agreed within twenty-four hours after the same was ready; & afterwards further broke the agreement, & absolutely refused to perform the same, or to ship any more goods at all for *pltf.* as agreed. *Plea* to the second breach, that before *deft.* absolutely refused as alleged, *pltf.* absolutely refused to pay according to the agreement, for certain coals that had theretofore been shipped for & delivered by *deft.* to *pltf.*, although requested by *deft.* to pay for the same according to the agreement & although everything had happened, & been done necessary to entitle *deft.* to such payment, wherefore *deft.* refused to load until such

quantity of barley by delivery in certain portions, each portion to be paid for on its arrival at the port of destination; some of the portions delivered were

delivered short in weight; *pltf.* refused to pay for any more unless a reduction was allowed for the price of the deficiency, & also for re-weighing

the barley:—*Held:* such a refusal did not amount to a rescission of the contract by *pltf.*—*CONCORAN v. PROSEK* (1873), 22 W. R. 222.—*IR.*



**Sect. 2.—Delivery: Sub-sect. 9, B. & C.]**

payment was made, as he lawfully might:—*Held*: a bad plea.—*CLARKE v. BURN* (1866), 14 L. T. 439; 2 Mar. L. C. 342.

1751. ———.]—*Longbottom (H.) & Co., Ltd. v. Bass, Walker & Co.*, [1922] W. N. 245.

1752. ——— **Agreement that payment condition precedent.**—By a contract for the sale of steel tinplate bars to be delivered over a period of three months, payment to be made in cash in fourteen days after delivery, it was provided that all payments should be made on due date as a condition precedent to future deliveries. The purchasers having made default in payment on due date:—*Held*: the vendors were justified in unconditionally refusing to make any further deliveries.—*EBBW VALE STEEL, ETC. CO. v. BLAINA IRON, ETC. CO.* (1901), 8 Com. Cas. 33, C. A.

1753. ——— **Declaration of purchaser's insolvency.**—H. sold 330 tons of bleaching powder to E., to be delivered thirty tons per month, payment to be made in cash fourteen days after each delivery. The whole amount was delivered except one instalment of thirty tons due in Dec. 1871, but the Nov. instalment was not paid for. On Dec. 20, E. called a meeting of his creditors, & declared himself insolvent. On Dec. 23, H. wrote a letter refusing to deliver any more bleaching powder under the contract. In Feb. following, E. was adjudicated bkpt., & the trustee applied to the ct. for an order upon H. to pay £150 damages for non-delivery of the Dec. instalment of goods:—*Held*: (1) although neither the non-payment of the Nov. instalment nor the bkpcy. of E. would entitle H. to rescind the contract, yet he had a right, after the declaration of insolvency to refuse to deliver any more goods till the price of both the Nov. & Dec. instalments had been tendered to him; (2) H.'s letter of Dec. 23, did not excuse the trustee of E.'s estate from tendering the price of the two instalments before claiming damages for the non-delivery of the Dec. instalment.—*Re EDWARDS, Ex p. CHALMERS* (1873), 8 Ch. App. 289; 42 L. J. Bcy. 37; 28 L. T. 325; 21 W. R. 349, L. C. & L. JJ.

*Annotations*:—*As to* 1. *Fold*. *Morgan v. Bain* (1874), L. R. 10 C. P. 15. *Refd.* *Re Phoenix Bessemer Steel Co., Ex p. Carnforth Hamatite Iron Co.* (1876), 4 Ch. D. 108; *Tolhurst v. Associated Portland Cement Manufacturers* (1900), *Associated Portland Cement Manufacturers* (1900) *v. Tolhurst*, [1902] 2 K. B. 660. *Generally, Refd.* *Re Nathan, Ex p. Stapleton* (1879), 10 Ch. D. 586; *Berry v. Halifax Commercial Banking Co.*, [1901] 1 Ch. 188.

1754. ———.]—Defts. had, on Feb. 5, sold to plffs. 200 tons of iron, to be delivered twenty-five tons monthly at £5 per ton, net cash, or by four months' bill with 2s. 6d. per ton added. By the usage of trade, no delivery was due under this contract till Apr. 1. On Mar. 12, plffs. found themselves to be insolvent, & they gave notice of the fact to defts. On Mar. 16, they filed a petition in the Bkpcy. Ct. for liquidation by arrangement or composition. The usual course of business under previous contracts between the parties of a similar description was for defts. to deliver upon such contracts without further demand of delivery. No delivery, however, was made by defts. or claimed by plffs. in Apr. On Apr. 5, at the first meeting of creditors a resolution was passed to accept a composition of 5s. in the pound. Though the existence of the contract was mentioned at the meeting, no mention was made of it in the written statement of pltf.'s affairs. No step was

taken in relation to the contract by either party until May 13, when, the market for iron having risen, plffs. claimed the delivery of iron in fulfillment of the contract, offering & being ready to pay cash for it. Defts. replied, stating that plffs. having failed to perform their part of the contract, there was an end of it. Plffs. thereupon brought an action against defts. for non-delivery of the iron:—*Held*: the effect of the facts was that there had been a rescission of the contract before May 13, the conduct of plffs. having been such as to justify defts. in the belief that plffs. intended to abandon the contract upon their insolvency, & there being evidence that defts. in such belief had likewise abandoned it.—*MORGAN v. BAIN* (1874), L. R. 10 C. P. 15; 44 L. J. C. P. 47; 31 L. T. 616; 23 W. R. 239.

*Annotations*:—*Refd.* *Re Phoenix Bessemer Steel Co., Ex p. Carnforth Hamatite Iron Co.* (1876), 4 Ch. D. 108; *Re Nathan, Ex p. Stapleton* (1879), 10 Ch. D. 586; *Tolhurst v. Associated Portland Cement Manufacturers* (1900), *Associated Portland Cement Manufacturers* (1900) *v. Tolhurst*, [1902] 2 K. B. 660; *Workman, Clark v. Lloyd Brazileño*, [1908] 1 K. B. 968. *Mentd.* *Berry v. Halifax Commercial Banking Co.*, [1901] 1 Ch. 188.

1755. ——— **Agreement for payment on delivery.**—R. agreed to supply W. with straw, to be delivered at W.'s premises, at the rate of three loads in a fortnight, during a specified time; & W. agreed "to pay R. 33s. per load for each load of straw so delivered on his premises" during the above period. After the straw had been supplied for some time W. refused to pay for the last load delivered, & insisted on always keeping one payment in arrear:—*Held*: according to the true effect of the agreement, each load was to be paid for on delivery, & on W.'s refusal so to pay for them. R. was not bound to send any more.—*WITHERS v. REYNOLDS* (1831), 2 B. & Ald. 882; 1 L. J. K. B. 30; 109 E. R. 1370.

*Annotations*:—*Fold.* *Re Edwards, Ex p. Chalmers* (1872), 42 L. J. Bcy. 2. *Appl.* *Corcoran v. Proser* (1873), 22 W. R. 222; *Freeth v. Burr* (1874), L. R. 9 C. P. 208. *Fold.* *Bloomer v. Bernstein* (1874), L. R. 9 C. P. 588. *Refd.* *Franklin v. Miller* (1836), 4 Ad. & El. 599; *Zulueta v. Miller* (1846), 2 C. B. 895; *Prickett v. Badger* (1856), 1 C. B. N. S. 296; *Clarke v. Burn* (1866), 14 L. T. 439; *Unwin v. Clarke* (1866), L. R. 1 Q. B. 417; *Bradford v. Williams* (1872), L. R. 7 Exch. 259; *Simpson v. Crippin* (1872), 27 L. T. 546; *Luker v. Dennis* (1877), 7 Ch. D. 227; *Mersey Steel & Iron Co. v. Naylor, Benzon* (1884), 9 App. Cas. 434; *Cornwall v. Henson*, [1900] 2 Ch. 298; *Rhymney Ry. v. Brecon & Merthyr Tydfil Junction Ry.* (1900), 69 L. J. Ch. 813; *Emery v. Wells*, [1906] A. C. 515; *Re Rubel Bronze & Metal Co. & Vos*, [1918] 1 K. B. 315; *Martin v. Stout*, [1925] A. C. 359.

1756. ——— **Nonpayment justifiable.**—*FREETH v. BURR*, No. 1746, *ante*.

1757. ——— **Probable failure to pay future instalments.**—Where there is a contract for the sale of goods to be delivered by instalments, the price of each instalment being payable on delivery, & the buyer does not pay for one instalment under such circumstances as to give the seller reasonable ground for believing that he will be unable to pay for the instalments to be delivered in future, & that he does not intend to go on with the contract, the seller is justified in repudiating the contract.—*BLOOMER v. BERNSTEIN* (1874), L. R. 9 C. P. 588; 43 L. J. C. P. 375; 31 L. T. 306; 23 W. R. 238.

*Annotations*:—*Refd.* *Morgan v. Bain* (1874), L. R. 10 C. P. 15; *Re Phoenix Bessemer Steel Co., Ex p. Carnforth Hamatite Iron Co.* (1876), 4 Ch. D. 108.

**C. Non-Delivery of Instalments.**

See Sale of Goods Act, 1893 (c. 71), s. 31 (2).

1758. **Right to refuse delivery—Without cash payment—Insolvency of purchasers.**—The C. Iron

**PART VI. SECT. 2, SUB-SECT. 9.—C.**

**g. Right to return instalments delivered.]**—The rule with regard to

contracts for the delivery of goods in parcels is that the buyer who receives some of the parcels may return them if the whole quantity is not delivered,

but he must pay for the instalments he keeps & deals with as his own, or which he retains after the expiration of the period stipulated for the complete

co. in Oct. 1874, contracted to supply the P. Steel co. with iron at a certain price, to be delivered in monthly instalments, & to be paid for, as to some, by bills at four months, & as to the rest, by cash at a certain length of credit. The instalments were delivered till the month of Feb. 1875, inclusive, in which month the purchasing co. called a meeting of their principal creditors, & stated that they were carrying on the business at a loss & were short of working capital, & asked for an extension of credit in their existing contracts, which, however, was refused them. The selling co. then refused to deliver any more iron except upon immediate cash payments, & in consequence of that refusal the purchasing co. gave notice to rescind the contract. The purchasing co. continued to carry on the business after the meeting, & endeavoured to raise fresh capital by issuing preference shares, but in June, 1875, they passed a resolution for winding up. The selling co. claimed to prove for damages for breach of the contract against the estate of the purchasing co. :—*Held* : there was no such declaration of insolvency at the meeting in Feb. as to justify the selling co. in refusing to deliver iron except for cash payments, & consequently that the purchasing co. had a right to rescind the contract, & the claim for damages was dismissed.—*Re PHOENIX BESSEMER STEEL CO., Ex p. CARNFORTH HEMATITE IRON CO.* (1876), 4 Ch. D. 108; 46 L. J. Ch. 115; 35 L. T. 776; 25 W. R. 187, C. A.

*Annotations* :—*Consd.* Mersey Steel & Iron Co. v. Naylor (1882), 9 Q. B. D. 648. *Mentd.* Johnstone v. Milling (1886), 54 L. T. 629.

— *Unpaid vendor.*]—*See* Part VII., Sect. 7, *post*.

**1759. Non-delivery in event provided for—Strike.**—*STEPHENS, MAWSON & CO. v. GREAT WESTERN COLLIERY CO., LTD.* (1899), 15 T. L. R. 432.

**1760. Delivery excused in certain events—Right to deliver instalments withheld.**—*DE OLFAGA v. WEST CUMBERLAND IRON & STEEL CO., No. 1780, post.*

**1761. Delivery withheld without request from purchaser—Beyond period of contract.**—*PLEVINS v. DOWNING, No. 1581, ante.*

**1762. Non-delivery of full instalments—At purchaser's request—Purchaser's right to arrears.**—*Defts.* in Oct. 1870, contracted to sell to *plffs.* 2,000 tons of iron "delivery in monthly quantities of 160½ tons over 1871, or sooner if required"; payment by four months' acceptance for the 10th of the month following delivery. In Jan. 1871, 101 tons were delivered, but *plffs.* did not then demand the delivery of the balance of the monthly quantity. In Feb. 1871, & at several periods between that date & Dec. 1871, *plffs.* requested *defts.* to forbear from delivery of more iron under the contract, & *defts.* accordingly only made partial deliveries during the several months of 1871, up to & including Nov. In Dec. *plffs.* required delivery of the residue of the whole 2,000 tons. *Defts.* refused it, & denied that they were liable to deliver any more iron under the contract, except what was due on the monthly balance. *Plffs.* then brought an action for non-delivery :—*Held* : without deciding whether *defts.* could be required to deliver in Dec. at once the whole balance of the 2,000 tons, they remained liable to deliver it at

some reasonable time, & not having asked for such reasonable time, but having repudiated their liability, they had no defence to the action.—*TYERS v. ROSEDALE & FERRYHILL IRON CO.* (1875), L. R. 10 Exch. 195; 44 L. J. Ex. 130; 33 L. T. 56; 23 W. R. 871, Ex. Ch.

*Annotations* :—*Consd.* Hartley v. Hymans, [1920] 3 K. B. 475. *Appl.* Sheikh Mohammad Habib Ullah v. Bird (1921), 37 T. L. R. 405. *Reid.* Hickman v. Haynes (1875), L. R. 10 C. P. 598.

**1763. Damages for non-delivery—Prior tender of price.**—*Re EDWARDS, Ex p. CHALMERS, No. 1753, post.*

**1764. — Damages calculable at time of particular breach.**—*Defts.* entered into a contract with *plff.*, whereby they undertook to deliver, from Jan. 1, until Dec. 31, 1872, 6,260 waggons of coal at 7s. 3d. per ton of 20 cwt., at the fair average rate of twenty waggons per day; payment by three months' acceptance, drawn on the 10th of each month, for the previous month's supply. The deliveries were irregular in point of time, & insufficient in point of quantity, & they failed to comply with the condition of the contract, that they should be at the fair average rate of twenty waggons per day. At the end of the year there was a large deficiency. *Plff.*, although constantly complaining of the deliveries, did not go into the market & buy against *defts.* at any time during 1872, but on Feb. 13, 1873, he bought coal in the market to supply the whole of the deficiency of the coal undelivered, at a very much higher price, namely, 19s. per ton. Coal had been gradually rising in price in the market throughout the successive months of 1872, & it rose more rapidly in the months of Jan. & Feb. 1873. *Plff.* claimed to be entitled to, as damages, the difference between the contract price of 7s. 3d. & the market price of coal at the expiration of such a reasonable time after Dec. 31, 1872, as would have enabled him to go into the market & obtain it, calculated upon the whole of the deficiency left undelivered by *defts.* under their contract throughout the year 1872. *Defts.* contended that *plff.* was not entitled to wait until the expiration of the year before assessing his damages, as contended for by *plff.*, for that a breach of the contract was committed as often as a month expired without the proper quantity applicable to such month having been delivered, & that *plff.* was bound to assess his damages in respect of such breach from an estimate of that month's market price of coal, or that the breaches were committed at some shorter periods; but that the damages should be calculated at the end of each month :—*Held* : as soon as *defts.* failed to deliver a fair average of coal, according to the terms of the contract, a breach had taken place, for which at that time, *plff.* was entitled to damages as upon that breach, & so on from time to time as each subsequent breach took place, & it was an erroneous way of estimating the damages by waiting until the full period of the contract had expired, & then claiming the difference at that time.—*BARNINGHAM v. SMITH* (1874), 31 L. T. 540.

**1765. — Reduction of damages—Unreasonable exercise of right to repudiate.**—*Deft.* agreed to sell to *plffs.* a quantity of silk, deliveries to be spread over several months, & payment for each delivery to be made within a month. *Plffs.*

delivery.—*DUNLOP v. DEVINE* (1917), 51 N. S. R. 110; 36 D. L. R. 385.—*CAN.*

*h. Contract discharged as to particular instalment.*—A contract, so far as it applies to any particular instalment, is discharged upon default being

made in delivery or acceptance.—*DONER v. WESTERN CANADA FLOUR MILLS CO., LTD.* (1918), 41 O. L. R. 503; 13 O. W. N. 328; 41 D. L. R. 476.—*CAN.*

*k. — Immediate right of action vesting in buyer.*—*WRIGHT, STEPHEN-*

*SON & CO., LTD. v. ADAMS & CO.* (1908), 28 N. Z. L. R. 193.—*N.Z.*

*l. — Where each delivery a separate contract.*—*HIGGIN v. PUMPHREYSTON OIL CO., LTD.* (1893), 20 R. (Ct. of Sess.) 532; 30 Sc. L. R. 595.—*SCOT.*

**Sect. 2.—Delivery:** Sub-sect. 9, C., D. & E.; sub-sect. 10, A.]

drew a cheque for the amount of the first delivery within a month, but it failed to reach debt. On ascertaining this fact in the following month pltf's. sent another cheque, & debt. then said that cash cover would be required for future deliveries. Pltf's. elected to treat debt.'s refusal to deliver under the contract as a repudiation, & endeavoured, on a rising market, to buy elsewhere, but unsuccessfully. They then brought an action claiming the amount of the loss which they had sustained, based on the value of silk at the time of repudiation, & on the refusal to deliver on the original terms. The judge at the trial found that there had been a breach of the contract, but that pltf's., for the purpose of minimising their loss, would have acted reasonably in accepting debt.'s offer to supply the goods for cash, & that therefore it was their duty to do so, & he reduced the damages accordingly:—*Held*: the question was one of fact & the decision must be affirmed.—*PAYZU, LTD. v. SAUNDERS*, [1919] 2 K. B. 581; 89 L. J. K. B. 17; 121 L. T. 563; 35 T. L. R. 657, C. A.

**Non-payment of instalments.**—See Sub-sect. 9, B., *ante*.

#### D. Non-Acceptance of Instalments.

See Sale of Goods Act, 1893 (c. 71), s. 31 (2).

**1766. Right to refuse acceptance—Delivery of first instalment delayed.**—To a declaration on an agreement, stating that debts. agreed to buy of pltf's. 667 tons of iron, to be shipped from Sweden in the months of June, July, Aug. & Sept., & in about equal portions each month, at £15 10s. per ton delivered, on arrival in London; that sellers should have the option of commencing shipments in May, & also of completing the whole by the end of July; & alleging, as a breach, the refusal to accept or pay for the iron, or any part thereof; debts. pleaded that pltf's. did not avail themselves of the option of commencing shipments in May; that in June pltf's. shipped 21 tons, being a much less quantity than was required to be shipped during that month by the terms of the contract; that pltf's. failed to complete the shipment for the month of June, according to the terms of the contract, & were never ready to deliver such a quantity of iron, shipped from Sweden in June, as is specified in the contract, & were not ready & willing to deliver to debts. the small quantity shipped, until after debts. had notice that pltf's. were not ready & willing, & were unable to fulfil their part of the agreement with reference to the quantity of iron to be shipped in June; wherefore debts. refused to receive the quantity so shipped during the month of June, & gave notice to pltf's. that they refused to accept the residue of the iron:—*Held*: the plea was a good answer to the action.—*HOARE v. RENNIE* (1859), 5 H. & N. 19; 29 L. J. Ex. 73; 1 L. T. 104; 8 W. R. 80; 157 E. R. 1083.

*Annotations*:—*Expld.* Jonassohn v. Young (1863), 4 B. & S. 296. *Dhdt.* Simpson v. Crippin (1872), L. R. 8 Q. B. 14. *Expld.* Freeth v. Burr (1874), L. R. 9 C. P. 208. *Apprvd.* Honck v. Muller (1881), 7 Q. B. D. 92. *Consd. & Distd.* Mersey, Steel & Iron Co. v. Naylor, Benzon (1884), 9 App. Cas. 434. *Consd.* Workman, Clark v. Lloyd Brazileiro Co. (1908), 99 L. T. 477. *Refd.* Bradford v. Williams (1872), L. R. 7 Exch. 259; Bellamy v. Debenham, [1891] 1 Ch. 412; Cornwall v. Henson, [1900] 2 Ch. 298.

**1767.** — First instalment not equal to contract.]—*ENGLEHART v. BOSANQUET* (1881), cited in 7 Q. B. D. at p. 100; 50 L. J. Q. B. at p. 533; 45 L. T. at p. 205.

*Annotation*:—*Apld.* Honck v. Muller (1881), 7 Q. B. D. 92.

**1768.** Previous attempt to repudiate on other grounds.]—*BRAITHWAITE v. FOREIGN HARDWOOD CO.*, No. 2496, *post*.

**1769.** — — — — —]—A contract was entered into for the sale of 1,100 pieces of timber, to be delivered in two instalments. Upon the delivery of the first instalment the purchasers refused to accept the goods on the ground that they did not fulfil the terms of the contract, & further intimated that they would refuse the second instalment on the ground that the first instalment was such a departure from the contract as to justify them in refusing to accept either parcel. The matter was referred to arb'n., & the arbitrator found & awarded that the first shipment was so far from complying with the requirements of the contract as to entitle the buyers to repudiate & to rescind the whole contract, & to refuse to accept the first shipment & all further shipments under the contract. Upon a motion by the vendors to set aside the award upon the ground that it was bad upon its face:—*Held*: the umpire was entitled to draw the inference from the defective delivery of the first instalment that the second would also be bad, & therefore the award could not be said to be bad upon its face.—*MILLAR'S KARRI & JARRAH CO. (1902) v. WEDDEL, TURNER & Co.* (1908), 100 L. T. 128; 11 Asp. M. L. C. 184; 14 Com. Cas. 25. *Annotation*:—*Refd.* Re Rubel Bronze & Metal Co. & Vos [1918] 1 K. B. 315.

**1770. Non-acceptance of inferior instalment—No intention to repudiate—Vendor not discharged from further performance.**—A contract to deliver oil of first quality, 5 tons in Oct., 5 in Nov., & 5 in Dec. The purchaser refused to receive part of the oil tendered in Oct., as of inferior quality, & sued the vendor for breach of contract, but failed in proof that the oil was of inferior quality, & it was found that pltf., the purchaser, did not intend thereby to repudiate the contract:—*Held*: the vendor was not thereby discharged from the further performance of the contract.—*KENT v. GODTS* (1855), 26 L. T. O. S. 88; 19 J. P. Jo. 725.

**1771. Failure to take full instalments—Vendor's right to rescind.**—Debts. agreed to supply pltf's. with from 8,000 to 8,000 tons of coal, to be delivered into pltf's. waggons at debts. collieries, in equal monthly quantities during the period of twelve months, at 5s. 6d. per ton. During the first month pltf's. sent waggons to receive only 158 tons. Immediately after the first month had expired, debts. informed pltf's. that, as pltf's. had taken only 158 tons, debts. would annul the contract. Pltf's. refused to allow the contract to be annulled, but debts. declined to deliver any more coal:—*Held*: the breach by pltf's. in taking less than the stipulated quantity during the first month did not entitle debts. to rescind the contract.—*SIMPSON v. CRIPPIN* (1872), L. R. 8 Q. B. 14; 42 L. J. Q. B. 28; 27 L. T. 546; 21 W. R. 141.

*Annotations*:—*Distd.* Reuter v. Sala (1879), 4 C. P. D. 239. *Consd. & Distd.* Honck v. Muller (1881), 7 Q. B. D. 92. *Consd.* Mersey Steel & Iron Co. v. Naylor (1882), 9 Q. B. D. 648; Workman, Clark v. Lloyd Brazileiro, [1908] 1 K. B. 968; Jackson v. Rotax Motor & Cycle Co., [1910] 2 K. B. 937. *Refd.* Corcoran v. Proser (1873), 22 W. R. 222; Davies v. McLean (1873), 21 W. R. 264; Freeth v. Burr (1874), 29 L. T. 773; Berghelm v. Blaenavon Iron & Steel Co. (1875), 32 L. T. 451; Brandt v. Laurence (1876), 1 Q. B. D. 344; Re Phoenix Bessemer Steel Co., Ex p. Carnforth Hematite Iron Co. (1876), 4 Ch. D. 108; Cornwall v. Henson, [1900] 2 Ch. 298.

**1772.** — — — — —]—*DICKINSON v. FANSHAW* (1892), 8 T. L. R. 271, C. A.

#### PART VI. SECT. 2, SUB-SECT. 9.—D.

**m. Right to refuse acceptance—Tender above maximum quantity.**—*BARR v. WALDIE* (1893), 21 R. (Ct. of Sess.) 224 31 Sc. L. R. 185; 1 S. L. T. 368.—*SCOT*.

**1773. Vendor's right to damages.]—**NEDERLANDSCHE CACAOFABRIK v. CHALLEN (DAVID) & Co., LTD. (1898), 14 T. L. R. 322.

**1774. Non-acceptance of first instalment—Vendor's right to withhold subsequent instalments.]—**Deft., in Oct., 1879, sold to pltf., & pltf. bought of deft., 2,000 tons of pig-iron at 42s. a ton, to be delivered to pltf. f.o.b. at maker's wharf, at Middlesborough, "in Nov. 1879, or equally over Nov., Dec. & Jan. next, at 6d. per ton extra." Pltf. failed to take delivery of any of the iron in Nov., but claimed to have delivery of one-third of the iron in Dec. & one-third in Jan. Deft. refused to deliver these two-thirds, & gave notice that he considered that the contract was cancelled by pltf.'s breach to take any iron in Nov. :—*Held* : in an action by pltf. for damages, in respect of deft.'s refusal, by pltf.'s failure to take one-third of the iron in Nov., deft. was justified in refusing to deliver the other two-thirds afterwards.

Suppose a man orders a suit of clothes, the price being £7, £4 for the coat, £2 for the trousers, & £1 for the waistcoat, can he be made to take the coat only, whether they were all to be delivered together, or the trousers & waistcoat first? The party to a contract so broken has a right not to rescind the contract, for rescission is the act of both parties, but a right to declare he will not perform a part only of his contract, viz., what would remain to be performed if the other party had performed his part, & so enabled the performance of the whole (BRAMWELL, L.J.).—HONCK v. MULLER (1881), 7 Q. B. D. 92; 50 L. J. Q. B. 529; 45 L. T. 202; 29 W. R. 830, C. A.

*Annotations* :—*Expld.* Mersey Steel & Iron Co. v. Naylor Benzon (1884), 9 App. Cas. 434. *Consd.* Workman, Clark v. Lloyd Brazileño, [1903] 1 K. B. 968. *Refd.* Soc. Générale de Paris v. Milders (1883), 49 L. T. 55; Cornwall v. Henson, [1900] 2 Ch. 298; Rhymney Rly. v. Brecon & Merthyr Tydfil Rly. (1900), 83 L. T. 111; Larrinaga v. Soc. Franco-Américaine Des Phosphates De Medulla (1923), 92 L. J. K. B. 455.

**1775. Damages for non-acceptance.]—**NEDERLANDSCHE CACAOFABRIK v. CHALLEN (DAVID) & Co., LTD. (1898), 14 T. L. R. 322.

**1776. —.]—**A contract provided that all mahogany & cedar on "the land of resp. is to be delivered" to appts. "for which contracts shall be made annually for the amount to be delivered." Before all the wood had been delivered appts. committed a breach of the contract, which was held to justify resp. in treating it as repudiated :—*Held* : the proper construction of the contract was that though annual contracts were to be made as to the amount to be delivered in each year, appts. were bound to make arrangements for taking all resp.'s wood, & he was entitled to prospective damages for the quantity not taken.—EMERY (GEORGE D.) Co. v. WELLS, [1906] A. C. 515; 75 L. J. P. C. 104; 95 L. T. 589, P. C.

*Annotation* :—*Refd.* Re Rubel Bronze & Metal Co. & Vos, [1918] 1 K. B. 315.

*E. Postponement of Delivery or Excuse for Non-Delivery.*

**1777. Postponement at vendor's request—Purchaser's right to damages for loss.]—**OGLE v. VANE (EARL), No. 2624, *post*.

**1778. Postponement at purchaser's request—Beyond reasonable time—Assessment of damages.]—**HICKMAN v. HAYNES, No. 2512, *post*.

**1779. Postponement in event provided for—Strike.]—**Pltfs. on Sept. 13, 1873, contracted in

writing with deft. to sell 4,000 parcels of Kibbles coal at 15s. 6d. per parcel of 2,240 lbs. loaded into deft.'s trucks at the average rate of two trucks per day, a truck consisting of eight tons, in the event of a colliers' strike or accident the vendors not binding themselves to keep up the daily supply. Coal was delivered under this contract up to Mar. 28, 1874, but on that day, in consequence of pltfs.' men refusing to accept a lower rate of wages proposed by pltfs., in pursuance of a combination entered into by pltfs., with other masters in the district, the pits were closed by pltfs., & remained closed until July 28, other pits in the neighbourhood being also closed by their owners for a like reason. During that time no coal was in consequence delivered; but at the end of the strike pltfs. called upon deft. to take the amount of coal which still remained undelivered under the contract. In an action for not accepting this coal :—*Held* : the strike was equally a strike within the meaning of the contract, though brought about by pltfs. lowering the wages of their men; the effect of the strike was merely to postpone the daily deliveries, & deft. was bound to accept the coal remaining undelivered.—KING v. PARKER (1876), 31 L. T. 887.

*Annotation* :—*Consd.* De Olegua v. West Cumberland Iron & Steel Co. (1879), 4 Q. B. D. 472.

**1780. —Increase of tonnage rate.]—**By agreement between pltfs. & defts., pltfs., who were merchants at Bilbao, undertook to supply defts. at Workington, Cumberland, with about 30,000 tons of Sommorostro ore at the price of 25s. 6d. per ton, cost, freight, & insurance, payment to be made by cash on delivery of each shipment "Deliveries to be made at the rate of from 800 to 1,300 tons per month, provided we, pltfs., are able to procure tonnage at or under the rate of 16s. 6d. per ton. No responsibility to attach to us should we be prevented from delivering all or any portion of the ore, through any dangers & accidents of the mines, railway shoots, rivers, seas, & navigation of whatever nature or kind, or through any circumstances beyond our own control" :—*Held* : (1) pltfs. were entitled to deliver quantities of the ore which they had previously withheld while freights were above the limit, provided such deliveries were made within a reasonable time, having regard to the contemplated duration of the contract, the means which they had to make up arrears, etc.; (2) they were not entitled to deliver quantities which they had previously been prevented from delivering from dangers & accidents of the mines, etc., such quantities being as much struck out of the contract as if they had been actually delivered.—DE OLEAGA v. WEST CUMBERLAND IRON & STEEL Co. (1879), 4 Q. B. D. 472; 48 L. J. Q. B. 753; 41 L. T. 342; 27 W. R. 870, D. C.

*Annotation* :—*Refd.* Voithardt & Hall v. Rylands (1917), 116 L. T. 706.

**1781. Delivery excused in case of accident.]—**BELGAARD v. GREEN, HOLLAND & Co. (1908), *Times*, Nov. 26.

SUB-SECT. 10.—DELIVERY TO CARRIER.

A. In General.

*See, generally*, CARRIERS, Vol. VIII., pp. 5, *et seq.*  
*See* Sale of Goods Act, 1893 (c. 71), s. 18, Rule 5 (2), 32 (1).

#### PART VI. SECT. 2, SUB-SECT. 9.—E.

n. *Continued request & receipt of goods below contract quantity.]—*TERMINAL STEAM NAVIGATION Co., LTD. v. IMPERIAL OIL Co., LTD., [1920] 2 W. W. R. 689.—CAN.

**Sect. 2.—Delivery: Sub-sect. 10, A. & B.; sub-sect. 11, A.]**

**1782. General rule—Delivery to purchaser.]—**Delivery of goods by the vendor on behalf of the vendee to a carrier not named by the vendee, is a delivery to the vendee.

If a tradesman order goods to be sent by a carrier . . . the moment the goods are delivered to the carrier it operates as a delivery to the purchaser (LORD ALVANLEY, C.J.).—DUTTON v. SOLOMONSON (1803), 3 Bos. & P. 582; 127 E. R. 314.

**Annotations:—**Expld. Anderson v. Hodgson (1818), 5 Price, 630. Apld. Fragan v. Long (1825), 3 L. J. O. S. K. B. 177. Consd. Dunlop v. Lambert (1839), MacL. & Rob. 663. Distd. Coats v. Chaplin (1842), 3 Q. B. 483; Coombs v. Bristol & Exeter Ry. (1858), 3 H. & N. 510. Reftd. Hoskins v. Duperoy (1808), 9 East, 498; Helps v. Winterbottom (1831), 2 B. & Ad. 431; Freeman v. Birch (1833), 1 Nev. & M. K. B. 420; Bushel v. Wheeler (1844), 8 Jur. 532; Rugz v. Weir (1864), 16 C. B. N. S. 471; Smith v. Hudson (1865), 6 B. & S. 431; Rabe v. Otto (1903), 89 L. T. 562; L. & N. W. Ry. v. Hudson, [1920] A. C. 324.

**1783. ———.]—**If goods are delivered to a carrier by the vendor addressed to the purchaser, while the latter is under the age of twenty-one, but they do not reach him till he has attained that age, infancy is a good defence to an action brought against him for the price of the goods.—GRIFFIN v. LANGFIELD (1812), 3 Camp. 254; 170 E. R. 1373, N. P.

**1784. ———.]—**Where plffs., having received an order from deft. for goods, shipped them, & transmitted to him the bill of lading, indorsed, making the goods deliverable to order or assigns, & on their arrival the captain withheld the goods, in consequence of deft. having refused to accept a bill drawn on him for the price; & thereupon deft. recovered in trover against the captain:—*Held*: plffs. might have an action for goods sold & delivered, for the delivery of the goods was complete as between them & deft., by the delivery on board the ship.—GRONING v. MENDHAM (1816), 5 M. & S. 189; 1 Stark. 299; 105 E. R. 1020.

**1785. ———.]—**An action for goods sold & delivered not supported by proof of an order by deft. to send the goods to a certain quay to be left till called for, without showing a reception & acceptance on the part of the vendee of the goods so sent, where deft. had not named the particular carrier by whom the goods were to have been conveyed; at least under the circumstances in evidence in the present case a nonsuit for want of proof of a delivery, was refused to be set aside.

The cases are abundant to prove that a delivery to a carrier is a delivery to the consignee; but the difficulty in this case is, that there is no evidence to fix deft. with knowledge of the course of conveyance, or an adoption of the course which had been pursued (GRAHAM, B.).—ANDERSON v. HODGSON (1818), 5 Price, 630; 146 E. R. 716.

**Annotation:—**Reftd. Bushel v. Wheeler (1844), 15 Q. B. 442.

#### PART VI. SECT. 2, SUB-SECT. 10.—A.

**1782.1. General rule—Delivery to purchaser.]—**When goods are delivered to a carrier, the purchasers' agent without reservation not only the property in the goods but the possession of the goods passes.—*Re* GOVERNMENT LIQUOR ACT & RANIER BOTTLING WORKS, LTD. (1924), 33 B. C. R. 443.—CAN.

**a. Delivery to master of ship.]—**The master of a ship is only an agent to receive goods for carriage not to accept delivery.—BLACK v. TYRER (1910), 8 E. L. R. 1.—CAN.

**p. Goods shipped by method not in accordance with contract.]—**Delivery to a carrier of the goods contracted for,

to be shipped by a method different from that provided by the contract, is not such a delivery as is contemplated by Sale of Goods Act, R. S. Sask., c. 147, s. 31.—MCGOWAN CIGAR CO. v. O'FLYNN (1911), 19 W. L. R. 877.—CAN.

**q. Vendee to pay freight—Delivery to vendee.]—**VOLANSKY CLOTHING CO. v. BANNOCKBURN CLOTHING CO., LTD. (Alta.), [1919] 3 W. W. R. 913.—CAN.

**r. Goods sold for delivery at certain place.]—**Where a vendor undertakes that the goods sold shall be delivered at a certain place, & thereupon hands such goods to a carrier, the latter is the agent of the vendor to carry & deliver,

**1786.**

*ante.*

**1787.**

—.]—COLONIAL INSURANCE CO. OF NEW ZEALAND v. ADELAIDE MARINE INSURANCE CO., No. 1113, *ante.*

**1788. ——— Constructive delivery.]—**Re COCK, *Ex p.* ROSEVEAR CHINA CLAY CO., No. 2199, *post.*

**1789. Delivery at risk of purchaser—Carrier appointed by vendor.]—**GODFREY v. FURZO, No. 2378, *post.*

**1790. ——— Mode of conveyance ordered by purchaser.]—**Where a vendee of goods orders a particular mode of conveyance, he must stand to the loss, if any happen.—VALE v. BAYLE (1775), 1 Cowp. 294; 98 E. R. 1094.

**1791. ——— Goods shipped by vessel other than specified.]—**A. in London, received an order from B. living in Bristol, to send goods to him by any conveyance which would reach Bristol, as B. lived only six miles from thence, informing B. when he sent them, that B. might know when to expect them; A. sent the goods to a wharf from whence vessels for Bristol sailed, & informed B. as he was told at the wharf that the goods would come by the ship "*Commerce*"; in fact the goods were not sent on board the "*Commerce*," which happened to be fully laden, but some time afterwards were sent by another vessel. B. after the arrival of the "*Commerce*" at Bristol, without the goods, made no further inquiry for the goods, & A. did not know till after he had required payment of the goods, that they had been sent by another ship, which he then communicated to B.:—*Held*: B. was liable to any loss of the goods.—COOKE v. LUDLOW (1806), 2 Bos. & P. N. R. 119; 127 E. R. 569.

**1792. ——— Carrier paid by vendor.]—**As soon as goods are delivered to a carrier, they are at the risk of the purchaser, although the carrier be paid by the vendor.—KING v. MEREDITH (1811), 2 Camp. 639; 170 E. R. 1278, N. P.

**Annotations:—**Distd. Freeman v. Birch (1833), 1 Nev. & M. K. B. 420. Consd. Dunlop v. Lambert (1839), MacL. & Rob. 663.

**1793. Departure from ordinary mode of transmission—Liability of vendor.]—**When goods are bought for export at a port from which goods are ordinarily shipped, if the seller sends them by land to a neighbouring port, he is liable for any loss which may take place up to the time of shipment from the latter port.

There was no delivery to the purchaser until the wine was put on board (LORD TENTERDEN).—ULLOCK v. REDDELEIN (1828), Dan. & Ll. 6.

**1794. Delivery to railway company abroad—Whether delivery to consignee in England.]—**POINTIN v. PORRIER, No. 1797, *post.*

& not of the purchaser to receive the goods.—STEPHEN, FRASER & CO. v. CLYDESDALE TRANVAAL COLLIERIES, LTD., [1903] T. H. 121.—S. AF.

**t. ———.]—**If a vendor undertakes to deliver goods at a particular place a common carrier employed to effect delivery is the agent of the vendor.—TIRAN v. EALES & HARRIS, [1916] C. P. D. 529.—S. AF.

**a. Delivery at risk of vendor.]—**So long as goods, though delivered to a common carrier appointed by the consignee, remain at the risk of the consignor, they are not delivered to the consignee.—WINTER v. WAY (1862), 1 Mad. 200.—IND.

*Annotation* :—**Apld.** *Pointin v. Porrier* (1885), 49 J. P. 199.

**1796.** ———.]—**BUCKMAN v. LEVI**, No. 1637, *ante*.

**1797.** ———.]—Where goods are transmitted through a common carrier, it is incumbent upon the consignor to take reasonable precautions to insure their safe delivery to the consignee; & whether the precautions taken were reasonable or not depends upon whether they were such as to have rendered the carrier liable to the consignee in respect of the goods in case of their loss during the transit.

*Qu.*: whether the rule, that the delivery of goods to a common carrier by the consignor is a delivery to the consignee, applies to the delivery of goods to a railway co. abroad for conveyance to a consignee resident in England.—**POINTIN v. PORRIER** (1885), 49 J. P. 199, D. C.

**1798. Insurance of goods — Where carrier's liability limited.**]—**CLARKE v. HUTCHINS**, No. 1795, *ante*.

**1799.** ———.]—Where a person in the country gives an order to a tradesman in London with whom he has been in the habit of dealing, to send him down more goods by a particular coach, & at the office of this coach there is a notice

#### SUB-SECT. 11.—DELIVERY BY BILL OF LADING AND OTHER DOCUMENTS.

##### *A. In General.*

*Sec, generally, SHIPPING.*

**1801. General rule—Delivery of documents constructive delivery of goods.**]—A contract for the sale of hops to be shipped from the Pacific Coast to this country provided that the buyer should pay for the hops at the rate of 90s. sterling per 112 lbs. “c.i.f. to London, Liverpool or Hull. Terms net cash.” The contract contained no terms expressly providing for payment against shipping documents:—**Held**: the seller was entitled to payment upon his shipping the goods & tendering to the buyer the bill of lading & insurance policy, or within a reasonable time.

Delivery of the bill of lading when the goods are at sea can be treated as delivery of the goods themselves (**LORD LOREBURN, C.**).—**E. CLEMENS HORST Co. v. BIDDELL BROTHERS**, [1912] A. C. 18; 81 L. J. K. B. 42; 105 L. T. 563; 28 T. L. R. 42; 56 Sol. Jo. 50; 12 Asp. M. L. C. 80; 17 Com. Cas. 55, H. L.; *revsq.* S. C. *sub nom.* **BIDDELL**

#### PART VI. SECT. 2, SUB-SECT. 10.—B.

**b. General rule — Reasonable precautions to ensure delivery—Duty to follow directions of buyer.**]—The seller of goods must follow the shipping instructions of the buyer, if consistent with the terms of the contract, & under Sales of Goods Ordinance, s. 31 (2), unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having

regard to the nature of the goods, & the other circumstances of the case.—**B. C. FRUIT MARKET, LTD. v. NATIONAL FRUIT CO., LTD.**, [1921] 2 W. W. R. 229; 16 Alta. L. R. 284; 59 D. L. R. 87.—**CAN.**

#### PART VI. SECT. 2, SUB-SECT. 11.—A.

**1801 i. General rule—Delivery of documents constructive delivery of goods.**]—Symbolical delivery when accepted by the purchaser is good delivery, but

the purchaser is not bound to accept symbolical in lieu of physical delivery. The purchaser who chooses to accept a bill of lading of goods at sea as equivalent to the goods themselves will not be allowed to set up that he has not received delivery.—**BIRKBECK & ROSE-INNES v. HILL**, [1915] C. P. D. 687.—**S. AF.**

**c. Bill of lading sent on shipment of goods.**]—A merchant in Glasgow sold goods to a firm there, to be shipped by



**Sect. 2.—Delivery: Sub-sect. 11, A. & B.]**

**BROTHERS v. CLEMENS (E.) HORST CO., [1911] 1 K. B. 934, C. A.**

**Annotations:—***Consd.* Landauer v. Craven & Speeding, [1912] 2 K. B. 94. *Distd.* Orient Co. v. Brekke & Howld, [1913] 1 K. B. 531. *Consd.* Arnold Karberg v. Blythe, Green, Jourdain, Schneider v. Burgett & Newsam, [1915] 2 K. B. 379. *Apld.* Groom v. Barber, [1915] 1 K. B. 318. *Consd.* Happe v. Manassch (1915), 84 L. J. K. B. 1895. *Apld.* Sharpe v. Nosawa, [1917] 2 K. B. 814. *Consd.* Johnson v. Taylor, [1920] A. C. 144; Diamond Alkali Export Corp. v. Bourgeois, [1921] 3 K. B. 443; Hansson v. Hamel & Horley, [1922] 2 A. C. 36. *Refd.* The Miramichi, [1915] P. 71; Upjohn v. Hitchens, Upjohn v. Ford, [1918] 1 K. B. 171; Manbre Saccharine Co. v. Corn Products Co., [1919] 1 K. B. 198; Aron v. Compotour Wegmont, [1921] 3 K. B. 435; Ballantine v. Cramp & Bosman (1923), 129 L. T. 502; Scriven v. Schmoll Fils Inc. (1924), 40 T. L. R. 677.

**1802. ———.]—**When goods are sold by contract on c.i.f. terms, the contract of the seller is performed by delivery to the buyer, within a reasonable time from the agreed date of shipment, of documents, ordinarily the bill of lading, invoice, & policy of insurance, which will entitle the buyer on the arrival of the ship to obtain the delivery of the goods shipped in accordance with the contract, or, in case of loss, will entitle him to recover on the policy the value of the goods if lost by a peril agreed in the contract to be covered, & in any case will give him a rightful claim against the ship in respect of any misdelivery or wrongful treatment of the goods. It is therefore immaterial whether, before the tender of the documents, the property in the goods is in the seller or buyer or a third person. The seller however must be in a position to pass the property in the goods by the bill of lading, if the goods are in existence, but he need not have appropriated the particular goods in the particular bill of lading to the particular buyer until the moment of tender.—*GROOM (C.), LTD. v. BARBER*, [1915] 1 K. B. 316; 84 L. J. K. B. 318; 112 L. T. 301; 31 T. L. R. 66; 59 Sol. Jo. 129; 12 Asp. M. L. C. 594; 20 Com. Cas. 71.

**Annotations:—***Distd.* Arnold Karberg v. Blythe, Green, Jourdain, Schneider v. Burgett & Newsam, [1915] 2 K. B. 379. *Refd.* Upjohn v. Hitchens, Upjohn v. Ford, [1918] 1 K. B. 171; Manbre Saccharine Co. v. Corn Products Co., [1919] 1 K. B. 198; Diamond Alkali Export Corp. v. Bourgeois, [1921] 3 K. B. 443.

**1803. ———.]—**Merchants in Japan sold goods to be shipped in June at a price including cost, freight, & insurance to London. Shipping documents, including the bill of lading & policy of insurance, relating to the last possible shipment in June would, if sent forward with reasonable dispatch, have reached London on July 21; the goods themselves would have arrived on Aug. 30. The goods were not shipped. In an action by the buyers for non-delivery:—*Held*: (1) the delivery intended by the contract was a constructive delivery by tender of the shipping documents as soon as possible after shipment, & there was a breach of contract on July 21; (2) the damages were to be measured by the difference between the contract price & the market price on July 21, as that date, & not Aug. 30, was the time when the goods ought to have been delivered within Sale of Goods Act, 1893 (c. 71), s. 5 (3); (3) it being impossible to buy similar goods coming forward on a June shipment but possible to buy such goods on the spot, a merchant in the circumstances acting reasonably would have bought goods on the spot, & the price of such goods should be regarded in measuring the damages.—*SHARPE*

(C.) & Co. v. NOSAWA & Co., [1917] 2 K. B. 814; 87 L. J. K. B. 33; 118 L. T. 91; 22 Com. Cas. 286. **Annotations:—***As to* (1) *Apld.* Johnson v. Taylor, [1920] A. C. 144. *As to* (2) *Distd.* Produce Brokers Co. v. Weis (1918), 87 L. J. K. B. 472.

**1804. ———.]—**MANBRE SACCHARINE CO. v. CORN PRODUCTS CO., No. 1807, *post*.

**B. Tender of Documents.**

**1805. General rule—Perfect documents must be tendered.]—**BERNAYS v. WINTER (1898), cited in 81 L. T. at p. 325.

**Annotation:—***Apld.* Re Salomon & Naudszus (1899), 81 L. T. 325.

**1806. ———.]—**A contract for the sale of wheat to be shipped from New Orleans to Hamburg provided that payment should be net cash against surrender of documents, which were to consist of the bill of lading, certificate of inspection & policy of insurance. On Sept. 3, 1898, the sellers appropriated to the sale a quantity of wheat on board a certain vessel, & on Sept. 8 tendered to the purchasers the three documents, two of which were altered & one of which was unaltered. The purchasers refused to accept & pay for the documents by reason of the erasures & alterations therein, & on a formal tender being made on Sept. 12, they again refused to accept them. As tendered, the bill of lading contained a marginal note reading "stored in holds 3 & 4." The figures 3 & 4 had been substituted for the figures 2 & 3 which had been erased; the certificate of inspection stated that the wheat was in holds 3 & 4; the figures "& 4" had been added after the figure 3, & the figures "2 &," which had been in the certificate before the figure 3, were struck through; & the certificate of insurance was unaltered & stated the wheat to be in holds 3 & 4, which was the fact, so that as tendered all three documents agreed & were in accordance with the facts. The mistake arose through an error, & having been discovered, was corrected as above described in the bill of lading & the certificate of inspection before those documents were executed. The certificate of insurance was correct from the first & was unaltered. The ship arrived in Hamburg on Sept. 14, & on Sept. 16, the documents were again tendered, together with two confirmatory documents showing that the alterations were made before the execution of the documents, & were proper alterations as agreeing with the facts:—*Held*: the tenders on Sept. 8, & Sept. 12, were good tenders of the documents, & ought to have been accepted by the purchasers as, upon such tenders, the purchasers were put upon inquiry & were bound to look at all the documents, & as one of the documents was unaltered & the altered documents agreed with the unaltered one, they ought to have come to the conclusion that the altered documents were altered before the execution, & were perfect documents in the sense that they absolutely agreed with the facts.—*Re SALOMON & CO. & NAUDSZUS* (1899), 81 L. T. 325; 8 Asp. M. L. C. 599.

**1807. Tender with knowledge of loss of goods.]—**(1) A vendor under a c.i.f. contract for the sale of goods, who has shipped the appropriate goods under a proper contract of carriage & obtained the proper documents, can effectively tender those documents to the purchaser notwithstanding that

him for Montreal. The bill of lading was taken in the vendors' name, & the goods were consigned to their agent in Montreal. The seller sent the bill of lading to the vendors, along with a bill at four months for the price, which

was not accepted by them, & they soon after became bankrupt.—*Held*: delivery was complete on the goods being shipped, & the bill of lading sent to the vendors.—*WRIGHT v. MITCHELL* (1871), 43 Sc. Jur. 235.—*SCOT*.

**PART VI. SECT. 2, SUB-SECT. 11.—B.**

**d. Sufficiency of tender—Of insurance policy—Certificate of insurance—Policy vitiated by deviation of ship.]—**LASCELLES & Co. v. WILLS & Co., LTD.

he knows at the time of such tender of the loss of the goods.

(2) Under a c.i.f. contract the vendor is bound to tender to the purchaser a proper policy of insurance together with the other shipping documents, & that obligation is not performed by the vendor guaranteeing to hold the purchaser covered by insurance in accordance with the terms of a policy of insurance in the vendor's possession.

(3) The purchaser under a c.i.f. contract is entitled to demand a policy of insurance which covers, & covers only, the goods mentioned in the bills of lading & invoices.—*MANBRE SACCHARINE Co. v. CORN PRODUCTS Co.*, [1919] 1 K. B. 198; 120 L. T. 113; *sub nom. MAMBRE SACCHARINE Co. v. CORN PRODUCTS Co.*, 88 L. J. K. B. 402; 35 T. L. R. 94; 24 Com. Cas. 89.

*Annotations*:—*As to* (3) *Apld.* *Diamond Alkali Export Corp'n. v. Fl. Bourgeois*, [1921] 3 K. B. 443. *Generally, Mentd.* *Re Moore & Landauer*, [1921] 2 K. B. 519; *Ballantine v. Cramp & Bosman* (1923), 129 L. T. 502.

*Compare* Nos. 1091, 1092, *ante*.

**1808. Sufficiency of tender—Question for jury.**—Defts. had become responsible, as *del credere* agents, for the purchase of a cargo of wheat of from 1,800 to 2,000 quarters, to be shipped at the price of 50s. per quarter f.o.b. at Taganrog, “& including freight & insurance to any safe port in the United Kingdom.” “Payment cash in London in exchange for shipping documents.” Pltfs. tendered the following shipping documents of a cargo answering the description in the contract: a charterparty; a bill of lading & provisional invoice, in both of which the cargo was stated to be 1,850 quarters, at 50s. per quarter, £4,626, less freight, at 10s. 9d. per quarter, £1,001 10s. & a policy of insurance effected on the cargo valued at £3,600. On behalf of pltfs. evidence was given, which was not contradicted, that the policy tendered was sufficient to protect the interest of the shipper of the cargo at the time of shipment. In an action against defts. for not paying or procuring from their principal payment of the price of the cargo, they pleaded that pltfs. were not ready & willing to tender, nor did they tender, “the usual shipping documents” according to the contract:—*Held*: whether pltfs. had so tendered was a question for the jury; it was not a question of law but of fact for the jury, whether, in all the circumstances, the policy was a sufficient shipping document within the meaning of the contract.—*TAMVACO v. LUCAS* (1862), 3 B. & S. 89; 3 F. & F. 110; 31 L. J. Q. B. 296; 6 L. T. 697; 10 W. R. 733; 1 Mar. L. C. 231; 122 E. R. 34, Ex. Ch.

*Annotation*:—*Refd.* *Rall v. Universal Marine Insee.* (1862), 4 De G. F. & J. 1.

**1809. — Of bill of lading—All sets not delivered or accounted for.**—*SANDERS v. MACLEAN*, No. 1936, *post*.

**1810. — From port of transhipment.**—*COX, MCEUEN & Co. v. MALCOLM & Co.*, [1912] 2 K. B. 107, n.; 17 Com. Cas. 205, n.

*Annotations*:—*Dbtd.* *Landauer v. Cravens & Speeding*, [1912] 2 K. B. 94. *Distd.* *Hansson v. Hamel & Horley*, [1922] 2 A. C. 36.

**1811. — — — — —**—*Sellers agreed to sell 400 bales of hemp at a price to include cost, freight, & insurance. By the terms of the contract of sale the hemp was to be shipped from a port in the Philippine Islands or from Hong Kong by*

steamer or steamers direct or indirect to London between Oct. 1 & Dec. 31, 1909; payment was to be by cash in exchange for shipping documents, & disputes under the contract were to be settled by arbn. The sellers then purchased from B. & co. 400 bales of hemp. This hemp had been shipped at Manila, a port in the Philippine Islands, under bills of lading dated at that place Dec. 28, 1909, for delivery at Hong Kong to the order of the shippers; it was intended for transhipment & was transhipped on a steamer bound for London, the bills of lading being dated at Hong Kong Mar. 25, 1910; it had been insured by the shippers from Manila to London. The sellers tendered to the buyers in fulfilment of the contract of sale the bills of lading from Hong Kong & the policy of insurance from Manila to London. The buyers paid the contract price under protest, contending that these documents were not a good tender under the contract. The dispute was referred to arbn. The arbitrator found that it was a usual course, when goods were shipped from Manila to London, to tranship them at Hong Kong, but to ship them in the first instance at Manila on a through bill of lading from Manila to London; in so far as it was a question of fact, he found that, on a contract of sale of goods on cost, freight, & insurance terms, it was by mercantile usage, unless otherwise agreed, the duty of the seller to provide by contract of affreightment for the carriage of the goods from the port of shipment to the port of destination named in the contract, & by an indorsed bill of lading, or otherwise, to transfer to the buyer the benefit of the rights created by the contract of affreightment between the shipper & the shipowner for the entire voyage from the port of shipment to the port of destination:—*Held*: the tender of the documents was not a good tender under the contract, because it did not include a contract of affreightment to London made before Dec. 31, 1909, & because it did not include a contract of affreightment from Manila to Hong Kong.—*LANDAUER & Co. v. CRAVEN & SPEEDING BROTHERS*, [1912] 2 K. B. 94; 81 L. J. K. B. 650; 106 L. T. 298; 56 Sol. Jo. 274; 17 Com. Cas. 193.

*Annotations*:—*Fold.* *Hansson v. Hamel & Horley*, [1922] 2 A. C. 36. *Refd.* *Aron v. Comptoir Weilmont*, [1921] 3 K. B. 435; *Diamond Alkali Export Corp'n. v. Bourgeois*, [1921] 3 K. B. 443.

**1812. — — — — —**—*A Swedish merchant agreed to sell to an English co. a quantity of guano in bags c.i.f. Norway to Kobe or Yokohama, terms net cash against documents in London; time of shipping as to the first instalment Mar./Apr., 1920. The seller, in anticipation of his obligations under the contract, agreed with L., the agent at Hamburg of a Japanese co., which ran a line of steamers from Hamburg to Japan but ran no steamers from Norway, for the conveyance of the guano from Hamburg to Japan on the terms that L. should sign through bills of lading as soon as the goods were in his possession. Between Apr. 20 & 22 the guano was shipped by the sellers in several lots from various Norwegian ports, including B., on the steamship K. to Hamburg. On the arrival of the goods at Hamburg L. signed several documents in identical terms called through bills of lading bearing date May 5. The bill of lading relating to the B. consignment stated that the goods were shipped in apparent good order & condition on board the*

(1921), 21 S. R. N. S. W. 773; 38 N. S. W. W. N. 238.—*AUS.*

*• Of railway receipts indorsed in blank—Where goods not available.*—*MOTICHAND v. FULCHAND*

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(1898), L. L. R. 26 Cal. 142; 3 C. W. N. 116.—*IND.*

*1. Sufficiency of document—Shipping receipt tendered in lieu of bill of lading—Usage of trade.*—*MARTIN v.*

*HOGAN* (1917), 24 C. L. R. 231.—*AUS.*  
*g. Omission of documents—Insurance policy—C.i.f. contract—Nett cash against bill of lading.*—*Under a c.i.f. contract which provides for delivery*

Sect. 2.—Delivery: Sub-sect. 11, B.]

K. lying at B. & bound for Hamburg, for transhipment into the Japanese co.'s steamer A., to be delivered in the like good order & condition at the port of Yokohama unto "order," & the margin contained the statement: "Shipped from B. according to bill of lading on Apr. 22, 1920." On May 12 the seller tendered to the buyers documents relating to the first instalment, including the ocean bills of lading, but the buyers rejected the documents & refused to take up the goods. In an action for the price of the goods:—*Held*: (1) the ocean bills of lading were not through bills of lading, inasmuch as they afforded no protection to the buyers on the initial voyage, & did not satisfy the conditions of the contract; (2) on a sale on c.i.f. terms the contract of affreightment must be procured on shipment, & a bill of lading issued thirteen days after the original shipment at another port in another country was not procured on shipment.—*HANSSON v. HAMEL & HORLEY, LTD.*, [1922] 2 A. C. 36; 91 L. J. K. B. 433; 127 L. T. 74; 38 T. L. R. 466; 66 Sol. Jo. 421; 15 Asp. M. L. C. 546; 27 Com. Cas. 321, H. L.

**1813.** — *Inoperative prior to date of tender—Valid at date of shipment.*—On a sale of goods under a c.i.f. contract, the tender by the sellers of a bill of lading & policy of insurance, which though valid at the time of shipment had, as regards the bill of lading only, or as regards both documents, become inoperative prior to the date of tender, is not a valid tender entitling the sellers to payment of the purchase-price by the buyers. Under two c.i.f. contracts, made respectively between two English firms the sellers sold to the buyers a quantity of horse beans to be shipped from a port in China to Naples in one case & to a range of European ports in the other case. Payment was to be in "net cash in London on arrival of the goods at port of discharge, in exchange for bill or bills of lading & policies of insurance, free of war risk, on Lloyd's conditions, "but was" to be made in no case later than three months from the date of bill of lading, or upon the posting of the vessel at Lloyds as a total loss." There was a provision that "In the event of war, should sellers not have received from buyers approved underwriters' policies . . . covering war risks three days prior to time of shipments, sellers shall have the right . . . to cover war risk for account & risk of buyers." They were also given power to insure at buyers cost if the war risk was incurred during the time of shipment. In each case the sellers shipped the beans on a German vessel, & war being subsequently declared between England & Germany each vessel entered a port of refuge without completing the voyage. Three months after the date of the bill of lading the respective sellers tendered to the buyers the shipping documents, namely, in the one case, the German bill of lading & an English policy, & in the other case, the German bill of lading & a German policy:—*Held*: (1) on the true construction of the contracts the buyers had not taken upon themselves all the risks of what might happen in the event of war, but only such risks as were excepted perils under the warranty "free of capture & seizure"; & the risk that the shipping documents might become invalid was not one of these perils; (2) the contracts evidenced by the German bills of lading or German policy of insurance were dissolved on the outbreak of war, &

consequently the shipping documents tendered were in neither case a good tender on which the sellers could claim payment of the purchase price.—*ARNHOLD KARBURG & Co. v. BLYTHE, GREEN, JOURDAIN & Co.*, *THEODOR SCHNEIDER & Co. v. BURGETT & NEWSAM*, [1916] 1 K. B. 495; 85 L. J. K. B. 665; 114 L. T. 152; 32 T. L. R. 186; 60 Sol. Jo. 156; 13 Asp. M. L. C. 235; 21 Com. Cas. 174, C. A.

*Annotations*:—As to (2) *Folld. Wels v. Credit Colonial et Commercial* (1915), 114 L. T. 168. *Generally, Refd.* *Produce Brokers Co. v. Olympia Oil & Cake Co.*, [1917] 1 K. B. 320; *Produce Brokers Co. v. Wels* (1918), 87 L. J. K. B. 472; *Manbre Saccharine Co. v. Corn Products Co.*, [1919] 1 K. B. 198.

**1814.** — *Not within c.i.f. contract.*—Under a contract for the sale of goods to be shipped from American seaboard c.i.f. Gothenburg, the sellers tendered, with an invoice for the goods, (a) a document purporting to be a bill of lading, in the following form, "Received in apparent good order & condition from D. A. to be transported by the S.S. *Anglia* now lying in the Port of Philadelphia . . . or failing shipment by said steamer in & upon a following steamer, 280 bags Dense Soda," & (b) a certificate of insurance issued by an American insurance corp., which, as the certificate declared, "represents & takes the place of the policy & conveys all the rights of the signed policy holder . . . as surely as if the property was covered by a special policy direct to the holder of this certificate":—*Held*: the buyers were entitled to reject upon the ground that proper documents had not been tendered by the sellers in conformity with the contract; for document (a) did not acknowledge shipment, & was therefore not a bill of lading within the c.i.f. contract, & as to (b), a document of insurance is not good tender in England under an ordinary c.i.f. contract unless it be an actual policy, & unless it falls within Marine Insurance Act, 1906 (c. 41).—*DIAMOND ALKALI EXPORT CORPN. v. BOURGEOIS*, [1921] 3 K. B. 443; 91 L. J. K. B. 147; 126 L. T. 379; 15 Asp. M. L. C. 455; 26 Com. Cas. 310.

*Annotations*:—*Folld. Scott v. Barclays Bank*, [1923] 2 K. B. 1. *Distd. Koskas v. Standard Marine Insee.* (1927), 137 L. T. 165. *Refd. Harper v. Mackechnie*, [1925] 2 K. B. 423.

**Of insurance policy—Certificate of insurance—In usual form.**—A parcel of meal was sold to a London firm at £5 8s. 9d. per ton c.i.f. London, under a contract which provided for dispatch of the meal from the mills in the interior of America to an American port, thence to be shipped per steamer; "all other conditions as per the American maize germ meal contract" The meal was forwarded from a town in Illinois under two through bills of lading issued in the customary form by the Illinois Ry. Co., which provided that the meal should be carried to the port of New Orleans & thence by Leyland Line to London, & further that the property covered by them was subject to all conditions expressed in the regular forms of bills of lading in use by the steamship co. at time of shipment. The Leyland Line is a well known line trading between New Orleans to London, having a regular form of bill of lading upon which all goods by that line are shipped. By that form of bill of lading the Leyland Line reserved liberty to proceed to the port stated in the bill of lading "via any other port or ports in any order or rotation, outwards or forwards, whether in or out of or in a contrary

of the goods "nett cash against bills, of lading or delivery order" it is not necessary in order to constitute a

tender of delivery entitling the party making the same to payment, to tender the policies of insurance.—*Fresse v.*

*TASMANIAN ORCHARDISTS & PRODUCERS CO-OPERATIVE ASSOCN., LTD.* (1919), 15 Tas. L. R. 67.—*AUS.*

direction to or beyond the customary or advertised route" & likewise reserved power to tranship the goods at any port into any other steamer or sailing vessel. Under the American maize germ meal contract the sellers were to give policies &/or certificates of insurance in respect of the meal in question, & certificates in the customary form were in fact given which took the place of a policy which was duly issued & which contained the following clause, "In event of deviation or of change of voyage held covered at a premium to be fixed by insurers." The steamship in which the meal was carried having deviated to Bremen before reaching London, thus causing delay, the buyers refused to accept delivery, & the question as to their right to do so was submitted to the trade tribunal, which decided against them, finding that all the documents relating to the carriage of the meal were usual & customary & were in forms well known in the trade, & constantly received, & hitherto without objection, in fulfilment of similar contracts of sale:—*Held*: (1) upon these findings of fact, the adoption by the sellers under the through bills of lading of the method of sea carriage in question was not necessarily inconsistent with the terms of the contract of sale, & the buyers were not justified in refusing to accept delivery; (2) as the certificate of insurance was in the usual form & covered deviation, it satisfied the requirements of the c.i.f. contract.—*BURSTALL & Co. v. GRIMSDALE & SONS* (1906), 11 Com. Cas. 280.

*Annotation*:—*As to* (2) *Reid*, *Diamond Alkali Export Corp'n. v. Bourgeois*, [1921] 3 K. B. 443.

**1816.** ——— **"Approved insurance policy."**—An approved insurance policy is one to which no reasonable objection can be made.

Bankers issued a letter of credit to English sellers of 100 tons of steel plates to Dutch buyers. By the terms of the letter of credit the bankers agreed to honour the sellers' draft for the amount of the purchase-money, which included freight & insurance to Rotterdam, provided the draft were accompanied by an approved insurance policy covering the shipment of the goods. The sellers presented their draft accompanied by a certificate of insurance which did not contain & did not offer any means of ascertaining the full terms of the insurance. In an action by the sellers against the bankers for not honouring the draft:—*Held*: the certificate was not an "approved insurance policy" within the meaning of the letter of credit, & the bankers were justified in refusing to honour the draft.—*SCOTT (DONALD H.) & Co. v. BARCLAYS BANK, LTD.*, [1923] 2 K. B. 1; 92 L. J. K. B. 772; 129 L. T. 108; 39 T. L. R. 198; 67 Sol. Jo. 456; 28 Com. Cas. 253, C. A.

*Annotations*:—*Apld.* *Malmberg v. Evans* (1924), 41 T. L. R. 38. *Reid*, *Harper v. Mackechnie*, [1925] 2 K. B. 423; *Koskas v. Standard Marine Insce.* (1927), 137 L. T. 165. *Mentl*, *Sassoon v. International Banking Corp'n.*, [1927] A. C. 711; *Tredegar v. Harwood* (1927), 44 T. L. R. 17.

**1817.** ——— *J*—(1) Under a c.i.f. contract for the sale of goods, the seller, in the absence of any custom or special stipulation to the contrary, does not perform his obligation of tendering to the buyer along with the other shipping documents a policy of insurance by tendering instead of a proper policy a broker's cover note or a certificate of insurance.

(2) Where the parties to a c.i.f. contract for the sale of goods, which have been duly shipped, enter into a stipulation that the seller, instead of tendering with the other shipping documents a policy of insurance, may tender a certificate of insurance with a broker's undertaking to hold the policy for the buyer's account, the seller does

not perform his obligation under the stipulation by tendering a certificate of insurance without a broker's undertaking.—*WILSON, HOLGATE & Co., LTD. v. BELGIAN GRAIN & PRODUCE Co., LTD.*, [1920] 2 K. B. 1; 89 L. J. K. B. 300; 122 L. T. 524; 35 T. L. R. 530; 14 Asp. M. L. C. 586; 25 Com. Cas. 1.

*Annotations*:—*As to* (1) *Reid*, *Harper v. Mackechnie*, [1925] 2 K. B. 423. *As to* (2) *Consd.* *Diamond Alkali Export Corp'n. v. Bourgeois*, [1921] 3 K. B. 443; *Scott v. Barclays Bank*, [1923] 2 K. B. 1.

**1818.** ——— **Inoperative prior to date of trade—Valid at date of shipment.**—*ARNHOLD KARBERG & Co. v. BLYTHE, GREEN, JOURDAIN & Co., THEODOR SCHNEIDER & Co. v. BURGETT & NEWSAM*, No. 1813, *ante*.

**1819.** ——— **Broker's cover note.**—*WILSON, HOLGATE & Co., LTD. v. BELGIAN GRAIN & PRODUCE Co., LTD.*, No. 1817, *ante*.

**1820.** ——— **Effect of stipulation in c.i.f. contract.**—*WILSON, HOLGATE & Co., LTD. v. BELGIAN GRAIN & PRODUCE Co., LTD.*, No. 1817, *ante*.

**1821.** ——— **Policy valid at place of shipment.**—It having been admitted that in the absence of some evidence of course of business, or waiver or estoppel, the policy of insurance tendered by the seller was not a good tender under a c.i.f. contract:—*Held*: there was no evidence of course of business between the parties, or waiver or estoppel on the part of defts. which would entitle them to set up the defence that the document in question was not a compliance with the terms of the written contract. *Qu.*: whether it is a sufficient compliance with a c.i.f. contract if the seller tenders a policy which is valid in the country in which the seller is carrying on business & from which he ships the goods.—*MALMBERG v. EVANS (H. J.) & Co.* (1924), 41 T. L. R. 38; 30 Com. Cas. 107, C. A.

**1822.** ——— **Invalid policy—Not within Marine Insurance Act, 1906 (c. 41).**—*DIAMOND ALKALI EXPORT CORPN. v. BOURGEOIS*, No. 1814, *ante*.

**1823.** ——— **Effect of course of business.**—*MALMBERG v. EVANS (H. J.) & Co.*, No. 1821, *ante*.

**1824.** ——— **Effect of waiver.**—*MALMBERG v. EVANS (H. J.) & Co.*, No. 1821, *ante*.

**1825.** ——— **Effect of estoppel.**—*MALMBERG v. EVANS (H. J.) & Co.*, No. 1821, *ante*.

**1826.** **Sufficiency of document—Question for jury.**—*TAMVACO v. LUCAS*, No. 1808, *ante*.

**1827.** **Declaration by seller—After elapse of contract time.**—Pltfs. contracted to sell to defts. "about 25 tons, more or less, Penang black pepper, Oct. & Nov. shipment, from Penang to London, per sailing vessel or vessels . . . the name of the vessel or vessels marks, etc., to be declared to the buyer in writing within sixty days from date of bill of lading." Pltfs. within the contract time declared 25 tons of pepper shipped in one vessel, of which 20 tons were properly shipped & declared, but 5 tons were shipped in Dec. & defts. in consequence refused to accept the whole quantity. Subsequently pltfs. declared 5 tons of Nov. shipment in substitution for the 5 tons shipped in Dec. but this declaration was made more than sixty days after date of bill of lading, & defts. refused to accept it. On the vessel arriving in England, pltfs. as a performance of their contract, tendered the 20 tons properly shipped & declared, & the 5 tons properly shipped but declared after the contract time had elapsed. Defts. refused to accept any of the pepper so tendered, & pltfs. claimed damages for such

*Sect. 2.—Delivery: Sub-sect. 11, B. & C.; sub-sects. 12 & 13.]*

**refusal:—Held:** (1) the contract time for declaration was an essential condition; (2) the contract was not divisible; & defts. therefore were entitled to reject the whole 25 tons.

The subject of the contract in the sale of a specific quantity of a given article, with a margin for a moderate excess in or diminution of that quantity under the words "about" & "more or less." The rule applicable to such a contract, if it were not qualified by other provisions, would be that, subject to the moderate margin, the sellers cannot call upon the buyers to accept any greater or less quantity of the article bargained for than the specified quantity (THESIGER, L.J.).

The matter may be made more plain by reversing the position of the parties. Suppose a declaration such as was made in this case on Jan. 19 & that the fact had been that all the then parcels had been shipped in accordance with the terms of the contract; suppose also that under such circumstances defts. had, either at the time of declaration or when the pepper was tendered, expressed their willingness to take the twenty tons, but had absolutely refused to take the five, plffs. might clearly have said, "we make this declaration or tender as a whole, & will only deliver the pepper comprised in it as a whole." If that be not so, where would defts.' right of separation cease? They might, of course, take one only of the three parcels, & it is difficult to see on what logical or legal principle they might not demand to have some bags out of the one parcel, & say, "We will pay for the non-acceptance of the remainder in damages." This would reduce the matter to a practical absurdity (THESIGER, L.J.).—*REUTER v. SALA* (1879), 4 C. P. D. 239; 48 L. J. Q. B. 492; 40 L. T. 476; 27 W. R. 631; 4 Asp. M. L. C. 121, C. A.

*Annotations:—As to (1) Reid. Hartley v. Hymans, [1920] 3 K. B. 475. As to (2) Reid. Lomas v. Barlt, Frangopulo v. Lomas (1901), 17 T. L. R. 437; Jackson v. Rotax Motor & Cycle Co., [1910] 2 K. B. 937; Ballantine v. Cramp & Bosman (1923), 129 L. T. 502.*

**1828. Irregularity in documents.—Bill of lading—Showing excessive quantity.]—**By a contract in writing K. bought from B. "About 3,000 tons of wheat, 10 per cent. more or less, to be shipped by steamer" from India, payment to be made by cash in London within seven days from delivery of invoice in exchange for bill or bills of lading. In the contract there was the following clause, "Sellers have option of shipping less than the minimum quantity, in which case the price of the quantity short shipped of the medium quantity will be settled at the value of the day of the appropriation. Sellers can also exceed the maximum quantity, in which case the excess over the medium quantity will remain for their account." B. informed K. that 3,800 tons had been shipped on the *Bombay*, & that he appropriated 3,000 tons of that shipment to the contract with K., & he subsequently sent K. an invoice for 3,000 tons *ex Bombay*. The bills of lading of the 3,000 tons were two for 1,750 tons each & two for 250 tons each. K. offered to deliver to B. either all the bills of lading or two for 1,750 tons each, but B. refused to accept the tender or to pay any part of the price:—**Held:** the buyers were entitled to delivery of a bill or bills of lading for the amount of wheat which they had bought, & were entitled to refuse the tender made by the sellers.—*Re KEIGHLEY, MAXTED & Co. & BRYAN, DURANT & Co.* (No. 2) (1894), 70 L. T. 155; 7 Asp. M. L. C. 418, C. A.

**1829.**

**—Slight variation—Immaterial.]—**

A contract for the sale of a cargo of wheat per *Vandura* provided that the vessel should discharge "At any safe port in the United Kingdom." The vessel was chartered by the sellers to discharge at "Any safe port in the United Kingdom, Manchester excepted," & the bill of lading was in the same terms. By Manchester Ship Canal Act, 1885 (c. clxxxviii), & by the Customs regulations, the port of Manchester included the whole of the ship canal, but in the ordinary commercial meaning it included only Manchester, & the waters adjacent thereto. In the wider meaning Manchester was, but in the more limited meaning was not, a safe port for the *Vandura*:—**Held:** Manchester, within the meaning of the charter-party & bill of lading, was not a safe port for the *Vandura*, & therefore the addition of the words "Manchester excepted" in the bill of lading & charter-party was not a material alteration of the contract of sale so as to release the buyers from taking the documents.—*Re GOODBODY & Co. & BALFOUR, WILLIAMSON & Co.* (1899), 82 L. T. 484; 9 Asp. M. L. C. 69; 5 Com. Cas. 59, C. A.

*Annotation:—Mentl. Leonis S.S. Co. v. Rank, [1908] 1 K. B. 499.*

**1830. — Chamber of Commerce certificate—Certificate not identifying goods.]—***Re REINHOLD & Co. & HANSLOH* (1896), 12 T. L. R. 422, D. C.

**1831. — Charterparty—Slight variation—Immaterial.]—***Re GOODBODY & Co. & BALFOUR, WILLIAMSON & Co., No. 1829, ante.*

**1832. Omission of documents.—Insurance policy.]—**Ptffs., at New York, contracted to sell & deliver 1,000 quarters of wheat to defts. at Bristol, upon the terms, "cost, freight & insurance." Through a mistake ptffs. shipped by a sailing vessel, a cargo of 2,000 quarters of wheat to K. at Bristol. They also forwarded to K. by steamer a bill of lading & a policy of insurance of the whole cargo of wheat shipped. This policy was "free from particular average." K. at the request of ptffs., accepted a bill of exchange drawn upon him by them for the price of the 2,000 quarters. Defts. afterwards refused to accept the 1,000 quarters from K.:—**Held:** in an action against defts. for breach of a contract to accept the 1,000 quarters, ptffs. were not "ready & willing" to deliver the 1,000 quarters to defts. within the terms of their contract.

Is the English firm bound to accept the bill of lading of the goods without the policy of insurance? I think they are certainly not so bound (MELLISH, L.J.).—*HICKOX v. ADAMS* (1876), 34 L. T. 404; 3 Asp. M. L. C. 142, C. A.

*Annotations:—Apld. Manbre Saccharine Co. v. Corn Products Co., [1919] 1 K. B. 198. Reid. Diamond Alkali Export Corp'n. v. Bourgeois, [1921] 3 K. B. 443.*

**1833. — — — No insurance effected.]—**When goods are sold under a c.i.f. contract, but the seller does not effect an insurance upon them for the transit, they are not delivered in accordance with the contract although they arrive safely at their destination, & the buyer is not bound to accept them or to pay the price.—*ORIENT Co., LTD. v. BREKKE & HOWLID*, [1913] 1 K. B. 531; 82 L. J. K. B. 427; 108 L. T. 507; 18 Com. Cas. 101, D. C.

*Annotation:—Apld. Manbre Saccharine Co. v. Corn Products Co., [1919] 1 K. B. 198.*

**1834. C.i.f. contract.]—**By a contract headed "C.i.f. contract" the sellers sold to the buyers a quantity of tapioca to be shipped at Java for Liverpool, "to be taken c.i.f. terms, net landing weights, war risk included." The contract provided that "should the goods or any portion thereof not arrive from loss of vessel . . .



or other unavoidable cause, this contract or such portion to be void," & (by clause 5), "Payment cash, before delivery if required, against documents or delivery order. . . ." On arrival of the tapioca at Liverpool the sellers tendered to the buyer a delivery order for the goods, but no policy of insurance, contending that under the contract they had the option of tendering documents or delivery order. The buyers refused to take delivery of the tapioca, contending that the contract was a c.i.f. contract, & therefore they were entitled to a policy of insurance on the tapioca:—*Held*: clause 5 meant, "Payment cash against delivery of all the usual documents under a c.i.f. contract or delivery order in lieu of one of those documents necessary for giving possession of the goods," & consequently the buyers were justified in refusing to take delivery without a policy of insurance.—*Re* DENBIGH COWAN & CO. & ATCHERLEY (R.) & CO. (1921), 90 L. J. K. B. 836; 125 L. T. 388, C. A.

**1835.** ——— **Inclusion of letter alleging fact of insurance.**—*MANBRE SACCARINE CO. v. CORN PRODUCTS CO.*, No. 1807, *ante*.

**1836.** **Tender must be made within reasonable time.**—*GROOM (C.), LTD. v. BARBER*, No. 1802, *ante*.

#### C. Miscellaneous Documents.

**1837.** **Whether document of title—Wharfinger's certificate.**—*GUNN v. BOLCKOW, VAUGHAN & CO.*, No. 1387, *ante*.

**1838.** ——— **Iron warrant.**—By the usage of the iron trade warrants for goods "deliverable f.o.b. to A., or their assigns, by indorsement hereon," are considered to pass to the holders for value free from any vendor's lien. The P. B. co., manufacturers of steel rails, contracted with S. & co., iron merchants, for the sale of a quantity of rails to be rolled at their works, & to be delivered at intervals, payment to be made as to three-fifths at three days' sight, & as to two-fifths by buyer's acceptances at four months. On the completion of each portion of goods a warrant for the same in the above form was sent to S. & co. with an invoice & drafts for the purchase-money & the goods referred to in the warrants were stacked at the works. In the meantime S. & co. pledged the several warrants & indorsed the same to plffs. Before the contract was completed, when only part of the goods were paid for, S. & co. became bkpt., & their acceptances were dishonoured. At that time part of the goods had been dispatched in waggons sent by order of S. & co., & were stored in a railway co.'s warehouse, addressed to the agents of S. & co., & part remained stacked at the works:—*Held*: (1) by the usage of the iron trade, as well as by the intention of the parties as shown by their course of dealing, plffs., as holders for value of the warrants, were entitled to the goods free from any vendor's lien; (2) even had the vendors been able to claim a lien on the undelivered goods the transit was at an end as regarded those stored in the warehouse, & their right was gone; (3) the contract was apportionable, & the vendors could not, in any event, have claimed any lien on that portion of the goods

which had been fully paid for.—*MERCHANT BANKING CO. OF LONDON v. PHENIX BESSEMER STEEL CO.* (1877), 5 Ch. D. 205; 46 L. J. Ch. 418; 36 L. T. 395; 25 W. R. 457.

*Annotation*:—*As to* (3) *Reid*. *Longbottom v. Bass, Walker*, [1922] W. N. 245.

— **Delivery order—Whether vendor estopped from setting up title.**—*See* ESTOPPEL, Vol. XXI., p. 323, Nos. 1206–1208.

**1839.** **Dock warrant—Right to clean warrants.**—Where the purchaser of goods agrees to pay for them against dock warrants the kind of warrant to which he is entitled depends on the contract, & if he does not stipulate for clean warrants he is not entitled to refuse to accept the warrants merely on the ground that they contain the words "cases frail, not accountable for quantity of contents."—*ROMARIZ & PISTACCHINI v. ZEYEN & CO.* (1919), 35 T. L. R. 299.

#### SUB-SECT. 12.—RIGHT OF UNPAID SELLER TO WITHHOLD DELIVERY.

*See* Part VII., Sect. 7, *post*.

#### SUB-SECT. 13.—DETERIORATION OF GOODS IN TRANSIT.

*See* Sale of Goods Act, 1893 (c. 71), s. 33.

**1840.** **Whether vendor liable—Agreement for delivery to carrier.**—*BRITISH & INDIA STEAM NAVIGATION CO. v. DE MATTOS, DE MATTOS v. BRITISH & INDIA STEAM NAVIGATION CO.*, No. 1557, *ante*.

**1841.** ——— **Agreement for delivery to purchaser.**—*BRITISH & INDIA STEAM NAVIGATION CO. v. DE MATTOS, DE MATTOS v. BRITISH & INDIA STEAM NAVIGATION CO.*, No. 1557, *ante*.

**1842.** ——— **Delivery in merchantable condition—Deterioration necessarily incident to transit.**—Where a manufacturer contracts to deliver a manufactured article at a distant place, & the article when delivered to the carrier for the purpose of being conveyed, is of a merchantable quality, the purchaser is bound to accept it, if only deteriorated to the extent that it is necessarily subject to in its course of transit from the one place to the other.—*BULL v. ROBISON* (1854), 10 Exch. 342; 2 C. L. R. 1276; 24 L. J. Ex. 165; 23 L. T. O. S. 288; 2 W. R. 623; 156 E. R. 476.

**1843.** ——— **Implied warranty.**—*B.*, a wholesale provision dealer in London, contracted to send weekly from London by railway to *W.*, a retail tradesman at Brighton, a quantity of Ostend rabbits, the cost of the railway carriage as well as the price of the rabbits being paid by *W.*:—*Held*: there was an implied warranty by *B.* that the rabbits should be fit for human food, not only when delivered at the railway station in London, but when in the ordinary course of transit they should reach *W.* at Brighton, & until he should have had there a reasonable opportunity of dealing with them in the usual course of business.—*BEER v. WALKER* (1877), 46 L. J.

#### PART VI. SECT. 2, SUB-SECT. 13.

**1841 i.** **Whether vendor liable—Agreement for delivery to vendee.**—A person sold a number of carcasses of whales in Shetland at a price per ton, to be delivered at the buyers' wharf at Newcastle. The carcasses became unfit for use on the voyage:—*Held*: the risk was with the seller, as neither the quantity sold nor the price could be

ascertained till delivery; & as the seller had undertaken to deliver at the buyers' wharf.—*WALKER v. LANGDALE'S CHEMICAL MANURE CO.* (1873), 11 Macph. (Ct. of Sess.) 906.—*SCOT*.

*h.* ——— **Deterioration due to accidental or exceptional cause.**—A number of barrels of oysters shipped by plff. at Pictou addressed to defts. at Truro were proved to have been in

good condition when shipped but sometime after their receipt were found to be unfit for food & worthless. The cause of deterioration was not explained, but was believed to be, probably due to exposure to heat on the train when in transit:—*Held*: plff. was not responsible for the deterioration of the goods & the buyer must take the risk of any accidental or



**Sect. 2.—Delivery: Sub-sects. 13 & 14. Sect. 3: Sub-sect. 1.]**

**Q. B. 677; 37 L. T. 278; 41 J. P. 728; 25 W. R. 880.**

**Annotations:—***Distd. Smith v. Baker & Death* (1878), 40 L. T. 261. *Expld. Olett v. Jordan*, [1918] 2 K. B. 41. *Reid. Burrows v. Smith* (1894), 10 T. L. R. 246.

#### SUB-SECT. 14.—INSURANCE OF GOODS.

*See, generally, INSURANCE, Vol. XXIX., pp. 36 et seq.; Sale of Goods Act, 1893 (c. 71), s. 32 (3). Duty to insure.]—See INSURANCE, Vol. XXIX., p. 78, No. 375.*

**Insurable interest.]—See INSURANCE, Vol. XXIX., pp. 88, 102, 108–110, 113, 114, Nos. 463, 597, 648–655, 668–682.**

**1844. Delivery “by route involving sea transit” —Notice to buyer—What constitutes notice.]—WIMBLE, SONS & CO. v. ROSENBERG & SONS, No. 1800, ante.**

**1845. ———.]—Pltfs. sold to defts. a quantity of nails to be delivered f.o.b. New York, for shipment to the destination specified by defts. on receipt of shipping instructions from defts., for cash against shipping documents. In June, 1916, defts. sent an order under the contract & specified the shipping marks. On Aug. 16, pltfs. gave notice to defts. that the goods would shortly be made. The goods were shipped on a vessel which sailed from New York on Aug. 24. On Aug. 26, the shipowners notified defts. that the ship had sailed, & by Sept. 6, defts. knew that the goods had been shipped. On Sept. 18, the ship was torpedoed & the goods were lost. Defts. had not insured the goods. In an action for the purchase-money there was evidence that defts. could have effected an insurance before they knew of the loss:—*Held*: Sale of Goods Act, 1893 (c. 71), s. 32 (3), applied to a contract for the sale of goods f.o.b., but as defts. had sufficient knowledge of the facts to enable them to insure pltfs. were entitled to recover.—*NORTHERN STEEL & HARDWARE CO., LTD. v. BATT. (JOHN) & CO. (LONDON), LTD.* (1917), 33 T. L. R. 516, C. A.**

**1846. ——— F.o.b. contract.]—WIMBLE, SONS & CO. v. ROSENBERG & SONS, No. 1800, ante.**

**1847. ———.]—NORTHERN STEEL & HARDWARE CO., LTD. v. BATT. (JOHN) & CO. (LONDON), LTD., No. 1845, ante.**

**1848. ——— C.i.f. contract.]—(1) Sale of Goods Act, 1893 (c. 71), p. 32 (3), does not apply to a contract on c.i.f. terms entered into in time of peace, inasmuch as the contract itself provides for all the insurance that is contemplated or usual at the time when it is made.**

**(2) Sale of Goods Act, 1893 (c. 71), s. 32 (3), does not impose any new obligation on the seller to give notice to the buyer so as to enable him to insure against war risks if, after the date of the contract, war becomes imminent.—*LAW & BONAR, LTD. v. BRITISH AMERICAN TOBACCO CO., LTD.*, [1916] 2 K. B. 605; 85 L. J. K. B. 1714; 115 L. T. 612; 13 Asp. M. L. C. 499; 21 Com. Cas. 350.**

**1849. Certificate of insurance on goods—War-**

**exceptional cause.—*DAVIDSON v. BIGELOW & HOOD, LTD.*, [1923] 1 D. L. R. 1175; 55 N. S. R. 539.—CAN.**

#### PART VI. SECT. 2, SUB-SECT. 14.

**k. Right of purchaser to benefits—Goods insured by seller.]—The buyer of goods is not entitled to claim from the seller the benefit of any insurance he**

**has on them, unless the seller has contracted to give him such benefit.—*GILL v. YORKSHIRE INSURANCE CO.* (1913), 24 W. L. R. 389; 4 W. W. R. 692; 12 D. L. R. 172; 23 Man. L. R. 368.—CAN.**

**1. Liability of stopper in transitu.]—Stopper in transitu of goods sent by sea not liable for premium of insurance**

**ranty of validity of certificate—Liability of vendor.]**

**—Under a c.i.f. contract, when a certificate of insurance is tendered by the seller & accepted by the buyer in fulfilment of the contract & in lieu of a policy of insurance, there is an implied warranty by the seller that the assertions in the certificate are true, & that the seller will produce or procure the production of the policy referred to in the certificate. The seller in such a case is liable for a breach of this warranty, even if the certificate is in fact signed by insurance brokers & the brokers fail to effect an insurance which will continue valid throughout the transit of the goods.—*HARPER (A. C.) & CO. v. MACKECHNIE & CO.*, [1925] 2 K. B. 423; 95 L. J. K. B. 162; 134 L. T. 90; 31 Com. Cas. 21.**

**1850. ——— Notice of damage to goods.]—Deft. co. insured a quantity of leather, consigned c.i.f., for a voyage from New York to Tunis, by a certificate of insurance which provided: “This certificate represents & takes the place of the policy & conveys all the rights of the original policy holder . . . as fully as if the property were covered by a special policy direct to the holder of this certificate.” By clause 11 of the policy, “In case of loss or damage to the property hereby insured the loss shall be reported to the representative of the co., or, if there be no representative of the co., to Lloyd’s agent, as soon as the goods are landed or the loss is known or expected.” On the day after the arrival of the goods at Tunis the consignee sold them to pltf., who found them to have been damaged by salt water. In an action by pltf. on the certificate of insurance deft. co. pleaded that the clause in the policy as to giving notice within a limited time had not been complied with:—*Held*: as it was not clear either that the certificate incorporated clause 11 of the policy or that clause 11 was a condition precedent, pltf. was entitled to recover.—*KOSKAS v. STANDARD MARINE INSURANCE CO., LTD.* (1927), 137 L. T. 165; 43 T. L. R. 169; 17 Asp. M. L. C. 240; 32 Com. Cas. 160, C. A.**

**—.]—See, also, INSURANCE, Vol. XXIX., p. 64, Nos. 235, 236.**

**1851. Right of vendor to benefits—Goods independently insured by purchaser.]—A. sold goods to B., at whose risk they were shipped for Lisbon, to be paid for by bills drawn upon R. & co., C. went as supercargo & trustee for A. & B. & was to retain possession of the goods until the amount of the bills drawn upon R. & co. was remitted, & then the bill of lading was to be delivered up to B. B. directed R. & co. to effect an insurance, which was done at his expense, & not in pursuance of any agreement between him & A. The ship, with the goods on board, was captured, & the underwriters paid a total loss to R. & co., who gave B. credit for the money, part of which they paid over to him, & part to his assignees after he had become bkpt. R. & co. paid part of the bills drawn upon them, & rejected others. In an action brought against them by A., for money had & received to his use:—*Held*: they were not bound to apply the money paid on the policy to the discharge of the bills drawn by B. for the goods.—*NEALE v. REID* (1823), 1 B. & C. 657;**

**on goods stopped.—*SMITH & JAMESON v. DRAKE* (1809), 15 Fac. Coll. 244.—SCOT.**

**m. Duty of seller to give immediate notice of shipment to purchaser—To enable purchaser to insure.]—A seller having shipped goods from London to Aberdeen by a steamer, did not send notice of shipment to the purchaser**

Ry. K. B. 158; 1 L. J. O. S. K. B. E. R. 241.

—See, also, INSURANCE, Vol. XXIX., p. 90, No. 484.

**1852. Insurance for more than value of goods—Right of purchaser to excess.]—HARLAND & WOLFF, LTD. v. BURSTALL (J.) & Co., No. 1607, ante.**

—See, also, INSURANCE, Vol. XXIX., p. 91, Nos. 492–494.

**1853. Insurance against all risks—Extent of vendor's obligation.]—A contract for the sale of goods on c.i.f. terms contained the following words: "insurance to be effected by (sellers) all risks?"—Held: on the construction of the contract, the sellers' obligation was to effect an insurance to cover all risks in the sense of the entire *quantum* of damage, & not to cover the assured against all causes of accident, e.g. damage done to the goods in consequence of the shipowners committing a breach of the contract of carriage by improperly stowing them on deck instead of below deck.**

*Qu*: whether under such a contract of sale it is sufficient for the seller to procure protection for the buyer against all risks partly by means of the contract of carriage & partly under the contract of insurance.—VINCENTELLI & Co. v. ROWLETT (JOHN) & Co. (1911), 105 L. T. 411; 12 Asp. M. L. C. 34; 16 Com. Cas. 310.

—Vendor's failure to effect.]—See INSURANCE, Vol. XXIX., p. 80, No. 392.

**Right of purchaser to partial benefit—Part of voyage insured.]—See INSURANCE, Vol. XXIX., p. 91, No. 491.**

**Goods sold without assignment of policy.]—See INSURANCE, Vol. XXIX., p. 92, No. 495.**

**Goods sold after loss.]—See INSURANCE, Vol. XXIX., p. 91, No. 488.**

**Insurance under floating policy—Loss of goods stored by seller—After purchase.]—See INSURANCE, Vol. XXIX., p. 308, No. 2548.**

**Goods destroyed in possession of warehouseman—After sale.]—See INSURANCE, Vol. XXIX., p. 316, Nos. 2601, 2602.**

**Goods delivered to carrier.]—See Nos. 1798, 1799, ante.**

**Duration of risk.]—See INSURANCE, Vol. XXIX., pp. 131, 134, Nos. 831–868.**

## SECT. 3.—ACCEPTANCE.

SUB-SECT. 1.—WHAT AMOUNTS TO.

See Sale of Goods Act, 1893 (c. 91), s. 35.

**Acceptance under Statute of Frauds.]—See Part II., Sect. 4, sub-sect. 4, A., ante.**

**1854. General rule.]—Pltfs., merchants at Liverpool, were in the habit of consigning to defts., brokers at Montreal, goods on sale or return, & of receiving in payment bills on British Houses purchased by defts. with the proceeds. Pltfs. having desired that none but undoubted bills should be sent to them, defts. remitted a bill drawn by & upon parties supposed at the time to be in good credit. Pltfs., on receiving it, returned for answer that it had been refused acceptance, & requested defts. to do what was needful to**

procure security from the drawer, & to take all legal & necessary steps for their security. In an action brought by pltfs. for money had & received, to recover from defts. the proceeds of the consignment to which this bill had reference, defts. pleaded the delivery to pltfs., & acceptance by them, of the bill of exchange in full satisfaction. The judge directed the jury, that if the bill was such a one as by the course of dealing between the parties pltfs. were bound to take, that was a taking in full satisfaction:—*Held*: this was a misdirection; for acceptance in satisfaction must be an act of the will in the party receiving.

What is an acceptance in satisfaction? To constitute an acceptance, there must be an act of the will. Every receipt is not an acceptance; but if the party accepts the thing, though but for a moment, for that for which the other pays it, he cannot afterwards by his subsequent dissatisfaction, get rid of the effect of it (ALDERSON, B.).—HARDMAN v. BELLHOUSE (1842), 9 M. & W. 596; 11 L. J. Ex. 135; 152 E. R. 251.

*Annotation*:—*Reid*. Croft v. Lumley (1858), 6 H. L. Cas. 672.

**1855. Acceptance of part—No notice of rejection of remainder.]—DICKS v. SIDNEY (1729), 1 Barn. K. B. 316; 94 E. R. 215.**

**1856. —Remainder rejected.]—MOLLING & Co. v. DEAN & SON, LTD., No. 1870, post.**

**1857. Removal of goods by buyer—To warehouse—To remain until paid for.]—Deft., having bargained with pltf. for the purchase of wool from pltf. at a certain price, removed it to a warehouse, used by deft. for that purpose, but belonging to a third party; then the wool was weighed & packed in sheeting of deft.'s. The course of dealing was that the wool remained on these premises till paid for. The wool in question was not removed or paid for:—*Held*: there was a sufficient delivery & acceptance of the goods, within Stat. Frauds, to ground an action for goods sold & delivered, though pltf. retained a special interest in them, not properly a lien, in respect of the understood engagement not to remove them till paid for.—DODSLEY v. VARLEY (1840), 12 Ad. & El. 632; Arn. & H. 128; 4 Per. & Dav. 448; 5 Jur. 316; 113 E. R. 954.**

*Annotations*:—*Reid*. Bushel v. Wheeler (1844), 15 Q. B. 442, n.; Dyer v. Cowley (1848), 12 Jur. 776.

**1858. —Sale by buyer in own name to satisfy damages.]—Pltfs., merchants at Dieppe, sold to deft., a merchant at Wisbech, a quantity of oil cake, which was delivered to deft. there in Dec. 1841. Deft., conceiving that the cargo did not answer the sample, landed a portion of it for the purpose of examination, & subsequently, landed the whole, stored it in a public warehouse, & wrote to pltfs. informing them that it lay there at their risk & costs, & requiring them to take it back: which pltfs. refused to do. After some correspondence, deft., in May, 1842, gave pltfs. notice that the cargo was lying at the warehouse at their disposal, & that if no directions were given by them, it would be sold, & the proceeds applied in part payment of deft.'s damages. Pltfs. answered that they considered the transaction at an end, & demanded payment of the price. Deft. thereupon offered the cargo for sale in his own name, & in July sold it in his own name to a third**

until the following day. The vessel having been lost on the passage:—*Held*: the seller's duty was to have given the purchaser immediate notice of shipment, so as to enable him to insure; & this not having been done, that the risk remained with the seller.—FLEET BROTHERS v. MORRISON (1854), 16 Dunl. (Ct. of Sess.) 1122; 26 Sc. Jur. 607.—SCOT.

## PART VI. SECT. 3, SUB-SECT. 1.

**18561. Acceptance of part—Remainder rejected.]—GROVER v. CAMERON (1841), 6 O. S. 196.—CAN.**

**n. Complaint as to goods—Tender of reduced price.]—McCLURE v. KREUTZIGER (1884), 6 O. R. 480.—CAN.**

**o. ———.]—WATT v. GLEN (1829), 7 Sh. (Ct. of Sess.) 372; 4 Fac. Coll. 472.—SCOT.**

**—Agreement to pay reduced.]—FRIENDLY v. CANADA TRANSIT (1886), 10 O. R. 756.—CAN.**

**q. Acceptance by conduct after notice of delivery—Failure to object to**

Sect. 3.—Acceptance: Sub-sects. 1 & 2.]

party:—*Held*: these facts sufficiently showed an acceptance of the goods by deft., after which he could not treat the contract as rescinded; he was not to be considered an agent of pltf. from necessity, to dispose of the goods; & he could not, in an action against him for another debt, set off money paid by him on bills which he had accepted on account of the disputed cargo before its arrival.—*CHAPMAN v. MORTON* (1843), 11 M. & W. 534; 12 L. J. Ex. 292; 1 L. T. O. S. 148; 152 E. R. 917.

*Annotations*:—*Consd. Loder v. Kekule* (1857), 3 C. B. N. S. 128. *Refd. Aronson v. Mologa Holzindustrie A/G* (1927), 32 Com. Cas. 276.

1859. — From barrels into bags—For purpose of examination.]—If a purchaser, receiving goods in his warehouse, & intending to examine into their quality, treats them in a manner which materially alters their condition, as by removing glue from hogsheads into bags, it is not necessarily to be inferred from that fact alone that he finally accepts the goods.—*CURTIS v. PUGH* (1847), 10 Q. B. 111; 16 L. J. Q. B. 199; 8 L. T. O. S. 447; 116 E. R. 44.

1860. — Horses moved into different stalls—Covered with initialed horse cloths.]—*ANJER v. HARGON* (1854), 24 L. T. O. S. 74.

1861. Acts of ownership—Spreading out seed.]—Pltf. sent twenty sacks of seed to defts. in part performance of a verbal contract for the sale of seed to the value of more than £10. On the same day one of defts. informed pltf. that he had heard the seed had arrived out of condition. Pltf. asserted it was in condition. Immediately afterwards defts. wrote to pltf., rejecting the seed, & in one of the letters informed him that "the twenty sacks which you authorised us to receive for you, & to lay out thin in consequence of its being hot & mouldy," would be returned.—On the trial, the above facts being proved by pltf., who gave evidence that he gave no authority to spread it out, & that the seed was not hot & mouldy, the judge directed a nonsuit, with leave to enter a verdict if there was any evidence of, or acceptance of, part of the goods:—*Held*: there being evidence to go to the jury that the seed was spread out thin, neither because it was out of condition, nor by pltf.'s authority, there was evidence that it was spread out thin as an act of acceptance; & therefore, the nonsuit was wrong. But the ct. thought the evidence too slight to justify them in entering a verdict for pltf., & directed a new trial.—*PARKER v. WALLIS* (1855), 5 E. & B. 21; 3 W. R. 417; 119 E. R. 390.

*Annotation*:—*Refd. Castle v. Sworder* (1860), 29 L. J. Ex. 235.

1862. — Consumption or sale of part.]—*HARNOR v. GROVES*, No. 1911, *post*.

1863. Complaint as to goods—Goods left at railway station—Railway employee informed of non-acceptance.]—Deft., a builder in the country, gave a verbal order to pltf. for timber, directing it to

be sent by a certain railway, as had been the practice between the parties in their previous dealings. On the timber arriving at the railway station in the country, on Apr. 19 deft. was informed of its arrival, when he told the railway clerk he should not receive it. He received at the same time an invoice, which he kept. On May 28 deft. informed pltf. that he declined to take the timber:—*Held*: although there might be a scintilla of evidence of an acceptance within Stat. Frauds, yet the jury ought to have found for deft.; & the ct. set aside a verdict for pltf. as against evidence.—*NORMAN v. PHILLIPS* (1845), 14 M. & W. 277; 14 L. J. Ex. 306; 9 Jur. 832; 153 E. R. 481.

*Annotations*:—*Distd. Saunders v. Topp* (1849), 4 Exch. 390. *Consd. Morton v. Tibbett* (1850), 15 Q. B. 428; *Coombs v. Bristol & Exeter Ry.* (1858), 3 H. & N. 510. *Refd. Hunt v. Hecht* (1853), 8 Exch. 814; *Castle v. Sworder* (1861), 4 L. T. 865; *Taylor v. Smith*, [1893] 2 Q. B. 65.

1864. — Kept for further trial.]—Pltf. sold a hogshead of cider to deft., by sample, as good draught cider. After the arrival of the cask, deft. on May 28 wrote to pltf.: "The cider differs from the sample, & the little I have sold has been complained of in every instance; should this continue I shall be obliged to return it." Pltf. did not answer this letter till June 24. Deft. in trying to sell it used 20 gallons, but finding it unserviceable, refused to pay for the rest, which he returned to pltf. It was found as a fact that the 20 gallons were more than sufficient to enable deft. to test the quality of the bulk:—*Held*: the omission of deft. to answer the letter of May 28 was evidence from which a jury might presume that pltf. acquiesced in the further trial of the cider, & deft. had not so accepted the bulk as to be bound to pay for the whole.—*LUCY v. MOUFLET* (1860), 5 H. & N. 229; 29 L. J. Ex. 110; 157 E. R. 1168.

*Annotation*:—*Consd. Grimoldby v. Wells* (1875), L. R. 10 C. P. 391.

1865. — — Arbitration as to allowance—Purchaser directing deduction from invoice.]—Deft., on Apr. 14, signed the following bought note, "I have this day bought from you the following: 500 piculs China cotton at 17d. per lb., June or July delivery, guaranteed fair, marks to be given when cotton ready for delivery; in case of dispute arising out of this contract, the matter to be referred to two respectable brokers for settlement, who shall decide as to quality & allowance, if any, to be made; the cotton to be taken from the warehouse with customary allowances of tare & draft, & the invoice to be dated from the date of the notice being given that the cotton is ready for delivery; to be delivered in merchantable condition to the buyer; the damaged, if any, to be rejected, provided it cannot be made merchantable." Deft. sold the cotton to Curry on June 25. Pltf. declared the marks on 420 piculs *ex Queensbury*, which were warehoused at the docks, & 80 piculs *ex Princess Royal*, but he never was in a position to deliver

goods.]—*COX v. JONES* (1864), 24 U. C. R. 81.—*CAN.*

r. Acceptance as agent—Delivery as to principal—Liability of agent.]—*BLACK v. DOHERTY* (1882), 22 N. B. R. 215.—*CAN.*

t. Direction to seller to mark & forward goods.]—Where A. purchased plate of B. & desired him to have his crest engraved on it, & afterwards to forward it to his residence, but paid nothing, & B., having obeyed his orders, sued him for the price:—*Held*: A.'s directions as to the engraving of the crest & forwarding to his residence,

constituted a sufficient acceptance & delivery.—*WALKER v. BOULTON* (1834), 3 O. S. 252.—*CAN.*

a. Goods taken into custody of purchaser—Intention of purchaser—Goods taken in for protection with denial of acceptance.]—*ANDREWS v. COOK* (Man.) (1907), 6 W. L. R. 691.—*CAN.*

b. — —.]—The mere taking into custody, by the purchaser, of goods which have been despatched to him by the seller, does not amount to delivery, unless an intention exists on the part of the purchaser to take the

goods into his possession as his property.—*DE VILLIERS v. MAISTER & SHAGAM* (1910), 27 S. C. 73.—*S. AF.*

c. Goods taken on trial—Failure to return within time limited.]—*MCCORMICK HARVESTING MACHINE CO. v. HISLOP* (1903), 7 Terr. L. R. 112.—*CAN.*

d. — Agreement to pay made after trial.]—*KNIGHT v. HANSON* (1906), 7 Terr. L. R. 306; 3 W. L. R. 412.—*CAN.*

e. Delay in returning goods—Goods not likely to deteriorate.]—Delay in returning an article not likely to

the latter. Owing to a dispute as to the quality of the 420 piculs of cotton, the matter was referred & an allowance made. The 420 piculs were afterwards weighed, the price ascertained, the invoice made out, & subsequently, at deft.'s request, corrected by deducting the amount of the allowance:—*Held*: there was evidence that deft. consented to take the 420 piculs, & the property in the same passed to him so that pltf. could maintain an action for goods bargained & sold.

It is argued that no action can be maintained, because the contract was for the sale of 500 piculs, not 420. If deft. had always stood upon that, it would have been unanswerable (*MARTIN, B.*).—*MORGAN v. GATH* (1865), 3 H. & C. 748; 34 L. J. Ex. 165; 13 L. T. 96; 11 Jur. N. S. 654; 13 W. R. 756; 159 E. R. 726.

#### SUB-SECT. 2.—BUYER'S RIGHT OF INSPECTION.

See Sale of Goods Act, 1893 (c. 71), s. 34.

**1866. Whether implied—Sale by auction—Printed conditions.**—Certain woollen & mercery goods were put up to sale by auction. Each lot was described in the catalogue as containing a certain number of yards. The goods were open to public inspection for two days before the sale. By the printed conditions of sale, the purchaser of any lot was to pay down a deposit; the lots were to be taken away with all faults, imperfections, or errors of description, on a day specified; & the remainder of the purchase-money was to be paid before the delivery. There was also a memorandum, that all small remnants were to be cleared at the measure stated in the catalogue. The biddings at the sale were to be at so much per yard:—*Held*: (1) in such a sale no condition was implied, that a purchaser might inspect & measure the lots, before paying the remainder of the purchase-money; (2) such a condition was at variance with the printed conditions.—*PETTITT v. MITCHELL* (1842), 4 Man. & G. 819; Car. & M. 424; 5 Scott, N. R. 721; 12 L. J. C. P. 9; 6 Jur. 1016; 134 E. R. 337.

*Annotations*:—*Distd.* *Isherwood v. Whitmore* (1843), 11 M. & W. 347. *Refd.* *Isherwood v. Whitmore* (1842), 10 M. & W. 757.

—**Sale by sample.**—See Part III., Sect. 6, sub-sect. 2, B., *ante*.

**1867. — Goods warranted of particular quality.**—Where a party buys a specific cargo of goods, expected by a particular ship, & which are warranted to be of a particular quality, he has a right, on the arrival of the ship, to inspect such cargo, before it is delivered to him, in order to ascertain whether the warranty has been complied with; & if it have not, he may reject the cargo altogether. But if the cargo be once delivered to him, he has no right to return it, on the ground that it does not correspond with the warranty.—*TOULMIN v. HEDLEY* (1845), 2 Car. & Kir. 157.

*Annotation*:—*Refd.* *Bannerman v. White* (1861), 8 Jur. N. S. 282.

**1868. Necessity for tender in manner offering reasonable opportunity of inspection—Closed casks.**

—An allegation of a tender of goods is not supported by proof of a delivery or offer to deliver closed casks, said to contain them; but they should be tendered in such a way that the party may have a reasonable opportunity of inspecting them, & of ascertaining whether what he has bargained for is presented for his acceptance.—*ISHERWOOD v. WHITMORE* (1843), 11 M. & W. 347; 12 L. J. Ex. 318; 1 L. T. O. S. 81; 7 Jur. 535; 152 E. R. 837.

**1869. Time for inspection—Whether after delivery.**—*TOULMIN v. HEDLEY*, No. 1867, *ante*.

**1870. Place of inspection—Goods shipped for export.**—Pltfs., a firm of colour printers in Germany, contracted to supply defts. in England with a number of books, some of which were for sale in England & some in America. Pltfs. supplied defts. with a parcel of 40,000 books which they knew were intended for America. Defts., without inspecting the books, sent them to America, where they were inspected & rejected as not being of the quality agreed, & were sent back to England. Defts. gave notice to pltfs. that they intended to reject them all, except such as were saleable, & they sold 13,000 of them, & rejected the rest:—*Held*: (1) as pltfs. knew that the books were intended for America, that was the proper place for inspection, & defts. were therefore entitled to reject them; & defts. could recover the cost of sending them to America & back to England; (2) as each of the books had to be up to standard defts. could accept some & reject the others.—*MOLLING & Co. v. DEAN & SON, LTD.* (1901), 18 T. L. R. 217, D. C.

*Annotations*:—As to (1) *Refd.* *Bragg v. Villanova* (1923), 40 T. L. R. 154. As to (2) *Refd.* *Ballantine v. Cramp & Bosinan* (1923), 129 L. T. 502. *Generally, Refd.* *Hardy v. Hillerns & Fowler*, [1923] 2 K. B. 490.

**1871. —**—Where goods are sold by a seller for delivery at a place which, to the seller's knowledge, is not their final destination, but only a place from which there is to be a further transit, the place at which the seller has to make delivery, although not the ultimate destination of the goods, is the place where the goods must be inspected & accepted or rejected by the buyer, if having regard to the nature of the goods & the way in which they are packed, inspection can be had reasonably at that place.

Where a buyer without inspection shipped goods from the original seller's place of delivery to their ultimate destination, he lost his right to reject the goods.—*SAUNT v. BELCHER & GIBBONS, LTD.* (1920), 90 L. J. K. B. 541; 125 L. T. 283; 26 Com. Cas. 115.

*Annotation*:—*Refd.* *Hardy (London) v. Hillerns & Fowler*, [1923] 1 K. B. 658.

**1872. — Goods shipped abroad f.o.b.**—Resps. contracted to buy from applts. a quantity of palm oil f.o.b. Antwerp, & in pursuance of the contract applts. shipped 79 casks from Antwerp to Liverpool. Both parties had representatives at Antwerp, but resps. did not inspect the oil till it arrived at Liverpool, & they then ascertained that 58 casks contained oil not of the contract quality. In the arbn. it was found by the

deteriorate does not necessarily infer acceptance.—*NOURSE v. MALAN*, [1909] T. S. 202.—S. AF.

**f. Receipt by carrier appointed by purchaser.**—The receipt of goods by a carrier appointed by a purchaser does not constitute an acceptance of the goods by the purchaser.—*DONALDSON v. MORRIS*, [1912] C. P. D. 339.—S. AF.

#### PART VI. SECT. 3, SUB-SECT. 2.

**1869 l. Time for inspection—Whether after delivery.**—*SMITH BROTHERS &*

*Co. v. SCOTT* (1875), 2 R. (Ct. of Sess.) 601; 2 Sc. L. R. 387.—SCOT.

**g. — Whether before payment—Where agreement to pay on arrival of cars in which goods shipped.**—*STRONG & DOWLER v. SCOTIA FLOUR & FEED CO.*, [1927] 2 D. L. R. 1183; 59 N. S. R. 339.—CAN.

**h. — Continuation until arrival & acceptance—Goods of particular quality for delivery at distant place.**—Where a seller undertakes to deliver goods of a particular quality to a

carrier to be forwarded to the buyer at a distant place, to be paid for on arrival, the right of inspection *prima facie* continues till the goods arrive & are accepted at their ultimate destination.—*THAMES CANNING CO. v. ECKARDT* (1915), 8 O. W. N. 395; 34 O. L. R. 72; 23 D. L. R. 805.—CAN.

**k. Place of inspection—Place of delivery.**—*Prima facie* the examination by a buyer under Sale of Goods Act, s. 45, in order to ascertain whether

*Sect. 3.—Acceptance: Sub-sects. 2 & 3, A. &*

arbitrators that by a usage of trade, as applied to f.o.b. contracts such as this, it was the regular custom for the buyer to examine the goods before the instructions to put them on board were given, & that therefore the right to reject expired when the goods were put on board at Antwerp, & resps. could only claim damages:—*Held*: the custom was so vaguely stated that it did not extend to exclude the resps. from rejecting the goods at Liverpool.—*Boks & Co. v. RAYNER (J. H.) & Co. (1921), 37 T. L. R. 800, C. A.*

**1873.** ——— *No reasonable opportunity on shipment.*—Resp., who carried on business in Spain, sold to applt., a merchant in Liverpool, a quantity of Spanish walnuts, to be shipped f.o.b. at Tarragona. The documents arrived in England before the goods, & applt. had taken up the documents & paid the price before the goods were delivered. On finding that the goods were not of the contract quality applt. rejected them & claimed the return of the price. Resp. contended that applt. ought to have examined the goods at the port of shipment & had lost his right of rejection:—*Held*: as the buyer was not to be deemed to have accepted the goods until he had had a reasonable opportunity of examination, & as applt. had in the circumstances not had a reasonable opportunity, he had not lost his right of rejection.—*BRAGG v. VILLANOVA (1923), 40 T. L. R. 154, D. C.*

**1874. Mode of inspection—Sale of ship—To be placed on gridiron.**—An agreement for the sale of a ship contained a provision that the purchaser should have permission to remove the ship to a suitable gridiron to scrape & otherwise examine the vessel's bottom. The person mutually agreed upon to make the inspection went on board the ship for the purpose, it being in the middle of Milford Haven, when the vendors refused to allow him to inspect the bottom of the ship from the inside, & upon this point the sale went off:—*Held*: the purchaser was not entitled to maintain an action for breach of contract, as the only inspection permitted was of the ship on the gridiron, & defts. had a right to refuse an inspection when the ship was in the middle of Milford Haven.—*DE MATTOS & Co. v. GREAT EASTERN S.S. Co. (1887), 3 T. L. R. 639, H. L.*

**1875. Effect of failure to inspect—Goods sold "payment after inspection on arrival."**—Where goods are sold "Payment net cash after inspections of goods immediately on arrival of steamer," the buyer has a right to claim damages if the goods are not in accordance with the contract even though he does not inspect the goods, or, by

mistake does not on inspection discover the defect in them.—*KHAN v. DUCHÉ (1905), 10 Com. Cas. 87.*

**SUB-SECT. 3.—BUYER'S RIGHT OF REJECTION.**

*A. What Amounts to Rejection.*

*See Sale of Goods Act, 1893 (c. 71), s. 36.*

**1876. Necessity for return of goods.**—If a party purchases an article at a certain price, pursuant to a specimen exhibited, & on delivery, it is found to be of inferior performance, the party cannot, in an action for goods sold, set up the inferiority of it to the specimen; he should have returned it, & so have rescinded the contract.—*GRIMALDI v. WHITE (1802), 4 Esp. 95; 170 E. R. 654, N. P.*

**1877.** ———.—*OKELL v. SMITH, No. 1899, post.*

**1878.** ———.—If goods are supplied not conformably to the order for them, the buyer is bound to return them within a reasonable time, or he will be bound to pay for them.—*MILNER v. TUCKER (1823), 1 C. & P. 15; 171 E. R. 1082, N. P.*

**1879.** ———.—Where goods were sold by sample, & the bulk was found by the purchaser on inspection after delivery not to be equal to sample:—*Held*: the purchaser might reject the goods by giving notice to the vendor that he would not accept them, & they were at the vendor's risk, & was not bound to send back, or offer to send back, the goods to the vendor, or to place them in neutral custody.—*GRIMOLDBY v. WELLS (1875), L. R. 10 C. P. 391; 44 L. J. C. P. 203; 32 L. T. 490; 39 J. P. 535; 23 W. R. 524.*  
*Annotation:—Refd. Perkins v. Bell, [1893] 1 Q. B. 193.*

*See, now, Sale of Goods Act, 1893 (c. 71), s. 36.*

**1880. Sufficiency of notice of rejection.**—*OKELL v. SMITH, No. 1899, post.*

**1881.** ———.—*TOY v. LAVENU (1852), 18 L. T. O. S. 247.*

**1882.** ———.—*GRIMOLDBY v. WELLS, No. 1879, ante.*

**1883.** ———.—*Held*: where goods had been sold to a debtor, & there was no evidence to show that such goods were sold as to sample, the mere fact that a letter was subsequently written by the vendee to the vendor stating that he could not accept the goods, but would hold them for the vendor & try to sell them for him, & to which letter no answer was returned by the vendor, will not constitute the vendee a trustee for the vendor under Bkpcy. Act, 1883 (c. 52), s. 44 (1), so as to prevent the trustee in the bkpcy. claiming such goods as part of the estate in the event of the vendee subsequently becoming bankrupt.—*Re LANDROCK, Ex p. FABIAN (1884), 1 Morr. 62.*

the goods tendered are in conformity with the contract, should be had at the place of delivery.—*BROOKS-SCANLON O'BRIEN Co. v. RED FIR LUMBER Co. (1909), 14 B. C. R. 439.—CAN.*

**l.** ———.—*Goods shipped f.o.b.—From another province.*—*FISHER v. CASSADY (1892), 14 P. R. 577.—CAN.*

**m.** ———.—*Lewis v. BARRE (1901), 22 C. L. T. 336; 14 Man. L. R. 32.—CAN.*

**n. Effect of failure to inspect—Acceptance by servant of purchases without knowledge of right of inspection.**—Where deft. purchased a quantity of casks by sample, & plff., under the contract, delivered the casks to deft.'s store keeper, who accepted the same, but was not aware of the nature of the contract:—*Held*: the receipt of the casks by the store keeper was no acceptance.—*WOODS v. WHITE (1860),*

*4 Nfld. L. R. 458.—NFLD.*

**o. Right to reasonable opportunity for inspection.**—A reasonable opportunity for inspection & examination is all that a purchaser is entitled to.—*RUTTONSEY MORARIJ v. JAMNADAS PITAMBERDAS (1882), 1 L. R. 6 Bom. 692.—IND.*

**p.** ———.—*CHALMERS v. PATERSON (1897), 24 R. (Ct. of Sess.) 1020; 36 Sc. L. R. 768; 5 S. L. T. 112.—SCOT.*

**q.** ———.—*KAHN v. ROBERT, [1921] C. P. D. 654.—S. AF.*

**PART VI. SECT. 3, SUB-SECT. 3.—A.**

**1876 i. Necessity for return of goods.**—When goods sold are rejected by the purchaser as disconform to contract it is not absolutely necessary that they should be at once restored to the seller, or placed in neutral custody, as

the adoption of either of these courses may be very inconvenient, or impossible, but if the purchaser, after intimating to the seller, his rejection of the goods, retains them in his own custody, he is bound to keep them intact until removal.—*CHAPMAN v. COUSTON, THOMSON & Co. (1871), 9 Macph. (Ct. of Sess.) 675; 43 Sc. Jur. 326.—SCOT.*

**1876 ii.** ———.—Where a buyer orders goods of a specified kind or quality, it is his duty to examine them on delivery to see that they are conform to contract, & in the event of their proving not to be so, to return them immediately to the seller, & if he does not do so, unless the defect is latent & only discoverable after use, he is barred from refusing to pay the contract price.—*CARTER & Co. v. CAMPBELL (1885), 12 R. (Ct. of Sess.) 1075; 22 Sc. L. R. 711.—SCOT.*



**1884.** —.]—Where goods sold at three months' credit were sent to deft. by a carrier named by him, an invoice being at the same time sent by the post, & deft., on their arrival at the wharf to which they were sent, said he would not take them, but did not repudiate the contract to the vendors until seven months afterwards:—*Held*: there was evidence to go to the jury of an acceptance within Stat. Frauds.—*BUSHEL v. WHEELER* (1844), 15 Q. B. 442, n.; 3 L. T. O. S. 125; 8 Jur. 532; 117 E. R. 526.

*Annotations*:—*Apld.* Norman v. Phillips (1845), 14 M. & W. 277; Morton v. Tibbett (1850), 15 Q. B. 428. *Consd.* Castle v. Sworder (1861), 6 H. & N. 828. *Refd.* Meredith v. Meigh (1853), 2 E. & B. 364; Taylor v. Smith, [1893] 2 Q. B. 65.

### B. Grounds for Rejection.

#### (a) Goods not according to Contract.

**1885. General rule.**—SHOOLBRED (JAMES) & CO. v. WYNDHAM & ALBERY (1908), *Times*, Dec. 1.

**1886.** —.]—ROTH, SCHMIDT & CO. v. NAGASE (D.) & CO., LTD. (1920), 2 Lloyd, L. R. 36, C. A.

*Annotations*:—*Consd.* Re Bourgeois & Wilson, Holgate (1920), 25 Com. Cas. 260; Lancaster v. Turner, [1924] 2 K. B. 222.

**1887. Goods of different description.**—Pltf. made a contract with deft. in the following terms:

"Sold . . . the following cotton  $\frac{DC}{C}$  128 bales

at 25d. per pound, expected to arrive in London, per *Cheviot*, from Madras; the cotton guaranteed equal to sample in our possession. Should the quality prove inferior to the guarantee a fair allowance to be made." The sample contained long stapled Salem cotton. When the bulk arrived it turned out to be Western Madras cotton, which is inferior to long stapled Salem, & requires different machinery for its manufacture:—*Held*: the contract was not a contract for the sale of the specific cotton on board the *Cheviot*, but it was a condition precedent that the cotton should be long stapled Salem, & therefore deft. was entitled to refuse to accept the cotton which arrived.—*AZEMAR v. CASELLA* (1867), L. R. 2 C. P. 677; 36 L. J. C. P. 263; 16 L. T. 571; 15 W. R. 998, Ex. Ch.

*Annotation*:—*Refd.* Smith v. Hughes (1871), 19 W. R.

**1888. Effect of arbitration clause.**—G. & co., on July 31, 1889, entered into a contract to buy from B. W. & co. 1,000 cases of tinned salmon. The contract contained, amongst other things, the following provisions: "Quality guaranteed good merchantable, & equal to the average of the spring pack of 1889 season C. R. salmon at 22s. per case, ex quay Liverpool. Usual examination for customary allowances & general broker's conditions. Any dispute to be settled by arbn." On Apr. 3, 1890, G. & co. wrote to the agents of B. W. & co. that they did not consider the tender, as per samples, examined, equal to contract guarantee, & therefore must call for arbn. An arbitrator was

appointed on each side, & the parties went to arbn. The arbitrators award was dated Apr. 11, 1890, & was, so far as is material, as follows: "That the buyers accept the salmon, & that the sellers make an allowance to the buyers of one shilling & sixpence per case." The arbitrators, according to their evidence, had proceeded on the understanding that they were not merely to find whether the salmon was inferior in quality, but, if they found it was so, were to decide whether it should be rejected or not. G. & co. moved to restrain B. W. & co. from proceedings to enforce the award, & also that the award might be set aside or remitted to the arbitrators for reconsideration:—*Held*: the submission extended to nothing except the question whether the goods were up to guarantee, & if the goods were not of the guaranteed quality, the buyers were entitled to reject them, the sale not being of specific goods; the arbitrators had exceeded their jurisdiction in dealing with a question not submitted to them; & the matter must be referred back to them.—*Re GREEN & CO. & BALFOUR, WILLIAMSON & CO.* (1890), 63 L. T. 325; 6 T. L. R. 445, C. A.

**1889. — & stipulation for non-rejection.**—A contract for the sale of laths to be shipped, & to be "about the specification stated below," provided that the property in the goods was to be deemed to have passed to the buyers when the goods were put on board, & contained a clause that, if any dispute arose under the stipulations of the contract, the buyers were not to reject any of the goods, but the dispute was to be referred to arbn. The sellers having put on board laths which were not of the specified lengths:—*Held*: the buyers were justified in rejecting these laths on their arrival in this country, & were not bound by the terms of the contract to accept them subject to an allowance to be fixed by arbn.—*VIGERS BROTHERS v. SANDERSON BROTHERS*, [1901] 1 K. B. 608; 70 L. J. K. B. 383; 84 L. T. 464; 49 W. R. 411; 17 T. L. R. 316; 45 Sol. Jo. 328; 6 Com. Cas. 99.

*Annotations*:—*Consd.* Re Bourgeois & Wilson, Holgate (1920), 25 Com. Cas. 260. *Refd.* Aron v. Comptoir Wegmont, [1921] 3 K. B. 435; Szymonowski v. Beck, [1923] 1 K. B. 457.

**1890. Treated as not delivered—By terms of contract.**—*KYNOCH, LTD. v. R.* (1909), *Times*, Mar. 30, C. A.

#### (b) Goods not in accordance with Sample.

See Part III., Sect. 6, ante.

#### (c) Other Grounds.

**1891. Goods tendered out of time—Not if unloading possible within time.**—In an action for not accepting goods which were to be delivered within the last fourteen days of Mar., the declaration having averred a readiness & offer by pltf. to deliver the goods on the last day of Mar., deft. pleaded, that the offer to deliver was at an hour

### PART VI. SECT. 3, SUB-SECT. 3.—B. (a).

**1887 i. Goods of different description.**—LUBRANO v. GOLLIN & CO. (1919), 20 S. R. N. S. W. 429; (1920), 21 S. R. N. S. W. 300.—*AUS.*

**1887 ii.** —.]—MASSEY v. ARLITZ, [1923] V. L. R. 132.—*AUS.*

**1887 iii.** —.]—DYMENT v. THOMSON (1886), 12 A. R. 659; *affd. sub nom.* THOMSON v. DYMENT (1886), 13 S. C. R. 303.—*CAN.*

**1887 iv.** —.]—BROCKLEY v. BURT (1873), 1 N. Z. Jur. 154.—*N.Z.*

**1887 v.** —.]—VAN OPPEN v. ARBUCKLE (1855), 18 Dunl. (Ct. of Sess.) 113.—*SCOT.*

**1887 vi.** —.]—JACK v. ROBERTS & GIBSON (1865), 3 Macph. (Ct. of Sess.) 554; 37 Sc. Jur. 278.—*SCOT.*

**r. — Right of rejection independent of passing of property.**—A purchaser's right to reject goods by reason of their not answering the description in the contract may be independent of the question whether the property in the goods has passed to him or not.—*MITCHELL HEID & CO. v. BULDEO DOSS KHETTRY* (1887), 1 L. R. 15 Calc. 1.—*IND.*

**1888 i. Effect of arbitration clause.**—RUTTONSI ROWJI v. BOMBAY UNITED SPINNING & WEAVING CO. (1916), 1 L. R. 41 Bom. 518.—*IND.*

**1889 i. — & stipulation for non-rejection.**—LEARY (C.) & CO. v. BRIGGS (FRANCIS) & CO. (1904), 6 F. (Ct. of Sess.) 857; 41 Sc. L. R. 681; 12 S. L. T. 210.—*SCOT.*

**t. Large percentage of consignment defective—Presumption of defectiveness of whole.**—*GILBERT-MENZIES CO. v. MITCHELL HARDWARE, LTD. (Man.)*, [1924] 2 D. L. R. 421.—*CAN.*

### PART VI. SECT. 3, SUB-SECT. 3.—B. (c).

**a. Goods not merchantable—Though remediable on outlay.**—*SCOTT v. ROGERS FRUIT CO.* [1928] 1 D. L. R. 201; [1927] 3 W. W. R. 628.—*CAN.*



*Sect. 3.—Acceptance: Sub-sect. 3, B. (c) & C.]*

which, by reason of the lateness thereof, was an unreasonable & improper hour. The jury found specially on this plea, that the hour was unreasonable & improper. They also found that there was time for deft. to have taken in & weighed the goods before twelve o'clock at night:—*Held*: judgment ought to be entered up for plffs. on this finding; a verdict ought to be entered for plffs., on a plea denying that they were ready to deliver the goods within the last fourteen days of Mar.

In such a case the party bound must find the other, at his peril & within the time limited, if the other be within the four seas; & he must do all that, without the concurrence of the other, he can do, to make the payment, or perform the act, & that, at a convenient time before midnight, such time varying according to the *quantum* of the payment, or nature of the act to be done (PARKE, B.).—*STARTUP v. MACDONALD* (1843), 6 Man. & G. 593; 7 Scott, N. R. 269; 12 L. J. Ex. 477; 1 L. T. O. S. 172; 134 E. R. 1029, Ex. Ch.

*Annotations*:—*Consd.* Coddington v. Paleologo (1867), L. R. 2 Exch. 193; Biddell v. Clemons Horst Co., [1911] 1 K. B. 934. *Refd.* Gilmour v. Supple (1858), 32 L. T. O. S. 1; Crane v. London Dock Co. (1864), 5 B. & S. 313; Sutherland v. Allhusen (1866), 14 L. T. 666; Arnold Karberg v. Blythe, Green, Jourdain, Theodor Schneider v. Burgett & Newsam, [1916] 1 K. B. 495. *Mentd.* Burton v. Griffiths (1843), 1 L. T. O. S. 289.

**1892. Goods tendered without proper shipping marks**—Subsequent tender of goods properly marked.]—(1) Deft. employed plffs., who were cotton brokers in London, to buy 500 bales of cotton for him, telling them to buy gradually at 8½d. if they could not do better. Cotton could not then have been bought at 8½d. Plffs. shortly afterwards passed to deft. a bought note, "Bought on your account 500 bales, etc., at 8½d." This was signed by plffs. as brokers, & at the bottom of the note a charge of ½ per cent. was made for brokerage. Before delivery of the cotton, deft. became aware that plffs. had not, at the time of their passing this bought note, made any contract for him for the purchase of cotton, but that they had subsequently bought the 500 bales, in their own name, to enable them to make delivery to him partly at 8½d. & partly at 7½d. per pound. Deft. would not have accepted the bought note from plffs. if he had known that they were thus acting as principals in the transaction. Deft., on becoming aware of the state of circumstances, refused to accept the cotton, & this action was brought to recover damages for non-acceptance. It was proved that there was a custom in the London cotton market that, if a broker bought for his employer of an undisclosed principal, he was liable himself upon the contract:—*Held*: the action was not maintainable, as no contract of sale had been made between plffs. & deft.

(2) Plffs. before the expiration of the time for the delivery of the cotton, tendered marks of cotton that was not in accordance with the terms of the contract, & on deft. rejecting the same, they, before the expiration of the time fixed for delivery, tendered marks of cotton that was in accordance with the contract:—*Held*: plffs. had not, by the first delivery, broken the contract, so as to justify deft. in refusing to accept the cotton subsequently tendered.—*TETLEY v. SHAND* (1871), 25 L. T. 658; 20 W. R. 206.

*Annotation*:—*Generally*, *Refd.* Borrowman v. Free (1878), 4 Q. B. D. 500.

**1893. Cargo tendered without shipping document.**]—Defts. agreed to buy of plffs. a cargo of maize. Plffs. tendered the cargo of the C., which defts. refused to accept, upon the ground that the shipping documents were not tendered with it.

Plffs. insisted that the tender was valid. This dispute was referred to an arbitrator, who decided that the tender was invalid. Plffs. thereupon, & within the time limited by the contract, tendered the cargo of the M., which defts. refused to accept, upon the ground that they were not bound to accept any cargo in substitution for that of the C., the tender of which the arbitrator had decided to be invalid:—*Held*: defts. were bound to accept the cargo of the M., & might be sued by plffs. to recover any loss which the latter might have sustained through the refusal to accept it.

It may be that, where goods which fulfil the terms of a contract are appropriated for sale in performance thereof, there is an election by the vendor which is irrevocable (BRETT, L.J.).

When a selection is made of goods not specified in the contract, the goods selected, if they comply with the conditions of the contract, must be treated as if they had actually been named in the contract (COTTON, L.J.).—*BORROWMAN v. FREE* (1878), 4 Q. B. D. 500; 48 L. J. Q. B. 65; 40 L. T. 25, C. A.

**1894. Goods subject to approval.**]—*ORNSTEIN v. ALEXANDRA FURNISHING CO.* (1895), 12 T. L. R. 128.

**1895. Goods not merchantable**—Though *remediable on outlay*.]—The expression "merchantable quality" in Sale of Goods Act, 1893 (c. 71), s. 14 (2), means goods saleable at the time the delivery is made, & not goods which can only be made saleable if some labour is expended on them.

In Oct. 1908, defts., an English co., who sell motor accessories, gave an order to pltf., a manufacturer in Paris, for a large number of motor horns of different sizes & of different prices "delivery as required." The goods were delivered in 19 cases at various dates in May & June, 1909, the last delivery being on June 24. On the same day defts. inspected the goods, & as the result of their inspection rejected them all, except those contained in one case which they had already resold, mainly on the ground that the goods were not merchantable. In an action by pltf. to recover the price of the goods:—*Held*: according to the true construction of the contract, it was to be treated as a separate contract in respect of each consignment; & subject to the exception of *de minimis*, the buyer had a right to insist that all the goods comprised in each consignment should be of merchantable quality, & if they were not, then to reject the whole consignment.—*JACKSON v. ROTAX MOTOR & CYCLE CO.*, [1910] 2 K. B. 937; 80 L. J. K. B. 38; 103 L. T. 411, C. A.

*Annotations*:—*Consd.* Longbottom v. Bass, Walker, [1922] W. N. 245. *Refd.* Manbre Saccharine Co. v. Corn Products Co., [1919] 1 K. B. 198; Pocahontas Fuel Co. (Incorporated) v. Ambatielos (1922), 27 Com. Cas. 148; Ballantine v. Cramp & Bosman (1923), 129 L. T. 502.

.]—*See* Part III., Sect. 5, sub-sect. 3, ante.

**1896. Delay in delivery.**]—By a contract in writing 200 tons of cotton seed were sold for shipment from Bombay & certain other Indian ports to Hull, via Suez Canal during Aug. & Sept. 1910, at £6 15s. per ton net, free delivered in sound & merchantable condition to buyers' craft alongside. Shipment was to be by steamer or steamers, direct or indirect, with or without transshipment, & the bill of lading was to be proof of date of shipment in the absence of evidence to the contrary. Particulars of shipment were to be given within six days after the receipt of the shipping documents in this country. It was further provided that if the seed, on arrival proved to be not as warranted, or was damaged or out of condition, it was to be taken with an allowance. The contract was to be void as to any portion

shipped that might not arrive by the ship or ships declared against the contract. By notice in writing dated Sept. 6, 1910, the sellers declared a shipment under the contract of 1,600 bags of cotton seed by the *Othello* under a bill of lading dated Aug. 16, 1910. The *Othello*, which was a general ship, left Bombay with the cotton seed on board on Aug. 18, 1910, intending to call at Karachi for further cargo. On Aug. 22, 1910, when near Karachi, she stranded, & was not refloated till Nov. 27, 1910. About 1,646 tons of her original cargo, including the cotton seed, were landed & stored at Karachi, & she returned to Bombay for repairs. On Feb. 12, 1911, the *Othello* again left Bombay, having on board 1,540 tons of new cargo to replace a somewhat larger quantity of manganese ore originally shipped at Bombay but jettisoned on the stranding off Karachi. Included in these 1,540 tons of new cargo was a further quantity of cotton seed which, being shipped in Feb., was available for & was used by the owners thereof to fulfil contracts made by other parties for Jan. to Feb. shipment. On the arrival of the *Othello* at Karachi on the second occasion she loaded the cargo, including the cotton seed in question, which had been left there; & on Feb. 20 she sailed for Hull, where her cargo, including the cotton seed, was discharged on Mar. 27, 1911, the cotton seed being carried under the original bill of lading. The buyers having declined to accept the declaration of shipment as a proper declaration in fulfilment of the contract the dispute was referred to arbn. No evidence was given in the arbn. to show that the stranding of the *Othello* was due to negligence. The arbitrators found that there was no undue delay in the refloating of the vessel after the stranding, or in the execution of the repairs, & that the voyage was not unduly delayed by the loading of the further cargo at Bombay; that cotton seed purchased for Aug. or Sept. shipment would be seed of the old crop & on arrival in the ordinary course would go into consumption before the new crop would be available; that when the new crop first comes on the market the value of seed of the old crop is at a discount compared with the price of seed of the new crop; & so far as the question was for them, the arbitrators found as a fact that the delay in delivery beyond the normal time for a voyage from Bombay to Hull was not due to any act or default of the sellers. They further found that the buyers had been prejudiced by the fact, but not further or otherwise, that the seed, being seed of the old crop arrived at a time when it had to compete on the market with seed of the new crop. On these findings:—*Held*: (1) there had been no cancellation of the original shipment in Aug. 1910, so as to make the reloading at Karachi in Feb. 1911, a new shipment, &, as such, not within the time stipulated for by the contract; the loading of further cargo at Bombay in Feb. 1911, did not constitute a new voyage so as to vitiate the tender made by the sellers; (2) the mere fact that the seed when it arrived at Hull was exposed to a more highly competitive market than that which it was expected would be found was not sufficient to warrant a finding of fact that the commercial object of the contract was defeated; therefore, the sellers were entitled to call upon the buyers to accept delivery of the seed; (3) *semble*: on the construction of the contract, the buyers would be entitled to damages for the delay in the delivery of the seed if it could be shown

that the delay had been caused by the negligent navigation of the *Othello*.—*Re CARVER & Co. & SASSOON & Co. (1911)*, 17 Com. Cas. 59.

**1897. Whole cargo not delivered.]**—By two contracts in similar terms cotton seed was sold, to be shipped in Alexandria & delivered in London to buyers' craft alongside, payment to be in London in exchange for shipping documents. On the arrival of the ship in London, & after payment by the buyers, a portion of the seed was delivered into the buyers' barges. The ship then left for Hull with the remainder of the seed on board in order to discharge other cargo. The ship returned to London in fourteen days & the balance of the seed was tendered to the buyers, but they refused to accept it. The buyers retained the portion which had been delivered & claimed repayment of the price paid for the rejected portion:—*Held*: when the delivery had begun the buyers were entitled to receive the whole quantity before the ship left the port, & in the circumstances the buyers were entitled to keep the part actually delivered & to reject the balance & to be repaid the price of the balance.—*BEHREND & Co. v. PRODUCE BROKERS' Co.*, [1920] 3 K. B. 530; 90 L. J. K. B. 143; 124 L. T. 281; 36 T. L. R. 775; 15 Asp. M. L. C. 139; 25 Com. Cas. 286.

#### C. Limitation of Right.

**1898. Delivery on trial—Necessity for return on discovery of defects.]**—Though on the sale of a horse there is an express warranty by the seller that the horse is sound, free from vice, etc., yet if it is accompanied with an undertaking on the part of the seller to take the horse again, & pay back the purchase-money, if on trial he shall be found to have any of the defects mentioned in the warranty, the buyer must return the horse as soon as he discovers any of those defects, in order to maintain an action on the warranty, unless he has been induced to prolong the trial by any subsequent misrepresentation of the seller. In such case the term trial means a reasonable trial.—*ADAM v. RICHARDS (1795)*, 2 Hy. Bl. 573; 126 E. R. 710.

*Annotation*:—*Refd. Hellbutt v. Hickson (1872)*, L. R. 7 C. P. 438.

**1899. — Reasonableness of trial question for jury.]**—Where utensils to be used in trade have been contracted for & delivered at a stipulated price, it is a question for the jury, whether the vendee, who complains that they are unfit for the purpose for which they were intended, has used them further than was necessary, in order to give them a fair trial; & if not, the commodity being bulky, & after a reasonable trial found to be unfit for such purpose, the vendor upon notice given, is bound to take them away; but if the vendee retain the utensils, without giving such notice, he is liable to pay for the value of the materials.—*OKELL v. SMITH (1815)*, 1 Stark. 107; 171 E. R. 416, N. P.

*Annotations*:—*Distd. Street v. Blay (1831)*, 2 B. & Ad. 456. *Refd. Jones v. Bright (1829)*, 5 Bing. 533; *Fuller v. Patrick (1849)*, 13 Jur. 561; *Hellbutt v. Hickson (1872)*, L. R. 7 C. P. 438.

**1900. Whether repudiation within reasonable time—Question for jury.]**—It is a question for the jury, whether the vendee of goods which turn out to be of a quality inferior to that which was stipulated for, has in point of fair mercantile dealing given a notice sufficiently early to the vendor of

**Sect. 3.—Acceptance: Sub-sect. 3, C. & D. (a) & (b) i.]**

his intention to repudiate the contract.—*ROWE v. OSBORNE* (1815), 1 Stark. 140; 171 E. R. 427, N. P. Annotations:—*Reid*. *Cowie v. Remfry* (1846), 3 Moo. Ind. App. 448; *Siewewright v. Archibald* (1851), 17 Q. B. 103.

**1901. Custom as to rejection—Inconsistent with express contract.]**—A usage of trade cannot be set up in contravention of an express contract: Therefore, where A. agrees to sell to B. a quantity of prime bacon, which B. weighs & examines, & pays for by a bill at two months, but before the bill becomes due, gives notice to A. that the bacon does not answer the contract:—*Held*: A. could not give in evidence a custom that the buyer was bound to reject the contract, if at all, at the time of examining the goods.—*YATES v. PYM* (1816), 6 Taunt. 446; 128 E. R. 1107; *sub nom.* *YEATS v. PIM*, 2 Marsh. 141.

Annotations:—*Distd.* *Parker v. Palmer* (1821), 4 B. & Ald. 387. *Reid*. *Budd v. Fairmanner* (1831), 1 L. J. C. P. 16; *Powell v. Horton* (1836), 2 Bing. N. C. 668; *Brown v. Byrne* (1854), 18 Jur. 700; *Maxwell v. Deare* (1854), 23 L. T. O. S. 1; *Hunfrey v. Dale* (1857), 7 E. & B. 266; *Lucas v. Bristow* (1858), 27 L. J. Q. B. 364.

**1902. ———.]—Held**: an alleged custom in the iron trade that defective castings might be returned by the purchaser to the founder, & that in such a case the purchaser had no claim against the founder except to have them replaced by sound castings or to receive credit for their cost price, could not apply to a contract which expressly provided that the purchaser relied upon the founder's inspection of the castings, & would use them on receiving them, & that the responsibility must rest on the founder. —*VICKERY'S PATENTS, LTD. v. HILL* (1917), 33 T. L. R. 536.

**1903. ——— Reasonableness.]—Semble**: an article sold by sample cannot be rejected as not corresponding with the sample, except within a reasonable time.—*SANDERS v. JAMESON* (1848), 2 Car. & Kir. 557.

**1904. Custom compelling acceptance—Subject to allowance—Existence in Liverpool corn trade.]**—A contract for the sale of wheat to arrive, contained a clause that any dispute arising thereout should be referred to arbitration as therein provided. On its arrival, the buyer claimed the right to reject it, on account of inferiority in quality. The sellers at once called for an arbn. The arbitrators made an award that the purchaser should take the wheat with an allowance:—*Held*: the award was invalid, inasmuch as the only question submitted to the arbitrators was the buyers' right to reject. No custom exists in the Liverpool corn trade compelling a buyer to accept, with an allowance, wheat inferior in quality to that contracted for, if not sea-damaged.—*SINIDINO, RALLI & Co. v. KITCHEN & Co.* (1883), Cab. & El. 217.

**1905. Effect of stipulation as to rejection—Damaged part only—Whether parcels divisible.]**—In a contract for the sale of ten bales of cotton at so much a pound, the following stipulation was contained: "Claims for damaged cotton allowed at the value of the sound cotton at the time of return, if claim & return made within ten days & three months." Of two out of the bales delivered respectively, two-thirds were sound & one-third damaged:—*Held*: the purchaser was not entitled

to return & be allowed for the whole bales, but only the one-third that was damaged. *Semble*: such a quantity out of a bale might be damaged as to render the whole bale substantially damaged cotton, & returnable under the above stipulation, even though there were some sound cotton in it.—*MELLOR v. STREET* (1866), 15 L. T. 223.

**1906. ——— On non-approval—Within reasonable time.]**—*ORNSTEIN v. ALEXANDRA FURNISHING CO.* (1895), 12 T. L. R. 128.

**1907. Stipulation as to non-warranty—No right of rejection.]**—*HOWCROFT & WATKINS v. PERKINS* (1900), 16 T. L. R. 217.

Annotation:—*Fold*. *Wallis & Wells v. Pratt & Haines* (1910), 102 L. T. 108.

*D. Loss of Right.*

(a) *Retention of Possession.*

**1908. Fourteen days.]**—A trader ordered bags of wool of defts., merchants, in Dec., which were delivered on Feb. 19 following, & by the course of dealing the trader had the option of returning the wool for which he had no call, though previously ordered. The trader being from home when the bags were delivered, on his return the same day gave directions not to have them opened or entered in his books, but only weighed off to see that they agreed with the invoice; he being then in embarrassed circumstances & intending not to take them into the account of his stock if in the event he found himself unable to pursue his business. Afterwards on Mar. 4, 5, being then avowedly insolvent, he returned the bags with a letter to the merchants declaring his situation, & hoping that they would have no objection to take back the wool, & requesting the favour of a line of approbation thereof; which letter was received & the approbation given after an act of bkpcy. committed on the same day the letter was sent:—*Held*: by the trader keeping possession of the goods so long, his option, which ought to have been exercised on the receipt of them, was gone; & being in a state of insolvency & on the eve of bkpcy., he could not exercise the power of restoring the goods to the vendors, though without any fraudulent concert with them: but the trader's assignees were entitled to the property.—*NEATE v. BAILL* (1801), 2 East, 117; 102 E. R. 313.

Annotations:—*Distd.* *Gibson v. Bray* (1817), 8 Taunt. 76. *Reid*. *Richardson v. Goss* (1802), 3 Bos. & P. 119.

**1909. Two months—Without inspecting goods.]**—If a person purchases an article, & suffers it to remain on his premises for two months without examination, & then finds it to be unfit for use, he cannot, after that length of time, avail himself of the objection in an answer to an action for the price, unless some deceit has been practised with regard to the article.—*PERCIVAL v. BLAKE* (1826), 2 C. & P. 514; 172 E. R. 233.

**1910. Necessity for prompt notice of rejection.]**—If one order a certain machine, *e.g.* a threshing-machine, which, when sent to him, turns out to be unfit for use, he should either return it immediately, or else give immediate notice to the vendor to fetch it away; for if he keep it a long time without doing either, he will be taken to have waived all objections to its goodness.—*CASH v. GILES* (1828), 3 C. & P. 407; 172 E. R. 477.

**PART VI. SECT. 3, SUB-SECT. 3.—**  
**D. (a).**

**c. Without notice of rejection.]**—*MOACHON v. BLAIR* (1913), 23 W. L. R. 59; 3 W. W. R. 831.—*CAN.*

**d. For unreasonable time.]**—*THOMP-*

*SON v. SMITH* (1870), 21 C. P. 1.—*CAN.*  
**e. ———.]**—*RECORD FOUNDRY & MACHINE CO., LTD. v. GARSON*, [1923] 2 D. L. R. 142; 50 N. B. R. 110.—*CAN.*

**f. Retention as security for part payment of price—Notice of rejection**

*to seller.*]—*LAING v. WESTERN* (1858), 20 Duml. (Ct. of Sess.) 519; 30 Sc. Jur. 275.—*SCOT.*

**g. Retention relying on representation of vendor that goods conformed to contract.]**—*MUNRO & Co. v. BENNET & Son*, [1911] S. C. 337.—*SCOT.*

(b) *Acts of Ownership.*i. *In General.*

*See Sale of Goods Act, 1893 (c. 71), s. 35.*

**1911. Using more than necessary as sample.]—**Pltf. contracted by parol with H., deft.'s agent, for the purchase of flour above the value of £10 of the same quality as deft. had supplied to M. On the next morning deft. sent to pltf. a sold note, which described the flour simply as "Whites XS." On the following day flour answering the description of "Whites XS" was delivered. Pltf. tried half a sack, & finding it not so good as the flour supplied to M., which was "Whites XSS," complained of it to H., but afterwards used two more sacks & sold a third, & then paid the contract price under protest:—*Held*: pltf. after having used more of the flour than was necessary for the purpose of testing it, & sold a portion of it, was not at liberty to rescind the contract & recover the price paid as money had & received to his use.—*HARNOR v. GROVES* (1855), 15 C. B. 667; 3 C. L. R. 406; 24 L. J. C. P. 53; 24 L. T. O. S. 215; 3 W. R. 168; 139 E. R. 587.

*Annotation*:—*Mentd.* *Rye v. Purcell*, [1926] 1 K. B. 446.

**1912. Announcing incapacity to return goods—On advice of solicitor.]—**Goods were consigned from London to A. at Sunderland according to order; & a draft for the price, the invoice, & the bill of lading, were forwarded. On the arrival of the goods at Sunderland A. was in difficulties, & desired that they should not be received from the wharf where they then lay. But in the absence of A., & without his consent, the goods were deposited on his premises. He afterwards knew of these facts, & took & kept the key of the warehouse in which the goods were deposited. On Feb. 4, A. wrote to pltf., the vendor, returning the draft unaccepted, & stating the circumstances as to the goods, & that a stoppage of his business was decided upon, & continued: "I immediately sent for my solr. to get his advice, amongst other things, as to whether I could not, under the circumstances, return the hemp to the wharf. He declared not; which placed me under the necessity of depriving you of what I considered your right. I cannot say what dividend there is likely to be." "I return your draft, & although it can be little satisfaction to you, must express my extreme regret that you are so unfortunately placed." On Feb. 6, the vendor applied to A. for the goods, & was referred by him to his solr. On Feb. 25, A. made an assignment to defts. for the benefit of his creditors, & delivered the key of the warehouse to them. The goods were demanded of defts. & were refused; & defts. sold them.

In an action of trover by the vendor:—*Held*: (1) the property in the hemp passed to A. by the delivery on board ship & the forwarding of the bill of lading; (2) there was no valid rescission of the contract, for such could only be by mutual consent, therefore any expression of a wish to rescind uttered by one party & not communicated to the other was immaterial, the letter of Feb. 4, which was communicated to the vendor, did not amount to an offer by A. to rescind, but to an

assertion that he could not do so; (3) there was no valid stoppage *in transitu*, for the natural transit was ended, & the facts showed that A. had taken to the goods as owner whilst they were in his possession.—*HEINEKEY v. EARLE* (1858), 8 E. & B. 410; 28 L. J. Q. B. 79; 31 L. T. O. S. 357; 4 Jur. N. S. 848; 6 W. R. 687; 120 E. R. 159, Ex. Ch.

*Annotations*:—*As to* (2) *Distd.* *Nicholson v. Bower* (1858), 28 L. J. Q. B. 97. *Refd.* *Hutchings v. Nunes* (1863), 9 L. T. 125.

**1913. Purchaser despatching goods abroad.]—**Defts. engaged to supply shoes to pltf.s., to be according to sample, & to be inspected & paid for by pltf.s. before shipment, it being known that the shoes were intended for the French army; a large quantity of shoes were inspected, approved & delivered, & a portion then sent by pltf.s. to Lille. It was subsequently discovered by pltf.s. that some of the shoes contained paper in the soles, which the French authorities would not allow, & after various communications defts. engaged to take back shoes returned because they contained paper, but not a larger quantity if only a few were so defective. The French authorities rejected all, & on cutting open a large number most were found to contain paper, which was also found in the sample; the shoes both delivered & undelivered were inferior to sample, & the defect could not be discovered by any reasonable inspection. Pltf.s. gave notice that they rejected the shoes delivered & would receive no more, & brought their action:—*Held*: (1) pltf.s. were entitled to reject the shoes delivered, & throw them back on defts.' hands at Lille & in England respectively, to refuse to receive more, & to recover as damages the whole money paid, the expense of sending to & keeping at Lille & the loss of profit on all shoes delivered or not.

In the case of executory contracts, where the goods are not ascertained or may not exist at the time of the contract, from the nature of the transaction no property in the goods can pass to the purchaser by virtue of the contract itself (*BOVILL, C.J.*).

(2) The shoes could not have been thrown back on defts.' hands at Lille but for the second engagement.—*HEILBUTT v. HICKSON* (1872), L. R. 7 C. P. 438; 41 L. J. C. P. 228; 27 L. T. 336; 20 W. R. 1005.

*Annotations*:—*As to* (1) *Refd.* *Kursell v. Timber Operators & Contractors*, [1927] 1 K. B. 298. *As to* (2) *Consd.* *Grimoldby v. Wells* (1875), L. R. 10 C. P. 391; *Hardy v. Hilliers & Fowler*, [1923] 2 K. B. 490. *Generally, Refd.* *Drummond v. Van Ingen* (1887), 12 App. Cas. 284.

**1914. Sending carrier for goods—No inspection until next day.]—**Pltf. sold a quantity of wheat to deft. by sample, & delivered it at a railway station some 20 miles from deft.'s mills. In obedience to the directions of deft. the wheat was brought from the station to the mills by a carrier employed by him. On inspecting it next morning, deft. found it was not equal to sample, & rejected it:—*Held*: on these facts he was precluded from rejecting it.—*WATSON v. HODGSON* (1876), 40 J. P. 487.

**1915. Claiming allowance for shortage—& delivering to sub-purchaser.]—**By letters & telegrams

PART VI. SECT. 3, SUB-SECT. 3.—  
D. (b) i.

**h. User of part—Loss of right to reject remainder.]—***EUREKA WOOLLEN MILL Co. v. KIRK* (1889), 21 N. S. R. 335.—*CAN.*

**k. Unloading & taking goods into custody—Notice of defects to vendor within reasonable time.]—**A purchaser of goods ordered to be sent by railway does not lose his right of rejecting the

goods by unloading them from the cars on arrival & teaming them to his own premises, if he finds them to be inferior to what he had ordered & so notifies the vendor within a reasonable time.—*CHEIGHTON v. PACIFIC COAST LUMBER Co.* (1899), 12 Man. L. R. 546.—*CAN.*

**l. User after failure of seller to remove goods at request of purchaser.]—***THOMPSON v. CAMERON* (1906), 2 E. L. R. 192; 41 N. S. lt. 29.—*CAN.*

**m. User pending efforts of seller to bring goods into conformity with contract.]—***MORRISON & MARON, LTD. v. CLARKSON BROTHERS* (1898), 25 R. (Ct. of Sess.) 427; 35 Sc. L. R. 335; 5 S. L. T. 277.—*SCOT.*

**n. User after notice of rejection.]—**If a vendor delivers a machine disconform to contract, & the purchaser intimates that he rejects it, but goes on using it for a short time, the purchaser loses his right to reject on the

**Sect. 3.—Acceptance: Sub-sect. 3, D. (b) i., ii. & iii.; sub-sects. 4 & 5.]**

between applts. in Gibraltar & resp. in Malta applts. sold to resps. anchovies f.o.b. Gibraltar. Upon the anchovies arriving in Malta resp. complained of their quality, but without claiming to reject them; on the contrary he claimed an allowance for an alleged shortage & delivered them to purchasers from him. Upon their refusing to accept the goods, resp. claimed to rescind his contract with applts., & brought an action against them in Malta. The cts. there found that the anchovies were defective in quality, & applying the law of Malta, held that resp. was entitled to rescind the contract, & to recover from applts. the price, together with the sums paid for freight & insurance:—**Held:** under Gibraltar Ordinance No. 20 of 1895, s. 35, which is in the same terms as Sale of Goods Act, 1893 (c. 71), s. 35, resp. had lost that right [to reject] since he had acted in a manner inconsistent with the ownership of the sellers.—**BENAIM & Co. v. DEBONO**, [1924] A. C. 514; 93 L. J. P. C. 133; 131 L. T. 1, P. C.

**ii. Resale by Buyer.**

**1916. General rule.]**—Pltf. sold barley by sample to deft. to be delivered at a railway station. Deft. resold by the same sample. On the barley being delivered, the stationmaster, at deft.'s request, sent him samples taken from the sacks; & deft. thereupon ordered the barley to be forwarded to the sub-purchaser, who on inspection found it not up to sample, & rejected it. Deft. then claimed to reject as against pltf.:—**Held:** there was nothing in the facts to dislodge the *prima facie* presumption that the place of delivery was to be the place of inspection, & when deft. ordered the barley to be forwarded to the sub-purchaser the property passed to him, & his right of rejection was gone.—**PERKINS v. BELL**, [1893] 1 Q. B. 193; 62 L. J. Q. B. 91; 67 L. T. 792; 41 W. R. 195; 9 T. L. R. 147; 37 Sol. Jo. 130; 4 R. 212, C. A.

**Annotation:—Folld. Hardy (London) v. Hillerns & Fowler**, [1923] 1 K. B. 658.

**1917. —.]—BENAIM & Co. v. DEBONO**, No. 1915, *ante*.

**1918. Application of rule—Resale of portion of goods.]—HARNOR v. GROVES**, No. 1911, *ante*.

**1919. —.]—Wheat** was sold under a c.i.f. contract to be shipped from a foreign port to this country. The ship arrived & the buyers took up the shipping documents on Mar. 20. On Mar. 21 she commenced to discharge the wheat & the buyers took delivery. On the same day they resold & dispatched to sub-purchasers a portion of the wheat so delivered to them. They sub-

sequently discovered that it was not in accordance with the contract, & on Mar. 23, before a reasonable time for the examination of the goods had expired, they gave the sellers notice of rejection. It was contended by the buyers that before the date of the sub-sales the property in the wheat had passed to them, so that the sellers had no ownership with which the sub-sales could be inconsistent:—**Held:** (1) whether the true effect of a c.i.f. contract is that the passing of the property in the goods is suspended until after the buyer has had a reasonable opportunity of examining them, or that the property passes upon the buyer taking up the shipping documents subject to its being revested in the seller in the event of the buyer rejecting the goods as not being in accordance with the contract, the transfer of the possession to the sub-purchasers was an act inconsistent with the ownership of the sellers, being either inconsistent with their ownership at the time of such transfer of possession in one view of the contract, or inconsistent with the ownership revested in them by rejection in the other; (2) the provisions of Sale of Goods Act, 1893 (c. 71), are not limited by Sale of Goods Act, 1893 (c. 71), s. 34, & the transfer of possession to the sub-purchasers put an end to the buyers' right of rejection notwithstanding that it took place before a reasonable time for examining the goods had expired.—**HARDY & Co. v. HILLERNS & FOWLER**, [1923] 2 K. B. 490; 92 L. J. K. B. 930; 129 L. T. 674; 39 T. L. R. 547; 67 Sol. Jo. 618; 29 Com. Cas. 30, C. A.

**Annotation:—Generally, Refd. Barker (Junior) v. Agius** (1927), 43 T. L. R. 751.

**1920. — Goods put up for sale—Bought in.]—Declaration** stated that deft. bargained for & bought of pltf. a quantity of E. I. rice, according to the conditions of sale of the E. I. co., to be put up at the next E. I. co.'s sale by the proprietors, if required, at a certain price there mentioned. The proof was, that, besides these conditions, the rice was sold per sample. This is no variance; the words "per sample" not being a description of the commodity sold, but a collateral engagement that it shall be of a particular quality. The rice did not correspond with the sample; but deft., after seeing fresh samples inferior in quality to the original purchase sample, put it up at the E. I. co.'s sale, at a limited price; & no bidding taking place to that extent, he bought it in:—**Held:** he could not afterwards repudiate the contract.—**PARKER v. PALMER** (1821), 4 B. & Ald. 387; 106 E. R. 978.

**Annotations:—Distd. Weedon v. Woodbridge** (1850), 13 Q. B. 470. **Refd. Sleevking v. Dutton** (1846), 3 C. B. 331; **Sharland v. Leffchild** (1847), 4 C. B. 529; **Syers v. Jonas** (1848), 2 Exch. 111; **Heilbutt v. Hickson** (1872), L. R. 7 C. P. 438; **Hardy (London) v. Hillerns & Fowler** [1923] 1 K. B. 658.

doctrine of personal bar.—**CROOM & ARTHUR v. STEWART & Co.** (1905), 7 F. (Ct. of Sess.) 563; 42 Sc. L. R. 437; 12 S. L. T. 799.—**SCOT**.

**o. With knowledge of defect.]—A** pltf. who exercises acts of ownership after knowledge of the defect in an article sold is debarred from claiming a rescission of the contract.—**LE ROUX v. VISSER**, [1911] E. D. L. 381.—**S. AF.**

**PART VI. SECT. 3, SUB-SECT. 3.—D. (b) ii.**

**1916 i. General rule.]—If** the right to reject the goods as being of inferior quality is not exercised by the buyer when the goods are tendered, but a right of proprietary character in respect of the goods is exercised by directing

delivery to be made to third parties then the buyer accepts the goods.—**HARIDAS KHANDELWAL v. KALUMULL** (1903), 1 L. R. 30 Calc. 649; 7 C. W. N. 562.—**IND.**

**1918 i. Application of rule—Resale of portion of goods.]—ROBINSON v. GORDON & MCKAY** (1863), 23 U. C. R. 143.—**CAN.**

**1918 ii. —.]—BURLINGTON CANNING Co. v. CAMPBELL** (1908), 7 W. L. R. 544.—**CAN.**

**1918 iii. —.]—J. G. VAN G. LUHR'S TRADING AS THE HOLLAND PACIFIC TRADING Co. v. FUNG TANG**

**p. — Before discovery of defect.]—A** purchaser is not barred

from rejecting goods as disconform to order by the mere fact of having sold part before the fault was discovered, but he must restore the value, not the contract price of the goods not returned.—**M'CORMICK & Co. v. RITTMAYER & Co.** (1869), 7 Macph. (Ct. of Sess.) 854; 41 Sc. Jur. 405.—**SCOT**.

**q. — Assignment in insolvency.]—WILDS v. SMITH** (1877), 2 A. R. 8.—**CAN.**

**r. — Attempt to sell.]—SYMONDS v. CLARK FRUIT & PRODUCE Co., LTD., & CLARK (B. C.), [1919] 1 W. W. R. 587.—**CAN.****

**Sale by buyer after rejection—Sale bona fide in interests of seller.]—CHAIMOWITZ v. BALGOWAN TRADING Co.** (1927), 48 N. L. R. 36.—**S. AF.**



iii. *Failure to Inspect.*

**1921. Transmission to place of destination without inspection.]**—*SAUNT v. BELCHER & GIBBONS, LTD.*, No. 1871, *ante*.

## SUB-SECT. 4.—EFFECT OF ACCEPTANCE.

**1922. Effect on right to repudiate—Acceptance of part.]**—If a person orders several articles from a tradesman, at the same time, though at different prices, he may consider the whole as forming one order, & he will not be obliged to accept or pay for any particular articles, unless all the rest are furnished according to the terms agreed on; but if he accept of any one article, he is precluded from saying that the order was entire, & he will be obliged to accept & pay for so many as are individually furnished according to the contract.—*CHAMPION v. SHORT* (1807), 1 Camp. 53; 170 E. R. 874, N. P.

**1923. ——— Allegation of inferior quality.]**—Defts. agreed to buy from plffs. goods of a certain description, to be delivered in instalments. The first instalments were delivered & paid for. Defts. then refused to accept any further deliveries on the ground that their sub-purchasers would not take them, owing to previous commitments. No further deliveries were tendered by plffs., who brought this action for damages for repudiation of the contract. Defts. then alleged & proved that the goods delivered & accepted were in fact slightly inferior to the contract description, & claimed that they were entitled to repudiate the whole contract:—*Held*: (1) plffs.' breach of contract in respect of the instalments delivered & accepted under the contract was not a repudiation of the whole contract, but a severable breach, giving defts. a right to claim compensation under Sale of Goods Act, 1893 (c. 71), s. 31, & not a right to treat the whole contract as repudiated; (2) defts. were not entitled to reject future deliveries before they were tendered, on the plea that plffs. could not have made good deliveries of the remainder if requested to do so.—*TAYLOR v. OAKES, RONCORONI & Co.* (1922), 127 L. T. 267; 38 T. L. R. 517; 66 Sol. Jo. 556; 27 Com. Cas. 261, C. A.

**1924. Effect on liability for price—Goods not as represented.]**—A. sold to B. for £95 two pictures, representing them as "a couple of Poussins," they were, in fact, not originals, but very excellent copies; B. did not offer to return them:—*Held*: if the jury thought that B. believed, from the representation of A., that they were originals,

he was not bound to pay the price agreed upon; but as he kept them, he was liable to pay such sum as the jury might consider to be the value.—*LOMI v. TUCKER* (1829), 4 C. & P. 15; 172 E. R. 586, N. P.

**1925. ——— Contract not under seal.]**—Pltf. supplied coals from time to time to defts., the guardians of a poor law union, for the use of their workhouse, under articles of agreement between pltf. & defts., executed by pltf., but not under the seal of defts. Defts. received & used some of the coals. In an action for goods sold & delivered:—*Held*: as the goods had been supplied & accepted by defts., & were such as must necessarily be from time to time supplied for the very purposes for which defts. were incorporated, defts. were liable to pay for the coals although the contract was not under seal.—*NICHOLSON v. BRADFIELD UNION* (1866), L. R. 1 Q. B. 620; 7 B. & S. 774; 35 L. J. Q. B. 176; 14 L. T. 830; 30 J. P. 549; 12 Jur. N. S. 686; 14 W. R. 731.

*Annotations*:—*Distd.* *Hunt v. Wimbledon L. B.* (1878), 4 C. P. D. 48. *Apprd.* *Lawford v. Billerica R. C.*, [1903] 1 K. B. 772. *Refd.* *Young v. Royal Leamington Spa Corp.* (1883), 8 App. Cas. 517. *Mentd.* *Peggo v. Lampeter Union Grdns.* (1872), 41 L. J. C. P. 204.

## SUB-SECT. 5.—RESCISSION OF CONTRACT BY INSOLVENT BUYER.

*See* Sale of Goods Act, 1893 (c. 71), s. 61 (1); *BANKRUPTCY*, Vol. V., pp. 858 *et seq.*

**1926. When contract may be rescinded—Effect of election by vendor not to rescind.]**—A contract of sale may be rescinded by the consent of the vendor & vendee before the rights of other persons are concerned. But where the vendee wished to return the goods, & the vendor instituted an attachment to attach the goods in the hands of a packer as the property of the vendee, it was considered as an election by the vendor not to rescind the contract; & the vendee having since become bkpt.:—*Held*: the vendor could not recover the goods from the packer in trover.—*SMITH v. FIELD* (1793), 5 Term Rep. 402; 101 E. R. 225.

*Annotations*:—*Consd.* *Parry v. Dawson* (1796), 3 Anst. 710. *Refd.* *Bartram v. Farebrother* (1828), 4 Bing. 579; *Van Casteel v. Booker* (1848), 2 Exch. 691; *Hutchings v. Nunes* (1863), 9 L. T. 125.

**1927. ——— After actual delivery of goods.]**—Where a sale of goods has been completed by actual delivery to the buyer, who afterwards becomes insolvent before they are paid for, he cannot rescind the contract & return the goods with the consent of the seller so as to give the

—The acceptance of goods by a buyer after examination does not estop him from claiming damages for the goods not being of the quality contracted for.—*HANG SHING FIRM v. LOXLEY (W. R.) & Co.* (1910), 5 Hong Kong L. R. 89.—*HONG KONG.*

**f. ——— Acceptance after time limited—Purchase money payable by instalments.]**—In the case of the purchase of a vessel paid for by instalments while building, the purchaser is not barred from claiming damages for non-delivery at the date contracted for, by accepting delivery at a later date.—*SUTHERLAND v. MONT-ROSE SHIPBUILDING CO.* (1860), 22 Dunl. (Ct. of Sess.) 665.—*SCOT.*

## PART VI. SECT. 3, SUB-SECT. 5.

**g. When contract may be rescinded—After acceptance—Goods delivered to quayside—Removal by buyer custodia causa.]**—*BOOKER & Co. v. MILNE* (1870), 9 Macph. (Ct. of Sess.) 314.—*SCOT.*

## PART VI. SECT. 3, SUB-SECT. 3.—D. (b) iii.

**1921 i. Transmission to place of destination without inspection.]**—*PINI & Co. v. SMITH & Co.* (1895), 22 R. (Ct. of Sess.) 699; 32 Sc. L. R. 474; 3 S. L. T. 20.—*SCOT.*

**a. Negligent inspection.]**—*NICHOLSON v. OUELLETTE*, [1927] 2 D. L. R. 1116.—*CAN.*

**b. Within reasonable time.]**—*MEINTJES & DIXON v. DEARE & DIETZ* (1856), 2 S. 294.—*S. AF.*

## PART VI. SECT. 3, SUB-SECT. 4.

**1922 i. Effect on right to repudiate—Acceptance of part.]**—*FARROW'S FALCON PRESS PROPRIETARY, LTD. v. QUARRILE*, [1915] V. L. R. 651.—*AUS.*

**1922 ii. ———]**—*LUCAS v. SMITH*, [1926] V. L. R. 400; 48 A. L. T. 66; [1926] Argus L. R. 319.—*AUS.*

**1922 iii. ———]**—*GERRARD v. GAAR SCOTT CO.* (1910), 13 W. L. R. 442.—*CAN.*

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**1923 i. ——— Allegation of inferior quality.]**—*HENEY v. BOSTWICK* (1885), 24 N. B. R. 414.—*CAN.*

**1923 ii. ———]**—*THOMSON v. DYMENT* (1886), 13 S. C. R. 303.—*CAN.*

**c. ———]**—Deft. sold a quantity of beans to pltf. by sample. On receipt, the beans were found to the extent of 50 per cent. to be not according to sample in quality & unmerchantable & of no commercial value:—*Held*: pltf., having accepted the beans, could not rescind the contract, but could recover damages for breach of warranty that the bulk of the beans sold should correspond with the sample.—*INGRAHAM SUPPLY CO. v. UNIVERSAL IMPORTING CO.* (1921), 54 N. S. R. 234; 57 D. L. R. 719.—*CAN.*

**d. Effect on liability for price—Acceptance with knowledge of defect.]**—*GOOD v. HARPER* (1846), 3 U. C. R. 67.—*CAN.*

**e. Effect on right to damages—Acceptance after examination of goods.]**



*Sect. 3.—Acceptance: Sub-sect. 5. Sect. 4: Sub-sects. 1, 2 & 3, A.]*

seller a preference to his other creditors.—*BARNES v. FREELAND* (1794), 6 Term Rep. 80; 101 E. R. 447.

*Annotation:—Consd. Bartram v. Farebrother* (1828), 4 Bing. 579.

**1928.** ——— *Delay in returning.*—*NEATE v. BALL*, No. 1908, *ante*.

**1929.** ——— *Debtor hoping to escape bankruptcy & unable to use goods.*—A. purchases goods of B. on Oct. 8, for the purpose of exportation; but finding that he must stop payment, & that he cannot apply the goods to the purpose for which they were bought, he returns them to B. on Oct. 16. On Oct. 17, he stops payment, but expecting remittances from abroad more than sufficient to pay his debts, has no doubt but his creditors will give him time. They, however, refusing, he is made bkpt. on Nov. 2. In an action by the assignees against B. for the value of the goods:—*Held*: the jury were warranted in finding that the delivery of the goods to B. was not made in contemplation of bkpy.—*FIDGEON v. SHARPE* (1814), 5 Taunt. 539; 1 Marsh. 196; 128 E. R. 800.

*Annotations:—Apld. Poland v. Glyn* (1823), 2 Dow. & Ry. K. B. 310; *Flook v. Jones* (1826), 4 Bing. 20. *Refd. Gibbins v. Phillips* (1828), 2 Man. & Ry. K. B. 238; *Stanger v. Wilkins* (1855), 19 Beav. 626; *Strachan v. Barton* (1856), 11 Exch. 647.

**1930.** ——— *Goods returned as condition of obtaining further credit.*—A trader, being in insolvent circumstances, applied to a creditor, to whom he owed £2,500 for goods supplied in the way of his business, to supply him with more goods on credit. Creditor refused to supply any more goods unless debtor paid £200 on account of the goods previously supplied. Debtor said he could not pay the money, & on being pressed by creditor, he offered to return goods to the amount of the £200, which he did not want. This, creditor agreed to, & the goods were accordingly returned to him. On the same day debtor filed a petition for liquidation:—*Held*: the delivery of the goods to creditor was not a fraudulent preference.—*Re WALKER, Ex p. TOPHAM* (1873), 8 Ch. App. 614; 42 L. J. Bcy. 57; 28 L. T. 716; 37 J. P. 628; 21 W. R. 655, L. J.J.

*Annotations:—Apld. Re Brown, Ex p. London & County Banking Co., Ex p. Trickett* (1873), L. R. 16 Eq. 391; *Smith v. Pilgrim* (1876), 2 Ch. D. 127. *Consd. Re Bird, Ex p. Hill* (1883), 23 Ch. D. 695. *Refd. Butcher v. Stead* (1875), L. R. 7 H. L. 839; *Re Cohen, Ex p. Trustee*, [1924] 2 Ch. 515.

**1931.** ——— *—*—*Re FLETCHER, Ex p. SUFFOLK* (1891), 8 T. L. R. 80; 9 Morr. 8, D. C.

*Annotation:—Apld. Re Blackburn, Buckley's Case*, [1899] 2 Ch. 725.

**1932.** *Effect of rescission—Property reverts in vendor.*—The property of goods bought by an agent for the vendee, delivered by him to the vendee's packer, in whose hands they are attached by the vendee's creditors, reverts in the vendor so as to avoid the attachment by the vendee's having countermanded the purchase by letter to his agent dated before such delivery though not received till afterwards, the vendor assenting to take back the goods.—*SALTE v. FIELD* (1793), 5 Term Rep. 211; 101 E. R. 119.

*Annotations:—Distd. Smith v. Field* (1793), 5 Term Rep. 402. *Apld. Richardson v. Goss* (1802), 3 Bos. & P. 119. *Consd. Bartram v. Farebrother* (1828), 4 Bing. 579. *Refd. Barnes v. Freeland* (1794), 6 Term Rep. 80; *Hutchings v. Nunes* (1863), 1 Moo. P. C. C. N. S. 243. *Mentd. Blades v. Free* (1829), 7 L. J. O. S. K. B. 211; *Re Oriental Bank Corpn., Ex p. Guillemin* (1884), 28 Ch. D. 634.

**PART VI. SECT. 4, SUB-SECT. 1.**  
h. *Acknowledgment of value received.*—Upon an agreement by H. to

pay to T. or bearer, pine saw-logs, etc., "for value received," etc., that the logs must be considered as paid

**1933.** *Before arrival of goods—Lien of*

*shipowner—In respect of general balance due from purchaser.*—A. of Newcastle shipped goods for London to order of B.; before their arrival B. wrote to say that he was in failing circumstances, & would not apply for the goods on their arrival; to this A. returned a general answer, without making any mention of the goods, but immediately left Newcastle for London, & on his arrival applied at the wharf of C., where the goods had in the mean time arrived, & where goods shipped for B. usually were landed & kept till sent for by him, tendering the freight & charges paid for the goods, & requiring a delivery of them, which was refused unless upon payment of a general balance due from B. to C. for wharfage:—*Held*: the contract as between A. & B. having been rescinded previous to the arrival of the goods C. had no right to retain against A. for a general balance due to him from B.—*Semble*: the goods were no longer *in transitu* when arrived at the wharf of C., where the goods of A. were usually landed & kept.—*RICHARDSON v. GOSS* (1802), 3 Bos. & P. 119; 127 E. R. 65.

*Annotations:—Consd. Scott v. Pettit* (1803), 3 Bos. & P. 469; *Foster v. Frampton* (1826), 6 B. & C. 107. *Refd. Rowe v. Pickford* (1817), 8 Taunt. 83; *Morley v. Hay* (1828), 3 Man. & Ry. K. B. 396; *Tucker v. Humphrey* (1828), 4 Bing. 516; *Hutchings v. Nunes* (1863), 9 L. T. 125.

**1934.** ——— *Vendor may demand goods from shipowner—Notwithstanding purchaser's engagement to ship goods.*—G. chartered a vessel of which deft. was master, & part owner, for a certain voyage, G. undertaking to pay, two months after the vessel had cleared from the custom house, a stipulated sum for the hire; G. purchased of pltf's. certain goods, to be shipped on board the vessel on G.'s own account, & to be paid for before the vessel left the port. Pltf's. shipped the goods accordingly, but G. becoming shortly afterwards insolvent, an agreement was made between him & pltf's. to rescind the contract of purchase, & an order was signed by G. for a redelivery of the goods to pltf's. Pltf's. accordingly demanded the goods of deft., offering to pay all reasonable charges, & every lawful claim in respect of the same. Deft. refused to redeliver, as the goods had been put on board for a particular voyage, & afterwards carried the goods on the voyage:—*Held*: (1) as G. had not become bkpt. or taken the benefit of Insolvent Act, the property in the goods revested in pltf's. by operation of the agreement to rescind & the order to redeliver, & the right to the possession was in pltf's. at the time of the conversion; (2) as the charterer had a right to take the goods out of the vessel before the stipulated sum for the hire of the vessel had become due, the refusal by deft. to redeliver the goods after the demand of pltf's. was a wrongful conversion.—*THOMPSON v. SMALL* (1845), 1 C. B. 328; 14 L. J. C. P. 157; 4 L. T. O. S. 396; 9 Jur. 412; 135 E. R. 566.

*Annotations:—As to (2) Refd. Tindall v. Taylor* (1854), 4 E. & B. 219; *Pearson v. Goschen* (1864), 17 C. B. N. S. 352; *Casebourne v. Avery & Houston* (1887), 3 T. L. R. 795.

## SECT. 4.—PAYMENT.

### SUB-SECT. 1.—IN GENERAL.

*See, now, Sale of Goods Act, 1893 (c. 71), ss. 27, 28.*

**1935.** *When ordinarily due—Not before delivery.*—*BRITISH & INDIA STEAM NAVIGATION CO. v.*

for, & H. could not recover from T. the value of the logs in an action of debt upon the common counts for

DE MATTOS, DE MATTOS *v.* BRITISH & INDIA STEAM NAVIGATION Co., No. 1557, *ante*.

**1936.** — On tender of duly indorsed bill of lading—Payment stipulated to be in exchange for bill.]—Where by the terms of the contract of sale of goods to be shipped payment is to be made in exchange for bills of lading of each shipment the purchaser is bound to pay when a duly indorsed bill of lading, effectual to pass the property in the goods, is tendered to him, although the bill of lading be drawn in triplicate, & all the three are not then tendered or accounted for; & if he refuses to accept & pay, he does so at his own risk as to whether it may turn out to be the fact or not that the bill of lading tendered was an effectual one, or whether there was another of the set which had been so dealt with as to defeat the title of the purchaser as indorsee of the one tendered.—SANDERS *v.* MACLEAN (1883), 11 Q. B. D. 327; 52 L. J. Q. B. 481; 49 L. T. 462; 31 W. R. 698; 5 Asp. M. L. C. 160, C. A.

*Annotations*:—*Consd.* Biddell *v.* E. Clemens Horst Co., [1911] 1 K. B. 934. *Refd.* Coderberg *v.* Borries, Craig (1885), 2 T. L. R. 201; Cahn *v.* Pockett's Bristol Channel Steam Packet Co., [1899] 1 Q. B. 643; Glasgow Assco. Corp'n. *v.* Symondson (1911), 104 L. T. 254; Landauer *v.* Craven & Speeding, [1912] 2 K. B. 94; Orient Co. *v.* Brekke & Howlid, [1913] 1 K. B. 531; Arnhold Karberg *v.* Blythe, Green, Jourdain, Theodor Schneider *v.* Burgett & Newsam, [1916] 1 K. B. 495; Sharpe *v.* Nosawa, [1917] 2 K. B. 814; Guaranty Trust Co. of New York *v.* Hannay, [1918] 2 K. B. 623; Manbre Saccharine Co. *v.* Corn Products Co., [1919] 1 K. B. 198.

**1937.** — Reasonable time—Sale “by cash in exchange for documents.”—RYAN *v.* RIDLEY & Co., No. 2369, *post*.

**1938.** — ———.] — E. CLEMENS HORST Co. *v.* BIDDELL BROTHERS, No. 1801, *ante*.

**1939.** Effect of payment on delivery—No debt.]—Where goods are sold for ready money, & payment is made accordingly, no debt arises, & such payment is therefore proveable under the general issue.—BUSSEY *v.* BARNETT (1842), 9 M. & W. 312; 11 L. J. Ex. 211; 152 E. R. 132.

*Annotations*:—*Consd.* Smith *v.* Winter (1852), 12 C. B. 487. *Refd.* Littlechild *v.* Banks (1845), 7 Q. B. 739.

**1940.** — ———.]—Where a man makes a purchase, & the article is paid for *eo instanti*, there is no debt incurred, & no occasion for a plea of payment.—WOOD *v.* BLETCHER (1856), 27 L. T. O. S. 126; 4 W. R. 566.

#### SUB-SECT. 2.—BY WHOM PAYMENT MAY BE MADE.

See CONTRACT, Vol. XII., pp. 447-449.

#### SUB-SECT. 3.—TO WHOM PAYMENT MAY BE MADE.

##### A. Agents.

Authority of agent generally, *see* AGENCY, Vol. I., pp. 295-387.

Authority to receive payment.]—*See* AGENCY, Vol. I., pp. 361-370, Nos. 705-784.

**1941.** — Revoked by principal—Effect of notice to purchaser.]—Where goods are sold by a

factor who has agreed to take the risk of the debts the vendee is answerable for the amount to the owner, if he has received notice from him to pay him & not the factor previous to his having paid the latter.—SCRIMSHIRE *v.* ALDERTON (1743), 2 Stra. 1182; 93 E. R. 1114.

Effect of ratification.]—*See* AGENCY, Vol. I., pp. 418-423.

Bankruptcy of agent.]—*See* BANKRUPTCY, Vol. V., pp. 699, 700, Nos. 6139, 6145-6147.

**1942.** Right of joint sellers against agent—On promise to pay by bill—Proceeds of sale of goods.]—A declaration stated that B. & deft., joint owners of a horse & mare, agreed that deft. should sell them, & pay one moiety of the proceeds to pltf. as the agent of B., who was abroad: that deft. sold the horse to C. for £600 & the mare for £300 & did not receive the price of the horse, but took from the purchaser of the mare a promissory note for £300 which deft. indorsed & delivered to pltf. as the agent of B., & the amount of which was received by pltf. as such agent: that deft. afterwards requested pltf. upon his own responsibility, to pay deft. one moiety of the £300 in pltf.'s hands as such agent, & pltf. paid deft. £50: that deft. again requested pltf., on his own responsibility, to pay deft. £100, the residue of the moiety of the £300, which pltf. was willing to do provided deft., in consideration of the sum of £50 so paid & the further sum of £100 when paid, would undertake either to deliver to pltf. a bill of exchange for £233 3s., being B.'s moiety of the proceeds of the sale of the horse, less the forfeits in respect of the same, drawn by deft. upon & accepted by C. at two months date, or pay pltf. £233 3s. in cash within two weeks; & thereupon deft. wrote & delivered to pltf. the following undertaking:—“In consideration of your having paid me the sum of £150 on account of my share of the mare, I hereby undertake to deliver to you a bill for £233 3s. drawn by me upon & to be accepted by C. at two months, or the above sum in cash within two weeks from this date.”—On demurrer:—*Held*: the declaration disclosed a sufficient consideration for deft.'s promise.—SURTEES *v.* LISTER (1861), 7 H. & N. 1; 30 L. J. Ex. 369; 158 E. R. 367.

*Annotation*:—*Mentd.* Miles *v.* New Zealand Alford Estate Co. (1886), 32 Ch. D. 266.

**1943.** Fictitious sales by agent—Liability to principal.]—An award stating alleged sales by an agent to himself to be “expedient,” to enable the agent to meet deficiencies in his accounts with the principal, implies that such sales are fictitious, & that the amount of the sales has been received by the agent to the principal's use.—BOWER *v.* JONES (1831), 8 Bing. 65; 1 Moo. & S. 140; 1 L. J. C. P. 31; 131 E. R. 325.

**1944.** Sale on behalf of various principals—Appropriation of payments.]—A person sold property, subject to different interests, but on account of one person only. He introduced all the sales into one account with that person; he had made payments sufficient to satisfy the interest of that one with whom he made the account; but a general balance remained in his hands:—*Held*: that general balance was not liable to be cut down

goods sold & delivered.—HIFERNAN *v.* THOMPSON (1848), 6 U. C. R. 207. —CAN.

k. Agreement to pay by appropriation of dividends—Partner purchasing from partnership.]—SPURR *v.* ALBERT MINING Co. (1883), 9 S. C. R. 35.—CAN.

l. Implied covenant to pay—Unless terms of contract exhibit different inten-

tion.]—GRIEVE MCCLORY, LTD. *v.* DOME LUMBER Co., LTD. & THOMPSON, [1923] 2 D. L. R. 154; [1923] 1 W. W. R. 989.—CAN.

m. Right to security for payment—Right of foreign merchant.]—A foreign merchant from whom goods are commissioned is entitled to send the bill of lading to his own agent, & to demand security from the purchaser that the price will be paid when due.—ARNOTS

*v.* BOYTER (1803), 13 Fac. Coll. 272; Mor. Dict. 14204.—SCOT.

#### PART VI. SECT. 4, SUB-SECT. 3.—A.

n. Agent buying as apparent principal—Intervention of principal—Right of buyer to pay principal.]—A purchaser from an agent, who has sold goods without disclosing the fact of his agency, is justified in paying them

*Sect. 4.—Payment: Sub-sect. 3, A. & B.; sub-sect.*

by an apportionment of the different interests of the parties; but the earlier payments must be taken against the earlier items, according to the general rule.—*SOLARTE v. MAES HILBERS* (1832), 1 L. J. K. B. 196.

**1945. Common agent of both parties—Entry of bill to credit of seller—Effect on principal's right to recover.]—**A. at the Cape, ordered 300 bags of coffee of B. at Rio, to be shipped & sent to the Cape. R. & co., at London, were the general agents of both buyer & seller. The coffee was to be paid for by a bill drawn by B. on R. & co. for the amount. A bill of exchange for the amount was accordingly drawn by B., on & accepted by R. & co. The coffee was received by the buyer. R. & co. on the receipt of the bill of exchange, credited the account of B. in their books with the amount, & debited the account of A. with a like sum. Before the bill of exchange arrived at maturity, R. & co. stopped payment:—*Held*: the entry of the amount of the bill of exchange to the credit of B. in the books of the mutual agents was not a payment for the coffee; & B. did not, by such entry, accept in satisfaction of his demand the credit opened by the purchaser with R. & co.—*MAXWELL v. DEARE* (1853), 8 Moo. P. C. C. 363; 1 C. L. R. 776; 23 L. T. O. S. 1; 14 E. R. 138, P. C.

**1946. Sale subject to discount—Omission of discount in contract—Liability of broker.]—**D., deft. entered into the following contract with R., pltf.:—"Mar. 22, 1860, From J. D., Corn Broker, To Messrs. R., Liverpool. Dear Sirs,—I have this day sold to you two cargoes of French maize, to consist of 800 to 1,000 quarters, shipment all Apr., from the port of Bordeaux, at 33s. 3d. per 480 lbs. cost & freight, payment in London, less 60 days' interest & 1 per cent. brokerage. Mr. J. Walker, London, will send contracts." On the following day W. forwarded contracts for the two cargoes on behalf of T. of Bordeaux, the owner of the maize, but omitting the stipulation as to the brokerage. Pltfs. remonstrated, & deft. said he would write to W., but pltfs., in order to obtain the cargoes, were subsequently compelled to pay the 33s. 3d. without any deduction for brokerage:—*Held*: deft. was responsible for the failure of W. to send the contracts stipulated for. *Seem*: deft.'s liability was not affected by the fact that pltfs., instead of returning the contracts sent by W., accepted the maize under them.—*REID v. DREAPER* (1861), 6 H. & N. 813; 30 L. J. Ex. 268; 4 L. T. 650; 7 Jur. N. S. 1125; 158 E. R. 335.

**1947. Agent buying as apparent principal—Entrusted with purchase-money—Seller delaying to obtain payment—& electing to treat agent as debtor.]—**When goods are sold to an apparent principal for ready money, the seller must at his peril obtain immediate payment, & if the buyer is only an agent contracting in his own name, & receives the price forthwith from his principal, the seller who omits to enforce immediate payment cannot at a subsequent time recover the value of the goods from the principal upon the failure of the agent to pay over to the seller their price. The seller of goods to an apparent principal upon discovering that the buyer is only an agent may so conduct himself by demanding payment from, & taking proceedings against, the

agent that he will be deemed to have elected to look to the agent only for payment, & will be debarred from any remedy against the real principal.

Defts. instructed R. to buy 700 pieces of cloth. R. obtained the cloth from pltfs., who made out the invoices to him. The terms of sale to R. were "cash on delivery." R. forwarded the cloth to defts. making out the invoice in his own name. The value of the cloth was £271 17s. 6d. Upon receipt of the cloth defts. sent R. £55 & defts. were allowed by R. on account of some silk £19 10s. R. afterwards drew a bill for £200 in favour of pltfs. upon defts., which was duly paid to pltfs. Pltfs. charged R. with interest, & not obtaining payment of the balance requested by letter payment of it by defts., defts. replied by letter repudiating liability. After receiving defts.' letter pltfs. twice demanded payment of the balance from R., & took proceedings in bkpcy. against him. R. having become insolvent, pltfs. afterwards sued defts. to recover the sum of £71 17s. 6d. the balance due after payment of £200:—*Held*: pltfs. were not entitled to recover, (a) because the goods were sold for ready money, & pltfs. having failed to enforce immediate payment from R. could not hold defts. liable, who had meanwhile paid R. the value of the goods; (b) because by demanding payment from R. & taking proceedings in bkpcy. against him after they knew him to be only an agent, they had made a final & irrevocable election to treat him as their debtor instead of defts.—*MACCLURE v. SCHEMEIL* (1871), 20 W. R. 168.

**Rights of principal against agent—Recovery of payment made to agent.]—***See AGENCY*, Vol. I., pp. 448–456, Nos. 1372–1446.

**Debtor paying own agent.]—***See AGENCY*, Vol. I., pp. 581 *et seq.*

*See, also*, *CONTRACT*, Vol. XII., p. 449; Part VIII., Sect. 3, sub-sect. 2 B. (a).

*B. Other Persons.*

*See, generally*, *CONTRACT*, Vol. XII., pp. 449, 450, Nos. 3632–3637.

**1948. Creditor's creditor.]—***FOREWOOD v. DICTON* (1816), 1 Roll. Rep. 296; 81 E. R. 497; *sub nom.* *MOORWOOD v. DICKENS*, 3 Bulst. 148.

**1949. — By delivery of goods.]—**To a count by A. against B. for goods sold & delivered, B. pleaded, as to £4, parcel, etc., that on a certain day, at the request of A., he delivered to C., for A. certain goods; that it was "then," to wit, on the day & year aforesaid, in consideration thereof, agreed between A. & B. that A. should accept such delivery to C. in full satisfaction & discharge of the premises as to the £4, etc., & that A. did "then" accept such delivery in full satisfaction & discharge:—*Held* on special demurrer for ambiguity, the plea was bad, inasmuch as it might mean either that the agreement to accept the delivery of the goods to C. in satisfaction took place at the same time as the delivery, or at a subsequent period.—*STEAD v. POYER* (1845), 1 C. B. 782; 14 L. J. C. P. 251; 9 Jur. 856; 135 E. R. 751.

*Annotation*:—*Mentd.* *Hamilton v. R.* (1846), 9 Q. B. 271.

—*See, also*, *CONTRACT*, Vol. XII., p. 449, Nos. 3632, 3633.

**1950. Stakeholder — Whether revocable — Payment pending taking of account.]—**Where A. agrees to take certain goods of B. at a price,

price to the principal, who has intervened & demanded the same, provided the agent had not given to the

purchaser notice of any lien or charge on the purchase money arising directly in respect of the said sale.—*MOSEMAN*

*v. AUSTRALASIAN STEAM NAVIGATION CO.* (1873), 12 N. S. W. S. C. R. 62. —*AUS.*

partly to be set against a debt due from B. to A. & the residue to be deposited with C. for the purpose of being paid over to D., when it should be ascertained in what sum B. is indebted to D., it is not competent for B. to countermand the payment to D., & until the account is taken C. may hold the whole of such residue against B.—*BIGNELL v. ELLIS* (1829), 5 Man. & Ry. K. B. 165; *sub nom. BRIGNELL v. ELLIS*, 8 L. J. O. S. K. B. 155.

**1951. — Order amounting to equitable assignment.**—The following letter, sent to the holders of the fund out of which payment is to be made, does not require a bill stamp:—"We now authorise you to pay to Messrs. R. & co., having revoked the former order in their favour, after you have paid yourselves the balance we owe you from the net proceeds of our shipments to your foreign establishments to the present date, one half of the remainder of the proceeds of shipments, provided the same shall not exceed the sum of £5,000.—H. & J."

Defts. carried on business as a commission house at Liverpool, & were connected with several houses abroad in which they were partners, but the foreign partners were not partners in the Liverpool house. H. & J. were in the habit of consigning goods to defts., to be sent abroad to their foreign houses for sale, & the proceeds were remitted to defts. on account of H. & J. H. & J. being indebted to R. & co., wrote the above letter to defts., on which defts. wrote to R. & co., stating they would pay the money accordingly on receiving their guarantee, which R. & co. thereupon gave. Before the proceeds were received by defts., H. & J. became bkpts., & their assignees gave defts. notice not to pay any thing on account of bkpts.:—*Held*: on the goods being afterwards received & sold by defts., the proceeds were not recoverable by the assignees, as the letter of H. & J. contained a specific appropriation or an equitable assignment to R. & co., which was not revocable by bkpts. or their assignees.—*HUTCHINSON v. HEYWORTH* (1838), 9 Ad. & El. 375; 1 Per. & Dav. 266; 1 Will. Woll. & H. 730; 8 L. J. Q. B. 17; 112 E. R. 1254.

*Annotation*.—*Consol. Belcher v. Capper* (1842), 4 Man. & G. 502.

**1952. Order acted upon.**—Pltf., a merchant at Sunderland, having given an order to B. & co., at Dantzic, for a cargo of wheat, wrote to request that B. & co. would hold it at the disposal of defts., merchants of Liverpool, who would lodge the necessary credits for the remaining balance, & communicated this to defts. A few days afterwards, & before the wheat was shipped from Dantzic, pltf. wrote to deft. as follows:—"We request you will account to Mr. J. S. of Newcastle for the proceeds of the wheat we have consigned to you, lying at Dantzic, in Messrs. B.'s possession, which we wrote about to you a few days ago." Defts. assented to this order, & informed S., who was largely indebted to them, that they held the wheat to his account; & on its arrival, they rendered accounts of the sale of it to S., & placed the balance of the proceeds to the credit of his account with them:—*Held*: pltf.'s order to account to S. was an order transferring the proceeds to him, & not a mere order to pay to him, & was not revocable after defts. had acted upon it.—*DICKINSON v. MARROW*

(1845), 14 M. & W. 713; 6 L. T. O. S. 156; 153 E. R. 662.

**1953. —**—H. & D. consign indigo to Messrs. G. for sale, with a letter of instructions, to which H. adds a postscript stating that T. is to share his moiety with him, & directing Messrs. G. to carry the balance, after certain payments thereout, to the separate accounts of the three, H., D., & T. Messrs. G. act on these instructions. T. deals with his share through their means, & H. then revokes his directions to carry to T.'s separate account in consequence of T.'s default in meeting a bill, of which he was joint acceptor with H. H. files a bill for a decree that he has a lien on T.'s share in the hands of Messrs. G., & for an account & lien on the balance. Bill dismissed with costs.—*HOLROYD v. GRIFFITHS* (1856), 3 Drew. 428; 4 W. R. 225; 61 E. R. 966.

**1954. — Assented to by all parties.**—In 1842, W. & S., type founders, were indebted to G., pltf.'s testator, in £6,000 for money lent. Deft., who was a member of the firm of E. & S., printers, had been accustomed to purchase of W. & S. large quantities of type, for which quarterly accounts used to be sent, & it was expected that those dealings would be continued. W. & S. being applied to by G. for payment, delivered to him the following order, signed by them, & directed to deft.: "We hereby authorise you to pay on our account to the order of G. £6,000 at the following periods, deducting the amount from the quarterly accounts for type furnished to you & to Messrs. E. & S., viz. Nov. 11, 1843, £1,000; Nov. 11, 1844, £1,000; Nov. 11, 1845, £1,000; Nov. 11, 1846, £1,500; Nov. 11, 1847, £1,500." Deft., on receiving this order, wrote underneath, "Having received the foregoing authority from Messrs. W. & S., I undertake to make you the payments as above stated." The instalments were paid up to Nov. 11, 1844, but no other part of the £6,000 was paid. W. & S. continued to furnish deft. with type, the quarter's account of which, up to Dec. 31, 1845, amounted to £651 0s. 9d. On Dec. 18, 1845, deft. wrote to W. & S. stating that he considered himself bound to see all the amounts due from him to them applied in payment of the debt due to G.:—*Held*: the documents amounted to an agreement, that, if any of the specified portions of debt mentioned therein were at any time unpaid by W. & S. to G., & if, after that event had occurred, & come to the knowledge of deft., any quarterly accounts for type should become due from deft. to W. & S., deft. would, so far as those accounts would extend, pay the debt due from W. & S. to G., & such agreement, when assented to by all parties, was irrevocable, & consequently pltf. were entitled to recover the £651 0s. 9d.—*HAMILTON v. SPOTTISWOODE* (1849), 4 Exch. 200; 18 L. J. Ex. 393; 14 L. T. O. S. 108; 154 E. R. 1182.

*Annotations*.—*Distd. Liversidge v. Broadbent* (1859), 4 H. & N. 603; *Greenway v. Atkinson* (1881), 29 W. R. 560.

**Auctioneer.**—See AUCTION & AUCTIONEERS, Vol. III., pp. 5 *et seq.*

#### SUB-SECT. 4.—TIME AND MODE OF PAYMENT.

##### A. In General.

See Sale of Goods Act, 1893 (c. 71), s. 28.

**1955. Change of mode of payment—Necessity for notice.**—Where a party has dealt with a trades-

**PART VI. SECT. 4, SUB-SECT. 4.—A.**  
o. Contract f.o.b.—Whether buyer bound to pay before loading.—*CLARK v. ROSE* (1870), 29 U. C. R. 302.—

p. Delivery inside thirty days—Whether time of payment extends to thirty days after delivery.—*VICTORIA HARBOUR LUMBER CO. v. IRWIN* (1895), 24 S. C. R. 607.—**CAN.**

q. Sale of cedar poles—Construction of shipping contract.—*PHELPS v. MCLACHLIN* (1904), 25 C. L. T. 53; 35 S. C. R. 482.—**CAN.**

**Sect. 4.—Payment : Sub-sect. 4, A., B. & C. (a), (b), (c) & (d) i. & ii.]**

man on credit, it is not sufficient to give notice to the tradesman's servant that he meant to pay ready money in future, it must be given to the tradesman himself.—*GRATLAND v. FREEMAN* (1800), 3 Esp. 85; 170 E. R. 547, N. P.

**1956. Payment of balance on resale.]**—In a contract for the sale of 641 hogsheads of tobacco, then on board a vessel bound from A. to B., it is stipulated "that one-fifth of the contract price shall be paid in ready money, & that for the other four-fifths the sellers are to look to their correspondents, D., of B. to whom the property goes consigned. It is nevertheless understood between the parties, that interest is to be calculated as if the sale was made at two & three months from final delivery; the buyers to have the benefit of the sellers' policy in case of average." One-fifth of the contract price is paid in ready money. On the arrival of the tobacco at B., it meets with an unfavourable sale, & a loss of two-fifths of the estimated value takes place:—*Held*: the buyer is liable to the seller upon this contract, for the amount of such loss.—*HOFFMAN v. HEYMAN* (1822), 1 B. & C. 7; 2 Dow. & Ry. K. B. 74; 1 L. J. O. S. K. B. 3; 107 E. R. 3.

**1957. Admissibility of evidence of custom.]**—By the custom of trade, when timber is sold in bond at a sale by auction in London, the buyer contracts to buy at a price including the duty payable, & he may, by giving notice on the following day so to do, elect to take the timber in bond, & if he does so, he is then only bound to pay the price less the duty. On Feb. 10, 1860, deft. bought timber in bond at a sale by auction at a price including duty, the contract to be completed within fourteen days, & the Chancellor of the Exchequer on the evening of that day gave notice that a resolution would be moved to reduce the duty on timber, & he accordingly moved & carried such a resolution on Mar. 8. An Act of Parliament passed to that effect on May 5, the reduction commencing from Mar. 8. On Feb. 11 deft. gave notice to the seller that he elected to take the timber in bond, & on Feb. 24 offered the price less the then duty, which plffs. refused to take, & they also refused to give a delivery order for the timber. In an action by plffs. to recover the price of the timber:—*Held*: the custom was receivable in evidence.—*CLARK v. SMALLFIELD* (1861), 4 L. T. 405.

*B. When Time Essence of the Contract.*

See Part III., Sect. 2, sub-sect. 2, *ante*.

*C. Sale on Credit.*

(a) *In General.*

**1958. What amounts to giving credit.]**—*R. v. JONES*, No. 1479, *ante*.

**PART VI. SECT. 4, SUB-SECT. 4.—C. (a).**

*r. What amounts to giving credit*  
—*Course of dealing between parties—*  
*Payment suspended until authorised*  
*by meeting of buying association.]*—*FITZGERALD v. LONDON CO-OPERATIVE ASSOC., LTD.* (1868), 27 U. C. R. 605.—*CAN.*

**19621. Effect of repudiation by buyer**  
—*Seller's rights to sue forthwith.]*—*McFARLANE v. McLEAN* (1909), 43 N. S. R. 304; 6 E. L. R. 505.—*CAN.*

*t. Credit given for particular*  
*voyage—Payment by appropriation of*  
*produce—Diversion of produce—Seller's*  
*right to sue forthwith.]*—Goods supplied for the fishery are advanced on the credit of the proceeds of the voyage, & therefore, if the produce of the

voyage, instead of being applied to the payment of those supplies are diverted to another object, the planter may be sued immediately for the debt.—*HUNTERS & CO. v. GRAHAM* (1820), 1 Nfld. L. R. 219.—*NFLD.*

*a. Expiration of credit—Usage of trade.]*—Where a dealer was attached by his merchant much earlier in the year than he had been for some time accustomed to settle his account, set up as a defence that at the time of issuing the writ his credit had not expired:—*Held*: there is no usage in this country to prevent parties from demanding an adjustment of their yearly dealings before the expiry of the year.—*DUPER v. WITTHCOMBE* (1881), 6 Nfld. L. R. 256.—*NFLD.*

*b. Conversion of sale for cash to*

**1959. Credit given for part of price—Nothing stated as to remainder.]**—*WILLOUGHBY v. MILWARD* (1598), Gouldsb. 118; 75 E. R. 1033.

**1960. Monthly credits—How calculated.]**—The time of credit given upon a mercantile contract must be reckoned exclusively of the day on which the contract was entered into.

Goods were sold on Oct. 5, to be paid for in two months:—*Held*: an action for the price could not be commenced until after the expiration of Dec. 5.—*WEBB v. FAIRMANER* (1838), 3 M. & W. 473; 6 Dow. 549; 1 Horn & H. 108; 7 L. J. Ex. 140; 2 Jur. 397; 150 E. R. 1231.

*Annotations.*—*Consd. Spartall v. Benecke* (1850), 10 C. B. 212. *Refd. Blunt v. Hislop* (1838), 2 Jur. 542; *Young v. Higgon* (1840), 6 M. & W. 49; *Russell v. Ledsam* (1845), 14 M. & W. 574; *Williams v. Nash* (1859), 28 L. J. Ch. 886; *Isaacs v. Royal Insce.* (1870), L. R. 5 Exch. 296; *Re Ry. Sleepers Supply Co.* (1885), 29 Ch. D. 204; *Goldsmiths' Co. v. West Met. Ry.*, [1904] 1 K. B. 1; *R. v. Turner* (1909), 3 Cr. App. Rep. 103; *English v. Cliff*, [1914] 2 Ch. 376. *Mentd. Simpson v. Margitson* (1847), 11 Q. B. 23.

**1961. Promise to pay before expiration of credit—Validity.]**—On a contract for credit for goods sold, a promise to pay before the time is *nudum pactum*, but it may be material as to whether the contract was for credit.—*HERITAGE v. LAWRENCE* (1861), 2 F. & F. 532, N. P.

**1962. Effect of repudiation by buyer—Seller's rights to sue forthwith.]**—Plffs. & deft. entered into a treaty for the sale & purchase of a large quantity of furniture, to be paid for half in cash & the residue by bill at six months. A portion of the goods having been delivered, the parties disagreed, & deft. wrote to plffs. as follows: "The way you do your business will not suit me. I have an account for a large amount of goods not purchased, & a demand made for payment, opposed to treaty. I now close all further orders, & desire what I have not purchased may be taken off my premises":—*Held*: plffs. were entitled to treat this letter as a rescission of the contract, & to sue at once upon a *quantum valebant* for the goods delivered & kept.—*BARTHOLOMEW v. MARKWICK* (1864), 15 C. B. N. S. 711; 3 New Rep. 386; 33 L. J. C. P. 145; 9 L. T. 651; 10 Jur. N. S. 615; 12 W. R. 314; 143 E. R. 964.

*Annotation.*—*Distd. Wayne's Merthyr Steam Coal & Iron Co. v. Morewood* (1877), 46 L. J. Q. B. 746.

**1963. "Payment at convenience"—Subject to payment of interest.]**—*CRAWSHAW v. HORNSTEDT* (1887), 3 T. L. R. 426, C. A.

(b) *Where No Time or Mode provided for.*

**1964. Where agreement in writing—Whether evidence of credit admissible.]**—*FORD v. YATES*, No. 1476, *ante*.

**1965. — Agreement not within Statute of Frauds.]**—Deft. ordered goods by letter, which did not mention any time for payment. Pltf. sent the goods & an invoice:—*Held*: parol

*sale on credit.]*—Where a contract is that the goods purchased are to be paid for on delivery, & the buyer receives the goods & neglects or refuses to remit the price, such neglect or refusal cannot convert what was to be a sale for cash into a sale on credit.—*CHADDER & SONS v. TURTLE-FORD GRAIN GROWERS CO-OPERATIVE ASSOC., LTD.*, [1922] 1 W. W. R. 936; 63 D. L. R. 498; 15 Sask. L. R. 207.—*CAN.*

*c. Whether credit presumed—By delivery.]*—The mere delivery of goods sold raises no presumption in favour of credit having been given; on the contrary the presumption is in favour of the sale having been for cash.—*DANIELS v. COOPER* (1880), 1 E. D. C. 174.—*S. AF.*



(1873), L. R. 9 C. P. 20; *sub nom.* ASHWORTH v. REDFORD, 43 L. J. C. P. 57.

**1970. Goods sold part for cash & part for bills.—Effect of default.—In payment of cash—& delivery of bills.]—A. sells goods to B. to be paid for partly in cash, & the residue by bills at intervals of three months each. The payment of the money & the delivery of the bills do not constitute a condition so as to entitle A. upon non-payment of the money & non-delivery of the bills, to sue as for goods sold & delivered, without waiting the expiration of the credit, nor can such action be maintained for the amount of the stipulated cash payment. A.'s remedy is, by special action on the express contract.—PAUL v. DOD (1846), 2 C. B. 800; 15 L. J. C. P. 177; 7 L. T. O. S. 44; 10 Jur. 335; 135 E. R. 1158.**

1971 i. *General rule*.—Original credit stands.]—Where pltf. sold goods to deflt., who was to give his note at three months for the price, but afterwards took away the goods without giving it:—*Held*: an action for goods sold would not lie until the time of



**Sect. 4.—Payment: Sub-sect. 4, C. (d) ii. & iii.; sub-sects. 5 & 6, A., B., C., D. & E.]**

**1974. ———.]**—Goods were sold at six months' credit, payment to be then made by a bill at two or three months, at the purchaser's option:—**Held:** this was in effect a nine months' credit, & consequently, an action for goods sold & delivered commenced within six years from the end of the nine months was in time to save Stat. Limitations.—**HELPS v. WINTERBOTTOM** (1831), 2 B. & Ad. 431; 9 L. J. O. S. K. B. 258; 109 E. R. 1203.

**Annotation:—****Expld.** **Rugg v. Weir** (1864), 16 C. B. N. S. 471.

**1975. ———.]**—Pltfs. contracted to deliver iron of a certain quality to defts., & agreed to receive payment for each delivery, either in cash for discount within a month, or by bills at four months, according to defts.' option. Upon application by pltfs. in July for payment of iron delivered in June, defts. elected to pay by bill. Before, however, the bill was given, defts. discovered that the iron which had been worked up into plates was of inferior quality to the sample, & useless to them. They therefore refused to accept any more bills, & pltfs. immediately, in Aug., brought an action to recover the contract price of the June delivery:—**Held:** the contract having been broken by pltfs. delivering iron of inferior quality, & it being consequently their fault that the bill for the invoiced price was not given, & yet both parties having at the time, & up to the discovery of the quality of the iron, treated the delivery as made under the contract, & to be paid for under it, the period of credit had not expired, & pltfs. were not entitled to sue in this action, either for the contract price or on a *quantum valebat* for the reduced value of the goods.—**WAYNE'S MERTHYR STEAM COAL & IRON CO. v. MORROW & CO.** (1877), 46 L. J. Q. B. 746.

**1976. ———.]**—If there is an agreement on the sale of goods that credit should be given, & as a security an agreement by the purchaser to give an acceptance, even although the purchaser refuses to give such acceptance the period of credit still stands. *Semble*, there may be an action for refusing to accept the bill if damage can be proved.—**RABE v. OTTO** (1903), 89 L. T. 562; 20 T. L. R. 27.

**1977. Exception to rule—Credit conditioned on bill given.]**—Goods sold at three months' credit, the vendor agreeing to take the vendee's bill of exchange, at three months' date, at the end of the first three months, if he wished for further time. Unless the vendee give such a bill, at the end of the first three months, the vendor may bring his action immediately.—**NICKSON v. JEPSON** (1817), 2 Stark. 227; 171 E. R. 629.

**Annotations:—****Distd.** **Paul v. Dod** (1846), 2 C. B. 800. **Consd.** **Rugg v. Weir** (1864), 16 C. B. N. S. 471.

**1978. ———.]**—Goods were sold upon the following terms: "2½ per cent., or three months' bill," which was explained to mean cash at the expiration of the month succeeding the current month, deducting a discount of 2½ per cent., or, at the buyer's option, a bill at three months from the same period. The buyer having refused to accept a bill at the end of the second month:—**Held:** the seller might at once sue him for goods sold & delivered, *concessit solvere* in the Mayor's

Ct., London, & was not bound to wait the additional three months.—**RUGG v. WEIR** (1864), 16 C. B. N. S. 471; 143 E. R. 1211.

**Annotation:—****Apld.** **Anderson v. Carlisle Horse Clothing Co.** (1870), 21 L. T. 760.

**1979. Action for failure to give bill or accept note.]**—**MILLER v. SHAW** (1801), cited in 4 East, at p. 149; 102 E. R. 787.

**Annotation:—****Refd.** **Mussen v. Price** (1803), 4 East, 147.

**1980. ———.]**—**MUSSEN v. PRICE**, No. 1972, *ante*.

**1981. ———.]**—**LEE v. RISDON**, No. 1973, *ante*.

**1982. ———.]**—**RABE v. OTTO**, No. 1976, *ante*.

**1983. ———.] Duty of seller to tender draft for acceptance.]**—**REED v. MESTAER** (1804), Comyn's Law of Contract, 2nd ed. 181.

**1984. ———.] No set-off allowed.]**—Where goods are sold, to be paid for by a bill of exchange at a given date, to an action commenced within that time for refusing to give such bill, deft. cannot set off a debt due to him from pltf.—**HUTCHINSON v. REID** (1813), 3 Camp. 329; 170 E. R. 1400, N. P.

### iii. "Cash or Acceptance."

**1985. Effect of default in accepting bill.]**—In an action for goods sold, the merits being strong for pltfs. & the period of credit having elapsed, they were allowed to add a count for not accepting a bill of exchange.—**ISAACS v. PICKARD** (1859), 1 F. & F. 672.

**1986. ———.]**—If the agreed terms of payment for goods sold be by a three months' bill, the buyer to have the option of paying cash at 2½ discount, the buyer is not bound to accept a bill for a larger amount than his debt, & even if he refuse to accept a bill correctly drawn the seller cannot sue for goods sold & delivered before the end of three months from the date of the bill drawn by him. If, however, the agreed terms be cash, with buyer's option of a bill, the seller can sue immediately upon the buyer's refusal to accept.—**ANDERSON v. CARLISLE HORSE CLOTHING CO., LTD.** (1870), 21 L. T. 760, N. P.

**Annotation:—****Apld.** **Rabe v. Otto** (1903), 89 L. T. 562.

**1987. Effect of part payment in cash.]**—Deft. bought goods upon the following terms of payment: "Four months' bill on the 10th of the month following delivery, or 2 per cent. for cash." After the delivery of the goods he paid part of the price in cash:—**Held:** he had exercised his option of paying ready money, & therefore pltf. might sue him for goods sold without waiting for the expiration of the four months.—**SCHNEIDER v. FOSTER** (1857), 2 H. & N. 4; 157 E. R. 2.

**1988. Bill with option of cash—Distinguished from cash with option of bill.]**—**ANDERSON v. CARLISLE HORSE CLOTHING CO., LTD.**, No. 1986, *ante*.

### SUB-SECT. 5.—PLACE OF PAYMENT.

*See* **CONTRACT**, Vol. XII., pp. 451–454, Nos. 3655–3673.

### SUB-SECT. 6.—WHAT AMOUNTS TO PAYMENT.

#### A. In General.

*See, generally,* **CONTRACT**, Vol. XII., pp. 454–473.

the credit had expired.—**MAGRATH v. TINNING** (1845), 6 O. S. 484.—**CAN.**

**1977 i. Exception to rule—Credit conditioned on bill given.]**—**SMITH v. HOBSON** (1857), 16 U. C. R. 368.—**CAN.**

**h. ———.] Right to interest on note.]**—**ROSS v. MOON** (1907), 5 W. L. R. 552; 17 Man. L. R. 21.—**CAN.**

**j. Action for failure to give bill or accept note.]**—**COUNTER v. ROEBUCK** (1840), 3 Ont. Dig. 6213.—**CAN.**

**k. ———.] Before expiration of credit.]**—When goods were delivered under an agreement to be paid for by indorsed notes payable in . . . days after delivery, the vendor recovered in

assumpsit before the expiration of the time of credit for a breach of the agreement in not giving the said notes.—**BROWN v. FRINK** (1838), Ber. [547] 363.—**CAN.**

**l. Right to restrain removal of goods by injunction.]**—**MITCHELL v. MCGAFFEY** (1858), 6 Gr. 361.—**CAN.**

**1889. Return of vendor's dishonoured acceptance.]**—Deft., who had ordered goods for ready money, paid for them by returning to the vendor's agent a bill accepted by vendor, which had been due & dishonoured before the goods were ordered; the agent at first refused to take the bill, but ultimately carried it home to the vendor, who kept it. The vendor having become bkpt., the ct., in an action brought by his assignees to recover the value of the goods:—*Held*: this transaction equivalent to payment, no fraud having been established.—*MAYER v. NIAS* (1823), 1 Bing. 311; 8 Moore, C. P. 275; 1 L. J. O. S. C. P. 113; 130 E. R. 125.

*Annotation*:—*Refd.* *M'Gillivray v. Simson* (1826), 9 Dow. & Ry. K. B. 35.

**1890. Approved banker's bills—Bills dishonoured on presentment—No notice of dishonour.]**—Pltfs. sold to defts. goods to be paid for, according to the contract between the parties, by cash or "approved banker's bills." Defts. paid for them by "approved banker's bills" which was dishonoured on presentment for acceptance. They were not parties to the bill, & received no notice of dishonour. In an action against them at the suit of pltfs. for the price of the goods:—*Held*: defts.' liability was not more extensive than it would have been if they had indorsed the bill, & they were therefore discharged, not having received due notice of dishonour.—*SMITH v. MERCER* (1867), L. R. 3 Exch. 51; 37 L. J. Ex. 24; 17 L. T. 317.

*Annotation*:—*Apld.* *Re British & American Steam Navigation Co., Pearce's Claim* (1869), L. R. 8 Eq. 506.

**1891. Shares—Calls to be debited on account of goods—Validity.]**—An agreement between A., a tradesman, & the directors of a co., that the co. should order goods of A., & A. should take shares in the co., but that calls on the shares should be placed to A.'s debit as payment on account of goods:—*Held*: to be *ultra vires* on the part of the directors, & not binding either on the co. or on A.—*Re RICHMOND HILL HOTEL CO., PELLATT'S CASE* (1867), 2 Ch. App. 527; 36 L. J. Ch. 613; 16 L. T. 442; 15 W. R. 726, L. J.J.

*Annotations*:—*Apld.* *Re Aldborough Hotel Co., Simpson's Case* (1869), 4 Ch. App. 184. *Distd.* *Re Patent Paper Manufacturing Co., Addison's Case* (1869), 21 L. T. 654; *Re Paraguassu Steam Trainroad Co., Black's Case* (1872), 8 Ch. App. 254. *Consd.* *Gardiner v. Iredale*, [1912] 1 Ch. 700.

*Refd.* *Re Saloon Steam Packet Co., Ex p. Fletcher* (1867), 37 L. J. Ch. 49; *Re Oriental Commercial Bank, Barge's Case* (1868), 18 L. T. 227; *Re General Provident Assoc., Bridger's Case* (1869), L. R. 9 Eq. 74; *Ilfracombe Ry. v. Nash* (1870), 22 L. T. 209; *Re Nanteos Consols Mining Co., Thomas's Case* (1872), 20 W. R. 479; *Re Harmony & Montague Tin & Copper Mining Co., Spargo's Case* (1873), 8 Ch. App. 407; *Re Limehouse Works Co., Coate's Case* (1873), L. R. 17 Eq. 169; *Re Church & Empire Fire Insee., Pagin & Gill's Case* (1877), 6 Ch. D. 681; *Re Johannesburg Hotel Co., Ex p. Zoutpansberg Prospecting Co.*, [1891] 1 Ch. 119; *Ooregum Gold Mining Co. of India v. Roper, Walbroth v. Roper*, [1892] A. C. 125; *Re Wragg*, [1897] 1 Ch. 796. *Mentd.* *Re Universal Banking Co., Roger's Case, Harrison's Case* (1865), 3 Ch. App. 633; *Re International Contract Co., Levita's Case* (1867), 3 Ch. App. 36; *Re Universal Banking Corp., Gunn's Case* (1867), 3 Ch. App. 40; *Re Howron, Bally's Case* (1868), L. R. 5 Eq. 428; *Re Peruvian Ry. Co., Ex p. Wallis* (1868), 18 L. T. 676; *Re Cheltenham & Swansea Ry. Carriage & Wagon Co., Little's Case* (1869),

20 L. T. 162; *British & American Telegraph Co. v. Colson* (1871), L. R. 6 Exch. 108; *Richards v. Home Assoc. Assocn.* (1871), L. R. 6 C. P. 591; *Re United Porto Co., Adam's Case* (1872), L. R. 13 Eq. 474; *Re Northern Electric Wire & Cable Manufacturing Co., Ex p. Hall* (1890), 63 L. T. 369.

**1892. — Fraudulent misrepresentation as to value.]**—*POTTS v. LEVER* (1887), 4 T. L. R. 50.

**Bank notes.]**—*See* BANKERS, Vol. III., pp. 198–200.

#### *B. Payment of Smaller Sum than Sum Due.*

**Liquidated debt.]**—*See* CONTRACT, Vol. XII., pp. 455–458, Nos. 3676–3715.

**Unliquidated debt.]**—*See* CONTRACT, Vol. XII., pp. 458, 459, Nos. 3716–3723.

#### *C. Payment in Goods.*

*See, generally*, CONTRACT, Vol. XII., p. 459, Nos. 3730, 3731.

**1893. Whether good payment—Apart from agreement.]**—*GRAY v. SHEPHERD* (1839), cited 1 Horn & H. at p. 425.

*Annotation*:—*Apld.* *Learmonth v. Grandin* (1839), 1 Horn & H. 424.

**1894. — —.]**—A. being indebted to B., agreed by letter to ship for B.'s account from 40 to 50 tons of foreign produce in any vessel which B. might despatch for that purpose, & that A.'s account with B.'s house should be credited with the invoice price. The letter concluded, "I do also further engage to ship produce on similar terms to the above, to the amount of what I may remain indebted to you after the first shipment as above, within six months from the sailing of the first vessel." B. assented to the terms of the letter, & the shipment of the 40 tons of foreign produce took place pursuant to such terms:—*Held*: the residue of the letter could not be considered as a substituted mode of payment, which B. was bound to accept in discharge of the debt, but a proposal on the part of A. to pay in goods, which, until it was performed, did not alter the position of the parties with reference to the original debt.—*PHILLIPS v. AFLALO* (1842), 4 Man. & G. 846; 12 L. J. C. P. 49; 134 E. R. 348.

**1895. Agreement on footing of goods for goods—How balance payable.]**—Upon an agreement between two traders to supply each other, on the footing of goods for goods, after a balance struck between them, such balance is to be paid in money.—*INGRAM v. SHIRLEY* (1816), 1 Stark. 185; 171 E. R. 441, N. P.

*Annotation*:—*Distd.* *Harrison v. Luke* (1845), 14 M. & W. 139.

**1896. — Action for price in default.]**—*BOWTELL v. GREENWELL* (1843), 1 L. T. O. S. 413.

#### *D. Settlement of Accounts.*

*See* CONTRACT, Vol. XII., pp. 459–461, Nos. 3732–3749.

#### *E. Book Entries.*

*See* CONTRACT, Vol. XII., pp. 461, 462, Nos. 3750–3754.

#### PART VI. SECT. 4, SUB-SECT. 6.—A.

**1899 i. Return of vendor's dishonoured acceptance.]**—*PETERS v. SEAMAN* (1890), 22 N. S. R. (10 R. & G.). 405.—CAN.

**m. Retention of draft after request for return—Presumption of acceptance as payment in full.]**—*NASH v. DEVER* (1866), 11 N. B. R. (6 All.). 404.—CAN.

**n. Account stated—Whether set-off.]**—A land owner had an old account for bread against the contractor for the erection of certain stores supplied, which account, with interest, he charged against the sums due to the

contractor under the contract:—*Held*: the account & interest should be treated, not as a matter of set-off, but as a payment of so much of the contract price.—*TRUAX v. DIXON* (1888), 17 O. R. 366.—CAN.

**o. Bank draft under letter of credit—When draft met by bank.]**—*HINDLEY & Co. v. TOTHILL, WATSON & Co.* (1895), 13, N. Z. L. R. 13.—N.Z.

#### PART VI. SECT. 4, SUB-SECT. 6.—C.

**1893 i. Whether good payment—Apart from agreement.]**—*Prima facie* goods delivered are not a payment, & with-

out an agreement of some kind that they are intended to be a payment of a debt, one party by his own act, such as tendering an account with the goods credited, cannot make them so.—*LITTLE v. CALE* (1876), 3 Pag. 386.—CAN.

**1893 ii. — —.]**—Fish is not a legal & sufficient tender in payment of a debt contracted for articles furnished for the prosecution of seal-fishery; & can only be a legal tender by virtue of a contract expressed or implied.—*ROGERSON & COWAN v. QUINLAN* (1821), 1 Nfld. L. R. 228.—NFLD.

**Sect. 4.—Payment: Sub-sect. 6, F., G., H. & I.; sub-sects. 7, 8 & 9.]**

*F. Composition with Creditors.*

**Position of creditor—Failure by debtor to perform stipulations.]—See BANKRUPTCY, Vol. V., pp. 1110–1118, Nos. 9049–9102.**

**Provision for indemnification—Bills not retired by creditor.]—See BANKRUPTCY, Vol. V., pp. 1159–1160, Nos. 9400–9403.**

**—.]—See, generally, BANKRUPTCY, Vol. V., pp. 1110 *et seq.***

*G. Negotiable Instrument.*

*See, generally, BILLS OF EXCHANGE, Vol. VI., pp. 348 *et seq.*; CONTRACT, Vol. XII., pp. 462 *et seq.**

**1997. Whether good payment—Giving of instrument part of agreement.]—Taking a note for goods sold is a payment because it was part of the original contract; but paper is no payment where there is a precedent debt (HOLT, C.J.).—WARD v. EVANS (1703), as reported in 2 Ld. Raym. 928; 3 Salk. 118; 92 E. R. 120.**

**Annotations.]—Refd. Smith v. Wilson (1738), Andr. 187. Mentd. Thorold v. Smith (1706), Holt, K. B. 462; Nickson v. Brohan (1712), 10 Mod. Rep. 109; Grant v. Vaughan (1764), 3 Burr. 1516; Tatlock v. Harris (1789), 3 Term Rep. 174; Hennings v. Rothschild (1827), 4 Bing. 315; Nicholl v. Thomas (1850), 2 Rob. Eccl. 157.**

**1998. — For original & precedent debt.]—WARD v. EVANS, No. 1997, *ante*.**

**1999. — Bill drawn on buyer's agent—Renewed by seller without notice to buyer.]—The purchaser of goods, to be paid for by bill upon his agent, is not discharged by the seller taking a renewal of the bill without giving him notice, if the agent had not funds in hand to pay the bill when it became due.—CLARKE v. NOEL (1813), 3 Camp. 411; 170 E. R. 1428, N. P.**

**2000. — Bill destroyed by buyer—In hands of indorsee.]—On the sale of certain goods by pltf., deft., the purchaser, agreed to accept bills for the price, & to pay the sums of money for which the bills should be given when the bills became due. One of the bills having been afterwards destroyed by deft., in the hands of a person to whom it had been indorsed as trustee for pltf.:—*Held*: no action could be maintained by pltf. on the promise to pay the money when the bills should become due.—JUNGBLUTH v. WAY (1856), 1 H. & N. 71; 25 L. J. Ex. 257; 156 E. R. 1122.**

**—.]—See, also, CONTRACT, Vol. XII., pp. 462–468, Nos. 3755–3811.**

**2001. Bill payable on future day—Whether remedies suspended during currency—Bill of no value.]—If a person in payment of a debt gives a bill or note which has some time to run the party receiving it cannot sue on his original debt until the time which such bill or note has to run is expired. *Aliter* if such bill or note was of no**

**value.—STEDMAN v. GOOCH (1793), 1 Esp. 3; 170 E. R. 262, N. P.**

**Annotations.]—Consd. Dutton v. Solomonson (1803), 3 Bos. & P. 582. Refd. Hickling v. Hardey (1817), 1 Moore, C. P. 61. Consd. Maillard v. Argyle (1843), 6 Man. & G. 40. Apld. *Re* London Birmingham & South Staffordshire Banking Co. (1865), 34 Beav. 332. Refd. Price v. Price (1847), 16 M. & W. 232; Bolshaw v. Bush (1851), 11 C. B. 191. Mentd. Nicholl v. Thomas (1850), 2 Rob. Eccl. 157.**

**2002. — —.]—Where a bill of exchange is given in payment for goods sold, which, upon presentment to the drawee, is refused acceptance:—*Held*: the holder having declared against the drawer on the bill, & joined counts for goods sold, may treat such bill as a nullity, & recover his demand on the latter counts, although the credit on the bill be not expired.—HICKLING v. HARDEY (1817), 7 Taunt. 312; 1 Moore, C. P. 61; 129 E. R. 125.**

**Annotation.]—Refd. The Staffordshire (1871), 25 L. T. 137.**

**2003. — —.]—Goods sold & delivered upon an agreement to be paid for by a present bill payable at a future day does not create a present debt, on which to found a commission of bkpt.; nor can an action for goods sold & delivered be maintained by the vendor before the time when the bill agreed to be given would have become due, & when the contract would be no longer executory. Neither can such executory contract, if no such bill payable at a future day be actually given to secure it, found a good petitioning creditor's debt within 7 Geo. 1 (c. 31), s. 1, & Bankrupts Act, 1732 (c. 30), s. 22, which are confined to debts due on bills, bonds, promissory notes, & other personal written securities of the like sort, payable at a future day; which alone by the latter statute are made available to found a good petitioning creditor's debt.—HOSKINS v. DUPEROY (1808), 9 East, 498; 103 E. R. 663.**

**2004. — —.]—A., a foreign merchant, employs B. to purchase goods on commission; the vendors, with the knowledge that the purchases were made on account of A., make out the invoices to B., & take in payment his acceptances, payable at six months:—*Held*: there was no contract of sale as between A. & B.; & if any such contract existed, B. could maintain no action against A. before the six months expired.—SEYMOUR v. PYCHLAU (1817), 1 B. & Ald. 14; 106 E. R. 6.**

**2005. — — Acceptance by agent.]—Where a tradesman who had supplied goods to a ship sent in his account to the owner's agent & ship's husband, & took his acceptance at three months for the amount, deducting discount for that time, which was the usual credit, & when the bill became due consented to a renewal of it, adding interest, & in like manner took a third acceptance, which was dishonoured, & the agent soon afterwards failed; the balance in his hands in favour of his principal, the ship owner, having during all this time exceeded the amount of the bill, which was,**

#### PART VI. SECT. 4, SUB-SECT. 6.—G.

**p. Whether good payment—Note of third person—Express agreement to take note.]—Deft. gave a note made by one K. to pltf. in exchange for a buggy. The note was not paid at maturity, whereupon pltf. sued deft. for the price, alleging that he had induced them to take the note by fraudulent representations:—*Held*: pltf. could not recover, for there being an express contract to take the note for the buggy, no agreement to pay in money could be implied by reason of the alleged fraud.—AUGER v. THOMPSON (1878), 3 A. R. 19.—CAN.**

**q. — Note taken for closing account.]—NORDHEIMER v. ROBINSON (1878), 2 A. R. 305.—CAN.**

**r. — Delivery of cheque to bank of seller—Cheque stopped after entry but before credit or notice to seller.]—The delivery of a cheque by the purchaser to a bank, which is agent of the seller, & the entry of the amount in the seller's account with the bank, does not constitute payment, when, before the bank credits the amount to its principal, or advises him of the fact that it has been received, the purchaser recalls the authority & has himself credited with the amount of the cheque.—NEILLY v. BEARNS (1897), 40 N. S. R. 102.—CAN.**

**t. — Promissory note credited against goods.]—Where goods are sold & delivered by the maker of a promissory note to the holder thereof, & their value credited by the latter, the**

**transaction amounts in law to a payment *pro tanto*.]—PINDER v. CRONKHITE (1898), 34 N. B. R. 498.—CAN.**

**a. — Cheque of third person—Barter of cheque with all risks.]—MCGLYNN v. HASTIE (1919), 44 O. L. R. 190; 15 O. W. N. 178.—CAN.**

**b. — Bill accepted by supplying merchant from party on whom dealer has drawn.]—Where a supplying merchant receives an order from his dealer, a partner in the fishery, upon a party who owes them money, & afterwards accepts from the party on whom such order was drawn a bill of exchange upon England for the amount thereof, & the bill is protested & the drawer becomes bankrupt:—*Held*: under these circumstances, the debt of the**

however, unknown to the principal, who had never inspected the agent's accounts:—*Held*: the tradesman might sue the ship owner for the amount of his claim, & it was not discharged by the acceptance of the agent.—*ROBINSON v. READ* (1829), 9 B. & C. 449; 4 Man. & Ry. K. B. 349; 7 L. J. O. S. K. B. 236; 109 E. R. 167.

*Annotations*:—**Apld.** The Huntsman, [1894] P. 214. **Reid.** Thompson v. Percival (1834), 3 L. J. K. B. 98.

— Acceptance after service of bankruptcy notice.]—See BANKRUPTCY, Vol. IV., p. 158, Nos. 1486, 1487.

—.]—*See, further, CONTRACT, Vol. XII,*  
pp. 468-469.

**Effect of payment.]—***See* CONTRACT, Vol. XII., p. 469, Nos. 3820, 3821.

**2006. Effect of non-payment—No right to question amount.]**—Where an account for goods sold is settled & the party gives a bill of exchange for the amount, but which bill is not paid, on an action brought, the party cannot go into evidence to impeach the charges in the first account which has been settled.—*Knox v. Whalley* (1794), 1 Esp. 159; 170 E. R. 312, N. P.

*Annotation*:—**Refd.** *Lumsden v. Shipcote Land Co.* (1906),  
75 L. J. K. B. 665.

—.]—See, further, CONTRACT, Vol. XII., pp. 469-471, Nos. 3822-3845.

**2007. Notice of dishonour—Time for giving.]—**To a declaration for goods sold, deft. pleaded that he transferred to pltf. promissory notes made by L. & co., etc., which pltf. accepted on account of the debt, & that pltf. did not, within a reasonable time, present them. Replication, that, on the day before the transfer, & without the knowledge of pltf., L. & co. "became & were bkpts. & insolvent," & that they "continued such bkpts.," etc., & unable to pay the notes; that afterwards, & before a reasonable time for presentment, pltf. discovered the bkpcy, & that, within a reasonable time after such discovery, etc., he gave deft. notice of the premises, & offered to return the notes; rejoinder, that pltf. did not give the notice till after the expiration of a reasonable time for presenting the notes for payment. Demurrer:—*Held*: pltf. was only bound to give such notice within a reasonable time after he acquired the knowledge, & not, necessarily, before the expiration of time for presentment. Judgment for pltf.—**ROBSON v. OLIVER** (1847), 10 Q. B. 704; 16 L. J. Q. B. 437; 9 L. T. O. S. 197; 11 Jur. 1056; 116 E. R. 268.

**Effect of invalidity.]—***See* CONTRACT, Vol. XII., p. 471, No. 3846; BILLS OF EXCHANGE, Vol. VI., pp. 493, 509-512, Nos. 3122, 3253-3255, 3263, 3270.

**Avoidance of bill by seller's own act—Right to sue on original consideration.]—See BILLS OF EXCHANGE, Vol. VI., pp. 386, 387, Nos. 2538-2540.**

**Lost instrument.**]—See **BILLS OF EXCHANGE**, Vol. VI., pp. 417-423; **CONTRACT**, Vol. XII., p. 471, Nos. 3847-3853.

dealer was extinguished by the merchants taking the bill.—CUSTERN & BURK v. DANSON (1820), 1 Nfld. L. R. 206.—NFLD.

c. — *Cheque subsequently dishonoured.*—Delivery of a cheque which is subsequently dishonoured is not payment of the price.—*M'LAREN'S TRUSTEE v. ARGYLLS, LTD.* (1915), 53 Sc. L. R. 67.—**SCOT.**

d. Express contract to accept negotiable instrument—No agreement to pay in money implied by reason of fraud.—To action on the common counts for goods sold debt, pleaded that at

the time of sale, pltf. agreed to & did receive in payment to promissory notes made by one M. Pltf. replied that he was induced to receive these notes by fraud:—*Held*: pltf. could not recover, for there being an express contract deft.'s fraud could not create an implied one.—*SHERIFF v. McCoy* (1868), 27 U. C. R. 597.—*CAN.*

6. ———.]—AUGER v. THOMP-  
SON (1878), 3 A. R. 19.—CAN.

**PART VI. SECT. 4, SUB-SECT. 9.**

### 1. Effect of default in payment—

### H. Payment by Post.

*See* CONTRACT, Vol. XII., pp. 471-472, Nos. 3847-3853.

### *I. Joint or Joint and Several Contracts.*

*See* CONTRACT, Vol. XII., pp. 472, 473, Nos. 3854-3864.

**SUB-SECT. 7.—IN WHAT CURRENCY AND AT WHAT RATE OF EXCHANGE PAYMENT MUST BE MADE.**

See DAMAGES, Vol. XVII., pp. 158-161, Nos. 596-618; MONEY & MONEY-LENDING, Vol. XXXV., pp. 169 *et seq.*

SUB-SECT. 8.—APPROPRIATION OF SUMS PAID.

*See CONTRACT, Vol. XII., pp. 474 et seq.*

**SUB-SECT. 9.—PAYMENT BY INSTALMENTS.**

*See Part VI., Sect. 2, sub-sect. 9, ante.*

**2008. Where goods delivered by instalments—Payment recoverable as instalments delivered.]—** Upon a contract for twenty-four numbers of a periodical work, to be delivered monthly, at a guinea a number, *pltf.* may sue for the numbers actually delivered, although the contract be not reduced into writing, as required by Stat. Frauds. —**MAVOR v. PYNE** (1825), 3 Bing. 285; 2 C. & P. 91; 11 Moore, C. P. 2; 4 L. J. O. S. C. P. 36; 130 E. R. 522.

*Annotation* :—**Apld.** Howell v. Evans (1926), 134 L. T. 570.

**2009.** ———.]—A. contracted with B. to supply him with the whole of the Sevenoaks stone required at the Pembury reservoir, same to be delivered into trucks of the railway co. at Sevenoaks at 5s. 3d. per ton:—*Held*: A. was entitled to payment on delivery for the quantities delivered from time to time.—*LOCKWOOD v. TUNBRIDGE WELLS LOCAL BOARD* (1884), Cab. & El. 289.

2010. —————.]—A purchaser contracted to purchase a series of engravings from pltfs., who were the publishers, by signing a circular to the following effect: "Please enter my name as a subscriber for 'the Cries of London' . . . to be sent to me as published, the price of each of the thirteen plates, £10 10s. . . ." After pltfs. had delivered the first four plates of the series they called on deft. to pay for them, but he refused to do so till the entire set was published & delivered:—*Held*: the words "to be sent to me as published" made it clear that the contract was an instalment contract, & not an indivisible contract for the entire set & the fact that the price of each plate was stated to be 10 guineas, while there was no mention of the price of the whole set, showed that each instalment was to be paid for separately.

**Whole sum unpaid immediately payable.**—Where an agreement for the conditional sale of goods provides that on default in payment of an instalment, the whole amount remaining unpaid shall become immediately due & payable, & the vendor takes possession of the goods on default by the buyer, such default operates under such provision to make the whole sum remaining unpaid "the full amount then in arrear," within *R. S. B. C. c. 203, s. 32*, on payment of which within twenty days the buyer may redeem the goods.

—*B. C. INDEPENDENT UNDERTAKERS, LTD. v. MARITIME MOTOR CAR CO.*

**Sect. 4.—Payment: Sub-sects. 9, 10 & 11, A. & B.; sub-sect. 12.]**

—**HOWELL v. EVANS** (1926), 134 L. T. 570; 42 T. L. R. 310, D. C.

**2011. Option of buyer to look to either of joint purchasers—Insolvency of one joint purchaser.]**

By a contract under seal between A., a vendor, of the one part, & B. & C., joint purchasers, of the other part, B. & C. agreed to pay a certain sum for the subject-matter of sale, such payment to be made by instalments, & to be partly in cash, & partly by bills to be drawn by A., & accepted at his option by either B. or C. A. exercised this option by drawing upon C. & after a large portion of the purchase-money had been duly paid in cash, & by the acceptances of C. which had been duly honoured, A. further elected as to such portion of the balance of the purchase-money as was to be paid by bills, to take the acceptances of C. & received such bills accordingly. Before the bills became due, & while they were in the hands of third parties, both B. & C. stopped payment. A., after having proved against C.'s estate for the amount of the bills, & having received dividends thereon, sought to prove against B.'s estate for the balance of the purchase-money which remained unpaid in consequence of the insufficiency of C.'s estate:—**Held:** the contract was a contract to pay, & A. was entitled to have recourse to the estate of B. for the balance of the purchase-money remaining unpaid.—**Re BRITISH & AMERICAN STEAM NAVIGATION CO., PEARSE'S CLAIM** (1869), L. R. 8 Eq. 506; 17 W. R. 1077.

**SUB-SECT. 10.—TENDER OF PAYMENT.**

*See, generally, CONTRACT, Vol. XII., pp. 319–332.*

**SUB-SECT. 11.—INTEREST ON PRICE.**

**A. In General.**

*See, generally, MONEY & MONEY-LENDING, Vol. XXXV., pp. 177–201, Nos. 64–281; CONTRACT, Vol. XII., p. 571, Nos. 4753–4760.*

**2012. Whether allowed—General rule.]**—No interest allowed in Chancery for book debts.—**DOLMAN v. PRITMAN** (1670), 3 Rep. Ch. 64; 21 E. R. 730; *sub nom.* **DALBIN v. PRETTIMAN**, Freem. Ch. 133.

**2013. ———.]**—**PINOCK v. WILLETT** (1733), Barnes, 228; 94 E. R. 889.

**2014. — By agreement.—In accordance with trade usage.]**—One sells goods at three months' credit; but stipulates, in case the money is unpaid, that the vendee shall allow him a half-penny an ounce per month, till the debt is discharged. This allowance was according to an usage in that particular branch of trade, but

above the legal rate of interest. The contract being a *bond fide* sale is not usurious. Otherwise, if it had been merely colourable, to cover a loan & evade the statute.—**FLOYER v. EDWARDS** (1774), 1 Cowp. 112; Lofft. 595; 98 E. R. 995.

*Annotations:—Consd.* **Jestons v. Brooke** (1778), 2 Cowp. 793; **Sinclair v. Steavenson** (1825), 10 Moore, C. P. 46. **Refd.** *Ex p.* **Aynsworth** (1799), 4 Ves. 678; **Long v. Storie** (1852), 9 Hare, 542; **Miller v. Cook** (1870), 35 J. P. 245. **Mentd.** **Jeffries v. Alexander** (1860), 8 H. L. Cas. 594.

**2015. ——— Goods on sale or return.]**

**Deft.,** who had contracted for jewellery, was to return it in a twelve-month, & if he omitted to do so, to pay for it a certain price, with interest. **Pltf.** sued for the amount, the jewellery having been retained; but the only counts in the declaration applicable to this case were a count for goods sold & delivered, & a count for interest on money due & forborne. The jury having found a verdict for the sum demanded, with interest, the ct. refused to set aside the verdict, or to reduce the damages.—**HARRISON v. ALLEN** (1824), 2 Bing. 4; 1 C. & P. 235; 9 Moore, C. P. 28; 2 L. J. O. S. C. P. 97; 130 E. R. 205.

*Annotation:—Refd.* **Bianchi v. Nash** (1836), 5 L. J. Ex. 252.

**2016. ——— Agreement for payment of purchase-money by instalments—Compound interest.]**

By a contract of sale, the purchaser is to pay a certain sum by six instalments, & also 5 per cent. half yearly, from the day appointed for the payment of the second instalment, upon the four remaining instalments, until paid; such additional sums by way of percentage to be secured by the bond of the purchaser. In the contract, & also in the declaration thereon, this additional percentage is called "interest" upon the instalments. Neither the instalments nor the additional percentage are paid as they become due, nor is any bond given:—**Held:** the purchaser is chargeable with interest upon the last four instalments until actual payment of those instalments, but the jury are not bound, either at common law or under Civil Procedure Act, 1833 (c. 42), s. 28, to give interest upon the additional percentage treated by the parties as "interest."—**ATTWOOD v. TAYLOR** (1840), 1 Man. & G. 279; 1 Scott, N. R. 611; 133 E. R. 340.

*Annotation:—Refd.* **Coats v. Direction der Disconto Gesellschaft** (1916), 85 L. J. K. B. 973.

—**See, further, MONEY & MONEY-LENDING, Vol. XXXV., pp. 180, 181, Nos. 95–109.**

**2017. — Whether inferred from course of dealing.]**—In the administration of the estate of deceased debtor, claims were made in respect of certain tradesmen's accounts, which included charges for interest. In each case accounts had been sent in, during the lifetime of debtor, charging interest after one year's credit. No objection was made by debtor to the charges, & he from time to time made payments on account of the amounts shown to be due. The heading of the

LTD. (B. C.), [1917] 3 W. W. R. 22; 35 D. L. R. 551.—**CAN.**

**g. Refusal to pay part of second instalment with plea of inferiority of goods—Abatement covered by amount of last instalment—Premature withholding of payment.]**—**DICK & STEVENSON v. WOODSIDE STEEL & IRON CO.** (1888), 16 R. (Ct. of Sess.), 242; 26 Sc. L. R. 165.—**SCOT.**

**PART VI. SECT. 4, SUB-SECT. 11.—A.**

**2012 i. Whether allowed—General rule.]**—**WINTERBURN v. BOON** (1913), 23 W. L. R. 556; 6 Sask L. R. 177; 3 W. W. R. 1068.—**CAN.**

**2012 ii. ———.]**—Where there is no time fixed or agreed for payment of

the price of goods bought nor was any demand of price made accompanied with an intimation that interest from the date of demand would be charged:—**Held:** interest could not by law be decreed for the period prior to the institution of the suit.—**PALMER v. MAHOO PERSAUD** (1867), 2 Agra 131.—**IND.**

**2012 iii. ———.]**—**HAJI MAHOMED HAJI JIVA v. SPINNER** (1900), 1 L. R. 24 Bom. 510.—**IND.**

**2012 iv. ———.]**—Where goods are sold & the price is to be paid on delivery, & delivery is not taken at the proper time, nor is the purchase-money then paid, the purchase-money does not carry interest under Lord Tenter-

den's Act, as it is not payable at a time certain; but if the default of the purchaser in not taking delivery prevented the vendor from making the demand for interest he would have been entitled to make under 3 & 4 Will. 4, c. 48, s. 28, if delivery had been taken at the proper time, interest by way of damages can be allowed to the vendor.—**RAYMOND & CO. v. FRIEDLANDER BROTHERS** (1904), 23 N. Z. L. R. 917.—**N.Z.**

**2014 i. — By agreement—In accordance with trade usage.]**—Interest is recoverable on goods sold on credit from the date on which the credit expired, where such is the usage of trade at the place where the goods are sold, although there may have been no previous



accounts sent to debtor by one of claimants contained the words "5 per cent. interest charged after twelve months' credit":—*Held*: interest could not be charged, as no agreement to pay interest could be implied from the circumstances, & no demand with notice of a claim for interest had been made within Civil Procedure Act, 1833 (c. 42), s. 28.—*Re LLOYD EDWARDS, WILLIAMS v. TRENCH* (1891), 61 L. J. Ch. 22; 65 L. T. 453.

*Annotations*:—*Apld.* Tautz v. Archdale (1895), 11 T. L. R. 452. *Refd.* *Re* Anglesey, Willmot v. Gardner, [1901] 2 Ch. 548.

**2018.** —. —.]—TAUTZ & SON v. ARCHDALE (1895), 11 T. L. R. 452.

**2019.** —. —.]—During a series of years a tradesman, in the yearly accounts which he delivered to his customer, charged him with interest on amounts which had been due for three years & longer. The customer never objected to the charge for interest, & he from time to time made payments to the tradesman on account generally. At the time of the customer's death a large amount was due from him to the tradesman for goods supplied:—*Held*: an agreement on the part of the customer to pay interest ought to be inferred from the course of dealing, & the tradesman was entitled to prove in the administration of the customer's estate for interest as it had been charged, as well as for principal.—*Re ANGLESEY (MARQUIS), WILLMOT v. GARDNER*, [1901] 2 Ch. 548; 70 L. J. Ch. 810; 85 L. T. 179; 49 W. R. 708; 45 Sol. Jo. 738, C. A.

*Annotations*:—*Refd.* Pocahontas Fuel Co. Incorporated v. Ambatielos (1922), 27 Com. Cas. 148. *Mentd.* *Re* Anglesey, De Galve v. Gardner, [1903] 2 Ch. 727.

**2020.** —. —.]—Particular time fixed for payment.]—In a contract for the sale of goods, if any particular time be limited for the payment of the price, the vendor is entitled to interest on the price from that time.—MOUNTFORD v. WILLES (1800), 2 Bos. & P. 337; 126 E. R. 1314.

*Annotations*:—*Consd.* Gordon v. Swan (1810), 2 Camp. 429, n.; Slack v. Lowell (1810), 3 Taunt. 157.

**2021.** —. —.]—Though an agreement for the sale of goods which were afterwards delivered give a certain day of payment for the price, interest does not run upon the sum due from that day.—GORDON v. SWAN (1810), 12 East, 419; 2 Camp. 429, n.; 104 E. R. 164.

*Annotations*:—*Distd.* Marshall v. Poole (1810), 13 East, 98; Harrison v. Allen (1824), 2 Bing. 4. *Refd.* Bell v. Free (1818), 1 Swan. 90; James v. Emery (1818), 2 Moore, C. P. 195; Higgins v. Sargent (1823), 2 B. & C. 348.

**2022.** —. —.]—On balance of account struck between parties.]—The mere act of striking a balance, for goods sold, of an account between two parties, does not entitle the party, in whose favour the balance is, to interest from that time, unless the money then was to be paid.—CHALIE v. YORK (DUKE) (1806), 6 Esp. 45; 170 E. R. 826, N. P.

—By statute.]—See MONEY & MONEY-LENDING, Vol. XXXV., pp. 182-185, Nos. 117-142.

#### B. Where Bill or Note to be Given.

**2023.** Interest allowed from due date of bill.]—BECHER v. JONES (1810), 2 Camp. 428, n.; 170 E. R. 1206, N. P.

*Annotations*:—*Refd.* Farr v. Ward (1837), 3 M. & W. 25; L. C. & D. Ry. v. S. E. Ry., [1892] 1 Ch. 120.

dealings between the parties, no engagement to pay interest, & no notice under the Statute that interest would be claimed.—BANNERMAN v. FULLERTON (1862), 1 Old. 200.—CAN.

h. —. —. —. Agreement for payment of purchase-money by instalments.]—GILLOW & CO. v. BURGESS (1824), 3 Sh. (Ct. of Sess.), 45.—SCOT.

k. —. —. Discretion of

**2024.** —. —.]—When the goods are sold to be paid for by a bill of exchange, & the purchaser neglects to give the bill, the vendor is entitled to interest from the time the bill if given would have become due.—PORTER v. PALSgrave (1810), 2 Camp. 472; 170 E. R. 1221, N. P.

**2025.** —. —.]—If goods are sold to be paid for by a bill of exchange, in an action by the vendor against the purchaser for not giving a bill accordingly, interest will be allowed from the time the bill, if given, would have become due, whether deft. has, or has not, accepted the goods.—BOYCE v. WARBURTON (1810), 2 Camp. 481; 170 E. R. 1225, N. P.

**2026.** —. —.]—Where goods are sold & delivered upon an agreement by the vendee to pay for them by a bill at a certain date; as interest would have run upon such bill, if given, it may be recovered in an action for the price of the goods brought after the time when such bill would have become due; & it may be recovered as part of the estimated value of the goods upon the common count for goods sold & delivered.—MARSHALL v. POOLE (1810), 13 East, 98; 104 E. R. 304.

*Annotations*:—*Distd.* Edwards v. Vere (1833), 5 B. & Ad. 282. *Fold.* Farr v. Ward (1837), 6 Dowl. 163. *Apld.* Davis v. Smyth (1841), 8 M. & W. 399.

**2027.** —. —.]—Where goods are sold, to be paid for by a bill of a certain date, the price shall bear interest from the day when the bill would have been due, & may be recovered as damages, on a special count for the non-delivery or non-payment of the bill.—SLACK v. LOWELL (1810), 3 Taunt. 157; 128 E. R. 63.

*Annotations*:—*Distd.* Hare v. Rickards (1831), 7 Bing. 254. *Refd.* Harrison v. Allen (1824), 2 Bing. 4.

**2028.** —. —.]—Where goods are sold & delivered, to be paid for by a bill at a certain date, if the bill be not given, interest on the price, from the time when the bill would have become due, may be recovered as part of the estimated value of the goods, on the common count for goods sold & delivered.—FARR v. WARD (1837), 6 Dowl. 163; 3 M. & W. 25; Murp. & H. 274; 1 Jur. 825; 150 E. R. 1041.

**2029.** —. —.]—In Jan. 1837, a carriage was sold & delivered by pltf. to deft. In Apr. following, deft. wrote to pltf. as follows: "The document you have sent me appears to be in the nature of a bill, & being payable to your order, is good in the market; just what I wished to avoid. The document I have wished to give you was simply my promissory note, payable to yourself," etc.:—*Held*: this was some evidence to go to the jury of an agreement to pay for the goods by a bill or note, & therefore the jury might give interest on the price as part of the damages.—DAVIS v. SMYTH (1841), 8 M. & W. 399; 10 L. J. Ex. 473; 151 E. R. 1094.

#### SUB-SECT. 12.—PAYMENT OF DEPOSIT.

**Earnest.**]—See Part II., Sect. 4, sub-sect. 6, A., ante.

**Recovery of deposit.**]—See Nos. 2680-2693, post.

STYLES v. HENDERSON (Sask.), [1918] 2 W. W. R. 394.—CAN.

1. For what period allowed.—Six years.]—HAYNES v. ROGERS (1841), 2 Leg. Rep. 224.—IR.



## Part VII.—Rights of Unpaid Seller Against Goods.

### SECT. 1.—THE SELLER.

See Sale of Goods Act, 1893 (c. 71), ss. 38, 39.

#### 2030. Agent himself responsible for price.]

A trader here gives an order to his correspondent abroad to ship him certain goods, which the latter procures upon his own credit, without naming the trader here, & ships to him at the original price, charging only his commission:—*Held*: the correspondent abroad is so far a vendor as between him & the trader here that on the bkpcy. of the latter he may stop the goods *in transitu* by procuring the bill of lading from bkpt.'s brother; & this though the trader here had before his bkpcy. accepted bills drawn on him by his correspondent for the amount of the goods; such acceptances proveable under his commission amounting at most to part payment for the goods, which does not take away the vendor's right to stop *in transitu*.—*FEISE v. WRAY* (1802), 3 East, 93; 102 E. R. 532.

*Annotations*:—*Apld.* *Falk v. Fletcher* (1865), 18 C. B. N. S. 403; *Ireland v. Livingston* (1870), L. R. 5 Q. B. 516. *Consd.* *Cassaboglou v. Gibb* (1883), 11 Q. B. D. 797. *Refd.* *Siffken v. Wray* (1805), 6 East, 371; *Nichols v. Hart* (1831), 5 C. & P. 179; *Edwards v. Brewer* (1837), 2 M. & W. 375; *Jenkyns v. Usborne* (1844), 7 Man. & G. 478; *The Tigress* (1863), *Brown & Lush*, 38; *Mollett v. Robinson* (1870), L. R. 5 C. P. 646; *Ireland v. Livingston* (1872), L. R. 5 H. L. 395; *Weguelin v. Collier* (1873), L. R. 6 H. L. 286; *Re Bruno, Silva, & p. Francis* (1887), 56 L. T. 577.

2031. —.]—An agent of a bkpt. who has made himself responsible for the price of goods, may stop them *in transitu*. But if, after they have reached a certain place, he give them a new destination in furtherance of bkpt.'s business, & in the course of bkpt.'s trade, when they arrive at the place of such destination, they vest in bkpt., & pass to his assignees.—*HAWKES v. DUNN* (1831), 1 Cr. & J. 519; 1 Tyr. 413; 9 L. J. O. S. Ex. 184; 148 E. R. 1529.

*Annotation*:—*Refd.* *Heald v. Carey* (1862), 11 C. B. 977.

2032. —.]—*VAN CASTEEL v. BOOKER*, No. 1305, *ante*.

2033. Agent of alien enemy selling under licence.]—A trading licence from the Crown to British merchants to send a ship in ballast to an enemy's port, there to receive & load a cargo, & import it into this country, by legalising the purchase by the subject, legalises the sale by the enemy, & impliedly legalises the vendor enemy's right to stop the goods *in transitu* after their arrival in port here, upon the intermediate insolvency of the vendees, after a part payment only, which was offered to be refunded, & also to employ an agent here for that purpose: & such agent having possessed himself of the goods, the assignees of bkpt. vendees cannot recover from him the value of them in trover.—*FENTON v. PEARSON* (1812), 15 East, 419; 104 E. R. 903.

*Annotations*:—*Consd.* *Morgan v. Oswald* (1812), 3 Taunt. 554; *Flindt v. Scott* (1814), 5 Taunt. 674. *Refd.* *Mennett v. Bonham* (1812), 15 East, 477.

2034. Agent to whom bill of lading indorsed.]—H. shipped goods at Dundee to the order of, & for P. in London. H. having ascertained shortly after the goods had been forwarded that P. had stopped payment, indorsed & forwarded the bill of lading to pltf., who demanded the goods of defts., wharfingers, in whose custody they were. Defts. having refused to deliver the goods to pltf.:—*Held*: he had a sufficient title to sue for them in trover.

The only question is whether H., having a right

to stop *in transitu*, has vested a right of action in pltf. by indorsement of the bill of lading . . . He could not do this more efficiently & correctly than by the general mode of transferring a bill of lading (*BEST, C.J.*).—*MORISON v. GRAY* (1824), 2 Bing. 260; 9 Moore, C. P. 484; 3 L. J. O. S. C. P. 261; 130 E. R. 305.

*Annotation*:—*Expld.* *Burgos v. Nascimento* (1908), 100 L. T. 71.

2035. Surety of purchaser.]—B., a trader in London, ordered goods to be shipped to him by D. & co., his correspondents at Dantzic, who were to draw for the amount on F. at Hamburg, who had agreed to accept the bills upon receiving commission on the amount, & the bills of lading & invoices were to be transmitted to D. & co. from Dantzic to F. at Hamburg, who was to forward them to B. in London; & F. accordingly accepted the bills of exchange drawn upon him & on the receipt of the bills of lading transmitted the same, which were made out to the order of the shippers & not indorsed, to B., in London, who received them, together with the invoices & letter of advice, five days after an act of bkpcy. committed by him. F. also became bkpt., & the bills of exchange drawn on him by D. & co. were obliged to be taken up & paid by themselves:—*Held*: (1) F. had no right to stop the goods *in transitu*, being no more than a surety for the price & not vendor or consignor; (2) one who was general agent of F. in London having obtained the bills of lading from bkpt. after his bkpcy. upon an agreement when the goods arrived to dispose of them, & to apply the net proceeds to the discharge of such bills as had been drawn against the goods, had no authority to retain the proceeds against the assignees of B. the bkpt., either in respect of F. or in respect of a stopping *in transitu* on behalf of D. & co., the shippers, who after his possession of them & after trover commenced by B.'s assignees for the value sent a letter to him approving of his having obtained possession of the bills of lading & the goods; for at any rate there was no adverse stopping *in transitu*, but the goods were obtained by agreement with the vendee after his bkpcy.; even if deft. could be considered as agent for the shippers at the time by relation.—*SIFFKEN v. WRAY* (1805), 6 East, 371; 2 Smith, K. B. 480; 102 E. R. 1328.

2036. —.]—According to the usage of the London dry goods market, a broker who buys for an undisclosed principal is personally liable to the seller for the price of the goods.

D., a broker, bought of C. for undisclosed principals a quantity of gum sandrac then lying at the St. Katharine's Dock, to be paid for on Saturday, Mar. 18, & obtained a delivery order from C., which he indorsed & gave to his principals on the faith of their representation that the goods were wanted for immediate shipment. D.'s principals, however, pledged the delivery order with a bank, & on the evening of Mar. 17 they stopped payment. On the morning of Mar. 18 the bank sent the delivery order to the dock office in the city with a request for a warrant, which, they were told, would be ready on Monday. Notice of the delivery order having been lodged was sent by the dock co. in due course to their warrant office at the dock, where through a mistake of the messenger it did not arrive until three p.m..

& in the meantime a clerk of D., who had, in accordance with the usage of the trade, paid the price of the goods to C. that morning, applied at the warrant office in C.'s name for a warrant for the goods, which was made out & given to him, as the goods were clear in the cargo ledger. C. indorsed the warrant to D., & in consequence of what had happened, the dock co. on the Monday refused to act on the bank's delivery order. In an action by the bank against the dock co., D. & co.:—*Held*: D. was entitled to the goods, for the bank had never obtained either actual or constructive possession of the goods, & D., having paid the price of the goods as surety for his principals, was, notwithstanding his prior application for the delivery order & endorsement thereof, entitled, by virtue of Mercantile Law Amendment Act, 1856 (c. 97), s. 5, to the benefit of the unpaid vendor's lien subsisting in C.

What was the position of the Imperial Bank? They had a modified ownership in the goods, but they were not the actual owners. They were pledgees of the goods, they were armed with the delivery order, & they had a right, . . . to require one of three things from the Docks co. They might go to the Docks co. & say: "Here is our delivery order; deliver us the goods standing in the name of Messrs. C.," who had given a delivery order. Of course, if nothing had intervened, that is, if there had been no stop & nothing to prevent the Docks co. delivering the goods, they would have delivered the goods. . . . Or they might say to the Docks co.: "We do not want you to deliver the goods; we want you to hold them for us, & be our bailees (that is, instead of making actual delivery), & so to make a constructive delivery to us by entering them in our name in your books, by which we should become owners to the same extent as if they had been delivered to us, & you to be our warehousemen or bailees of the goods for us." Or they might have super-added to this second proposal a third thing; they might have said: "Besides entering our names in your books, give us a dock warrant, which will show our title to the goods, & enable us to confer a title by indorsement on the buyer of the goods" (JESSEL, M.R.).—*IMPERIAL BANK v. LONDON & ST. KATHARINE DOCKS CO.* (1877), 5 Ch. D. 195; 46 L. J. Ch. 335; 36 L. T. 233.

**2037. Purchaser agreeing to buy goods—Subsequent resale without right of possession.]—***JENKINS v. USBORNE*, No. 2236, *post*.

## SECT. 2.—THE UNPAID SELLER.

*See* Sale of Goods Act, 1893 (c. 71), ss. 38, 39.

**2038. Whole purchase-price not paid—Effect of part payment.]—**A consignor's right of stopping goods *in transitu* is not taken away by the consignee's having partly paid for the goods.—*HODGSON v. LOY* (1797), 7 Term Rep. 440; 101 E. R. 1065.

*Annotations:—Apld.* Feise *v.* Wray (1802), 3 East, 93. *Refd.* Dixon *v.* Baldwin (1804), 5 East, 175; *Ex p.* Gwynne (1806), 12 Ves. 379; *Stovell v. Hughes* (1811), 14 East, 308; *Bloxam v. Sanders* (1825), 4 B. & C. 941; *Nichols v. Hart* (1831), 5 C. & P. 179; *Edwards v. Brewer* (1837), 6 L. J. Ex. 135; *Schotsmans v. L. & Y. Ity.* (1867), 2 Ch. App. 332.

**2039.** —[.]—*FEISE v. WRAY*, No. 2030, *ante*.

**2040. Goods to be paid for on delivery—Delivery of part of goods without payment.]—**It is not an entire waiver of a condition to be paid for goods on delivery, that the vendor allowed the purchaser to carry away a part of the goods

without being paid for them.—*PAYNE v. SHADBOLT* (1808), 1 Camp. 427; 170 E. R. 1009, N. P.

**2041. —When unsettled account current between parties.]—**A merchant in England sent goods of a given value to a merchant at Quebec for sale on his account. Before the goods were sold or the proceeds ascertained, the latter shipped three cargoes of timber to the former, to credit in account. Two of them arrived. Against the third, the consignor drew a bill for the amount, whilst it was *in transitu*. In the interval, the consignee dishonoured the bill & became insolvent:—*Held*: the consignor had a perfect right of stoppage *in transitu*, & was not bound to wait until the mutual accounts between him & the consignee were finally adjusted.—*WOOD v. JONES* (1825), 7 Dow. & Ry. K. B. 126.

**2042. —Acceptance of composition by seller.]—**A. sold to B. a butt of wine, which was not delivered. B. compounded with his creditors, & the amount of the wine was, by A.'s consent, included in the composition. The composition money was secured by bills, & A. had a claim against B. beyond the price of the wine. Before the whole of the composition was paid, B. demanded the wine of A., who refused to deliver it:—*Held*: he was bound to deliver it, as he had undertaken to do so; & the doctrine with respect to stoppage *in transitu* did not apply under the circumstances.—*NICHOLS v. HART* (1831), 5 C. & P. 179; 172 E. R. 929.

**2043. —Buyer's acceptance negotiated by seller—Insolvency of buyer.]—***BUNNEY v. POYNTE*, No. 2065, *post*.

**2044.** —[.]—Goods were sold under an invoice which expressed that they remained at rent. The vendee subsequently accepted a bill drawn by the vendor for the price which was negotiated by the vendor. Whilst the bill was running the vendor sold a part, which, by his direction, was delivered by the vendor to the sub-vendee whom the vendor charged with warehouse rent for the part, which he paid. Subsequently the vendee became bkpt., & the bill was dishonoured:—*Held*: the assignee of bkpt. vendee could not without paying the price maintain trover against the vendor for the residue of the goods which had remained in his hands.—*MILES v. GORTON* (1834), 2 Cr. & M. 504; 4 Tyr. 295; 3 L. J. Ex. 155; 149 E. R. 860.

*Annotations:—Apld.* Tanner *v.* Scovell (1845), 14 M. & W. 28. *Consd.* Grice *v.* Richardson (1877), 3 App. Cas. 319. *Refd.* Griffiths *v.* Perry (1859), 1 E. & E. 680; *Re* Edwards, *Ex p.* Chalmers (1873), 8 Ch. App. 289; *Re* McLaren, *Ex p.* Cooper (1879), 27 W. R. 518.

**2045.** —[.]—*GUNN v. BOLCKOW, VAUGHAN & CO.*, No. 1387, *ante*.

**2046. Purchaser having rejected goods after paying price.]—**A person who has purchased goods & has rejected them after paying the price is not in the position of an unpaid vendor under Sale of Goods Act, 1893 (c. 71), ss. 38, 39, & therefore has no lien upon the goods & is not entitled to retain possession of them until the money paid has been returned.—*LYONS (J. L.) & CO. v. MAY & BAKER, LTD.*, [1923] 1 K. B. 685; 92 L. J. K. B. 675; 129 L. T. 413.

## SECT. 3.—SELLER'S LIEN.

### SUB-SECT. 1.—IN GENERAL.

*See* Sale of Goods Act, 1893 (c. 71), ss. 39, 41–42, 55; & generally, LIEN, Vol. XXXII., pp. 215 *et seq.*

**2047. Extent of lien—Bankruptcy of buyer—Difference between price & amount of composition.]—***SMITH v. BEEMAN* (1843), 1 L. T. O. S. 233.

*Sect. 3.—Seller's lien: Sub-sects. 1 & 2, A., B. & C.]*

**2048. Enforcement by injunction.]**—Pltfs. having purchased goods abroad by the order of B. & co. of Liverpool, shipped the goods on board a ship belonging to B. & co. & by insertions in the bill of lading, retained or intended to retain a lien upon the goods until bills, which pltfs. had drawn on B. & co. for the price of the goods, had been paid. Before the arrival of the ship in Liverpool, B. & co. had become bkpts., & their assignees claimed the goods as being in the legal ownership of bkpts.:—*Held*: equity would interfere by injunction to preserve the property until the question of right had been tried at law.—*MANLOVE v. CARTER* (1848), 12 L. T. O. S. 169.

**Rights as against mortgagee of buyer—Goods on hire-purchase agreement.]**—*See MORTGAGE*, Vol. XXXV., pp. 309, 310.

**2049. Whether power of sale conferred.]**—The lien at law upon a chattel for a portion of the price unpaid confers no right of sale upon the person having such lien, although the retention of the chattel may be attended with expense.—*THAMES IRON WORKS Co. v. PATENT DERRICK Co.* (1860), 1 John. & H. 93; 29 L. J. Ch. 714; 2 L. T. 208; 6 Jur. N. S. 1013; 8 W. R. 408; 70 E. R. 676.

*Annotations:—Mentd. Lievesley v. Gilmore* (1866), L. R. 1 C. P. 570; *Aitken v. Bachelor* (1893), 62 L. J. Q. B. 193.

**2050. Trover by purchaser against third party—During continuance of lien.]**—A purchaser of goods, of which the vendor retains possession with a lien for unpaid purchase-money, cannot maintain trover against a mere wrongdoer. *Qu.*: whether he can, if after the conversion he pays or tenders the purchase-money to the vendor.—*LORD v. PRICE* (1874), L. R. 9 Exch. 54; 43 L. J. Ex. 49; 30 L. T. 271; 22 W. R. 318.

#### SUB-SECT. 2.—WHEN EXERCISABLE.

##### A. In General.

*See Sale of Goods Act, 1893 (c. 71), s. 41, & generally, LIEN*, Vol. XXXII., pp. 215 *et seq.*

**2051. Until price paid.]**—*SIMMONS v. SWIFT*, No. 1042, *ante*.

**2052. —.]**—*NEW v. SWAIN*, No. 2060, *post*.

**2053. —.]**—On a contract for the sale of a specific chattel on credit, time, without express stipulation, is not of the essence of the contract; & the vendee, on tender of the price, though after the expiration of the period of credit, may maintain trover against the vendor to recover such chattel. The vendor cannot rescind the contract on non-payment at the day.

The vendor's right therefore to detain the thing

#### PART VII. SECT. 3, SUB-SECT. 1.

**2049 i. Whether power of sale conferred.]**—A vendor has a mere passive right to detention, & no right to sell.—*MCGREGOR v. WHALEN* (1914), 31 O. L. R. 543; 20 D. L. R. 489; 6 O. W. N. 553.—*CAN.*

**m. Whether right of user.]**—The vendor of a chattel holding it under his vendor's lien has no right to use it; if he does the purchaser may refuse to accept or pay for it.—*DUNCAN MOTOR Co. v. HAMMAN*, [1920] 2 W. W. R. 49.—*CAN.*

#### PART VII. SECT. 3, SUB-SECT. 2.—A.

**2051 i. Until price paid.]**—*KUTTAYAN CHETTY v. PALANIAPPA CHETTY* (1904), 1 L. R. 27 Mad. 540.—*IND.*

**2051 ii. —.]**—*TESCHMAKER v. MCLEAN*, Mac. 1, 10.—*N.Z.*

**2054 i. Until possession obtained by buyer.]**—*PATON'S TRUSTEES v. FINLAYSON*, [1923] S. C. 872.—*SCOT.*

**n. — Subject to terms of agreement.]**—Where by the terms of a contract of sale of personal chattels a lien is to be retained thereon in favour of the vendor until payment is made, such lien is not destroyed by any possession taken by the purchaser authorised by the contract in the usual course of such business.—*REYNOURT v. VAN WALLEGHEM* (1916), 33 W. L. R. 336; 9 W. W. R. 958.—*CAN.*

**o. Creditor's deed dishonoured — Right as against trustee of creditor's deed.]**—D. sold to P. fifty chests of tea then stored in D.'s bonded stores; took his acceptance for the price & delivered him bonded certificates for

the tea. Subsequently fifteen of the chests were delivered to P. who paid the rent due on them & also paid some rent on the remaining thirty-five chests. P. then executed a creditor's deed & his acceptance was dishonoured. In an action by the trustee of the creditor's deed against D. to recover possession of the thirty-five chests:—*Held*: D. was entitled to a lien as unpaid vendor.—*FRASER v. DALGETY* (1864), 2 W. W. & A.B. 227.—*AUS.*

*Annotations:—Reid. Chinery v. Viall* (1860), 5 H. & N. 288; *Page v. Cowasjee Eduljee* (1866), L. R. 1 P. C. 127; *Cohen v. Roche*, [1927] 1 K. B. 169.

**2054. Until possession obtained by buyer.]**—*LACKINGTON v. ATHERTON*, No. 1552, *ante*.

**2055. —.]**—*COOPER v. BILL*, No. 2076, *post*.

**2056. —.]**—*GRICE v. RICHARDSON*, No. 2061, *post*.

**2057. —.]**—Defts. contracted to buy a quantity of onions from pltf. After the arrival of the first shipment defts. paid certain sums on account thereof, & pltf. refused to deliver the second & third shipments until after the balance of the price of the first shipment had been paid. In an action by pltf. against defts. to recover the balance of the price of the first shipment, defts. counterclaimed for damages for non-delivery of the remainder of the goods:—*Held*: pltf. was entitled to recover on his claim, but he had no lien on the undelivered goods under Sale of Goods Act, 1893 (c. 71), ss. 39, 42, as the property in them had not passed to defts. & in the circumstances he was not entitled to refuse delivery, & defts. were entitled to recover on the counterclaim.—*STEINBERGER v. ATKINSON & Co., LTD.* (1914), 31 T. L. R. 110.

**2058. Felled timber.]**—*Qu.*: upon the bkpcy. of the purchaser of a chattel, viz. timber felled, whether the vendor has a lien, & may prove the deficiency.—*Ex p. GWYNNE* (1806), 12 Ves. 379; 33 E. R. 143, L. C.

**2059. Machinery fitted into vessel—Vessel in possession of engineers during operations.]**—Engineers contracted with debtor, the owner of a barge, to supply steam machinery to the vessel, at the docks of a dock co., for the price of £1,050, to be paid by approved bills; one at three months for £260 when the boiler & engine should be placed in the vessel, one at three months for £260, & one at six months for £530, when the vessel should have made a trial trip. The vessel having been taken to the docks, was there entered in the name of one of the engineers; & whilst shipwrights & other agents of debtor were occasionally or constantly on board, the vessel remained in the possession of the engineers till the boat was ready to make a trial trip. In the interim the engineers had been paid £360, partly in cash, & partly by debtor's acceptance, which they discounted. On the day appointed for the trial trip debtor filed a liquidation petition, & a receiver took possession of the vessel. A few days afterwards debtor's

the tea. Subsequently fifteen of the chests were delivered to P. who paid the rent due on them & also paid some rent on the remaining thirty-five chests. P. then executed a creditor's deed & his acceptance was dishonoured. In an action by the trustee of the creditor's deed against D. to recover possession of the thirty-five chests:—*Held*: D. was entitled to a lien as unpaid vendor.—*FRASER v. DALGETY* (1864), 2 W. W. & A.B. 227.—*AUS.*

**p. Right as against seizure by sheriff.]**—*PIPER v. ROBERTS* (B. C.) (1910), 14 W. L. R. 445.—*CAN.*

**q. Movables on sugar estate sold & delivered on credit—Increase in value —Unpaid seller's lien unaffected.]**—*ROCHECOUSTE v. DUPONT* (1864), 2 Moo. P. C. C. N. S. 195.—*MAURITIUS.*

acceptance was dishonoured:—*Held*: the lien of the engineers for the unpaid price for the machinery & their labour was not affected by their having agreed to take bills in payment, nor by the nature of the possession, nor by their having discounted debtor's acceptance.—*Re WESTLAKE, Ex p. WILLOUGHBY* (1881), 16 Ch. D. 604; 44 L. T. 111; 29 W. R. 934.

*Annotation*:—*Reid*, *The Rellim* (1922), 39 T. L. R. 41.

**Goods on hire-purchase agreement—Rights against mortgagee of buyer.**—*See* MORTGAGE, Vol. XXXV., pp. 309, 310.

### *B. Possession of Seller as Agent.*

*See* Sale of Goods Act, 1893 (c. 71), s. 41, & generally, LIEN, Vol. XXXII., pp. 215 *et seq.*

**2060. Purchaser paying rent.**—The buyer of goods agrees to leave them in the warehouse of the seller, paying a certain rent for the room:—*Held*: upon the dishonour of the bill given according to the bargain, in payment, the seller, who had still the goods in his warehouse, had a right to retain them until payment of the price.—*NEW v. SWAIN* (1828), Dan. & Ll. 193.

*Annotation*:—*Reid*, *Castle v. Sworder* (1861), 4 L. T. 865.

**2061.** —[—]—Unless actual possession of goods sold has been delivered to the purchaser, the vendor is not deprived of his right of lien as against the assignees of the purchaser, in the event of his insolvency. Where the vendors were also warehousemen of the goods sold under an arrangement with the purchasers to pay warehouse rent:—*Held*: as the goods remained in the possession of the vendors, & no actual delivery had been made to the purchasers, the vendor's lien revived upon the insolvency of the vendees.—*GRICE v. RICHARDSON* (1877), 3 App. Cas. 319; 47 L. J. P. C. 48; 37 L. T. 677; 26 W. R. 358, P. C.

**2062.** —[—]—**Goods in bond.**—A. buys two pipes of wine in bond; the agent of the seller gives him a delivery note, upon which one pipe is subsequently delivered to his order the other remaining in the bonded warehouse at a rent charged to A.; he having become bkpt., his assignees claim that pipe on payment of the warehouse rent:—*Held*: the seller had a right to retain it until the duties advanced upon it were repaid him.—*WINKS v. HASSALL* (1829), 9 B. & C. 372; Dan. & Ll. 312; 7 L. J. O. S. K. B. 265; 109 E. R. 138.

*Annotation*:—*Reid*, *Miles v. Gorton* (1834), 2 Cr. & M. 501.

**2063.** —[—]—**Sale to sub-purchaser.**—D. bought of Y. forty-six puncheons of rum, lying in the warehouse of Y., at Liverpool, & sold them to C., who was a clerk of Y., but carried on business for himself. D. gave C. an invoice, specifying the marks & numbers of each puncheon, & took his acceptances for the price. The rum, & the samples which had been taken, remained in Y.'s warehouse. The invariable mode of delivering goods sold while they are in warehouses at Liverpool, is by the vendor's giving a delivery order to the vendee. D. was asked by C. for delivery orders, but declined giving any, except for two or three puncheons, which C. received. C. marked, coopered, & gauged the casks. While the bills were running, C. sold twenty-six of the puncheons to K., who paid him for them, & who, by C.'s permission, without the knowledge of D., gauged & coopered the casks in the warehouse of Y., & marked them with his initials. C. gave an invoice to K., stating the marks & numbers of the casks, & by whom the rum was bonded. C. also, while the bills were running, sold eighteen puncheons of the rum to two other parties, to whom he gave similar invoices, & samples; & who afterwards obtained three of the puncheons, on a delivery

order signed by themselves, but not by D. They paid C. for the whole. The bills given by C. for the price of the forty-four puncheons were dishonoured:—*Held*: C. never had acquired the actual possession of the rum, & on his dishonouring his acceptances, D. had a lien on it for the price; & C.'s sub-vendees could not claim against D. the rum which remained undelivered to them.

The very appropriation of the chattel is equivalent to delivery by the vendor, & the assent of the vendee to take the specific chattel, & to pay the price, is equivalent to his accepting possession (PARKE, J.).—*DIXON v. YATES* (1833), 5 B. & Ad. 313; 2 Nev. & M. K. B. 177, 110 E. R. 806; *sub nom.* *DIXON v. YATES*, *DIXON v. KAYE*, *DIXON v. BOND*, 2 L. J. K. B. 198.

*Annotations*:—*Apld.* *Lackington v. Atherton* (1844), 7 Man. & G. 360. *Consd.* *Godts v. Rose* (1855), 17 C. B. 229; *Kemp v. Falk* (1882), 7 App. Cas. 573. *Reid.* *Townley v. Crump* (1835), 4 Ad. & El. 58; *Jones v. Jones* (1841), 8 M. & W. 431; *Scott v. England* (1844), 2 Dow. & L. 520; *Tanner v. Scovell* (1845), 14 M. & W. 28; *Davies v. Lowndes* (1847), 3 C. B. 808; *Logan v. Le Mesurier* (1847), 11 Jur. 1091; *Pearson v. Dawson* (1858), 27 L. J. Q. B. 248; *Meyerstein v. Barber* (1866), L. R. 2 C. P. 38; *Heilbutt v. Hickson* (1872), 41 L. J. Q. B. 228; *Ite McLaren, Ex p. Cooper* (1879), 27 W. R. 518. *Mentd.* *Badische Anilin und Soda Fabrik v. Hickson*, [1906] A. C. 419.

**2064.** —[—]—*MILES v. GORTON*, No. 2044, *ante*.

### *C. Goods Partly Delivered.*

*See* Sale of Goods Act, 1893 (c. 71), s. 42; & generally, LIEN, Vol. XXXII., pp. 215 *et seq.*

**2065. Whether lien exists over remainder—Dependent on intention governing delivery.**—A part delivery of goods to vendee, will not vest the absolute right of possession to the whole in him, unless it be done in progress of the delivery of the whole; but if it be clear that the intention was to separate the part delivered from the rest, the original right of lien which the vendor had will still remain.

Deft. employed an agent to sell a certain quantity of hay in a stack, which he did, to one C., & took his promissory note, payable at three months, to the agent himself, for the price. The agent immediately discounted the note with ptfs. his bankers. The purchaser at several times within the three months, carried away several tons of the hay, & afterwards sold the remainder to ptfs., allowing the note given by him to the agent to be taken as part payment, & receiving a further sum. The agent afterwards became bkpt., & upon demand being made by ptfs., after the three months had elapsed, to be allowed to take away the rest of the hay, deft. refused. In an action of trover for the hay:—*Held*: (1) the fact of part having been delivered did not take away deft.'s lien; but (2) deft. could not be considered as an unpaid vendor, so as to revive the right of lien upon the expiration of the time for which the note was to run.—*BUNNEY v. POYNTZ* (1833), 4 B. & Ad. 568; 1 Nev. & M. K. B. 229; 2 L. J. K. B. 55; 110 E. R. 569.

*Annotations*:—*As to* (1) *Reid*, *Tanner v. Scovell* (1843), 14 M. & W. 28; *Ite McLaren, Ex p. Cooper* (1879), 11 Ch. D. 68. *As to* (2) *Reid*, *Sykes v. Giles* (1839), 5 M. & W. 645. *Generally, Reid.* *Dixon v. Yates* (1833), 5 B. & Ad. 313; *Pooley v. Budd* (1851), 14 Boav. 34; *Gunn v. Bolokow, Vaughan* (1875), 32 L. T. 781. *Mentd.* *Nicholl v. Thomas* (1850), 15 L. T. O. S. 50; *Ite Dofries, Eichholz v. Dofries*, [1909] 2 Ch. 423; *Allen v. Royal Bank of Canada* (1925), 95 L. J. P. C. 17.

**2066.** —[—]—**Sale of delivered part to sub-purchaser.**—*DIXON v. YATES*, No. 2063, *ante*.

**2067.** —[—]—*MILES v. GORTON*, No. 2044, *ante*.

**2068.** —[—]—*TOWNLEY v. CRUMP*, No. 2219, *post*.

Sect. 3.—*Seller's lien: Sub-sect. 2, C.; sub-sect. 3, A. & B.]*

2069. — **Property in remainder not passed.]—**STEINBERGER v. ATKINSON & Co., LTD., No. 2057, *ante*.

### SUB-SECT. 3.—LOSS OF LIEN.

#### A. In General.

See Sale of Goods Act, 1893 (c. 71), ss. 41, 43, 47, &, generally, LIEN, Vol. XXXII., pp. 215 *et seq.*

2070. **Goods in custody of third party—Carrier—As agent of buyer.]—**One who has a lien on goods in his possession, if he afterwards deliver them to a ship carrier to be conveyed on account & at the risk of his principal, though unknown to the carrier, cannot recover his lien by stopping the goods *in transitu*, & procuring them to be re-delivered to him by virtue of a bill of lading signed by the carrier in the course of his voyage.—SWEET v. PYM (1800), 1 East, 4; 102 E. R. 2.

*Annotation:—*Reid. McCombie v. Davies (1805), 7 East, 5.

2071. — **—.]—**GURNEY v. BEHREND, No. 2314, *post*.

2072. — **—.]—**Goods were consigned to pltf's. order to a station on defts.' railway, & the usual advice note was sent them by defts. On Apr. 12 pltf's. sold these goods to one J., payment half by cash, half by bill at three months due July 13; & handed over the advice note to J. with an indorsement directing defts. to deliver the goods to J.'s order. On Apr. 24 J. handed over this delivery order to D. as collateral security for the payment of money advanced to him by D. with a second indorsement ordering defts. to deliver the goods to D.'s order. But neither this delivery order nor that made by pltf's. was stamped in accordance with Stamp Act, 1870 (c. 97), s. 89. J. becoming insolvent, D. on May 14 wrote defts., inclosing the delivery order, & directing them to hold the goods to his order. To this he received the following reply from defts.' goods manager, dated May 15: "I have yours of yesterday inclosing transfer of rails & beg to say I hold them to your order; but you will please produce this order when applying for the rails, & which order must also bear a transfer stamp by both parties transferring the goods, in accordance with the Act of Parliament. You will be aware they remain here at owner's risk & subject to our usual rent-charges." On May 19 D. affixed an adhesive stamp to each transfer, but omitted to cancel the stamps as required by Stamp Act, 1870 (c. 97), ss. 24, 89, & the same were never up to trial so cancelled. On May 23 defts. wrote to pltf's. asking if they consented to the goods being delivered to D., to which pltf's. replied on June 23 & 30, giving defts. formal notice to hold them to their, pltf's., order; but upon indemnity being given by D. the goods were handed over to D. The bill given to pltf's. by J. in part payment of these goods not being met at maturity, pltf's. claimed the goods as partial unpaid vendors, & brought an action against defts. for wrongfully parting with the possession of them:—*Held*: (1) the condition in defts.' letter of May 15 as to the transfer stamp was no qualification of their admission that they held the goods to D.'s order; (2) the letter was an absolute attornment by the defts. to D., by which pltf's. right of possession as unpaid vendor was destroyed, & pltf's. were, therefore, not entitled to recover.—POOLEY v. GREAT EASTERN RY. CO. (1876), 34 L. T. 537.

2073. — **—.]—**TRENT MINING CO. v. MIDLAND RY. CO. (1881), Butterworth & Ellis' Railway Rates & Traffic, App. C. 71, C. A.

*Annotation:—*Apld. Ivens v. G. W. Ry. (1889), 53 J. P. 148.

2074. — **Acts of ownership by buyer.]—**A number of bales of bacon then lying at a wharf having been sold for an entire sum, to be paid for by a bill at two months, an order was given to the wharfinger to deliver them to the vendee, who went to the wharf, weighed the whole, & took away several bales, & then became bkpt., whereupon the vendor within ten days from the time of the sale, ordered the wharfinger not to deliver the remainder. By the custom of the trade the charges of warehousing were to be paid by the vendor for fourteen days after the sale:—*Held*: the vendee had taken possession of the whole & the vendor had no right to stop what remained in the hands of the wharfinger.—HAMMOND v. ANDERSON (1803), 1 Bos. & P. N. R. 69; 127 E. R. 384.

*Annotations:—*Consd. Hanson v. Meyer (1805), 6 East, 614; Simmons v. Swift (1826), 8 Dow. & Ry. K. B. 693. Distd. Bunney v. Poyntz (1833), 4 B. & Ad. 568. Apld. Swanwick v. Sothorn (1839), 9 Ad. & El. 895. Distd. Re McLaren, *Ex p.* Cooper (1879), 11 Ch. D. 68. Consd. Re Kiell, *Ex p.* Falk (1880), 14 Ch. D. 446. Reid. Holder-ness v. Shackleton (1828), 3 Man. & Ry. K. B. 25; Dodson v. Wentworth (1842), 4 Man. & G. 1080; Tanner v. Scovell (1845), 14 M. & W. 28.

2075. — **—.]—**TANSLEY v. TURNER, No. 1221, *ante*.

2076. — **—.]—**On Sept. 12, G. wrote to defts. as follows: "I will agree to purchase your oak timber at L. wharf, to be delivered free to boats when required, at so much per foot, naming the sum. Payment by bill at four months date from measurement." On Sept. 21, the contract was completed, & the following note signed by defts. the vendors: "Sold to G. the oak timber at the prices mentioned in his letter of Sept. 12, delivered to boats. Payment, £100 by bill at one month, & balance by bill at four months from measurement." The timber had been brought by defts. to the wharf at L., belonging to a wharfinger on the canal where defts. were in the habit of conveying & depositing their timber to remain until sold, when it would be carried away by canal. On Oct. 7, G.'s agent measured the timber on the wharf, & marked it with G.'s initials, which were "scribed" & "punched" upon each piece, & G. also employed men to "square" it for his trade purposes, & paid them £5 for so doing. On Oct. 15, whilst the squaring was going on, the bills were given to defts., & the first bill for £100 was duly paid, but before the four months bill became due, & whilst the timber remained at the wharf, G. became bkpt., & assigned all his estate to trustees, pltf's., who thereupon demanded possession of the timber, which was refused by defts., who then removed the whole of it from the wharf into their own custody, except enough to cover in value the £100 paid bill. An action was brought by pltf's., as trustees of bkpt.'s estate against defts., for detention of the timber, when a verdict was found for them with leave to move, & upon a rule to set aside the verdict & enter a nonsuit or a verdict for defts. on the ground that defts. were entitled to stay *in transitu*, the ct. having power to draw inferences of fact:—*Held*: it was not a question of stoppage *in transitu*, but whether the lien of the vendors had ceased by their allowing the vendee to deal with the timber, while it was in the custody of the wharfinger, as he had done, which was a question of fact upon the evidence; &, as an inference of fact, there was an actual transfer of the possession of the timber to the



vendee, & the vendors' lien was gone, & they had no right to meddle with the timber.

The vendee had taken actual possession of the timber. He had sent his agent to the place where the timber lay, who had measured & marked it with the initials of the vendee's name; he had expended money upon it in having it "squared," as it is termed, for the purposes of his business, & I think that he had thereby taken a possession of it, which excluded the vendors from afterwards saying that they still had a lien on the goods. . . . The case is answered by saying not that the *transitus* was or was not at an end, but that the vendors had parted with their lien by allowing the vendee to take possession of the goods, the same being at the time out of the vendors' possession, & in the possession of a third person, the wharfinger (POLLOCK, C.B.).—COOPER v. BILL (1865), 3 H. & C. 722; 34 L. J. Ex. 161; 12 L. T. 466.

**2077. — Holding as bailee of seller.]—Pltfs.,** through T., who was acting for them in the matter, bought three old boilers which belonged to & were in the possession of a paper co. While the boilers still remained on the premises of the paper co., T. sold them to H. for £60, on the terms that £20 should be paid before the removal of the first boiler & the balance of £40 by Dec. 1909, & in Oct. 1909, T., by letter, informed the paper co. of the sale to H. Subsequently H. sold the boilers, which still physically were in the paper co.'s possession, to defts. & paid £10 on account to T., but paid no more. There was no acknowledgment by the paper co. to H. that they held the boilers on his behalf:—*Held*: pltfs. were not precluded from setting up their right of lien as unpaid sellers by the fact that they had through T. informed the paper co. of the sale to H.

I agree that it is not necessary to have an acknowledgment to pass the possession. . . . It may be done by something in the nature of a delivery order (VAUGHAN-WILLIAMS, L.J.).—POULTON & SON v. ANGLO-AMERICAN OIL CO., LTD. (1911), 27 T. L. R. 216, C. A.

**2078. Goods in possession of seller—Resale by purchaser—Delivery to sub-purchaser—Unreasonable delay in objecting to delivery.]—A.** at Bristol sells goods to B. to be paid for by B.'s acceptance of a bill to be drawn by A.: the goods are weighed, but remain in A.'s warehouse, who omits to draw the bill. B. sells a specific & ascertained portion of these goods to C. in London who pays for them, & transmits B.'s order to A. for the delivery of them. On the fourth day after A.'s receipt of the order B. becomes bkpt., & then & not before, A. refuses to deliver the goods to C., insisting that he has a lien upon them for the price. C. may maintain trover against A.; for he was bound at all events to notify his refusal immediately.—GREEN v. HAYTHORNE (1816), 1 Stark. 447; 171 E. R. 525, N. P.

*Annotation*:—*Distd.* Townley v. Crump (1835), 5 L. J. K. B. 14.

**2079. — — — —.]—MILES v. GORTON, No. 2044, ante.**

**2080. Conversion by seller.] — GURR v. CUTHBERT, No. 2665, post.**

**2081. Payment taken in promissory note—Negotiation of note—Effect of dishonour.]—BUNNEY v. POYNTZ, No. 2065, ante.**

**PART VII. SECT. 3, SUB-SECT. 3.—A.**  
2081 i. *Payment taken in promissory note—Negotiation of note—Effect of dishonour.*—ADAIR v. MALONE (1827), 1 Hud. & B. 19.—*IR.*

**2082 i. —.]—GRAHAM v.**

CROUCHMAN (1918), 41 O. L. R. 22; 39 D. L. R. 284; 13 O. W. N. 165.—*CAN.*

**PART VII. SECT. 3, SUB-SECT. 3.—B.**  
*r. Delivery conditional upon cash payment—Non-fulfilment of condition—*

**2082. — — — —.]—MILES v. GORTON, No. 2044, ante.**

**2083. Delivery order—Goods partly removed.]—HAMMOND v. ANDERSON, No. 2074, ante.**

**2084. — Negotiated to third parties—Warrants in use in iron trade.]—MERCHANT BANKING CO. OF LONDON v. PHOENIX BESSEMER STEEL CO., No. 1838, ante.**

**2085. — — — —.]—A delivery order was given by defts. to F. for 2,640 bags of mowra seed, which formed part of a consignment of 6,400 bags. F. gave defts. a cheque therefor & indorsed the delivery order to pltfs., who took it in good faith & for valuable consideration. F.'s cheque having been dishonoured, defts. refused to give delivery of the seed to pltfs.:—*Held*: (1) the delivery order was a document of title to the goods which had been "transferred" by defts. to F. within the meaning of Factors Act, 1889 (c. 45), s. 10, & Sale of Goods Act, 1893 (c. 71), s. 47, & having been transferred by F. to pltfs., who took it in good faith & for valuable consideration, defts.' right of lien as unpaid vendors was defeated; (2) the delivery order was valid notwithstanding that it related to goods which were not specific.—*ANT.* JURGENS MARGARINEFABRIEKEN v. DREYFUS (LOUIS) & Co., [1914] 3 K. B. 40; 83 L. J. K. B. 1344; 111 L. T. 248; 19 Com. Cas. 333.**

*Annotation*:—*Distd.* Laurie & Morewood v. Dudin (1926), 134 L. T. 309.

**2086. Recovery of judgment for price of goods.]—**After judgment against the purchaser of a leasehold house & furniture, lien of the vendor upon the house & furniture, & proof under a commission of bkpcy., against the purchaser for the deficiency.—*Ex p.* SEAFORTH (1812), 19 Ves. 235; 34 E. R. 505; *sub nom.* *Re WILKINSON, Ex p.* SEAFORTH, 1 Rose, 306.

**2087. — — — —.]—A.** sells to B. a carriage, to be paid for partly by a bill upon the delivery, & partly by a bill at a future day, & B. neglecting to take the carriage, A. obtains a verdict against him for goods bargained & sold. Until the amount is paid to A., he has a lien upon the carriage, & the sheriff cannot seize it under a *fi. fa.* against the goods of B.—*HOULDITCH v. DESANGES* (1818), 2 Stark. 337; 171 E. R. 666, N. P.

**2088. — — — —.]—The right of an unpaid vendor to lien over goods in the hands of his agent is not taken away by the fact that the vendor has recovered a verdict for their price against the purchaser, & under a county ct. order for payment of the debt by instalments, has been paid one instalment of it.—*SCRIVENER v. GREAT NORTHERN RY. CO.* (1871), 19 W. R. 388.**

**2089. Pledge of bill of lading.]—ADELPHI BANK, LTD. v. HALIFAX SUGAR REFINING CO., LTD.** (1887), 4 T. L. R. 21, C. A.

#### *B. Waiver.*

*See* Sale of Goods Act, 1893 (c. 71), s. 43; & generally, LIEN, Vol. XXXII., pp. 215 *et seq.*

**2090. Claim to retain on ground other than lien—Omitting to mention lien.]—BOARDMAN v. SILL** (1808), 1 Camp. 410, n.; 170 E. R. 1003, N. P.

*Annotations*:—*Consd.* White v. Gainer (1824), 9 Moore, C. P. 41. *Distd.* Scarfe v. Moran (1838), 4 M. & W. 270. *Consd.* Dirks v. Richards (1842), 4 Man. & G. 574. *Apld.* Weeks v. Goode (1859), 6 C. B. N. S. 367. *Refd.* Storr v. Crowley (1825), McCle. & Yo. 129; Owen v. Knight (1837),

*Whether lien waived.*—Pltf. agreed to purchase cattle from deft. for cash, & paid a deposit. On his arriving at deft.'s station, the cattle were counted, & deft. allowed pltf. to start them on their journey. Pltf. did not pay the balance in cash. Deft. retook



**Sect. 3.—Seller's lien: Sub-sect. 3, B. Sect. 4: Sub-sects. 1 & 2.]**

4 Bing. N. C. 54; *Romsey v. N. E. Ry.* (1863), 2 New Rep. 360; *Yungmann v. Brieseemann* (1892), 67 L. T. 642. **Mentd.** *Gobind Chunder Sein v. Ryan* (1861), 9 Moo. Ind. App. 140.

**2091.** ———.]—A person having a lien upon goods, does not waive that lien by the mere fact of his omitting to say that he claims the goods in that right, when they are demanded. Nor is it sufficient evidence of a waiver of his lien that he bought these goods with others, & also refuses to deliver up the other goods, though he has no lien on them; the sale of both sets of goods being void.

Deft. keeps the goods, not saying in what right; & plffs. seek to recover them in an action of trover. To do that, he having a lien, they must tender him the amount of his lien, before they have a complete right to the goods (BEST, C.J.).—*WHITE v. GAINER* (1824), 2 Bing. 23; 1 C. & P. 324; 9 Moore, C. P. 41; 2 L. J. O. S. C. P. 101; 130 E. R. 212.

**Annotations:—***Refd.* *Owen v. Knight* (1837), 4 Bing. N. C. 54; *Yungmann v. Brieseemann* (1892), 67 L. T. 642.

**2092.** ———.]—A refusal, grounded on a claim of right, to deliver up goods on demand, is evidence of a conversion, though deft. may have a lien on them.—*CANNEE v. SPANTON* (1844), 8 Scott, N. R. 714; 14 L. J. C. P. 23; 8 Jur. 1008; *sub nom.* *CAUNCE v. SPANTON*, 7 Man. & G. 903; 135 E. R. 367.

**2093.** By claim to retain with other goods—No lien claimed on other goods.]—*WHITE v. GAINER*, No. 2091, *ante*.

**2094.** Levying execution on the goods.]—A party, who having a lien on goods, causes them to be taken in execution at his own suit, loses his lien thereby, although the goods are sold to him under the execution, & are never removed off his premises.—*JACOBS v. LATOUR* (1828), 5 Bing. 130; 2 Moo. & P. 201; 6 L. J. O. S. C. P. 243; 130 E. R. 1010.

**Annotations:—***Consd.* *Judson v. Etheridge* (1833), 1 Cr. & M. 743. *Distd.* *Compston v. Haigh* (1836), 5 L. J. C. P. 99; *Scarte v. Morgan* (1838), 4 M. & W. 270; *Forth v. Simpson* (1849), 13 Jur. 1024. **Refd.** *Jackson v. Cummins* (1839), 5 M. & W. 342. **Mentd.** *The Repulse* (1845), 2 Wm. Rob. 398; *Hamilton v. Harland & Wolff, The Acacia* (1880), 42 L. T. 264.

**2095.** Election to appropriate payment—To particular purchase.]—A factor in London purchased from time to time silk for R., & paid for the same. Remittances were made by R. generally, & not on account of any particular purchase. A general account current was kept by deft., & then rendered to & checked by R., & the next account began with the balance of the preceding one. After the purchase of a certain lot of silk by the factor, which R. sold shortly afterwards to pltf., two such accounts were delivered & balances struck in favour of R., showing that the factor had, subsequent to the purchase of this silk, received remittances from R. amply sufficient to cover both its price & also the preceding items of the amount against him. Subsequently, the balance being much against R., the factor sold this lot of silk, among others, to recoup himself:—**Held:** the accounts showed an election by the factor to appropriate the remittances about the time of the purchase of this lot of silk in payment of the advance on account thereof, & they were therefore not entitled to sell it, as against pltf., to recoup

themselves.—*SIEBEL v. SPRINGFIELD* (1863), 3 New Rep. 36; 9 L. T. 324; 12 W. R. 73.

**Annotations:—***Refd.* *Johnson v. Stear* (1863), 15 C. B. N. S. 330. **Mentd.** *De Comas v. Prost* (1865), 3 Moo. P. C. C. N. S. 158.

**2096.** Execution of composition deed.]—X. bought hops of T. on a custom known in the hop trade as W. O., i.e. the hops were to wait the order of X. in T.'s warehouse, & to be charged for warehouse room & insurance. X. paid for the hops by bills of exchange, which were dishonoured at maturity. X. afterwards registered a deed of composition which was assented to & executed by T. to the full amount of his debt in respect of the dishonoured bills:—**Held:** assent & execution of the deed operated as a proof in bkpcy., & therefore an abandonment of his lien for unpaid purchase-money.—*Re OXLEY, Ex p. TURNBULL* (1868), 19 L. T. 463; 17 W. R. 200.

**Annotation:—***Mentd.* *Re Peters & Warburton, Ex p. Lloyds Banking Co.* (1869), 17 W. R. 492.

**SECT. 4.—STOPPAGE IN TRANSITU.**

**SUB-SECT. 1.—IN GENERAL.**

*See* Sale of Goods Act, 1893 (c. 71), ss. 44–46.

**2097.** Right lies in unpaid seller.]—If the purchaser of goods to be paid by bill, after giving his acceptance during the time of credit, & while the goods are *in transitu*, sells them to a third person for a valuable consideration, without transferring any bill of lading to him, the right of the original vendor to stop the goods *in transitu* is taken away.

The consignors are in the situation of paid vendors (LORD ELLENBOROUGH, C.J.).—*DAVIS v. REYNOLDS* (1815), 4 Camp. 267; 1 Stark. 115; 171 E. R. 85, N. P.

**Annotations:—***Refd.* *Dixon v. Yates* (1833), 5 B. & Ad. 313. **Mentd.** *Strother v. Barr* (1828), 5 Bing. 136.

**2098.** ———.]—*PHELPS, STOKES & Co. v. COMBER*, No. 2289, *post*.

—Who is an unpaid seller.]—*See* Sect. 2, *ante*.

**2099.** Right to retake goods—In state in which they arrive—Materiality of damage.]—*BERNDTSON v. STRANG*, No. 2279, *post*.

**2100.** ———.]—*PHELPS, STOKES & Co. v. COMBER*, No. 2289, *post*.

**2101.** Seller's knowledge of destination—Whether material.]—B., residing at Birmingham, ordered goods for the Valparaiso market of defts., who had a house at Manchester. Defts. duly forwarded them to L. H. & co., shipping agents at Liverpool employed by B. to receive & forward his goods, they forwarded also some pattern cards, & in their letter to L. H. & co., said "We have forwarded by Pickford's the pattern cards of four cases sent by them this evening, marked, etc., for shipment to Valparaiso; you will see the same put on board, with the goods & property, directed as B. may direct the same to be shipped." They sent the invoice of the goods to B. The goods were loaded by L. H. & co. on board a vessel for Valparaiso, but were afterwards relanded by an order of an agent of B. & sent back to defts. to be differently packed. Before the day of payment for the goods or the repacking, B. became bkpt. Defts., having kept the goods, the assignees brought trover:—**Held:** (1) the possession of the goods as well as the property vested in B. when B.'s agent exercised the ownership of relanding the

possession of the cattle:—**Held:** deft. had not waived his right of lien.—*KIDMAN v. PATTERSON* (1887), 8 N. S. W. L. R. 290; 4 N. S. W. N. 45.—**AUS.**

**PART VII. SECT. 4, SUB-SECT. 1.**  
t. *Effect of.*—Stoppage *in transitu* does not rescind a contract on the

sale of goods, but merely gives the vendor a lien on the goods for their price.—*BRASSETT v. McEWEEN* (1885), 10 O. R. 179.—**CAN.**

goods & sending them to be repacked; that the *transitus* would have ended there had it not been already determined by the original delivery to L. H. & co.; & deft.'s knowledge that the goods were to be sent to Valparaiso & of which they informed L. H. & co., made no difference; (2) the vendors, though in the lawful possession of the goods had no right to retain them as against the assignees.—*VALPY v. GIBSON* (1847), 4 C. B. 837; 16 L. J. C. P. 241; 9 L. T. O. S. 434 11 Jur. 826; 136 E. R. 737.

*Annotations*:—*As to* (1) *Distd. Re Cock, Ex p. Rosevear China Clay Co.* (1879), 11 Ch. D. 560. *Apld. Kendal v. Marshall Stevens* (1883), 11 Q. B. 356; *Re Isaacs, Ex p. Miles* (1885), 15 Q. B. D. 39.

**2102. Purchaser a partner in seller's firm.]—***Re McLAREN, Ex p. COOPER*, No. 2238, *post*.

**2103. Purchaser a passenger by ship carrying goods.]—***LYONS v. HOFFNUNG*, No. 2197, *post*.

**2104. Relation to third parties—Execution creditor of purchaser—Process out of Mayor's Court.]—**(1) If A. sells goods to B. & according to B.'s directions sends them to C. a wharfinger, to be by him forwarded to B.; while they are in C.'s hands they may be stopped *in transitu* by A.

(2) The right of a consignor to stop goods *in transitu* is not divested by the goods, while in their transit, being attached by process out of the Ct. of the Mayor of London at the suit of a creditor of the consignee.—*SMITH v. GOSS* (1808), 1 Camp. 282; 170 E. R. 958, N. P.

*Annotations*:—*As to* (1) *Consd. Bethell v. Clark* (1887), 19 Q. B. D. 553. *As to* (2) *Refd. United States Steel Products Co. v. G. W. Ry.* (1914), 83 L. J. K. B. 1650. *Generally, Refd. Pearson v. Goschen* (1861), 17 C. B. N. S. 352.

**2105. — Right paramount to lien of carrier against purchaser.]—**An usage for carriers to retain goods as a lien for a general balance of account between them & the consignees, cannot affect the right of the consignor to stop the goods *in transitu*. *Semble*: such a lien could not be established even by agreement between the carrier & the consignor.—*OPPENHEIM v. RUSSELL* (1802), 3 Bos. & P. 42; 127 E. R. 24.

*Annotations*:—*Consd. Richardson v. Goss* (1802), 3 Bos. & P. 119; *Morley v. Hay* (1828), 3 Man. & Ry. K. B. 396; *Jackson v. Nichol* (1839), 5 Bing. N. C. 508; *Booth S.S. Co. v. Cargo Fleet Iron Co.*, [1916] 2 K. B. 570; *United States Steel Products Co. v. G. W. Ry.*, [1916] 1 A. C. 189. *Refd. Harris v. Packwood* (1810), 3 Taunt. 264; *Leuckhart v. Cooper* (1836), 3 Bing. N. C. 99; *Pearson v. Goschen* (1861), 17 C. B. N. S. 352.

**2106. — —.]—***MORLEY v. HAY*, No. 2255, *post*.

**2107. — —.]—**C. purchased goods of pltf. in London, & ordered them to be forwarded to Guernsey, by the care of deft., C.'s shipping agent at Southampton. Deft. took the goods from the warehouse of a London & Southampton waggoner, by whom they had been brought from London, paid the waggoner's charges, & shipped the goods for Guernsey in deft.'s name. C., who was insolvent, wrote at the request of pltf. to deft. to reland the goods without saying why; deft.'s clerk, in his master's absence, obtained a custom-house order for that purpose, but before he had relanded the goods, the vendor of other goods sold to C., & shipped in the same vessel, although a stranger to & without authority from pltf., ordered deft.'s clerk to stop the goods sold by pltf. to C.; when deft.'s clerk promised that deft. should hold them for the owner:—*Held*: deft.'s having taken

these goods from the waggoner, & having paid the waggoner's charges & shipped the goods, was not such a determination of the *transitus* to Guernsey as to authorise deft. to hold the goods in assertion of a lien for a general balance due to him from C.—*NICHOLLS v. LE FEUVRE* (1835), 2 Bing. N. C. 81; 1 Hodg. 255; 4 L. J. C. P. 281; 132 E. R. 32; *sub nom. SLATER v. LE FEUVRE*, *NICHOLLS v. LE FEUVRE*, 2 Scott, 146.

**2108. — —.]—**The vendors of goods, an American co., authorised their agents, on the arrival of the goods in England, to deliver the goods to a railway co., for carriage to the buyers upon the terms of a consignment note which contained a condition that all goods delivered to the co. would be received & held by them subject to a lien for money to them for the carriage of & other charges upon such goods, & also to a general lien for any moneys due to them from the owners of such goods upon any account. The vendors' agents accordingly delivered the goods to the railway co. for carriage to the buyers. The vendors had paid all freight & charges in respect of the carriage of the goods. While the goods were still in the possession of the railway co. as carriers the vendors, being unpaid & having been informed that the buyers were insolvent, gave notice of stoppage *in transitu* to the railway co. The buyers, who had meanwhile become owners of the goods by indorsement & delivery of the bill of lading, were indebted to the railway co. in the sum of £1,170 on a general account. The co. claimed, under the condition in the consignment note, that they had a lien as against the vendors in respect of the £1,170 due from the buyers:—*Held*: the condition did not confer on the railway co. a right to assert a general lien on the goods in respect of the debt of the buyers in priority to the vendor's right of stoppage *in transitu*.—*UNITED STATES STEEL PRODUCTS CO. v. GREAT WESTERN RY. CO.*, [1916] 1 A. C. 189; 85 L. J. K. B. 1; 113 L. T. 886; 31 T. L. R. 561; 59 Sol. Jo. 648; 21 Com. Cas. 105, H. L.

*Annotations*:—*Consd. Booth S.S. Co. v. Cargo Fleet Iron Co.*, [1916] 2 K. B. 570. *Mentd. Denholm v. Shipping Controller* (1920), 124 L. T. 378.

**2109. — Rights acquired for value.]—***Re KNIGHT, Ex p. GOLDING, DAVIS & CO., LTD.* No. 2294, *post*.

**— — — Purchasers from purchase.]—***See* Sect. 5, *post*.

**2110. Consignment of money—To meet particular account.]—**When a party remits money on a particular account or for a particular purpose, & the consignee becomes insolvent, it may be stopped *in transitu*; *aliter* where it is a general remittance from a debtor to his creditor on account of his debt.—*SMITH v. BOWLES* (1797), 2 Esp. 578; 170 E. R. 461, N. P.

**2111. — To meet general account.]—***SMITH v. BOWLES*, No. 2110, *ante*.

#### SUB-SECT. 2.—WHEN RIGHT ARISES.

*See* Sale of Goods Act, 1893 (c. 71), s. 44.

**2112. Insolvency of buyer.]—**A. being beyond sea, consigns goods to B., then in good circumstances in London, but before the goods arrive, becomes a bkpt. If A. can by any means prevent the goods

possession of the goods or what is called stoppage *in transitu*.—*BARNES & CO. v. FRANCISCO LOPEZ* (1864), 5 Nfld. L. R. 89.—*NFLD.*

**2112 iii. —.]—***SCHENFIELD'S TRUSTEE v. MURRAY & CO.*, [1920] C. P. D. 87.—*S. AF.*

#### PART VII. SECT. 4, SUB-SECT. 2.

**2112 i. Insolvency of buyer.]—**A vendor, who, in good faith & in ignorance of the embarrassed circumstances of a customer, sold goods to him, may, on discovery of the customer's insolvency, exercise the right of stoppage *in transitu*.—*COUTURE v. MCKAY*,

*HUDSON'S RAY CO., CLAIMANTS* (1889), 6 Man. L. R. 273.—*CAN.*

**2112 ii. —.]—**When goods are consigned on credit by one merchant to another, & whilst on their way & before they are delivered the consignee becomes insolvent, the consignor by law is permitted to resume

*Sect. 4.—Stoppage in transitu: Sub-sects. 2 & 3, A.]*

coming into the hands of B. or the assignees, it is allowable in equity, & B. or the assignees, shall have no relief in equity.—*WISEMAN v. VANDEPUTT* (1690), 2 Vern. 203; 23 E. R. 732.

*Annotations:—***Apld.** *Snee v. Prescott* (1743), 1 Atk. 245. **Consd.** *Lickbarrow v. Mason* (1787), 2 Term Rep. 63. **Apld.** *Hodgson v. Loy* (1797), 7 Term Rep. 440. **Consd.** *Gibson v. Carruthers* (1841), 8 M. & W. 321. **Refd.** *Scott v. Surman* (1742), Willes, 400; *Dixon v. Baldwin* (1804), 5 East, 175; *The Constantia* (1807), 6 Ch. Rob. 321; *Booth S.S. Co. v. Cargo Fleet Iron Co.*, [1916] 2 K. B. 590. **Mentd.** *Paul v. Birch* (1743), 2 Atk. 621.

**2113.** —.]—*BURGHALL v. HOWARD* (1759), 1 Hy. Bl. 366, n.; 126 E. R. 215.

*Annotations:—***Consd.** *Mason v. Lickbarrow* (1790), 1 Hy. Bl. 357. **Refd.** *Hodgson v. Loy* (1797), 7 Term Rep. 440.

**2114.** —.]—Merchant consigns goods to A. in England. A. becomes insolvent. The consignor may stop the goods at any time before they get into A.'s hands.—*D'AQUILA v. LAMBERT* (1761), Amb. 399; 2 Eden, 75; 27 E. R. 266, L. C.

*Annotations:—***Consd.** *Booth S.S. Co. v. Cargo Fleet Iron Co.*, [1916] 2 K. B. 570. **Refd.** *The Constantia* (1807), 6 Ch. Rob. 321; *Gibson v. Carruthers* (1841), 8 M. & W. 321.

**2115.** —.]—The consignor may stop goods *in transitu* before they get into the hands of the consignee in case of the insolvency of the consignee; but if the consignee assign the bills of lading to a third person for a valuable consideration, the right of the consignor as against such assignee is divested.—*LICKBARROW v. MASON* (1787), 2 Term Rep. 63; 100 E. R. 35; *on appeal*, *sub nom. MASON v. LICKBARROW* (1790), 1 Hy. Bl. 357, Ex. Ch.; *sub nom. LICKBARROW v. MASON* (1793), 4 Bro. Parl. Cas. 57; 1 East, 22, n., H. L.; *subsequent proceedings* (1794), 5 Term Rep. 683.

*Annotations:—***Distd.** *Salomons v. Nissen* (1788), 2 Term Rep. 674. **Consd.** *Coxe v. Harden* (1803), 4 East, 211; *Newsom v. Thornton* (1805), 6 East, 17. **Distd.** *Patten v. Thompson* (1816), 5 M. & S. 350. **Consd.** *Gibson v. Carruthers* (1841), 8 M. & W. 321. **Apld.** *Gurney v. Behrend* (1854), 3 E. & B. 622. **Consd.** *The Marie Joseph* (1866), Brown. & Lush. 449; *Sewell v. Burdick* (1884), 10 App. Cas. 74; *Booth S.S. Co. v. Cargo Fleet Iron Co.*, [1916] 2 K. B. 570. **Refd.** *Slubey v. Heyward* (1795), 2 Hy. Bl. 504; *Walley v. Montgomery* (1803), 3 East, 585; *Morison v. Gray* (1824), 9 Moore, C. P. 484; *Bloxam v. Sanders* (1825), 4 B. & C. 941; *Re Westzinthus* (1833), 5 B. & Ad. 817; *Thompson v. Dornay* (1845), 14 M. & W. 403; *Griffiths v. Perry* (1859), 1 E. & E. 860; *The Tigress* (1863), Brown. & Lush. 38; *Rodger v. Comptoir d'Escompte de Paris* (1869), L. R. 2 P. C. 393; *Leask v. Scott* (1877), 2 Q. B. D. 376; *Re Cock, Ex p. Rosevear* *China Clay Co.* (1879), 11 Ch. D. 560; *Re Knight, Ex p. Golding, Davis* (1880), 42 L. T. 270; *Glyn, Mills, Currie v. East & West India Dock Co.* (1882), 7 App. Cas. 591; *Cassaboglou v. Gibb* (1883), 11 Q. B. D. 797; *Commonwealth Trust v. Akotey*, [1926] A. C. 72. **Mentd.** *Christy v. Row* (1808), 1 Taunt. 300; *Martini v. Coles* (1813), 1 M. & S. 140; *Giles v. Grover* (1832), 9 Bing. 128; *Saunders v. Smith* (1838), 7 L. J. Ch. 227; *Grant v. Norway* (1851), 10 C. B. 665; *Re North British Australasian Co., Ex p. Swan* (1859), 7 C. B. N. S. 400; *Taylor v. Great Indian Peninsular Ry.* (1859), 28 L. J. Ch. 285; *Swan v. North British Australasian Co.* (1863), 2 H. & C. 175; *The Figlia Maggiore* (1868), L. R. 2 A. & E. 106; *The Freedom* (1871), L. R. 3 P. C. 594; *Chartered Bank of India, Australia & China v. Henderson*, (1874), L. R. 5 P. C. 501; *Goodwin v. Roberts* (1875), L. R. 10 Exch. 337; *Arnold v. Cheque Bank, Same v. City Bank* (1876), 1 C. P. D. 578; *Nahmasehinen Fabrik* (late *Frister & Rossmann*) *Act v. Pickford & Lee & Harris* (1888), 4 T. L. R. 617; *Bank of England v. Vagliano*, [1891] A. C. 107; *Bristol & West of England Bank v. Mid. Ry.* (1891), 65 L. T. 234; *Nash v. De Freville*, [1900] 2 Q. B. 72; *Farquharson v. King*, [1902] A. C. 325; *Rimmer v. Webster*, [1902] 2 Ch. 163; *London Joint Stock Bank v. Macmillan & Arthur*, [1918] A. C. 777; *McDonald v. Nash*, [1924] A. C. 625; *Jones v. Waring & Gillow*, [1926] A. C. 670.

**2116.** —.]—*BOHTLINGK v. INGLIS*, No. 2228, *post.*

**2117.** —.]—*JENKYN v. USBORNE*, No. 2236, *post.*

**2118.** —.]—*MERCHANT BANKING CO. OF LONDON v. PHOENIX BESSEMER STEEL CO.*, No. 1838, *ante.*

**2119.** —.]—Proprietary interest in goods ordered & shipped but afterwards restrained to a different consignment by the shipper. Right of the shipper in such cases limited to insolvency, etc. When a vessel is chartered by the consignor, & goods are put on board, those goods are considered as *in transitu*; & when the consignor has not received payment, he has a right to stop & divert the delivery of those goods, & has what a proprietary lien upon them. . . . If the person, to whom the goods are consigned is not insolvent; if, from misinformation or from excess of caution, the vendor has exercised this privilege prematurely, he has assumed a right that did not belong to him, & the consignee will be entitled to the delivery of the goods, with an indemnification for the expenses that may have been incurred. . . . It is not an unlimited power that is vested in the consignor, to vary the consignment at his pleasure in all cases whatever. It is a privilege allowed to the seller, for the particular purpose of protecting him against the insolvency of the consignee. Certainly it is not necessary that the person should be actually insolvent at the time. If the insolvency happens before the arrival, it would be sufficient to justify what has been done, and to entitle the shipper to the benefit of his own provisional caution. But if the person is not insolvent, the ground is not laid on which alone such a privilege is founded (*SIR W. SCOTT*).—*THE CONSTANTIA* (1807), 6 Ch. Rob. 321; 165 E. R. 947.

*Annotations:—***Consd.** *Wilmshurst v. Bowker* (1841), 2 Man. & G. 792. **Distd.** *Turner v. Liverpool Docks Trustees* (1851), 6 Exch. 543.

**2120.** —.]—*Stoppage in anticipation of insolvency.*—*THE CONSTANTIA*, No. 2119, *ante.*

**2121.** —.]—*Report of insolvency erroneous—Buyers' right to delivery of goods—With indemnity for loss.*—*THE CONSTANTIA*, No. 2119, *ante.*

**2122.** —.]—*Adjustment of final accounts between parties—Necessity for.*—*WOOD v. JONES*, No. 2041, *ante.*

**2123.** —.]—*Failure of alien enemy firm to meet acceptances—Whether amounting to insolvency.*—*Semble:* the failure of an alien enemy firm to meet their acceptances given for the price of goods shipped to such alien enemy firm by a neutral in a British ship does not constitute insolvency, so as to give the neutral a right of stoppage *in transitu*. It is very doubtful whether the act of declining to pay an acceptance through bankers because of the outbreak of war could be interpreted as ceasing to pay debts in the ordinary course of business, so as to give the right to say that the firm could be "deemed to be insolvent" within Sale of Goods Act, 1893 (c. 71), s. 62 (3).—*THE FELICIANA* (1915), 59 Sol. Jo. 546.

**2124.** —.]—*Before possession obtained by buyer.*—*WISEMAN v. VANDEPUTT*, No. 2112, *ante.*

**2125.** —.]—*BURGHALL v. HOWARD* (1759), 1 Hy. Bl. 366, n.; 126 E. R. 215.

*Annotations:—***Refd.** *Mason v. Lickbarrow* (1790), 1 Hy. Bl. 357; *Hodgson v. Loy* (1797), 7 Term Rep. 440.

**2126.** —.]—*D'AQUILA v. LAMBERT*, No. 2114, *ante.*

**2127.** —.]—*HUNTER v. BEAL* (1785), cited in 3 Term Rep. at p. 466; 100 E. R. 680.

*Annotations:—***Consd.** *Lickbarrow v. Mason* (1787), 2 Term Rep. 63. **Apld.** *Hodgson v. Loy* (1797), 7 Term Rep. 440. **Expld.** *Dixon v. Baldwin* (1804), 5 East, 175. **Distd.** *Rowe v. Pickford* (1817), 8 Taunt. 83. **Consd.** *Tucker v. Humphrey* (1828), 4 Bing. 516; *Lyons v. Hoffnung* (1890), 15 App. Cas. 391. **Refd.** *Ellis v. Hunt* (1789), 3 Term Rep. 464.

**2128.** —.]—*LICKBARROW v. MASON*, No. 2115, *ante.*

**2129.** —.]—*BOHTLINGK v. INGLIS*, No. 2228, *post.*

**2130.** —.]—Where goods are to be delivered to the vendee at a particular place, the *transitus* in general continues until they are delivered to him at that place; but if he by his own act prevent the delivery, which otherwise in the ordinary course would take place, & does any act equivalent to taking possession, the *transitus* is thereby terminated; & therefore, where the vendee of several hogsheads of sugar upon receiving from the carrier notice of their arrival, took samples from them, & for his own convenience desired the carrier to let them remain in his warehouse until he should receive further directions, & before they were removed, became bkpt. :—*Held*: the *transitus* was at an end, & the vendor was not entitled to stop them.—*FOSTER v. FRAMPTON* (1826), 6 B. & C. 107; 9 Dow. & Ry. K. B. 108; 5 L. J. O. S. K. B. 71; 108 E. R. 392.

*Annotations*:—*Distd.* *Tucker v. Humphrey* (1828), 4 Bing. 516. *Apld.* *Allan v. Gripper* (1832), 2 Cr. & J. 218; *Dodson v. Wentworth* (1842), 5 Scott, N. R. 821. *Distd.* *Whitehead v. Anderson* (1842), 9 M. & W. 518. *Refd.* *Clay v. Harrison* (1829), 10 B. & C. 99; *Jones v. Jones* (1841), 8 M. & W. 431.

**2131.** —.]—*JAMES v. GRIFFIN*, No. 2257, *post*.

**2132.** —.]—*MERCHANT BANKING CO. OF LONDON v. PHENIX BESSEMER STEEL CO.*, No. 1838, *ante*.

**2133.** —.]—*Re COCK, Ex p. ROSEVEAR CHINA CLAY CO.*, No. 2199, *post*.

— What amounts to possession.] — *See* Sub-sect. 3, B. & C., *post*.

#### SUB-SECT. 3.—DURATION OF TRANSIT.

##### A. In General.

*See* Sale of Goods Act, 1893 (c. 71), s. 45.

**2134.** Until delivery to buyer.—At agreed place—Effect of prevention of delivery thereat.]—*FOSTER v. FRAMPTON*, No. 2130, *ante*.

**2135.** Until arrival at ultimate destination.]—*COATES v. RAILTON*, No. 2170, *post*.

**2136.** —.]—*COOPER v. BILL*, No. 2076, *ante*.

**2137.** —.]—A., a merchant in Liverpool, bought certain winches of yarn of B., in London, through C., who acted as broker for both parties, "to be taken immediately from the wharf in London & paid for by the buyers' acceptance at four months." B. sent an invoice of the goods to A., inclosing a bill of exchange for his acceptance, & on the same day C., acting as agent for A.,

directed the goods to be forwarded by rail to Liverpool. Upon their arrival there the railway co. sent A. the usual advice note that the goods "remained there to his order & were then held by the co., not as carriers, but as warehousemen." A. did not accept the bill of exchange, but filed a petition for liquidation. B. having claimed the right of stoppage *in transitu* as against the trustee under A.'s liquidation:—*Held*: the acceptance of the bill of exchange was not a condition precedent to the passing of the property in the goods: & the goods on arriving at Liverpool had reached their final destination, & consequently the *transitus* had ended.—*Re CHADWICK, Ex p. CATLING* (1873), 29 L. T. 431.

**2138.** —.]—*Re WHITWORTH, Ex p. GIBBES*, No. 2185, *post*.

**2139.** —.]—*Re LOVE, Ex p. WATSON*, No. 2163, *post*.

**2140.** —.]—An unpaid vendor is entitled to stop his goods while *in transitu* up to their ultimate delivery at the destination fixed & determined upon in the contracts & shipping documents, *i.e.* the *transitus* continues to that time.—*GLIDDON v. PEEK* (1885), 1 T. L. R. 593.

**2141.** —.]—*Re ISAACS, Ex p. MILES*, No. 2171, *post*.

**2142.** —.]—*BETHELL v. CLARK*, No. 2164, *post*.

**2143.** — Ship ordered to remain in quarantine—On arrival in port.]—Where a cargo is consigned & before the ship's arrival, the consignee becomes a bkpt., the arrival of the ship in the port, where she is taken possession of by the assignees, but from whence she is ordered out to perform quarantine, is not such a completion of the voyage as shall vest the property in the assignees; but the consignor may still consider the goods as *in transitu*, & stop them while the vessel is performing quarantine.—*HOLST v. POWNAL & SPENCER* (1794), 1 Esp. 240; 170 E. R. 343, N. P.

*Annotations*:—*Refd.* *Bohtlingk v. Inglis* (1803), 3 East, 381; *James v. Griffin* (1837), 2 M. & W. 623.

**2144.** — Or new direction given by buyer.]—*MORLEY v. HAY*, No. 2255, *post*.

**2145.** Goods lodged in custom warehouse—Pending payment of dues.]—When goods are consigned, but the duties are not being paid, are lodged in the King's stores, the consignor may stop them *in transitu* if he claims them before they are actually sold for the payment of the duties; or if

#### PART VII. SECT. 4, SUB-SECT. 3.—A.

*u. Until delivery to buyer.*]—*NEW ONTARIO COLONIZATION CO. v. GRAND TRUNK RAILWAY SYSTEM*, [1926] 1 D. L. R. 818; 31 Can. Ry. Cas. 450; 58 O. L. R. 249; [1925] 3 D. L. R. 870; 57 O. L. R. 244; 31 Can. Ry. Cas. 448.—*CAN.*

**2135 i.** Until arrival at ultimate destination.]—*FAIRFAX v. ILLAWARRA S. N. CO.* (1872), 11 N. S. W. S. C. R. (L.) 103.—*AUS.*

**2135 ii.** —.]—*Re ALCOCK, INGRAM & CO., LTD.*, [1924] 1 D. L. R. 388; 53 O. L. R. 422.—*CAN.*

**2135 iii.** —.]—*BAPUJI SOKARJI v. CLAN LINE STEAMERS, LTD.* (1910), 1 L. R. 34 Bom. 640.—*IND.*

**2135 iv.** —.]—*NEISH v. TROMPOD-SKY & CO.* (1807), Hume, 693.—*SCOT.*

**2135 v.** —.]—*McLEOD & CO. v. HARRISON* (1880), 8 R. (Ct. of Sess.) 227; 18 Sc. L. R. 129.—*SCOT.*

**2135 vi.** —.]—*McDOWALL & NEILSON'S TRUSTEE v. SNOWBALL CO., LTD.* (1904), 7 F. (Ct. of Sess.) 35.—*SCOT.*

**2135 vii.** —.]—*DOBELL, BECKETT & CO. v. NEILSON* (1904), 42 Sc. L. R. 279.—*SCOT.*

**2135 viii.** —.]—Goods having arrived at their destination & the consignee having been advised that they were held to their order by the railway as warehousemen for the consignee & not as carriers:—*Held*: the question of stoppage *in transitu* did not apply.—*GURNEY & MOORE v. UNION GOVERNMENT* (1913), 34 N. L. R. 320.—*S. AF.*

**2144 i.** — Or new direction given by buyer.]—*MOLLISON v. LOCKHART* (1891), 30 N. B. R. 398.—*CAN.*

**2145 i.** Goods lodged in custom warehouse—Pending payment of dues.]—A., living in K., bought six cases of goods in N., & saw them packed & leave the vendor's shop on their way to the shipping warehouse; on their arrival at K. they were received by the officers of the customs, & placed in the custom house store. A. entered & paid duty upon & took away two of the cases; he also paid the freight & charges upon all from N.:—*Held*: the vendor had not lost the right of stoppage *in transitu* over the remaining four cases.—*BURR v. WILSON* (1855), 13 U. C. R. 478.—*CAN.*

**2145 ii.** —.]—A. having purchased goods from deft. in N., they were shipped in bond to him & landed

at a wharf in B., whence they were carted by him & placed in a bonded warehouse on his own premises, to which there were two different locks & keys, one in the control of A., the other of the custom house. While the goods were thus placed, A. became insolvent, & plff. gave notice of ownership & stoppage *in transitu* to the custom house officer:—*Held*: the goods were not in possession of A., & the right of stoppage *in transitu* still remained in plff.—*HOWELL v. ALPORT* (1862), 12 C. P. 375.—*CAN.*

**2145 iii.** —.]—*LEWIS v. MASON* (1875), 36 U. C. R. 590.—*CAN.*

**2145 iv.** —.]—Plffs. at P. sold to R. at T. 92 bags of coffee on credit, & consigned the same to them in bond. On arrival at T. they were entered & bonded in the consignees' names & placed in one of the customs bonded warehouses, subject to the payment of duties. Subsequently E. paid the duties & took out of bond 54 of the bags, but 38 still remained in bond, subject to duty, & while they so remained E. became insolvent:—*Held*: the right of stoppage *in transitu* still existed in plff.—*GRAHAM v. SMITH* (1876), 27 C. P. 1.—*CAN.*





bonded warehouse of Messrs. F. & C. at Bristol, & subsequently on the same day verbally agreed to sell them to A. in exchange for other goods, & to give him the transfer order when received back from Dublin; & A., in pursuance of such arrangement, then sold & delivered to W. & co. goods to the value of £90. On Sept. 9, pltf's. being ignorant of the spirits having been moved to F. & C.'s customs warehouse, sent by post to W. & co., in answer to their request of Sept. 7, a transfer order, dated Aug. 31, addressed "To the principal Officer, Customs Warehouse, Bristol." On Sept. 7, pltf's. drew a bill on W. & co. at five months' date, for £99 odd, the invoice price of a portion of the spirits, which bill W. & co. accepted & returned to them. The excise authorities threatening to seize the spirits unless they were passed through the excise warehouse, W. & co., on Sept. 27, wrote to pltf's. for a fresh transfer order for that purpose, which order, also dated Aug. 31, pltf's. sent to W. & co. by post on Sept. 29. On Oct. 4, the day before the spirits would have been liable to seizure for non-payment of duty under the bond, they were removed from F. & C.'s customs warehouse to deft.'s duty free excise warehouse, by direction of A., who had obtained W. & co.'s delivery order to F. & C. for that purpose. On Oct. 5, the transfer order of Aug. 31 from pltf's. to W. & co. was handed to the excise officer; & on the same day, W. & co.'s effects were seized by the sheriff in execution at the suit of a creditor, whereupon pltf's., on Oct. 7, telegraphed to the excise collector at Bristol not to transfer, until further notice, the spirits which were still in the pltf's.' names in the excise duty free warehouse. On Oct. 8, a transfer order from W. & co. to A., dated Sept. 8, but, actually signed on Oct. 8, & the transfer order of Aug. 31, from pltf's. to W. & co., were presented to the collector, pursuant to 23 & 24 Vict. c. 114, s. 122, but, having heard of the execution & received pltf's.' telegram, he declined to allow the transfer. On Oct. 12, W. & co. were adjudged bkpts., & on Oct. 15 notice of claim to the spirits on behalf of the assignees was given to defts., but the claim was subsequently abandoned. On July 5, 1865, A. cleared a portion of the spirits, & paid the duty thereon, & on July 29 pltf's. gave deft. notice that they claimed the spirits, & not to part with the same except to them. Subsequently, & down to the commencement of the present action deft. has delivered several more of the original number of the casks of whisky to A. In trover by pltf's. against deft., the proprietor or tenant of the excise warehouse:—*Held*: the spirits were in the possession of W. & co., the vendees, & the *transitus* was at an end, & the right of pltf's. as vendors to stop *in transitu* was consequently gone, at the moment the spirits were taken by the vendees from the vessel, a proceeding which pltf's. either authorised or subsequently ratified, & the fact of the spirits being first taken to the customs, instead of to the excise, warehouse was immaterial.—*JAMESON v. WILLS* (1867), 17 L. T. 380; 3 Mar. L. C. 12.

**2159. — Assignee of buyer obtaining order for delivery.—On ship breaking bulk.—Notice of stoppage before bulk broken.]**—Goods were shipped by A., a firm at Calcutta, to the order of B. in this country. B. pledged the bill of lading to C., & afterwards became bkpt. On the arrival in the Thames of the ship in which the goods were, C. obtained from the brokers, on payment of the freight, an overside order for the delivery of the goods. On presenting this order to the chief officer on board the ship the lighterman employed by C. to bring away the goods was told that he

should have them as soon as they could be got at. In the meantime, before the ship broke bulk, A., by their agents in this country, served notice upon the captain & agents of the ship to stop the delivery of the goods to any person other than themselves:—*Held*: by the mere promise to deliver them to C. when they could be got at, the goods were not brought into the actual or constructive possession of B., so as to prevent A., the unpaid vendor, from exercising his right of stoppage *in transitu*; & accordingly A. was entitled, as against the assignees in bkpcy. of B., to the surplus proceeds of the goods after satisfying the charge of C.—*COVENTRY v. GLADSTONE* (1868), L. R. 6 Eq. 44; 37 L. J. Ch. 492; 16 W. R. 837.

*Annotation*:—*Reid. Re Whitworth, Ex p. Gibbs* (1875), 45 L. J. Bcy. 10.

**2160. — Goods at intermediate port.—Pending instructions from buyer.]**—A., a merchant at Bahia, shipped at Bahia a cargo of sugar by the order & at the risk of B., of Glasgow, in a ship chartered by A. The charterparty provided that the ship should proceed "either direct or via Falmouth, Cowes, or Queenstown, for orders to a port in the United Kingdom, or to a port on the continent, between certain limits, & deliver the cargo in conformity with the bill of lading." The bill of lading stated that the ship was "bound for Falmouth, Cowes, or Queenstown for orders," & that the cargo was to be delivered "unto order or its assigns." A. sent to B. the charterparty, the bills of lading, indorsed to "B. or order," & the invoice, which stated that the cargo was shipped, "for the account & risk of B., for Falmouth, Cowes, or Queenstown for orders & a market." The ship arrived at Falmouth, & the master, in pursuance of written instructions from A., announced its arrival to A.'s agents in London, & asked them for orders. The agents applied to B. for instructions as to the destination of the ship; but before any instructions were given, B. became insolvent, & thereupon A.'s agents stopped the cargo:—*Held*: the cargo had not been constructively delivered to B., the *transitus* was not over, & the stoppage was valid.—*FRASER v. WITT* (1868), L. R. 7 Eq. 64; 19 L. T. 440; 17 W. R. 92; 3 Mar. L. C. 164.

**2161. — Bill of lading in return for accepted bill.]**—*Re WHITWORTH, Ex p. GIBBES*, No. 2185, *post*.

**2162. — Goods loaded on purchasers' trucks.]**—*MERCHANT BANKING CO. OF LONDON v. PHENIX BESSEMER STEEL CO.*, No. 1838, *ante*.

**2163. — Agreement for particular destination of goods.]**—An agreement was entered into between L., a merchant in London, & W., a manufacturer in Yorkshire, that W. should from time to time supply L. with goods, W. drawing upon L., & L. accepting, bills of exchange for the invoice price of the goods. L. was to ship the goods to R. at Shanghai, for sale on L.'s account. On receipt of the bills of lading L. was to send them to R., to whose order they were to be made out. W. was to have a lien upon the bills of lading, & each shipment of goods in transit outwards, or in the hands of the consignee or any other persons, which lien, however, was to extend only to the particular shipment, & was to cease when the bills of exchange given for that shipment had been paid. No notice of this agreement was given to R. In pursuance of the agreement L. ordered a parcel of goods of W. The goods were packed by W.'s packer, who forwarded them by railway to London in bales marked for Shanghai, & addressed to a ship called the *Gordon Castle* designated by L., which was loading in the West India Docks for



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Shanghai. The freight to London was paid by W. The packer in advising L. of the despatch of the goods, told him that they were "at his disposal." L. accepted a six months' bill of exchange drawn upon him by W. for the invoice price. The railway co., in advising L. of the arrival of the goods at their Poplar Docks Station, told him that they remained at his order & were held by the co. as warehousemen at his risk, but added, "will be sent to the *Gordon Castle*." The goods were shipped on board that vessel. The bills of lading were by L.'s direction made out to the order of himself or assigns, but they were never delivered to him by the shipowners, inasmuch as he did not pay the freight. The ship sailed for Shanghai with the goods on board. A few days previously L. had stopped payment, & shortly after she had sailed he committed an act of bkpcy. upon which he was adjudicated a bkpt. The bills of lading were still in the possession of the shipowners in London, of whom they were claimed by W. & by the trustee in the bkpcy. It was arranged that the goods should be sold by the agent of the shipowners at Shanghai, & the proceeds of sale paid to the person who should be entitled to them:—*Held*: (1) the agreement did not deprive W. of the right to stop the goods *in transitu*; (2) the transit was not ended till the goods arrived at Shanghai, & the demand by W. of the bills of lading from the shipowners was an effectual stoppage *in transitu*. Consequently, W. was entitled to have the bill of exchange satisfied out of the proceeds of sale.—*Re LOVE, Ex p. WATSON* (1877), 5 Ch. D. 35; 46 L. J. Bcy. 97; 36 L. T. 75; 25 W. R. 489; 3 Asp. M. L. C. 396, C. A.

*Annotations*:—*As to* (1) *Reid*. *Kendal v. Marshall Stevens* (1883), 11 Q. B. D. 356. *As to* (2) *Distd. Re Isaacs, Ex p. Miles* (1885), 15 Q. B. D. 39. *Reid*. *Bethell v. Clark* (1888), 57 L. J. Q. B. 302.

**2164. — Goods forwarded to orders of buyer.]**

—Goods having been purchased by merchants in London of manufacturers in Wolverhampton, the purchasers wrote to the vendors asking them to consign the goods "to the *Darling Downs*, to Melbourne, loading in the East India Docks." The goods were accordingly delivered by the vendors to carriers to be forwarded to the ship. The vendors being subsequently informed of the purchasers' insolvency gave notice to the carriers to stop the goods, but too late to prevent their shipment on board the *Darling Downs*. The ship sailed with the goods on board for Melbourne, but before she arrived the vendors claimed the goods from the shipowners as their property:—*Held*: the transit was not at an end till the goods reached Melbourne, & therefore the vendors had till then a right to stop them *in transitu*.—*BETHELL v. CLARK* (1888), 20 Q. B. D. 615; 57 L. J. Q. B. 302; 59 L. T. 808; 36 W. R. 611; 6 Asp. M. L. C. 346; *sub nom. Re BETHELL & Co. & CLARK*, 4 T. L. R. 401, C. A.

*Annotations*:—*Apprvd.* *Lyons v. Hoffnug* (1890), 15 App. Cas. 391. *Consd. Re Gurney, Ex p. Hughes* (1892), 67 L. T. 598. *Apld.* *Kemp v. Ismay, Imrie* (1909), 100 L. T. 996. *Reid.* *Jobson v. Eppenheim* (1905), 21 T. L. R. 468.

**2165. — — — — —.]**—W. & co., commission agents, having received an order from Australia to buy certain goods on commission, made contracts with six vendors at Manchester for the purchase of the goods, & so far as the vendors were concerned, W. & co. were the principals. The goods were to be sold, delivered at Manchester, & the property passed on delivery to the carriers in Manchester. W. & co. instructed the vendors to mark the goods

N.X.Z. Adelaide, & forward them so marked to Liverpool to the order of defts., who were forwarding agents, for shipment per the ship S., & on Jan. 1, 1908, W. & co. advised defts. that they had instructed the vendors to forward the goods for shipment per the ship S. & directed defts. to include all the parcels in one bill of lading deliverable to the order of W. & co., at Adelaide. The goods were delivered on board by Jan. 11, & the ship sailed on Jan. 18. On Jan. 15, W. & co. became insolvent, & the vendors purported to stop the goods *in transitu* & obtained from defts., under an indemnity, bills of lading making the goods deliverable to their order. In an action by the trustee in bkpcy. of W. & co. to recover from defts. the value of the goods:—*Held*: the transit did not end, & the vendors' right to stop *in transitu* was not determined, on the receipt of the goods by defts. at Liverpool, & the action could not be maintained.—*KEMP v. ISMAY, IMRIE & Co.* (1909), 100 L. T. 996; 14 Com. Cas. 202.

*Annotation*:—*Reid.* *Reddall v. Union Castle Mail S.S. Co.* (1914), 84 L. J. K. B. 360.

*(b) By Agent of Buyer.*

*See Sale of Goods Act, 1893 (c. 71), s. 45.*

**2166. Whether goods in transit.]**—*LEEDS v. WRIGHT*, No. 2215, *post*.

**2167. — Agent of assignee in bankruptcy.]**

(1) Where goods were consigned to A., & his becoming a bkpt., his assignee went to the inn, where they were arrived, & put his mark on them, but did not take them away, because they had been attached there by a creditor of the bkpt.; the consignor could not afterwards stop them, because they were not then *in transitu*. It is not necessary, in order to divest the consignor's right to stop *in transitu*, that the goods should have been taken by the very hands of the consignee himself.

(2) There may be an actual delivery of the goods without the bkpt.'s seeing them; as a delivery of the key of vendor's warehouse to purchaser (*LORD KENYON, C.J.*).—*ELLIS v. HUNT* (1789), 3 Term Rep. 464; 100 E. R. 679.

*Annotations*:—*As to* (1) *Reid.* *Bohtlingk v. Inglis* (1803), 3 East, 381; *Scott v. Pettit* (1803), 3 Bos. & P. 469; *Crawshay v. Eades* (1823), 2 Dow. & Ry. K. B. 288; *Bloxam v. Sanders* (1825), 4 B. & C. 941; *Whitehead v. Anderson* (1842), 9 M. & W. 518; *Bornitson v. Strang* (1867), L. R. 4 Bq. 481. *As to* (2) *Reid.* *Oppenheim v. Russell* (1802), 3 Bos. & P. 42; *Hilton v. Tucker* (1888), 57 L. J. Ch. 973. *Generally, Reid.* *Tooke v. Hollingworth* (1793), 5 Term Rep. 215; *Lyons v. Hoffnug* (1890), 63 L. T. 293.

**2168. — — — — —.]**—*WHITEHEAD v. ANDERSON*, No. 2200, *post*.

**2169. — Agent for distribution.]**—Where A. & B., traders living in London, were, in the course of ordering goods of defts., cotton manufacturers at Manchester, to be sent to M. & co. at Hull, for the purpose of being afterwards sent to the correspondents of A. & B. at Hamburg; & on Mar. 31 A. & B. sent orders to defts. for certain goods to be sent to M. & co. at Hull, to be shipped for Hamburg as usual:—*Held*: as between buyer & seller the right of defts. to stop as *in transitu* was at an end when the goods came to the possession of M. & co. at Hull; for they were for this purpose the appointed agents of the vendees, & received orders from them as to the ulterior destination of the goods; & the goods, after their arrival at Hull, were to receive a new direction from the vendees.—*DIXON v. BALDWIN* (1804), 5 East, 175; 102 E. R. 1036.

*Annotations*:—*Consd.* *Coates v. Ralton* (1827), 6 B. & C. 422; *Tucker v. Humphrey* (1828), 4 Bing. 516. *Distd.* *Jackson v. Nichol* (1839), 5 Bing. N. C. 508. *Apld.* *Dodson v. Wentworth* (1842), 4 Man. & G. 1080; *Wentworth v. Outhwaite* (1842), 10 M. & W. 436; *Kendal v. Marshall Stevens* (1883), 11 Q. B. D. 356; *Re Isaacs, Ex p. Miles* (1885), 15 Q. B. D. 39. *Consd.* *Bethell v.*

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(1892), 67 L. T. 598. *Refd.* Rowe v. Pickford (1817), 1 Moore, C. P. 526; James v. Griffin (1837), 2 M. & W. 623; Valpy v. Gibson (1847), 4 C. B. 837; Coventry v. Gladstone (1868), L. R. 6 Eq. 44; *Re* Whitworth, *Ex p.* Gibbs (1875), 1 Ch. D. 101; Lyons v. Hoffmann (1890), 15 App. Cas. 391; Taylor v. G. E. Ry. (1901), 70 L. J. K. B. 499; Oppenheimer v. Fraser (1907), 97 L. T. 3. *Mentd.* Griffiths v. Perry (1859), 5 Jur. N. S. 1076.

**2170. — Commission agent.]**—Goods were purchased by a commission agent at Manchester for A. to be sent to Lisbon. A. had no warehouse at Manchester, & the vendor delivered the goods to the commission agent, who was to forward them to Lisbon:—*Held*: the *transitus* continued until they reached Lisbon, the place named by the vendee to the vendor as the place of ultimate destination, & the latter had a right to stop them in the hands of the agent, the vendee having become insolvent.—*COATES v. RAILTON* (1827), 6 B. & C. 422; 9 Dow. & Ry. K. B. 593; 5 L. J. O. S. K. B. 209; 108 E. R. 507.

*Annotations*:—*Consd.* Kendal v. Marshall Stevens (1883), 11 Q. B. D. 356. *Refd.* Valpy v. Gibson (1847), 16 L. J. C. P. 241; Bethell v. Clark (1888), 20 Q. B. D. 615.

**2171. —**—*]*—A commission agent in London was employed by merchants at Kingston, Jamaica, to buy goods for them in England. He ordered the goods of manufacturers "for this mark," there being in the margin of the letter which gave the order a mark consisting of two letters, with "Kingston, Jamaica," added. The manufacturers knew from previous dealings that this mark had been used by the Jamaica firm. The goods were to be paid for by six months' bills drawn by the manufacturers on the commission agent & accepted by him. On Sept. 11, the commission agent wrote to the manufacturers, telling them to pack the goods & mark them with the mark previously mentioned, & to forward them to specified shipping agents at Southampton, for shipment by a particular ship, "advising them with particulars for clearance." On Sept. 13, the manufacturers sent the invoice of the goods to the commission agent, telling him that they had that day forwarded the goods by railway to the shipping agents "with the usual particulars for clearance." The same day the manufacturers wrote to the shipping agents, sending them the particulars of the goods, & adding, "which please forward as directed." The particulars described the goods as marked with the letters originally given by the commission agent, & the words "Kingston, Jamaica," & numbered with specified numbers, but the columns for "consignee" & "destination" were left in blank. The cost of the carriage to Southampton was paid by the manufacturers. On Sept. 14, the commission agent sent to the shipping agents particulars of the goods, giving the name of the Jamaica firm as consignees, & stating the destination of the goods to be Kingston, Jamaica. The goods were shipped on board the vessel, the bills of lading describing the commission agent as consignor, & the Jamaica firm as consignees. After the ship had sailed, but before her arrival at Jamaica, the commission agent stopped payment, & the manufacturers, who had not been paid for the goods, gave notice to the shipowners to stop them *in transitu*:—*Held*: as between the commission agent & the manufacturers, the transit was at an end when the goods arrived at Southampton, & the notice to stop was given too late.—*Re* ISAACS, *Ex p.* MILES (1885), 15 Q. B. D. 39; 54 L. J. Q. B. 566, C. A.

*Annotations*:—*Distd.* Bethell v. Clark (1888), 20 Q. B. D. 615. *Refd.* *Re* Gurney, *Ex p.* Hughes (1892), 67 L. T. 598.

**2172. — Shipping agent.]**—*NICHOLLS v. LE FEUVRE*, No. 2107, *ante*.

**2173. —**—*]*—*VALPY v. GIBSON*, No. 2101, *ante*.

**2174. —**—*]*—Pltf. sold to defts., who carried on business at Hamburg, ten tons of wagon brass ex York stores to be forwarded to the Co-operative Wholesale Society at Goole. Defts. at the same time wrote to the Co-operative Society, who were shipping agents, informing them that they would receive the brass, & directing them to forward it by steamer to Hamburg. Pltf., who knew that the goods were going to be forwarded by steamer, but had received no instructions where they were to be sent after arrival at Goole, forwarded them to the Co-operative Society at Goole, who received them & sent them on to Hamburg. When the brass arrived at Hamburg pltf., who had not been paid, telegraphed to the Co-operative Society's branch there not to deliver it:—*Held*: as pltf. had only received instructions to send the goods to the Co-operative Society at Goole, the goods were received there by the society as agents in that behalf for defts., & fresh instructions to the society as to the further destination of the goods were necessary; therefore the transit was at an end at Goole, & the notice to stop was too late.—*JOBSON v. EPPENHEIM & Co.* (1905), 21 T. L. R. 468.

**2175. — Forwarding agent.]**—Goods were purchased of B. in London by A., residing at Falmouth. On Oct. 27, 1876, B. delivered the goods for shipment on a steamer calling at Falmouth, & on the same day posted an invoice to A. On Oct. 29 the steamer left London, & on Oct. 31 arrived at Falmouth, where the goods were discharged on the quay & taken to the warehouse of C., who was the agent of the Steam Packet co., & in the habit of holding goods landed from the steamers at the risk & subject to the order of the consignees, & also with the exclusive right as between himself & the Steam Packet co. of delivering goods to the consignees. On Oct. 30, A. committed an act of bkpcy. by absconding from Falmouth, & on Nov. 4, 1876, he was adjudicated bkpt. On Nov. 4 B. telegraphed instructions to C. not to deliver the goods:—*Held*: the *transitus* had not ended on the arrival of the goods at Falmouth, & transfer to the warehouse of C., who, in the absence of instructions, held them as forwarding agent, & not as an agent for B. to keep the goods; & accordingly, that the right of B., as unpaid vendor, to stop the delivery of the goods prevailed as against the claim of A.'s trustee in bkpcy.—*Re* WORSDELL, *Ex p.* BARROW (1877), 6 Ch. D. 783; 46 L. J. Bcy. 71; 36 L. T. 325; 25 W. R. 466; 3 Asp. M. L. C. 387.

*Annotation*:—*Distd.* Taylor v. G. E. Ry. (1901), 70 L. J. K. B. 499.

**2176. — Ulterior destination intended.]**—When goods have been sent by an unpaid vendor through a carrier to a forwarding agent, who has been appointed by the vendee, & who receives the necessary orders from the vendee & not from the vendor, the transit of the goods upon reaching the hands of the forwarding agent is at an end & the right to stop *in transitu* is lost, even although the goods may have been intended to be sent to an ulterior & subsequent destination. L. bought certain goods of W. at Bolton, saying nothing as to the place of delivery. L. afterwards arranged with M. that the goods should be sent by steamer from Garston to Rouen. L. then instructed W. to send the goods to M. at Garston. W. accordingly dispatched the goods by railway. The railway co. gave notice to M. of the arrival of the goods, & further gave notice that they would hold the goods as warehousemen. L. then filed a petition for the liquidation of his affairs by arrangement;

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he had not paid W. for the goods. W. thereupon stopped the delivery of the goods, & M. returned them to him. The trustee in liquidation of L. having brought an action against M. & W. to recover the value of the goods:—*Held*: the transit of the goods had ceased when the goods reached Garston & came into the possession of M., as forwarding agent for L., the right to stop *in transitu* was then at an end, & the trustee was entitled to recover the value of the goods.—**KENDALL v. MARSHALL, STEVENS & Co.** (1883), 11 Q. B. D. 356; 52 L. J. Q. B. 313; 48 L. T. 951; 31 W. R. 597, C. A.

**Annotations:—***Apld.* *Re Isaacs, Ex p. Miles* (1885), 15 Q. B. D. 39. *Distd.* *Kemp v. Ismay, Imrie* (1909), 100 L. T. 996. *Refd.* *Brindley v. Cilgwyn Slate Co.* (1885), 55 L. J. Q. B. 67; *Bethell v. Clark* (1888), 20 Q. B. D. 615.

**2177. —Reservations annexed by seller.]—****SCHOTSMANS v. LANCASHIRE & YORKSHIRE RY. CO., No. 2328, post.**

**Possession of carriers, wharfingers, or other bailees.]—***See* Sub-sect. 3, C., *post*.

**C. Possession of Carriers, Wharfingers, or Other Bailees.**

**(a) Carriers.**

*See* Sale of Goods Act, 1893 (c. 71), s. 45.

**2178. Possession as agent of buyer.]—**A trader in London was in the habit of purchasing goods at Manchester, & exporting them to the continent soon after their arrival in London. The goods so consigned to him remained in the wagon office of defts., who were carriers, until they were removed by his agent for the purpose of being shipped. A consignment of goods for the trader was delivered to defts. on Aug. 9 & 12; on Aug. 14 & 17 the goods arrived at the wagon office of defts.; on Aug. 16 or 17 the trader became bkpt.; & on Aug. 19, notice of non-delivery to the bkpt. was given by the consignor to defts., who, according to order, on Aug. 21 delivered the goods to a third house:—*Held*: the assignees of the bkpt. were entitled to recover the goods deposited with defts.; & the right of the consignor to stoppage *in transitu* ceased on the arrival of the goods at the wagon office of defts. in London.—**ROWE v. PICKFORD** (1817), 8 Taunt. 83; 1 Moore, C. P. 526; 129 E. R. 313.

**Annotations:—***Distd.* *Coates v. Railton* (1827), 6 B. & C. 422. *Consd.* *Morley v. Hay* (1828), 3 Man. & Ry. K. B. 396. *Refd.* *James v. Griffin* (1837), 2 M. & W. 623; *Dodson v. Wentworth* (1842), 4 Man. & G. 1080; *Whitehead v. Anderson* (1842), 9 M. & W. 518.

**2179. —.]—****FOSTER v. FRAMPTON, No. 2130, ante.**

**2180. —.]—**Where goods were conveyed by a carrier by water, & deposited in the carrier's warehouse for the convenience of the vendee, to be delivered out as he should want them:—*Held*: the *transitus* was at an end, & the vendor's right to stop *in transitu* gone, although it appeared that the carrier claimed to have a lien on the goods.—**ALLAN v. GRIPPER** (1832), 2 Cr. & J. 218; 149 E. R. 94; *sub nom.* **ALLEN v. GRIPPER**, 2 Tyr. 217; 1 L. J. Ex. 71.

**Annotation:—***Apld.* *Dodson v. Wentworth* (1842), 4 Man. & G. 1080.

**2181. —.]—**H. & co. of Hull, having sold to W. of Mickley Mills, near Leeds, twenty mats of flax, they were, on Aug. 10, sent by railway to Leeds, & arrived at defts.' warehouse at Leeds, where it was the custom for defts. to receive goods sent for W., & to give him notice of their arrival & for him to send his carts for them. On Aug. 16, W. sent his cart & took away ten of the mats.

On Aug. 18, H. & co. sold to W. twenty other mats of flax, & a quantity of other goods. The flax was sent by railway to Leeds & arrived duly at defts. warehouse; the other goods were sent by sloop to Boroughbridge. On the arrival of this flax at defts.' warehouse, notice was given to W. by letter which stated that unless the goods were sent for, they would remain there at warehouse rents. On Aug. 23, W. sent his cart & took away ten of the latter mats, & left there ten of the mats last sent, & ten of the former. On Sept. 8, W. having become insolvent, the goods which had been shipped for Boroughbridge were stopped *in transitu* at Hull; & on the same day the ten mats of flax of the second parcel were also stopped at Leeds by H. & co. On Sept. 11, the sheriff entered, & seized all the flax in defts.' warehouse sent by H. & co. under an execution against W. On Sept. 15, there was also a stoppage by H. & co. of the remaining ten mats of the first parcel. It was found by the jury at the trial that the parties contemplated that the goods were to be used for the purpose of manufacture at Mickley Mills:—*Held*: (1) under the above circumstances, the *transitus* was at an end on the arrival of the goods at defts.' warehouse; (2) the stoppage of the goods which had been shipped to go to Boroughbridge had not the effect of revesting the property in the parcel of flax which had been sent to defts.' warehouse at Leeds, although comprised in one joint contract with the other goods. (3) *Semble*: the effect of a stoppage *in transitu* is not to rescind the contract, but only to replace the vendor in the same position as if he had not parted with the possession of the goods.

(4) At all events, the vendor had no right to retake that part which had arrived at its journey's end.—**WENTWORTH v. OUTHWAITE** (1842), 10 M. & W. 436; 12 L. J. Ex. 172; 152 E. R. 541.

**Annotations:—***As to* (1) *Apld.* *Coventry v. Gladstone* (1868), 1 L. R. 6 Eq. 44. *Distd.* *Re Worsdell, Ex p. Barrow* (1877), 6 Ch. D. 783. *Refd.* *Re Whitworth, Ex p. Gibbs* (1875), 1 Ch. D. 101. *As to* (3) *Refd.* *Re Edwards, Ex p. Chalmers* (1873), 8 Ch. App. 289; *Booth S.S. Co. v. Cargo Fleet Iron Co.*, [1916] 2 K. B. 570. *As to* (4) *Refd.* *Re Edwards, Ex p. Chalmers* (1873), 8 Ch. App. 289. *Generally, Refd.* *Tanner v. Scovell* (1845), 14 M. & W. 28; *Gunn v. Bolekow, Vaughan* (1875), 10 Ch. App. 491.

**2182. —.]—**Wheat purchased by sample was consigned from Peterborough to P., at a railway station in London. On the arrival of the wheat at the station on May 4, P. received notice from the railway co. that it had been warehoused at the co.'s warehouse, & entered in their books in the name of P. The co. allow consignees to use their warehouse for fourteen days without charge. On the morning of Saturday, May 9, the carman of P. brought a bulk sample from the station, & P. having examined it, & found it equal to sample, said "Don't cart the wheat to the mill at present." In the afternoon P. found himself in difficulties, & on Monday morning stopped payment. On Monday P. gave the vendor an order for the wheat, which he took to the railway station. On an issue to try whether the wheat was the property of the assignees of P. or of the vendor:—*Held*: (1) there was no acceptance of the wheat by P. within Stat. Frauds; (2) *semble*: there was no valid stoppage *in transitu*, for the transit was ended.—**NICHOLSON v. BOWER** (1858), 1 E. & E. 172; 28 L. J. Q. B. 97; 5 Jur. N. S. 240; 120 E. R. 873.

**Annotations:—***As to* (1) *Consd.* *Cusack v. Robinson* (1861), 1 B. & S. 299; *Taylor v. G. E. Ry.*, [1901] 1 K. B. 774.

**2183. —.]—**(1) To make a valid verbal contract for the sale of goods above the value of £10 where nothing has been given to bind the bargain or by way of part payment binding upon the vendee, there must be an acceptance & actual receipt, & such acceptance must be made with the consent

of the vendor; & until such acceptance, the property in the goods is not changed & the vendor may exercise his right to rescind the contract, & if under such circumstances the contract has been rescinded, no act on the part of the vendee, or of his assignees in case of his subsequent bkpcy., can effect an acceptance so as to change the property in the goods. (2) Goods purchased under such a contract & sent by the vendor to a railway station, consigned to the order of the vendee, are not, whilst lying at the station, waiting the order of the vendee, & before any order given or other act done by him constituting an acceptance of the goods, in his "possession, order or disposition," with the consent of the true owner, so as, upon his bkpcy., to give his assignees any right to them under Bkpcy. Law Consolidation Act, 1849 (c. 106), s. 125, notwithstanding the goods were no longer *in transitu*, & the right of stoppage therefore did not exist.—*SMITH v. HUDSON* (1865), 6 B. & S. 431; 6 New Rep. 103; 34 L. J. Q. B. 145; 12 L. T. 377; 11 Jur. N. S. 622; 13 W. R. 683; 9 Sol. Jo. 674; 122 E. R. 1254.

*Annotations*.—As to (1) *Reid*, *Taylor v. Smith*, [1893] 2 Q. B. 65. As to (2) *Consd.* *Re Bell, Ex p. Clarke* (1877), 47 L. J. Bey. 33. *Reid*. *Re Watson, Ex p. Atkin*, [1901] 2 K. B. 753; *Lamb v. Wright*, [1924] 1 K. B. 857.

2184. —[—]G. & co. sold 16 casks of oil by letter to bkpts., upon terms of payment by acceptance at thirty days' date. The oil arrived, & its arrival was notified to bkpts. by the carriers; subsequently, G. & co. telegraphed to stop the delivery. The carriers gave notice to the parties to interplead.—*Held*: the *transitus* ended with the notice of arrival of goods, & the trustee in bkpcy. was entitled.—*Re MILLO, Ex p. GOUDA* (1872), 20 W. R. 981.

2185. —[—]Goods were sent by G. from Charleston to an agent, B., at Liverpool, for the use of W., who were manufacturers in Yorkshire. A bill of lading was sent with the goods, & a bill of exchange for the amount. The arrangement between G. & W. was that, on the acceptance of the bill of exchange by W., the bill of lading was to be sent by B. to W. This was done, & W. forwarded the bill of lading to a gentleman who was the agent of the L. & Y. Ry. co. in Liverpool with directions to forward the goods to W. The goods were sent as directed, & such of them as were wanted by W. for use in his mill were taken from the trucks & used; the rest remained on the trucks in the possession of the railway co. W. filed a petition for liquidation, & G.'s agent gave notice to the co. & claimed against the trustee a right of stoppage *in transitu* as to the goods not yet taken into use by W.:—*Held*: (1) G.'s right to stoppage *in transitu* ceased on arrival of the goods at Liverpool, & the handing of the bill of lading to W. in return for the accepted bill of exchange. (2) *Semle*: the selection from & taking away of part of the goods from the trucks was constructive possession of the whole.—*Re WHITWORTH, Ex p. GIBBES* (1875), 1 Ch. D. 101; 45 L. J. Bey. 10; 40 J. P. 88; 24 W. R. 298; *sub nom. Re WHITWORTH & Co., Ex p. BLACKBURN, Ex p. GIBBES*, 33 L. T. 479; 3 Asp. M. L. C. 74.

*Annotation*.—As to (1) *Reid*. *Re Worsdell, Ex p. Barrow* (1877), 6 Ch. D. 783.

2186. —[—]—*Re MCLAREN, Ex p. COOPER*, No. 2238, *post*.

#### PART VII. SECT. 4, SUB-SECT. 3.—C. (a).

2189 i. *Possession as carrier*.—*Held*: the *transitu* was not at an end, for the railway co. held the goods as carriers, & not as agents.—*MORGAN ENVELOPE Co. v. BOUSTEAD* (1885), 7 O. R. 697.—*CAN.*

2189 ii. —[—]—*Re ALCOCK, INGRAM & Co., LTD.*, [1924] 1 D. L. R. 388; 53 O. L. R. 422.—*CAN.*

2189 iii. —[—]—*BLACK v. CASSELS* (1828), 6 Sh. (Ct. of Sess.) 894.—*SCOT.*

b. — *Demand for goods by buyer's assignee for benefit of creditors.*

2187. —[—]—Where an agreement has been arrived at between the buyer of goods consigned by carrier to await his orders & the carrier, that the goods are to remain in the possession of the carrier as warehouse keeper for the buyer, the seller is not entitled to stop the goods as still being *in transitu*.—*TAYLOR v. GREAT EASTERN RY. Co.*, [1901] 1 K. B. 774; 70 L. J. K. B. 499; 84 L. T. 770; 49 W. R. 431; 17 T. L. R. 394; 45 Sol. Jo. 381; 6 Com. Cas. 121.

2188. —[—]—A purchaser of goods consigned them to a destination abroad, the transit being in several stages. At the end of one of such stages he intercepted the goods, & they thereafter remained in the custody of the carriers, who charged him warehouse rent in respect of them. The unpaid vendors having claimed to stop the goods *in transitu*:—*Held*: the original transit had been terminated by the purchaser, & the right of the vendors to stop the goods *in transitu* was therefore lost.—*REDDALL v. UNION CASTLE MAIL S.S. Co.*, 1 L.T.D. (1914), 84 L. J. K. B. 360; 112 L. T. 910; 13 Asp. M. L. C. 51; 20 Com. Cas. 86.

2189. *Possession as carrier*.—*STOKES v. LA RIVIERE* (1784), cited in 3 East, at p. 380; cited in 3 Term Rep. at p. 466; 102 E. R. 643.

*Annotations*.—*Reid*. *Mason v. Lickbarrow* (1790), 1 Hy. Bl. 357; *Bohtlingk v. Inglis* (1803), 3 East, 381; *Dixon v. Baldwin* (1801), 5 East, 175.

2190. —[—]—*HUNTER v. BEAL* (1785), cited in 3 Term Rep. at p. 466; 100 E. R. 680.

*Annotations*.—*Consd.* *Dixon v. Baldwin* (1804), 5 East, 175. *Reid*. *Lickbarrow v. Mason* (1787), 2 Term Rep. 63; *Hodgson v. Loy* (1797), 7 Term Rep. 440; *Rowe v. Pickford* (1817), 8 Taunt. 83; *Tucker v. Humphrey* (1828), 4 Bing. 516; *Lyons v. Hoffmann* (1890), 15 App. Cas. 391.

2191. —[—]—*BOHTLINGK v. INGLIS*, No. 2228, *post*.

2192. —[—]—A. delivered a quantity of iron to a carrier to be conveyed by the latter to B., the vendee, in the country. The carrier having reached B.'s premises, landed a part of the iron on his wharf, & then finding that B. had stopped payment, reloaded the same on board his barge & took the whole of the iron to his own premises:—*Held*: there was no delivery of any part of the iron so as to divest the consignor of his right to stop *in transitu*, the special property remaining in the carrier until the freight for the whole cargo was either tendered or paid, or until he had done some act showing that he assented to part with the possession of the goods without receiving his freight.—*CRAWSHAY v. EADES* (1823), 1 B. & C. 181; 2 Dow. & Ry. K. B. 288; 1 L. J. O. S. K. B. 90; 107 E. R. 68.

*Annotations*.—*Distd.* *Allan v. Gripper* (1832), 2 Cr. & J. 218. *Reid*. *Sheridan v. New Quay Co.* (1858), 4 C. B. N. S. 618.

2193. —[—]—A consignor of goods, who has received the acceptance of the consignee for part of the goods, may stop them *in transitu* on the consignee's insolvency, & retain possession of them, without tendering back the bill. Goods were consigned to A., deliverable in the port of London at a certain price per ton. The vessel in which they were shipped arrived off the wharf at which the captain was in the habit of trading. The captain called at A.'s place of business & saw B., his clerk, A. being from home, & pressed him to send a craft for the goods, & he should be under

—*ANDERSON v. FISH* (1889), 16 O. R. 476; *affd.* (1890), 17 A. R. 28.—*CAN.*

c. *Claim for delivery by trustee in bankruptcy*.—*Power of carrier to prolong transitus to consult solicitor*.—*Re SIMMONS* (Ont.), [1924] 4 D. L. R. 562; 5 C. B. R. 144.—*CAN.*

*Sect. 4.—Stoppage in transitu: Sub-sect. 3, C. (a) & (b).]*

the necessity of landing them. After some days, B. wrote to the captain, stating that A. was from home, but he, B., thought he had better land the goods on A.'s account. They were accordingly landed at the wharf, & entered in the wharfinger's book, with "freight & charges" set opposite to them, & not in the name of any party as consignee. While they were lying there, A. became insolvent, & they were stopped by the consignor:—*Held*: the *transitu* was not determined.—EDWARDS v. BREWER (1837), 2 M. & W. 375; Murp. & H. 132; 6 L. J. Ex. 135; 1 Jur. 432; 150 E. R. 802.

2194. —[—BOLTON v. LANCASHIRE & YORKSHIRE RY. CO., No. 2258, *post*.

2195. —[—The forbearance or release of an antecedent claim is not a good consideration for an indorsement of a bill of lading, so as to defeat an unpaid vendor's right of stoppage *in transitu*. L. & S., carrying on business in London & Hong Kong, bought goods of L. & others, merchants at Manchester, to be shipped to their firm at Hong Kong. The goods were on a ten months' credit, & it was agreed that remittances of proceeds of the sales should be made from Hong Kong to meet the acceptances of L. & S. given for the price of the goods, on receipt of the bills of lading. L. & S. contracted for the carriage, & shipped the goods in a vessel they engaged, & the bills of lading deliverable to their firm in Hong Kong, or their assigns, were signed by the master & handed over to L. & S., who accepted the draft of the vendors for the amount of the purchase. Before the goods or bills of lading reached Hong Kong, L. S. & co., being insolvent, & pressed by two banking firms at Hong Kong, to whom they were largely indebted, in consideration of their debt to the bank, assigned to them the "whole of their property, premises, & chattels, specified in a schedule thereto, with all the estate, right, title, interest, claim, or demand of L. S. & co. arising thereout or therefrom." The schedule (*inter alia*) enumerated "All goods & bills of lading or other documents, for all goods now on the way hither." In pursuance of this agreement the bills of lading were indorsed & handed over to the banking firms, to whom the insolvent circumstances of L. S. & co. at that time were well known:—*Held*: (1) the pre-existing debt was not a valuable consideration for the assignment, so as to defeat the right of the unpaid vendors to stop the goods *in transitu*; & (2) the *transitu* had not ended before the arrival of the goods at Hong Kong, as the *transitu* continued while the goods were in charge of a third party, contracted with as carrier for the purpose of forwarding them.—RODGER v. COMPTON D'ESCOMPTE DE PARIS (1869), L. R. 2 P. C. 393; 5 Moo. P. C. C. N. S. 538; 38 L. J. P. C. 30; 21 L. T. 33; 17 W. R. 468; 3 Mar. L. C. 271; 16 E. R. 618, P. C.; *subsequent proceedings* (1871), L. R. 3 P. C. 465, P. C.

*Annotations*:—As to (1) *Distd. Chartered Bank of India, Australia & China v. Henderson* (1874), L. R. 5 P. C. 501. *N.F. Leask v. Scott* (1877), 2 Q. B. D. 376. *Folld. Re Love, Ex p. Watson* (1877), 5 Ch. D. 35. *Generally, Refd. The Emilien Marie* (1875), 44 L. J. Adm. 9; *Kendal v. Marshall Stevens* (1883), 11 Q. B. D. 356.

2196. —[—*Re McLAREN, Ex p. COOPER*, No. 2238, *post*.

2197. —[—Where goods have not been delivered to the purchaser, or to any agent of his, to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such, & for the purposes of the transit, then, although such carrier was the purchaser's agent to accept delivery so as to pass the property, nevertheless the goods

are *in transitu* & may be stopped. The right to stop under such circumstances is not affected by the facts that the purchaser has handed to the shipping agents the bills of lading received by him from the vendor, & has received from them a fresh bill of lading; & that the purchaser is himself a passenger by the vessel on board which the goods are shipped as cargo for conveyance to their ultimate destination.—LYONS v. HOFFNUNG (1890), 15 App. Cas. 391; 59 L. J. P. C. 79; 63 L. T. 293; 39 W. R. 390; 6 Asp. M. L. C. 551, P. C.

*Annotation*:—*Refd. Kemp v. Ismay, Imrie* (1909), 100 L. T. 996.

2198. — *Demand for goods by buyer.*—[The delivery of goods by the seller to a carrier by order of the buyer's agent, for the purpose of being forwarded to the buyer, is not such a constructive delivery to the buyer as to put an end to the seller's right of stoppage *in transitu*; & although it seems to be the better opinion that if the buyer actually takes possession of his goods before their arrival at the place of their ultimate destination the seller's right of stoppage *in transitu* is thereby defeated, yet a mere demand by the buyer before such arrival without delivery will not have that effect. C., the agent of M., bought some lead of pltf. at Newcastle which was shipped by C.'s order to be forwarded to M. in London. Upon the vessel's arrival in the Thames the lead was demanded by M., but the captain refused to deliver it; it was put on board a lighter belonging to defts. who were warehousemen & who had undertaken the delivery of the lead by his orders. While still on board the lighter it was demanded by pltf.:—*Held*: at the time of such demand his right of stoppage still existed.—JACKSON v. NICHOL (1839), 5 Bing. N. C. 508; 2 Arn. 32; 7 Scott, 577; 8 L. J. C. P. 294; 3 Jur. 772; 132 E. R. 1195.

*Annotation*:—*Refd. Re Worsdell, Ex p. Barrow* (1877), 46 L. J. Bcy. 71.

2199. — *Nominated & hired by purchaser.*—[Delivery of goods by the vendor to a carrier, even though the carrier be nominated & hired by the purchaser, is only constructive, not actual delivery to the purchaser, inasmuch as the contract with a carrier to carry goods does not make the carrier the agent or servant of the person with whom he contracts. Till the goods are in the actual possession of the purchaser the transit is not at an end, & it makes no difference that their ultimate destination has not been communicated by the purchaser to the vendor. A contract was entered into for the sale of some china clay to be delivered free on board at a specified port, & to be paid for by an acceptance of the purchaser. Afterwards the purchaser chartered a ship & gave notice to the vendors, who then delivered the clay on board the specified ship at the port agreed upon. The destination of the clay had not been communicated to the vendors. Before the ship left the harbour the vendors heard of the insolvency of the purchaser, & gave notice to the master of the ship to stop the clay *in transitu*. No bill of lading had been signed, nor had the purchaser given any acceptance for the price of the clay:—*Held*: the clay being in the possession of the master of the ship only as carrier, the transit was not at an end, & the notice to stop was given in time.—*Re COCK, Ex p. ROSEVEAR CHINA CLAY CO.* (1879), 11 Ch. D. 500; 48 L. J. Bcy. 100; 40 L. T. 730; 27 W. R. 591; 4 Asp. M. L. C. 144, C. A.

*Annotations*:—*Consd. Kendal v. Marshall Stevens* (1883), 11 Q. B. D. 356. *Folld. Bethell v. Clark* (1887), 19 Q. B. D. 553. *Appld. Kemp v. Ismay, Imrie* (1909), 100 L. T. 996. *Refd. Jobson v. Eppenheim* (1905), 21 T. L. R. 468.

2200. *Marking & taking samples—When in possession of carrier—Whether amounting to con-*



structive possession.]—(1) A notice of stoppage *in transitu*, to be effectual, must be given either to the person who has the immediate custody of the goods, or to the principal whose servant had the custody, at such a time, & under such circumstances, as that he may by the exercise of reasonable diligence communicate it to his servant in time to prevent the delivery to the consignee. Therefore, where timber was sent from Quebec, to be delivered at Port Fleetwood in Lancashire, a notice of stoppage given to the shipowner at Montrose, while the goods were on their voyage, whereupon he sent a letter to await the arrival of the captain at Fleetwood, directing him to deliver the cargo to the agents of the vendor, was held not to be a sufficient notice of stoppage *in transitu*.

(2) The vessel arrived in port on Aug. 8, on which day, before the captain had received his owners' letter, the agent of the assignees of the vendee, who had become bkpt., went on board, & told the captain he had come to take possession of the cargo. He went into the cabin, into which the ends of timber projected, & saw & touched the timber. When the agent first stated that he came to take possession, the captain made no reply, but subsequently, at the same interview, told him that he would deliver him the cargo when he was satisfied about his freight. They then went on shore together. Shortly afterwards the agent of the vendor came on board, & served a notice of stoppage *in transitu* upon the mate, who had charge of the cargo, & a few days afterwards received possession of the cargo from the captain:—*Held*: under these circumstances, there was no actual possession taken of the goods by the assignees; &, as there was no contract by the captain to hold the goods as their agent, the circumstances did not amount to a constructive possession of the goods by them.

(3) *Qu.*: whether the act of marking, or taking samples, or the like, without any removal of any part of the goods from the possession of the carrier, even though done with the intention of taking possession, will amount to a constructive possession, unless accompanied by circumstances denoting that the carrier was intended to keep, & assented to keep, possession of the goods as the agent of the vendee.

(4) Before the consignor knew of the bkpcy. of the consignee, he had sent three letters to the manager of a bank in Liverpool, inclosing bills drawn by himself upon certain parties, & he referred therein to defts. as persons who would settle any irregularity that might occur respecting the acceptances. These letters were communicated to defts., & assented to by them. Another letter to the same party inclosed a bill drawn upon the consignee for the price of the timber in question:—*Held*: the letters were admissible in evidence, & were some evidence to show an authority in defts. to stop the cargo *in transitu*.

(5) The consignor, before the stoppage *in transitu*, wrote a letter to defts., in which he assumed that they had stopped the cargo, & gave directions as to the sale of it. This letter did not reach defts. until after the stoppage. *Qu.*: whether it gave authority to them to stop the cargo at the time of the stoppage, or amounted to a valid ratification of that act.—*WHITEHEAD v. ANDERSON* (1842), 9 M. & W. 518; 11 L. J. Ex. 157; 152 E. R. 219.

*Annotations*:—As to (1) *Refd.* *Wentworth v. Outhwaite* (1842), 10 M. & W. 436; *Bolton v. L. & Y. Ry.* (1866), L. R. 1 C. P. 431; *Coventry v. Gladstone* (1868), L. R. 6 Eq. 44; *Re Kiell, Ex p. Falk* (1880), 14 Ch. D. 446; *Bethell v. Clark* (1887), 19 Q. B. D. 553. As to (2) *Refd.* *Re Whitworth, Ex p. Gibbes* (1875), 1 Ch. D. 101. *Generally,*

*Refd.* *Tanner v. Scovell* (1845), 14 M. & W. 28; *Reddall v. Union Castle Mail S.S. Co.* (1914), 84 L. J. K. B. 360; *Booth S.S. Co. v. Cargo Fleet Iron Co.*, [1916] 2 K. B. 570.

### (b) Wharfingers.

See Sale of Goods Act, 1893 (c. 71), s. 45.

2201. Wharfinger as forwarding agent.]—*SMITH v. GOSS*, No. 2104, *ante*.

2202. Delivery order by seller—Nothing remaining to complete sale—Weighing.]—*WITHERS v. LYSS*, No. 1373, *ante*.

2203. ——— Resale to sub-purchaser.] *BARTON v. BODDINGTON*, No. 1549, *ante*.

2204. Wharfinger as agent of buyer.]—Where goods are delivered to a vendee at a wharf, who afterwards ships them there, no subsequent stoppage of the goods *in transitu* can take place.—*NOBLE v. ADAMS* (1816), 7 Taunt. 59; 2 Marsh. 366; 129 E. R. 24.

*Annotations*:—*Mentd.* *Harris v. Lunell* (1819), 4 Moore, C. P. 10; *Bristol v. Wilmshire* (1823), 1 B. & C. 514; *Stephenson v. Hart* (1828), 1 Moo. & P. 357; *Irving v. Motly* (1831), 7 Bing. 543; *Load v. Green* (1846), 15 M. & W. 216; *White v. Garden* (1851), 10 C. B. 919; *Re Shackleton, Ex p. Whittaker* (1875), 10 Ch. App. 447, n.

2205. ———.]—A., by contract, sold to B. a quantity of tallow, then lying at a wharf, at so much per cwt.; & on the same day gave a written order upon the wharfingers to weigh, deliver, transfer & rehouse the same. B. having entered into a contract to sell tallow to C., obtained from the wharfingers & gave to C. a written acknowledgment that they had transferred the tallow to the account of C., & that C. was to be liable to charges from a given date. B. having stopped payment, A. gave notice to the wharfingers not to deliver the tallow to B.'s order. In an action of trover by C. against the wharfingers:—*Held*: after their acknowledgment, they held the tallow as the agents of C., & they could not therefore set up as a defence a right in A. to stop it *in transitu*.—*HAWES v. WATSON* (1824), 2 B. & C. 540; 4 Dow. & Ry. K. B. 22; Ry. & M. 6; 2 L. J. O. S. K. B. 83; 107 E. R. 484.

*Annotations*:—*Apld.* *Gosling v. Birnie* (1831), 7 Bing. 339; *Woodley v. Coventry* (1863), 2 H. & C. 164; *Re Knight, Ex p. Golding, Davies* (1880), 13 Ch. D. 628. *Refd.* *Mellin v. Kelslow* (1830), 1 Tyr. 109; *Crawshaw v. Thornton* (1837), 2 My. & Cr. 1; *Swanwick v. Sothorn* (1839), 9 Ad. & El. 895; *Biddle v. Bond* (1865), 6 B. & S. 225; *Knights v. Wiffen* (1870), L. R. 5 Q. B. 660; *Henderson v. Williams*, [1895] 1 Q. B. 521; *Dixon v. Kennaway*, [1900] 1 Ch. 833. *Mentd.* *Meynell v. Angell* (1862), 1 New Rep. 126.

2206. ———.]—The "acceptance" of goods, required by Stat. Frauds, s. 17, in order to make the contract of sale good, may be prior to the "actual receipt," & need not be contemporaneous with or subsequent to it.

Deft., on Oct. 24, having examined at Liverpool several of a lot of 156 firkins of butter, verbally agreed with plffs. to purchase the whole of them, & directed that they should be sent, by carriers whom he named, to Fenning's Wharf, London. The butter was accordingly delivered by plffs. to the carriers, & by them delivered at Fenning's Wharf, in two lots, on Oct. 26 & 27. Fenning was in the habit of receiving & warehousing butter for deft. until he sold it. Plffs. sent an invoice to deft. in London, on Oct. 25, with a letter apprising him that the butter had been sent as he had directed. There was no direct evidence that deft. inspected the butter at the wharf; but on Oct. 27 he telegraphed to plffs. that he should send it back as not according to sample, & it was redelivered, on the same day, by Fenning to the carriers under an order from deft.:—*Held*: (1) there was ample evidence that the goods when placed in the wharf were put under the control of deft.,



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so as to put an end to any right of plffs. as unpaid vendors; (2) there was a sufficient "actual receipt" by deft., within Stat. Frauds, s. 17 (3) deft. having selected at Liverpool the specific firkins as those which he agreed to take as his property as the goods sold, & having directed those specific goods to be forwarded to London, there was an "acceptance" by him within the sect.—*CUSACK v. ROBINSON* (1861), 1 B. & S. 299; 30 L. J. Q. B. 261; 4 L. T. 506; 7 Jur. N. S. 542; 9 W. R. 735; 121 E. R. 726.

*Annotations*.—As to (1) *Distd.* Bolton v. L. & Y. Ry. (1866), 1 L. T. C. P. 431. *Refd.* *Re* Roberts, Evans v. Roberts (1887), 36 Ch. D. 196. As to (3) *Refd.* Bog Lead Mining Co. v. Montague (1861), 10 C. B. N. S. 481; Williamson v. Barton (1862), 7 H. & N. 899; Smith v. Hudson (1865), 6 B. & S. 431; Reuss v. Pickersley (1866), L. R. 1 Exch. 342; Kibble v. Gough (1878), 38 L. T. 204.

**2207. — Delivery order by buyer—Transfer in books of wharfinger.**—When the purchaser of goods has lodged an order to deliver them with the wharfinger in whose warehouse they lie, & the latter has transferred them in his books into the name of the purchaser, the vendor's right to stop them *in transitu* is gone & the wharfinger is bound to hold them as the agent of the purchaser. The same effect is produced by the delivery note being lodged with the wharfinger, without a transfer in his books.—*HARMAN v. ANDERSON* (1809), 2 Camp. 243; 170 E. R. 1143.

*Annotations*.—*Folld.* Zwinger v. Samuda (1817), 1 Moore, C. P. 12; Hawes v. Watson (1824), 2 B. & C. 540; Holl v. Griffin (1833), 10 Bing. 246. *Consd.* Lackington v. Atherton (1844), 7 Man. & G. 360. *Distd.* Laurio & Morewood v. Dudin, [1926] 1 K. B. 223. *Refd.* Lucas v. Dorrien (1817), 7 Taunt. 278; Holderness v. Shackels (1828), 7 L. J. O. S. K. B. 80; Gosling v. Birnie (1831), 5 Moo. & P. 160; Miles v. Gorton (1834), 2 Cr. & M. 504; Swanwick v. Sothern (1839), 1 Per. & Dav. 648; Dublin City Distillery v. Doherty, [1914] A. C. 823.

**2208. — What constitutes agency.**—Goods were forwarded in bales by ship to London, deliverable to B. & co., or their assigns, who were factors for sale; & were landed at defts.' wharf. B. & co. gave defts. orders to "weigh & deliver" the goods to M. who had contracted with B. & co. for the purchase of them. They were accordingly weighed & an account of the weights sent to B. & co. who made out invoices to M. accordingly. M. resold several bales of the goods, which were delivered by defts., upon his order, to his vendees; the rest remained on defts.' wharf until they were stopped by B. & co. as unpaid vendors. They were never transferred in defts.' books from the names of B. & co. to that of M. nor was any warehouse rent paid by him:—*Held*: (1) upon these facts, defts. never stood in the relation of wharfingers to M., so as to be liable to an action on the case by him for the non-delivery of the goods to his order; (2) under these circumstances B. & co.'s right of stoppage *in transitu* was not determined by the part delivery to M.'s vendees.—*TANNER v. SCOVELL* (1845), 14 M. & W. 28; 14 L. J. Ex. 321; 153 E. R. 375.

*Annotations*.—As to (1) *Refd.* Grice v. Richardson (1877), 37 L. T. 677. As to (2) *Consd.* *Re* McLaren, *Ex p.* Cooper (1879), 11 Ch. D. 68. *Refd.* *Re* Piggett, *Ex p.* Cross (1851), Fowl. 215; *Re* Harcourt, Danby v. Tucker (1883), 31 W. R. 578.

—*Compare* BAILMENT, Vol. III., pp. 102–105, Nos. 294–305.

**2209. Order by buyer to deliver to third party—On arrival of goods.**—*AKERMAN v. HUMPHREY*, No. 1366, *ante*.

**2210. — Previous delivery order by seller to wharfinger.**—*SWANWICK v. SOTHERN*, No. 1061, *ante*.

**2211. —**—*TANNER v. SCOVELL*, No. 2208, *ante*.

**2212. Goods not landed—No application by buyer.**—The shippers, acting for G., purchased, & paid for with their own money, flour at Stockton, which was sent by a vessel to London, & the invoice forwarded to G. A manifest of the flour was also forwarded by the shippers to a wharfinger in London, whose practice it was to deliver goods to the consignee named in the manifest upon application, & till application to keep it on board the vessel; if not applied for before the vessel returned, he landed it, & kept it in his warehouse, to the order of the shipper; if the goods were to be delivered to order, he delivered them to persons producing either bills of lading or the shipper's invoices. G. was in the habit of having flour consigned to him at the wharf, & sometimes sold it on board, sometimes when it was landed, & kept for him in the wharfinger's warehouses. The flour in question arrived at the wharf on Apr. 12, but was not landed till Apr. 22; on Apr. 17, before any application by G., who had become bkpt., the flour was claimed under an order from the shippers:—*Held*: the flour not having been landed, nor any application having been made by G., the shippers might stop *in transitu*.

I have never heard it contended that the mere possession of an invoice could bar the vendor's rights (PARK, J.).—*TUCKER v. HUMPHREY* (1828), 4 Bing. 516; 1 Moo. & P. 378; 6 L. J. O. S. C. P. 92; 130 E. R. 866.

*Annotation*.—*Distd.* Dodson v. Wentworth (1842), 12 L. J. C. P. 59.

**Rejection of goods by buyer.**—*See* Sub-sect. 3, H., *post*.

## (c) Other Bailees.

*See* Sale of Goods Act, 1893 (c. 71), s. 45.

**2213. Engraver—Goods to be engraved before delivery to buyer.**—A. agreed to buy some articles of plate of B. who was to get A.'s arms engraved on them, & to pay for the engraving:—*Held*: a delivery to the engraver for that purpose was not a delivery to A. so as to defeat B.'s right of stopping the goods *in transitu*, the price of the goods not being paid by A. If the seller of goods takes notes or bills for them, without agreeing to run the risk of the notes being paid, & the notes turn out to be worth nothing, this will not be considered as payment.—*OWENSON v. MORSE* (1796), 7 Term Rep. 64; 101 E. R. 856.

*Annotation*.—*Refd.* Dutton v. Solomonson (1803), 3 Bos. & P. 582.

**2214. Packer—As agent of buyer.**—On Mar. 16, 1802, goods were forwarded from Manchester, addressed to A. at the Bull & Mouth Inn, London, in consequence of a previous order from him. On Mar. 23 the goods were sent to deft.'s house as the packer of A., the latter having given no direction at the Bull & Mouth Inn respecting these particular goods; but having given a general order that all goods addressed to him should be sent to deft.; A. having no warehouse of his own. On Mar. 11 A. committed an act of bkpcy. When the goods arrived at deft.'s they were booked to the account of A., & deft., not knowing of A.'s bkpcy., unpacked the goods to ascertain the contents. On Mar. 31 the goods were claimed by the consignees, & on the day after by the assignees of A. against whom a commission had been taken out:—*Held*: the *transitus* of the goods was at an end when they arrived at deft.'s house; & consequently, plffs., as the assignees of A., were entitled to recover them in an action of trover.—*SCOTT v. PETTIT* (1803), 3 Bos. & P. 469; 127 E. R. 255.

*Annotations*.—*Apld.* Dixon v. Baldwin (1804), 5 East, 175; *Howe v. Pickford* (1817), 1 Moore, C. P. 526. *Consd.* *Foster v. Frampton* (1826), 6 B. & C. 107; Kendal v.

Marshall, Stevens (1883), 11 Q. B. D. 356. *Reid*. Tucker v. Humphrey (1828), 4 Bing. 516; James v. Griffin (1837), 2 M. & W. 623.

**2215.** ———.]—A., the general agent in London of B. & co. a house at Paris, with power to export for them to such markets as he should think fit, purchased goods in the name of B. & co. of C. at Manchester, & directed them to be sent to D. a packer in London. After their arrival A. had some of the goods unpacked & sent away, & the remainder repacked. News then arrived of the failure of B. & co.:—*Held*: the goods in D.'s hands were no longer *in transitu*, & C., therefore, had no right to stop them.—*LEEDS v. WRIGHT* (1803), 3 Bos. & P. 320; 127 E. R. 176; *previous proceedings* (1802), 4 Esp. 243, N. P.

*Annotations*:—*Consd.* Scott v. Pettit (1803), 3 Bos. & P. 469. *Apd.* Dixon v. Baldwin (1804), 5 East, 175; Rowe v. Pickford (1817), 1 Moore, C. P. 526. *Distd.* Coates v. Railton (1827), 6 B. & C. 422. *Reid*. Kendal v. Marshall, Stevens (1883), 11 Q. B. D. 356.

**2216.** ——— **Goods to be paid for in ready money.**]—Although goods are delivered at the packer's of the purchaser, he having no warehouse of his own, if they were to be paid for in ready money, & this was intimated to the packer when he received them, they may still be stopped *in transitu*.—*LOESCHMAN v. WILLIAMS* (1815), 4 Camp. 181; 171 E. R. 58, N. P.

**2217. Warehouseman—Agent of buyer.**]—Bales of flax sold by A. in London to B. residing at Mickley Mill, are addressed to "B. Mickley," & are shipped for Hull under a bill of lading making them deliverable "at the port of Boroughbridge for B., Mickley Mill." The bales are forwarded from Hull to Boroughbridge by water carriage, & are deposited there in the warehouse of C., a party unconnected with the carriers, who was in the habit of receiving goods for B. & holding them at B.'s risk, & without charging warehouse rent, until fetched away by B. or delivered to other persons by B.'s order. The *transitus* is at an end, & the bales cannot be stopped by A. upon the insolvency of B. although B. has exercised no act of ownership over them.—*DODSON v. WENTWORTH* (1842), 4 Man. & G. 1080; 5 Scott, N. R. 821; 12 L. J. C. P. 59; 6 Jur. 1060; 134 E. R. 443.

**2218.** ———.]—**MERCHANT BANKING CO. OF LONDON v. PHENIX BESSEMER STEEL CO.**, No. 1838, *ante*.

**2219.** ——— **Delivery order by seller—Seller as warehouseman.**]—Where, by the custom of the trade, a delivery order given by the seller to the purchaser, operated as a delivery of the goods to the purchaser, so as to enable him to sell in the market:—*Held*: (1) that did not extend to a case where the vendor was also the warehouseman, & had given such a delivery order, & had delivered part of the goods to the order of the purchaser, but the vendor had a right, upon the purchaser becoming bkpt., to stop the goods *in transitu*, no indorsement having previously been made of the delivery order, by the purchaser to a third party; (2) bkpt. had not possession of the goods as reputed owner, with the consent of the true owner, within 6 Geo. 4, c. 16, s. 72.—*TOWNLEY v. CRUMP* (1835), 4 Ad. & El. 58; 1 Har. & W. 564; 5 Nev & M. K. B. 606; 5 L. J. K. B. 14; 111 E. R. 709.

*Annotations*:—*As to* (1) *Distd.* Pearson v. Dawson (1858), E. B. & E. 448. *Reid*. *It.* Oxley, *Ex p.* Turnbull (1868), 19 L. T. 463. *As to* (2) *Consd.* Dublin City Distillery v. Doherty, [1914] A. C. 823.

#### PART VII. SECT. 4, SUB-SECT. 3.—D.

**d. Ship freighted by buyer—Whether transit terminated.**]—Putting goods sold on board a vessel freighted by the purchaser, does not prevent stoppage *in transitu*.—*ROBERTSON & ATKIN v. MORE* (1801), 12 Fac. Coll.

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*e.* ———.]—*DRAKE v. M'MILLAN* (1807), 1 Fume, 691.—*SCOT.*

#### PART VII. SECT. 4, SUB-SECT. 3.—E.

**2227 i. Whether right exercisable—**

**2220.** ——— **—Sale of part out of bulk—Part not severed.**]—*LAURIE & MOREWOOD v. DUDIN & SONS*, No. 1372, *ante*.

#### D. Delivery on Buyer's Vessel.

*See Sale of Goods Act, 1893 (c. 71), s. 45 (5).*

**2221. Whether transit terminated.**]—There can be no right of stoppage *in transitu* where the goods affected to be stopped are freighted on board a ship which is substantially the vessel of the consignees.—*Re HUMBERSTON* (1846), De G. 262; 15 L. J. Bcy. 10; 6 L. T. O. S. 449, L. C.

**2222.** ———.]—*MOAKES v. NICOLSON*, No. 1340, *ante*.

**2223.** ———.]—*SCHOTSMANS v. LANCASHIRE & YORKSHIRE RY. CO.*, No. 2328, *post*.

**2224.** ———.]—B. & S., acting as agents in England for a foreign principal, purchased from F. & co. in England, cement for the New York market; the cement was ordered to be sent alongside a vessel which B. & C. had purchased for their principal, & was shipped on board that vessel; mate's receipts for the cement were taken by F. & co. & handed on to B. & S. who exchanged them for bills of lading in which B. & S. were stated to be the shippers, & which made the goods deliverable to the order of B. & S. B. & S. gave all necessary directions as to the destination of the goods & the sailing of the vessel. While the vessel was on its way to New York, B. & S. became bkpt., & F. & co. claimed as unpaid vendors to stop the cement *in transitu*. F. & co. knew not only that the vessel belonged to B. & S.'s principal, but also that the cement was bought by B. & S. for that principal:—*Held*: F. & co. were not entitled to stop the cement *in transitu*.—*Re BRUNO, SILVA & SON, Ex p. FRANCIS & CO., LTD.* (1887), 56 L. T. 577; 6 Asp. M. L. C. 138; 4 Morr. 146.

**2225. Seller reserving right of disposal.**]—*TURNER v. LIVERPOOL DOCKS TRUSTEES*, No. 1316, *ante*.

**2226.** ———.]—*SCHOTSMANS v. LANCASHIRE & YORKSHIRE RY. CO.*, No. 2328, *post*.

#### E. Delivery on Chartered Vessel.

*See Sale of Goods Act, 1893 (c. 71), s. 45.*

**2227. Whether right exercisable—Ships chartered by buyer.**]—If goods abroad are put on board a ship chartered by the consignee, the consignor cannot afterwards stop them *in transitu*.—*BOEHLINCK v. SCHNEIDER* (1799), 3 Esp. 58; 170 E. R. 537, N. P.

*Annotations*:—*Mentd.* De Bode's Case (1845), 8 Q. B. 208; *Buorger v. New York Life Assce.* (1927), 96 L. J. K. B. 930.

**2228.** ———.]—(1) A trader in England charts a ship on certain conditions for a voyage to Russia & to bring goods home from his correspondent there, who accordingly ships the goods on account & at the risk of the freighter, & sends him the invoices & bills of lading of the cargo:—*Held*: the delivery of the goods on board such chartered ship does not preclude the right of the consignor to stop the goods while *in transitu* on board the same to the vendee in case of his insolvency in the meantime before actual delivery, any more than if they had been delivered on board a general ship for the same purpose.

The consignor [can] in case of the insolvency of the consignee stop the goods consigned before

*Ships chartered by buyer.*]—*MORTON & CO. v. ABERCROMBY & CO.* (1858), 30 Sc. Jur. 193.—*SCOT.*

**2227 ii.** ———.]—*COWDENBEATH COAL CO., LTD. v. CLYDESDALE BANK* (1895), 22 Ll. (Ct. of Sess.) 682.—*SCOT.*

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they come into the possession of the consignee which possession . . . means actual possession. That the possession of a carrier is not such a possession has been repeatedly determined (LAWRENCE, J.).

(2) A demand of the goods having been made by the agent of the consignor upon the captain before they were unloaded, after which he delivered them to the assignees of the vendee:—*Held*: the consignor might maintain trover against the assignees.—*BOHTLINGK v. INGLIS* (1803), 3 East, 381; 102 E. R. 643.

*Annotations*:—As to (1) *Consd.* *Christie v. Lewis* (1821), 2 Brod. & Bing. 410; *Gibson v. Carruthers* (1841), 8 M. & W. 321. *Expld.* *Turner v. Liverpool Docks Trustees* (1851), 6 Exch. 543. *Appld.* *Berndtson v. Strang* (1867), L. R. 4 Eq. 481. *Refd.* *Scott v. Pettit* (1803), 3 Bos. & P. 469; *Dixon v. Baldwin* (1804), 5 East, 175; *The Constantia* (1807), 6 Ch. Rob. 321; *Noble v. Adams* (1816), 2 Marsh. 366; *Saville v. Campion* (1819), 2 B. & Ald. 503; *Bloxam v. Sanders* (1825), 4 B. & C. 941; *James v. Griffin & Hillhouse* (1836), Tyr. & Gr. 449; *Mitchel v. Ede* (1840), 11 Ad. & El. 888. *Generally, Refd.* *Jackson v. Nichol* (1839), 5 Bing. N. C. 508. *Mentd.* *Clegg v. Levy* (1812), 3 Camp. 166.

## 2229. — Retaking under foreign law.]—

A delivery by the consignor of goods on board a ship chartered by the consignee is a delivery to him, & the consignor cannot afterwards stop them *in transitu*. But where the delivery was made on board such a ship in Russia, & by a law of that country the owner of goods in case of the bkpcy. of the vendee may sue out process to retake his goods on board a ship, &c., & retain them till payment; & the owners, hearing of the insolvency of the vendee, applied to the captain on board of whose ship the goods had been delivered to sign the bills of lading to their order, which he complied with, without the necessity of suing out process:—*Held*: this was a substantial compliance with such law, & the captain on his arrival here was bound to deliver the goods to the order of the vendors, & not to the assignees of the vendee who had become bkpt.—*INGLIS v. USHERWOOD* (1801), 1 East, 515; 102 E. R. 198.

*Annotations*:—*Consd.* *Bohtlingk v. Inglis* (1803), 3 East, 381. *Refd.* *Bloxam v. Sanders* (1825), 4 B. & C. 941; *Mitchel v. Ede* (1840), 11 Ad. & El. 888; *Gibson v. Carruthers* (1841), 8 M. & W. 321. *Mentd.* *Clegg v. Levy* (1812), 3 Camp. 166.

## 2230. — Conclusiveness of bill of lading.]—

—Upon a question between the consignees of the bill of lading & the vendor, as to the right of the latter to stop *in transitu*, in the absence of any contradictory evidence, the bill of lading, stating that the agent of the purchaser shipped the goods by his order, is conclusive as to the fact of delivery to the purchaser. In such case the ct. will not interpose on behalf of the vendor to protect the property pending litigation, but will leave the vendor to the assertion of his right at law.—*MELETOPULO v. RANKING* (1842), 6 Jur. 1095, L. C.

2231. — Possession of master of ship as carrier.]—*BERNDTSON v. STRANG*, No. 2279, *post*.

2232. — *Re COCK, Ex p. ROSEVEAR CHINA CLAY Co.*, No. 2199, *ante*.

2233. — Ship chartered by seller.]—*THE CONSTANTIA*, No. 2119, *ante*.

## F. Effect of Part Delivery.

See Sale of Goods Act, 1893 (c. 71), s. 45 (7).

2234. Whether right exercisable—Whether delivery of part equivalent to delivery of whole.]—

A., at a foreign port, ships goods by the order & on the account of B. to be paid for at a future day, & bills of lading are accordingly signed by the master of the ship. One of the bills is immediately transmitted to B., who, before the arrival of the ship at the place of destination, sells the goods, & indorses the bill of lading to C. After the arrival of the ship, & a delivery of part of the goods to the agent of C., B. becomes bkpt. without having paid A. the price of the goods. By this delivery the *transitus* is at an end as to the whole of the goods.—*SLUBEY v. HEYWARD* (1795), 2 Hy. Bl. 504; 126 E. R. 672.

*Annotations*:—*Distd.* *Simmons v. Swift* (1826), 8 Dow. & Ry. K. B. 693. *Expld.* *Bunney v. Poyntz* (1833), 4 B. & Ad. 568. *Consd.* *Tanner v. Scovell* (1845), 14 M. & W. 28. *Distd.* *Re McLaren, Ex p. Cooper* (1879), 11 Ch. D. 68. *Dbtd.* *Re Kiell, Ex p. Falk* (1880), 14 Ch. D. 446. *Refd.* *Hammond v. Anderson* (1804), 1 Bos. & P. N. R. 69; *Hanson v. Meyer* (1805), 6 East, 614; *Miles v. Gorton* (1834), 2 Cr. & M. 504. *Mentd.* *Holderness (Assignees of Foxton, Bankrupt) v. Shackels* (1828), 3 Man. & Ry. K. B. 25.

2235. — — —.]—A cargo of 80 quarters of wheat was shipped in London, on Dec. 6, 1839, on board a vessel bound to Barmouth & Tremadoc, & by the bill of lading was to be delivered at the port of Barmouth & Tremadoc to L., or to his assigns, on his paying freight, etc. The cargo was paid for by L. partly in cash, partly by his acceptance at two months.

On Jan. 28, 1840, L. by deed assigned all his estate & effects to pltf. & A. in trust for the benefit of themselves & his other creditors. L. was at that time insolvent, to pltf.'s knowledge. The bill of lading was indorsed by L. to pltf. as follows, the indorsement being without date: "I do hereby order that Captain J. do deliver the possession of the within-mentioned quantity of wheat to R., pltf., being one of my assignees, to be disposed of as he may think proper." On Feb. 4, the vessel arrived at Barmouth with the wheat on board, & pltf. there went on board & took samples, & sold 70 of the 80 quarters, for which he paid the freight, & they were delivered to the purchasers: & he directed the master to take forward the remaining 10 quarters to Tremadoc. On Feb. 9, L.'s acceptance became due & was dishonoured, & on Feb. 10, the shippers gave notice to the captain, at Barmouth, not to deliver the wheat, but to hold it to their use. On Feb. 23, the vessel arrived at Tremadoc, where pltf. demanded the remaining 10 quarters, tendering the freight, but the master refused to deliver it:—*Held*: even supposing pltf. to be in the same situation as L., the right of stoppage *in transitu* was determined, as to the whole of the cargo, by the acts done by pltf. at Barmouth; *semble*: if the composition deed contained a release to L. pltf. was an indorsee for value of the bill of lading, & no right of stoppage *in transitu* therefore existed as against him.—*JONES v. JONES* (1841), 8 M. & W. 431; 10 L. J. Ex. 481; 151 E. R. 1107.

*Annotations*:—*Expld.* *Re McLaren, Ex p. Cooper* (1879), 11 Ch. D. 68. *Refd.* *Tanner v. Scovell* (1845), 14 M. & W. 28.

2236. — — —.]—A., of London, had ordered beans of B. & C., of Ieghorn, through D., their agent. B. & C. shipped more than the quantity ordered, & drew two bills upon A., one for the quantity ordered, & the other for the residue; & they transmitted those bills to A. through D., with a letter of advice & an indorsed bill of lading for the whole cargo. The beans were shipped in 3,032 sacks. A. accepted the bill for the beans

## PART VII. SECT. 4, SUB-SECT. 3.—F.

2234 i. Whether right exercisable—Whether delivery of part equivalent to delivery of whole.]—*MECHAN & SONS, LTD. v. NORTH EASTERN RY. CO.*, [1911] S. C. 1348; 48 Sc. L. R. 987.—SCOT.

ordered, but declined to take the residue, amounting to 1,442½ sacks, or to accept the bill drawn against them. D. consented to take the residue of the beans, & A. thereupon wrote a letter to him, acknowledging such residue to be his, & inclosed an order to the captain to deliver to the bearer the 1,442½ sacks. D. thereupon handed over the bill of lading to A. D. accepted the bill drawn against the residue of the cargo, & paid it at maturity. Before the arrival of the ship D. sold the residue to E., who accepted a bill for the amount, drawn by B., who happened to be in London, & D. handed to E. A.'s letter & delivery order. E. afterwards applied to F. for an advance of cash, & handed him over as a security (*inter alia*) such letter & delivery order; & F. gave his acceptance to E. for the amount of cash required; which acceptance was honoured at maturity. Before E.'s acceptance became due, & before the arrival of the ship, E. stopped payment. When the ship arrived, the portion of the cargo which A. had accepted the bill was delivered to him:—*Held*: (1) D. might exercise the right of stoppage *in transitu* as to the residue; (2) the delivery order given by A. was not equivalent to a bill of lading.

(3) An unpaid vendor of an interest in a contract for the delivery of goods may, on the insolvency of the purchaser, stop the goods *in transitu*.

(4) The transfer to a *bona fide* holder for value of a delivery order, where the party transferring is not in possession of the bill of lading, does not defeat the right of stoppage *in transitu*.—*JENKINS v. USBORNE* (1844), 7 Man. & G. 678; 8 Scott, N. R. 505; 13 L. J. C. P. 196; 3 L. T. O. S. 300; 8 Jur. 1139; 135 E. R. 273.

*Annotations*:—As to (4) *Reid*, Grant v. Norway (1851), 10 C. B. 665; *Fuentes v. Montis* (1868), L. R. 3 C. P. 268; *Cole v. North Western Bank* (1875), L. R. 10 C. P. 354; *Folkes v. King*, [1923] 1 K. B. 282.

2237. ————.]—*Re* WHITWORTH, *Ex p.* GIBBES, No. 2185, *ante*.

2238. ———— **Presumption against such delivery—Rebuttal.**—(1) A cargo of 114 tons of miscellaneous iron castings was consigned from Scotland to London on board a ship chartered by the vendor, the bill of lading being made out in favour of the purchaser or his assigns, he or they paying freight. After 30 tons of the cargo had been delivered to the purchaser the vendor gave notice to stop the unloading of the ship. At this time only part of the freight had been paid to the master of the ship. Soon afterwards the purchaser filed a liquidation petition, & a receiver was appointed. The balance of the freight was paid by the receiver, & the remainder of the iron was placed *in medio*:—*Held*: inasmuch as it could not be supposed that the master intended to abandon his lien for the unpaid freight, the delivery of the 30 tons did not operate as a constructive delivery of the whole cargo, & consequently, the *transitus* was not at an end as to the remainder of the cargo, & the vendor's notice to stop *in transitu* was given in time. In the absence of evidence to the contrary, it must, as a general rule, be assumed that the delivery of part of a cargo is intended only to operate as a delivery of that part. But, if the cargo consisted of the different parts of one entire machine, *semble*: the delivery of an essential part of the machine would operate as a delivery of the whole.

(2) When goods are placed in the possession of a carrier to be carried for the vendor & to be

delivered to the purchaser, the transit is not at an end so long as the carrier holds the goods as carrier, nor until by agreement between him & the purchaser he holds them, not as carrier, but as the purchaser's agent.

(3) The purchaser was also a partner in the vendor's firm:—*Held*: this did not affect the right of the vendor to stop *in transitu*.—*Re* McLAREN, *Ex p.* COOPER (1879), 11 Ch. D. 68; 48 L. J. B. 49; 40 L. T. 105; 27 W. R. 518; 4 Asp. M. L. C. 63, C. A.

*Annotations*:—As to (1) *Reid*, *Re* Kiell, *Ex p.* Falk (1880), 42 L. T. 780; *Re* Knight, *Ex p.* Golding Davis (1880), 13 Ch. D. 628. As to (2) *Reid*, Taylor v. G. E. Ry. (1901), 70 L. J. K. B. 499.

2239. ———— **Delivery by ballee to purchaser—Wharfinger.**—HAMMOND v. ANDERSON, No. 2074, *ante*.

2240. ———— **To sub-purchaser.**—TANNER v. SCOVELL, No. 2208, *ante*.

2241. ———— **Carrier.**—Part delivery by a carrier to the consignee is *prima facie* such a virtual delivery of the whole as puts an end to the consignor's right of stoppage *in transitu*.—*BETTS v. GIBBINS* (1834), 2 Ad. & El. 57; 4 Nev. & M. K. B. 64; 4 L. J. K. B. 1; 111 E. R. 22.

*Annotations*:—*Dbtd*, *Tanner v. Scovell* (1845), 14 M. & W. 28. *Mentd*, *Shackell v. Roster* (1836), 2 Hodg. 17; *Toplis v. Grane* (1839), 5 Bing. N. C. 636; *Dugdale v. Lovering* (1875), L. R. 10 C. P. 196; *The Englishman & The Australia*, [1895] P. 212; *Burrows v. Rhodes*, [1899] 1 Q. B. 816; *Moxham v. Grant*, [1900] 1 Q. B. 88; *Sheffield Corp'n. v. Barclay*, [1905] A. C. 392; *Leslie v. Reliable Advertising & Addressing Agency*, [1915] 1 K. B. 652; *Cory v. Lambton & Hutton Collieries* (1916), 86 L. J. K. B. 401; *Weid-Blundell v. Stephens*, [1919] 1 K. B. 520.

2242. ————.]—WENTWORTH v. OUTHWAITE, No. 2181, *ante*.

#### G. Effect of Transfer of Documents of Title.

2243. **Transfer from seller to buyer—Delivery order—Transfer through broker.**—A. having entered goods in the books of the West India Dock co., received two dock warrants or delivery orders in blank for them, which he delivered to B. on a sale of the goods to him, & B. having sold the goods to C. delivered the dock warrants to that person, & C. employed D. as his broker, to effect a sale of the goods, & delivered over the dock warrants, one of which was signed by C., but the blank intended for the name of the purchaser remained, & D., after having effected a sale on credit, delivered the dock warrants to the purchaser, one of which, viz. the one in which the blank for the name of the purchaser remained, the purchaser deposited with E. as a security for money advanced on the faith of that warrant:—*Held*: C. had no right to put a stop upon the goods in the event of the purchaser not paying for them, since the transfer of the warrant by D. his broker operated as a constructive delivery of the goods, so as to defeat C.'s right of stoppage *in transitu*.—*KEYSER v. SUSE* (1818), Gow, 58; 71 E. R. 838, N. P.

2244. ———— **Bills of lading—Signed to orders of buyer.**—Where goods were sold, f.c.b., & upon their shipment the agent of the vendors tendered to the mate, the captain being absent, a receipt by which the goods were acknowledged to be shipped on account of the vendors, which the mate kept, but refused to sign, & on the following day signed bills of lading to the orders of the vendees:—*Held*: the *transitus* was not at an end, but, on the insolvency of the vendees, the vendors were

#### PART VII. SECT. 4, SUB-SECT. 3.—G.

1. *Transfer from seller to buyer—Delivery order.*—*ORR v. MURDOCK* (1851), 2 I. C. L. R. 9; 4 Ir. Jur. 67.—*IR.*
- g. *Bill of exchange accepted by buyer.*—*LORIMER v. CLEVE* (1865), 2 W. W. & A'B. 223.—*AUS.*

*Sect. 4.—Stoppage in transitu: Sub-sect. 3, G. & H.; sub-sect. 4, A. & B.]*

entitled to stop the goods.—*RUCK v. HATFIELD* (1822), 5 B. & Ald. 632; 106 E. R. 1321.

*Annotation:—Consd. Cowas-Jee v. Thompson* (1845), 5 Moo. P. C. C. 165.

**2245.** ——— *Intention to part with property.]—GURNEY v. BEHREND*, No. 2314, *post*.

**2246.** ——— *Agent purchasing on own credit.]—THE TIGRESS (OR TIGRIS)*, No. 2337, *post*.

**2247.** ——— *Indorsement of one bill.]—THE TIGRESS (OR TIGRIS)*, No. 2337, *post*.

**2248.** ——— *Notice to master of ship of buyer's possession.]—THE TIGRESS (OR TIGRIS)*, No. 2337, *post*.

**2249.** ——— *—]—RODGER v. COMPTOIR D'ESCOMPTE DE PARIS*, No. 2195, *ante*.

**2250.** ——— *Deliverable to buyer or assignee.]—The right of the vendor of goods to stop them in transitu is not lost by the mere fact that by the bill of lading under which they are shipped they are deliverable to the vendee or his assignees.*

Pltfs. entered into a contract with defts. to purchase 70 tons of slates. At the request of pltfs. defts. chartered a ship, & loaded her with the slates for Southampton, taking bills of lading by which the slates were deliverable "to the vendees or their assignees." Before the arrival of the ship at Southampton defts. heard of the insolvency of pltfs., & gave orders to the master to stop the slates *in transitu*. In an action by pltfs. for non-delivery of the slates:—*Held*: the transit was not at an end, & defts. had a right to stop the delivery of the slates.—*BRINDLEY & CO., LTD. v. CILGWYN SLATE CO.* (1885), 55 L. J. Q. B. 67, D. C.

**2251.** ——— *—]—Re TAPPENBECK, Ex p. BANNER*, No. 1347, *ante*.

**2252.** ——— *Bill of exchange accepted by buyer.]—Re WHITWORTH, Ex p. GIBBES*, No. 2185, *ante*.

*Transfer of documents by buyer to third party—On disposition of goods.]—See Sect. 5, post.*

#### *H. Rejection of Goods by Buyer.*

*See Sale of Goods Act, 1893 (c. 71), s. 45 (4).*

**2253. Whether goods in transit—Goods delivered to wharfinger.]—A. living at N. in Devonshire, ordered goods of B. in London, who sent them by ship via Exeter, consigned to A., & advised him thereof. On their arrival at Exeter they were delivered to C., a wharfinger who received them on A.'s account, & paid the freight & charges; after their arrival A. wrote to B. informing that in consequence of his affairs being deranged he should not take the goods, & telling him that they were at Exeter; at this time A. had committed an act of bkpey., upon which he was afterwards declared bkpt. B. applied to C. for the goods, & tendered him the freight & charges due; upon which C. promised not to deliver them out of his custody, but afterwards did deliver them to the assignees of A. though indemnified by B.:—*Held*: (1) B. had a right to stop the goods in the hands of C.; (2) he might maintain trover for them against C.—*MILLS v. BALL* (1801), 2 Bos. & P. 457; 126 E. R. 1382.**

*Annotations:—As to (1) Consd. Scott v. Pettit* (1803), 3 Bos. & P. 469. *Apld. Bartram v. Farebrother* (1828), Dan. & Ll. 42. *Distd. Hutchings v. Nunes* (1863), 9 L. T. 125. *Generally, Refd. James v. Griffin* (1836), 1 M. & W. 20.

**2254.** ——— *—]—RICHARDSON v. GOSS*, No. 1933, *ante*.

**2255.** ——— *—]—Upon a sale of goods the transitus continues until the goods have reached their ultimate destination under the contract of*

sale, or the vendee has given a new direction to the property. The right of a vendor to stop *in transitu* is paramount to any lien against the purchaser.—*MORLEY v. HAY* (1828), 3 Man. & Ry. K. B. 396; 7 L. J. O. S. K. B. 104.

**2256.** ——— *—]—P.*, to whom goods were consigned, said, on their arrival at a wharfinger's, that he would not have them, & directed an attorney to do what was necessary to stop them. The attorney, on Nov. 3, gave the wharfinger an order not to deliver them to the consignee, which order the consignor wrote to confirm on Nov. 6; on Nov. 7 the goods were claimed under an execution at the suit of A.:—*Held*: the contract between P. & the consignor was rescinded; the *transitus* was not ended by the arrival of the goods at the wharf & the order given by P.; & the consignor had a right to stop *in transitu*.—*BARTRAM v. FAREBROTHER* (1828), 4 Bing. 579; Dan. & Ll. 42; 1 Moo. & P. 515; 6 L. J. O. S. C. P. 125; 130 E. R. 891.

*Annotation:—Refd. Hutchings v. Nunes* (1863), 9 L. T. 125.

**2257.** ——— *—]—Goods* were consigned to A., deliverable in the river Thames; on the arrival of the vessel in the river the captain pressed A. to have them landed immediately; A. in consequence sent B., his son, with directions to land them at a wharf where he was accustomed to have goods landed for him, & kept until he carted them away to his customers in his own carts; but A. being then insolvent, at the same time told B. he would not meddle with the goods, that he did not intend to take them, & that the vendor ought to have them. The goods were, by B.'s direction, landed at the wharf, & there stopped *in transitu* by the vendor. In trover for the goods by the assignees in bkpey. of A. against the wharfinger:—*Held*: the declarations so made by A. to B. were admissible in evidence, although they were not communicated to the vendor or to the wharfinger; & they showed that A. had not taken possession of the goods as owner, & therefore the *transitus* was not determined.—*JAMES v. GRIFFIN* (1837), 2 M. & W. 623; 6 L. J. Ex. 241; 150 E. R. 906.

*Annotations:—Consd. Heinekey v. Earle* (1858), 4 Jur. N. S. 848. *Apld. Bolton v. L. & Y. Ity.* (1866), L. R. 1 C. P. 431. *Consd. Fraser v. Witt* (1868), L. R. 7 Eq. 64; *Re Worsdell, Ex p. Barrow* (1877), 46 L. J. Bey. 71. *Apld. Re Cock, Ex p. Rosevear China Clay Co.* (1879), 11 Ch. D. 560. *Refd. Dodson v. Wentworth* (1842), 4 Man. & G. 1080; *Bushel v. Wheeler* (1844), 15 Q. B. 442.

**2258.** ——— *Goods delivered to carrier.]—On* July 12, 1864, W. sold P. 11 skips of cotton twist, then lying at defts.' station at S., to be delivered for P. at B. station. 3 of the skips were delivered on July 22, & paid for; but P., objecting to the weight & quality, declined to take any more of them. On Aug. 17, 4 more were sent to B. station, & an invoice of the 8 was sent to P., with an intimation to him that 4 had been forwarded, & that the remaining 4 were lying at S. station waiting his instructions. P. immediately returned the invoice, & wrote to W., saying that he declined to take any more of the twist. On Sept. 1, W. sent an order to S. station, directing defts. to deliver the remaining 4 skips to P. These were accordingly forwarded to B. station, & were taken by P.'s carman to his mill, but were immediately returned by P.'s orders: & the whole 8 were sent back by him to S. station to the order of W. They were again returned by W. to B. station; but P. refusing to have anything to do with them, they remained there until P.'s bkpey. on Oct. 19, when W. claimed them. Upon a special case stated in an action of trover by P.'s assignee against the railway co., in which the ct. were to



**k. Assignee of bankrupt purchaser.]—**RICHARDSON v. TWINING (1871), 8 N. S. R. 281.—**CAN.**



**Sect. 4.—Stoppage in transitu: Sub-sect. 4, B., C., D. & E.]**

**2271. — — —.]—**If the commission agent . . . is bound to pay for the goods to the foreign seller of whom he bought them & if after he has shipped them to his principal such agent has not been paid & his principal is insolvent, so that the foreign seller could only have the agent to look to for payment, the cts. have held that such agent may stop the goods *in transitu* as if he were a vendor or in the position of a vendor (**BRETT, M.R.**).—**CASSABOGLOU v. GIBB** (1883), 11 Q. B. D. 797; 52 L. J. Q. B. 538; 48 L. T. 850; 32 W. R. 138, C. A.

**Annotations:—****Mentd.** Salvesen v. Røderl Akt. Nordstjernan, [1905] A. C. 302; The Kronprinzessin Cecilie (1915), 32 T. L. R. 139; Johnston v. Braham & Campbell, [1916] 2 K. B. 529; Weiss, Biheller & Brooks v. Farmer, [1923] 1 K. B. 226.

**2272. — — —.]—**THE TIGRESS (OR TIGRIS), No. 2337, post.

**2273. Surety for price.]—**SIFFKEN v. WRAY, No. 2035, ante.

**2274. Assignee of seller.]—**The indorsement of a bill of lading without consideration does not transfer any property in the goods; & therefore the mere indorsement of a bill of lading by the consignor to an agent to authorise him to stop the goods *in transitu* on account of the principal, will not enable such agent to maintain *assumpsit* or trover for the goods in his own name.

The right to stop goods *in transitu* is a personal right of the seller & cannot be thus assigned to another (**LORD ELLENBOROUGH**).—**WARING v. COX** (1808), 1 Camp. 369; 170 E. R. 989, N. P.

**Annotations:—****Distd.** Morrison v. Gray (1824), 2 Bing. 260. **Consd.** Thompson v. Dominy (1845), 14 M. & W. 403; Burgos v. Nascimento (1908), 100 L. T. 71. **Mentd.** Johnston v. Orr Fwling (1882), 7 App. Cas. 219.

**2275. Indorsee of bill of lading from seller.]—**MORISON v. GRAY, No. 2034, ante.

**2276. Agent of seller—Subsequent ratification by principal—Letter written before but arriving after stoppage.]—**WHITEHEAD v. ANDERSON, No. 2200, ante.

**2277. — — — Agency not established at time of buyer's insolvency.]—**I., a merchant in America, shipped certain cargoes of goods to the account of C. & T. merchants in this country, against whom a fiat in bkpcy. issued on May 8. Immediately on the arrival of the cargoes on May 5, 7 & 9 defts. during the continuance of the *transitus*, gave notice to the master & consignees of a claim to stop the goods *in transitu* on behalf of I. Defts. were not the agents of I., nor had they received any authority from I. to make the stoppage. On May 11 pltf., the official assignee of C. & T., demanded from the masters & consignees the cargoes which were then on board the vessels in port, & undelivered, but delivery of them was refused. On the same day the masters handed over the cargoes to defts., who, on May 12 refused to deliver them to pltf., the assignees of C. & T., on demand. On May 13 II. having received from I. a power of attorney, executed on Apr. 28 to stop the goods *in transitu*, on the same day adopted & confirmed the previous stoppage of defts., & I. before the commencement of the action adopted & ratified the acts of defts. & H.:—**Held:** (1) there could be no valid stoppage *in transitu* after the demand of the goods by pltf. on May 11; (2) the ratification by I., after the *transitus* was ended, was too late, & had not the effect of altering retrospectively the property in the goods, which at that time, notwithstanding the act of defts., had become vested in pltf.s.—**BIRD v. BROWN** (1850), 4 Exch. 786; 19 L. J. Ex.

154; 14 L. T. O. S. 399; 14 Jur. 132; 154 E. R. 1433.

**Annotations:—****As to (2) Distd.** Hutchings v. Nunes (1863), 1 Moo. P. C. C. N. S. 243. **Consd.** Kelghley, Maxsted v. Durant, [1901] A. C. 240. **Refd.** Berwick v. Horstall (1858), 4 C. B. N. S. 450; McCaul v. Strauss (1883), Cab. & El. 106; Bolton Partners v. Lambert (1889), 41 Ch. D. 295; Dibbins v. Dibbins, [1896] 2 Ch. 348; Re Gloucester Municipal Election Petn. 1900, Ford v. Nowth, [1901] 1 K. B. 683. **Generally, Mentd.** Simpson v. Egginton (1855), 10 Exch. 845; Jardine v. Leathley (1863), 3 B. & S. 700; Ainsworth v. Creeke (1868), L. R. 4 C. P. 476; Brook v. Hook (1871), L. R. 6 Exch. 89; Smart v. Pessol (1874), 30 L. T. 632; Williams v. North China Insce. (1876), 35 L. T. 884; Lyell v. Kennedy, Kennedy v. Lyell (1889), 14 App. Cas. 437; Re Portuguese Consolidated Copper Mines, Ex p. Badman, Ex p. Bosanquet (1890), 45 Ch. D. 16.

**2278. Agency established at time of buyer's insolvency.]—**R., a merchant, resident in Jamaica, in Feb. 1860, ordered from P. & G., merchants residing at Baltimore, in America, goods to be shipped to him at Kingston, in Jamaica, at his risk & expense. The goods were shipped & sent on Mar. 28 following. On Mar. 31 while the goods were on their voyage, a fiat of insolvency was issued against R., & II. was appointed official assignee. Previous, however, & on the 28th of that month, P. & G. were advised of the failure of R. by a letter from a firm in Jamaica, & on the 29th of the same month, by a letter from R. himself, who, at the same time, informed them that he had handed the goods to R. N., one of resp.s., as agent for P. & G., for whose firm R. N. had previously acted as agent & transacted some business. The letters of Mar. 28 & 29 reached P. & G. on Apr. 16 & on that day they executed & sent a letter & a power of attorney to R. N. to do & transact on their behalf, whatever was necessary for their interests in the matter of the consignment of the goods to R. The power of attorney was not received by R. N. until May 5. The vessel containing the consignment arrived at Kingston on Apr. 21 & on that day, R. N. demanded, on behalf of P. & G., & obtained possession of the goods, which he afterwards disposed of. An action of trover having been brought by II., applt., the official assignee of R., against resp.'s firm of R. & B. N. for the value of the goods, the jury found for pltf. for the amount the goods had sold for: leave, however, was reserved to defts. to set aside the verdict & enter a nonsuit, which was afterwards directed, on the ground, that as R. had signified to R. N. his refusal to receive the goods before his insolvency, the property in them had reverted to P. & G., & consequently, had never passed to pltf., the official assignee:—**Held:** (1) resp., R. N., being by the evidence sufficiently proved to have been the agent of P. & G., before the insolvency of R., the possession taken by him of the cargo on Apr. 21 was an effectual stoppage *in transitu* on behalf of P. & G.; (2) the letter & power of attorney sent by P. & G., though not received until after the stoppage of the goods, ratified & confirmed the act of R. N., as P. & G.'s agent.—**HUTCHINGS v. NUNES** (1863), 1 Moo. P. C. C. N. S. 243; 9 L. T. 125; 10 Jur. N. S. 109; 15 E. R. 692, P. C.

**C. Against What Exercisable.**

**2279. General rule—Only against goods themselves.]—**A contract was entered into by timber merchants in London for the purchase of timber, the property of pltf., in Sweden. Under the contract the vendor shipped the goods on board a vessel chartered by the purchasers. The bill of lading was made out in the vendor's own name, to order or assigns, & was by him indorsed in blank

& handed to the purchaser. The purchasers secured the timber, & deposited the policy & the bill of lading with a creditor. The cargo arrived damaged; the creditor sold it, but part of the proceeds was claimed & recovered by the owners of other goods carried in the same ship. The creditor received two sums for general & particular average. The vendor had received a dividend under the purchaser's bkpcy., on condition that it should not prejudice his claim under the stoppage *in transitu*, & that if he recovered anything under the stoppage the dividend should be returned, the vendor being allowed to prove for the balance of his debt:—*Held*: (1) the vendor had a right to stop *in transitu*; (2) the right to stop *in transitu* conferred only a right to stop the goods in the state in which they arrived, whether damaged or not; & accordingly, the vendor was not entitled to the policy moneys, & had no right to claim from the creditor anything beyond the balance of the money realised by the damaged timber.—*BERNDTSON v. STRANG* (1868), 3 Ch. App. 588; 37 L. J. Ch. 665; 19 L. T. 40; 16 W. R. 1025; 3 Mar. L. C. 154, L. C.

*Annotations*:—*As to* (1) *Apld.* *Fraser v. Witt* (1868), L. R. 7 Eq. 64. *Distd.* *Re Cock, Ex p. Rosevear China Clay Co.* (1879), 11 Ch. D. 560. *Consd.* *Bethell v. Clark* (1888), 20 Q. B. D. 615. *Refd.* *Hodger v. Comptoir d'Escompte de Paris* (1869), L. R. 2 P. C. 393; *Re Whitworth, Ex p. Gibbs* (1875), 45 L. J. Bey. 10; *Kendall v. Marshall, Stevens & Ward* (1882), 46 L. T. 693; *Kemp v. Ismay, Imrie* (1909), 100 L. T. 996. *As to* (2) *Consd.* *Latham v. Chartered Bank of India* (1874), L. R. 17 Eq. 205.

2280. ———.]—*KEMP v. FALK*, No. 2308, *post*.

2281. Goods consigned against debt.]—The right of an unpaid consignor to stop *in transitu* is not taken away by an assignment of the bill of lading for a valuable consideration to a third person, with notice of the insolvency of the consignee.

A. being indebted to B. on the balance of accounts, including bills of exchange still running accepted by B. for A. consigns goods to B. on account of this balance:—*Held*: A. has no right to stop the goods *in transitu*, upon B. becoming insolvent before the bills are paid.—*VERTUE v. JEWELL* (1814), 4 Camp. 31; 171 E. R. 10, N. P.

*Annotations*:—*Consd.* *Patten v. Thompson* (1816), 5 M. & S. 350. *Distd.* *Leusk v. Scott* (1877), 2 Q. B. D. 376.

2282. Proceeds of insurance policy—Effected by buyer—Against damage in transit.]—*BERNDTSON v. STRANG*, No. 2279, *ante*.

#### D. Notice of Stoppage.

*See* Sale of Goods Act, 1893 (c. 71), s. 46 (1).

By whom given.]—*See* Sub-sect. 4, B., *ante*.

2283. To whom given—Person having immediate custody of goods.]—*WHITEHEAD v. ANDERSON*, No. 2200, *ante*.

2284. ——— Principal of person having custody of goods.]—*WHITEHEAD v. ANDERSON*, No. 2200, *ante*.

2285. ——— Whether to consignees only—Without notice to carriers.]—*PHELPS, STOKES & CO. v. COMBER*, No. 2289, *post*.

2286. When given.]—*WHITEHEAD v. ANDERSON*, No. 2200, *ante*.

2287. ——— After demand by assignee in bank-

ruptcy of buyer.]—*BIRD v. BROWN*, No. 2277, *ante*.

— Duration of transit.]—*See* Sub-sect. 3, *ante*.  
2288. Duty to forward notice—Duty of ship owners to master—Sufficiency of forwarded notice.]—*KEMP v. FALK*, No. 2308, *ante*.

2289. Intention to stop must be shown.]—A firm at Liverpool & a firm at Pernambuco employed B. as their agent at New York. According to their course of business the firm at Pernambuco received orders from persons there to purchase goods at New York. The firm instructed the Liverpool firm, who instructed B. B. then purchased the goods in New York & shipped them to the firm at Pernambuco with the bills of lading. B. drew bills on the Liverpool firm to pay for the goods, but not for the precise amount of the shipments, & sold the bills in New York. B. advised the Liverpool firm of the bills, & with the advice forwarded a statement of his account with them. To each bill was attached a counterfoil headed "Advice of draft," & containing a memorandum of amount of the bill & the name of the drawer, with the words "Against shipments per, naming the vessel. Please protect the draft as advised above." The Liverpool firm on the bills being presented to them for acceptance detached the counterfoils & kept them in their own possession. Pltfs. were the holders for value of bills drawn on the Liverpool firm in accordance with this course of dealing, the goods having been shipped by B. to the Pernambuco firm & the bills of lading being also sent to that firm. On June 10, 1879, the Liverpool firm stopped payment, & on the same day B. telegraphed to the Pernambuco firm as follows: "Having pledged documents & shipments (naming the vessel) hold proceeds for P. & co. (pltfs.)." The ship arrived on June 11, but the bill of lading had been previously delivered to the purchasers of the goods. The three bills having been dishonoured by the Liverpool firm, pltfs. brought an action against the Pernambuco firm claiming to have the bills paid out of the proceeds of the goods as having been specifically appropriated to meet the bills; & also relying on the telegram as having stopped the goods *in transitu*:—*Held*: (1) there was no specific appropriation of the goods either by the course of dealing or by the "advice of draft" attached to the bills; also (2) the telegram to the Pernambuco firm was not effectual to stop goods *in transitu*.

Stoppage *in transitu* is a right given to an unpaid vendor at any time while the goods are still *in transitu*. . . . It is a retaking by the unpaid vendor . . . at any time while the goods are in the hands of the carrier & have not reached the hands of the purchaser or consignee & when they are not in his possession. . . . On the mere construction of that document [the telegram] it is not a declaration that the vendor intends to retake possession (*COTTON, L.J.*).—*PHELPS, STOKES & CO. v. COMBER* (1885), 29 Ch. D. 813; 54 L. J. Ch. 1017; 52 L. T. 873; 33 W. R. 829; 5 Asp. M. L. C. 428, C. A.

*Annotation*:—*As to* (2) *Refd.* *Booth S.S. Co. v. Cargo Fleet Iron Co.*, [1916] 2 K. B. 570.

#### E. Effect of Exercise.

*See* Sect. 6, *post*.

#### PART VII. SECT. 4, SUB-SECT. 4.—D.

2283i. To whom given—Person having immediate custody of goods.]—Goods which came from M. in bond were deposited in the customs warehouse at the Grand Trunk Ry. station at

T. The consignees became insolvent, & the consignors gave notice of stoppage *in transitu* to the railway co., after which the agent of the co. gave an order for delivery on payment of charges to another person, who made the entry & received them from the

customs:—*Held*: the notice to the co. was sufficient, though in such cases it is advisable to give notice also to the customs officer.—*ASCHER v. GRAND TRUNK RY. CO.* (1875), 36 U. C. R. 609.—*CAN.*

**SECT. 5.—EFFECT OF DISPOSITION BY BUYER ON SELLER'S RIGHTS OF LIEN AND STOPPAGE IN TRANSITU.**

**SUB-SECT. 1.—IN GENERAL.**

See Sale of Goods Act, 1893 (c. 71), s. 47.

**2290. Pledge of goods—Pledgee holding other securities—Right of seller to marshal.**—A firm in Ceylon employed a firm in England as their agents & factors, the course of business being that the Ceylon firm consigned cargoes to the English firm for sale on their account, & drew bills on the English firm against the consignments. Consignments of coffee having been made in this manner, & bills accepted by the English firm against them, the English firm pledged the coffee, together with certain securities of their own, with T., their broker, to secure a large debt due from them to him. The English firm became insolvent & executed a creditors' deed under Bankruptcy Act, 1861 (c. 134), & then T. sold the coffee, which produced more than sufficient to cover the bills drawn against it, & enough of the other securities to satisfy his debt:—*Held*: the Ceylon firm were entitled, as against the English firm in liquidation, to have the remaining securities in T.'s hands marshalled, & to have a lien thereon for the balance due to them upon the coffee transaction.—*Re HOLLAND, Ex p. ALSTON* (1868), 4 Ch. App. 168; 19 L. T. 542; 17 W. R. 266, L. C. & L. J.

*Annotation*:—*Apld. Re Stratton, Ex p. Salting* (1883), 25 Ch. D. 148.

**2291. — Contract of hiring—Pledge by mercantile agent.**—*STROHMENGER v. ATTENBOROUGH* (1894), 11 T. L. R. 7.

—*See, further, BAILMENT, Vol. III., pp. 97, 98, Nos. 265–267.*

**SUB-SECT. 2.—RESALE OF GOODS BY BUYER.**

See Sale of Goods Act, 1893 (c. 71), s. 47.

**2292. Seller's rights not affected.**—A resale of goods by a vendee, & payment to him, does not destroy the vendor's right of stoppage *in transitu*.—*CRAVEN v. RYDER* (1816), 6 Taunt. 433; 2 Marsh. 127; 128 E. R. 1103.

*Annotations*:—*Distd. Cowas-Jee v. Thompson* (1845), 5 Moo. P. C. C. 165. *Refd. Dixon v. Yates* (1833), 5 B. & Ad. 313; *Re Cock, Ex p. Rosevear China Clay Co.* (1879), 11 Ch. D. 560. *Mentd. Fragan v. Long* (1825), 6 Dow. & Ry. K. B. 283; *Scott v. England* (1844), 4 L. T. O. S. 141; *Schuster v. McKellar & Young* (1857), 3 Jur. N. S. 1320.

**2293. —**—*DIXON v. YATES*, No. 2063, *ante*.

**2294. — Unless third party acquires title for value.**—The mere fact that the purchaser of goods has resold them, & that the bill of lading has been made out in the name of the sub-purchaser, does not put an end to the *transitus*, or destroy the right of the original vendor to stop the goods *in transitu*. The rule being that effect will be given to a vendor's right of stoppage *in transitu*, so far as the exercise of that right will not interfere with the rights of third parties acquired for value, it follows that an unpaid vendor, who has given

a valid notice to stop *in transitu* before his vendee has received the purchase-money of the goods from his sub-purchaser, is entitled to have the original purchase-money satisfied out of the unpaid purchase-money of the sub-purchaser.—*Re KNIGHT, Ex p. GOLDING DAVIS & Co., LTD.* (1880), 13 Ch. D. 628; 42 L. T. 270; 28 W. R. 481, C. A.

*Annotations*:—*Refd. Kemp v. Falk* (1882), 7 App. Cas. 573; *Bellamy v. Davey*, [1891] 3 Ch. 540.

**2295. — Unless seller assents to sale—What amounts to assent.**—Defts. having sold a quantity of timber, then lying at their own wharf, to D., for bills payable at a future day, which timber was then marked by D. & a small part of it was forwarded by defts. to one place, & part to another, & then D., before the time of payment arrived, sold the whole to pltf., who notified such sale to defts., & was answered that it was very well, & then in the presence of defts. pltf. marked all the timber lying at their wharf, & afterwards marked that which had been forwarded to the other two stages:—*Held*: defts., after such assent to the transfer, & such marking by pltf., could not retain or stop any of the timber, as *in transitu*, upon the subsequent insolvency, before the day of payment, of D., the original vendee, to whom payment had been made by pltf., whatever question there might have been as between the original vendors & vendee.—*STOVELD v. HUGHES* (1811), 14 East, 308; 104 E. R. 619.

*Annotations*:—*Distd. Townley v. Crump* (1835), 5 L. J. K. B. 14. *Refd. Hawes v. Watson* (1824), 2 B. & C. 540; *Holderness v. Shackles* (1828), 3 Man. & Ry. K. B. 25.

**2296. — Entry of sub-buyer's name in seller's books.**—A. purchased from D. certain goods, lying at D.'s bonded warehouse under the charge of D.'s warehouse keeper, & entered at the custom house in D.'s name; A. paid D. by bills at three months. On the same day A. sold part of the goods, still lying at D.'s warehouse, to P., & gave him a delivery order on D. for specific goods. D., on receiving it, placed it on the file, & unknown to P., put P.'s name, as purchaser, opposite the entry of the specified goods in the sale book, in which he had originally entered A.'s name as purchaser. P. afterwards, on several occasions, gave to D. delivery orders for portions of the goods. D. thereupon signed a delivery order to his warehouse keeper, & those portions were delivered to P., he paying the duty. Without a delivery order by D. & payment of duties, the goods would not be delivered from the warehouse. A. afterwards, & before the bills given by him were due, became insolvent; & the bills were dishonoured. D. refused to deliver the remainder of the goods to P., alleging that he was entitled to detain them till A.'s debt to him was paid:—*Held*: he had no such right; by accepting the delivery order given by A. to P., without giving notice to P. of any contingent claim upon the goods in respect of A., D. must be held to have recognised P. as entitled to the absolute right in the property and the possession of the goods, & could not, as against P., set up any subsequent claim in respect of A.—*PEARSON v. DAWSON* (1858),

**PART VII. SECT. 5, SUB-SECT. 1.**

**1. Contract to deliver logs at specified time—Assignment of contract by purchaser.**—A., the purchaser of saw logs to be delivered at certain specified times, assigned the contract, & the vendor delivered one year's supply of the logs to the assignee. Afterwards A., becoming insolvent, absconded, & the vendor refused to complete the contract, asserting a right to stop the goods *in transitu*, or to retain them in consequence of A.'s insolvency. The

assignee commenced an action at law in A.'s name against the vendor, in which he recovered judgment; & a bill by the vendor to restrain proceedings at law was dismissed with costs.—*WAIT v. SCOTT* (1857), 6 Gr. 154.—*CAN.*

**PART VII. SECT. 5, SUB-SECT. 2.**

**2292 i. Seller's rights not affected.**—*McEWAN SONS & Co. v. SMITH* (1849), 9 Durol. (Ct. of Sess.), 434.—*SCOT.*

**2294 i. — Unless third party acquires title for value.**—The vendor of

bonded goods, on the bkpey. of the purchaser without payment of the price, is not entitled to stop them as *in transitu* after the purchaser has sold them to a *bonâ fide* onerous purchaser, both sales having been intimated at the bonded cellar.—*TOD & Co. v. RATTRAY* (1809), 15 Fac. Coll. 132.—*SCOT.*

**2296 i. — Unless seller assents to sale—What amounts to assent—Entry of sub-buyer's name in seller's books.**—*FLEMING v. SMITH & Co.* (1881), 8 R. (Ct. of Sess) 548; 18 Sc. L. R. 419.—*SCOT.*

E. B. & E. 448; 27 L. J. Q. B. 248; 31 L. T. O. S. 177; 4 Jur. N. S. 1015; 120 E. R. 576.

**2297.** ————.]—(1) By Sale of Goods Act, 1893 (c. 71), s. 47, it is declared that the unpaid seller's right of lien or retention or stoppage *in transitu* is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto:—*Held*: the mere assent of an unpaid seller to a sale by the buyer of an unascertained portion of the goods is not such an assent as is contemplated by Sale of Goods Act, 1893 (c. 71), s. 47, as affecting the unpaid seller's right of lien. To affect the lien the assent must be given in such circumstances as to show an intention on the part of the unpaid seller to renounce his right against the goods sold by the buyer.

(2) Defts. sold oil to certain merchants. The merchants sold a portion of this oil to plffs., giving them delivery orders addressed to defts., & directing the latter to deliver to plffs. or their order "ex our contract." Plffs. presented these orders to defts., who either sent word that they were in order, or retained them without comment, & in either case they entered in their books the names of plffs. While the merchants were punctual in their payments to defts. the latter regularly delivered oil on these orders to plffs. or their sub-purchasers. The merchants fell into arrear with their payments, & defts., claiming to exercise their right of lien as unpaid sellers, refused to make any further deliveries against the merchants' delivery orders:—*Held*: defts. had not assented to the sales by the merchants to plffs. so as to preclude them from exercising their right of lien as unpaid sellers. *MORDAUNT BROTHERS v. BRITISH OIL & CAKE MILLS, LTD.*, [1910] 2 K. B. 502; 79 L. J. K. B. 967; 103 L. T. 217; 54 Sol. Jo. 654; 15 Com. Cas. 285.

*Annotation*:—As to (1) *Apld.* *Poulton v. Anglo-American Oil Co.* (1910), 27 T. L. R. 38.

**2298.** ————.]—**Acknowledgment of title to ballee.**—Deft., having a quantity of barley in sacks lying in his granary, which adjoined a railway station, sold eighty quarters of it to M. No particular sacks were appropriated to M., but the barley remained at the granary subject to his orders. M. sold sixty quarters of it to pltf., who paid him for them & received from him a delivery order addressed to the station master, as was usual in such cases. Pltf. sent this order in a letter to the station master, saying, "Please confirm this transfer." The station master showed the delivery order & pltf.'s letter to deft., who said, "All right, when you get the forwarding note I will put the barley on the line." M. became bkpt., & deft., as unpaid vendor, refused to deliver the barley when the forwarding note was presented to him by the station master acting for pltf.:—*Held*: deft. was estopped by his statement to the station master from denying that the property in the goods had passed to pltf.; for, by making such statement, he induced pltf. to rest satisfied under the belief that the property had passed, & so to alter his position by abstaining from demanding back the money which he paid to M.—*KNIGHTS v. WIFFEN* (1870), L. R. 5 Q. B. 660; 40 L. J. Q. B. 51; 23 L. T. 610; 19 W. R. 244.

*Annotations*:—*Apld.* *Henderson v. Williams*, [1895] 1 Q. B. 521; *Dixon v. Kennaway*, [1900] 1 Ch. 833. *Refd.* *Colley v. Overseas Exporters* (1919) Ltd., [1921] 3 K. B. 302; *Laurie & Morewood v. Dudin*, [1926] 1 K. B. 223.

#### PART VII. SECT. 5, SUB-SECT. 3.

**m. When seller's rights defeated.—Bills of lading—Transfer or pledge for value & without notice.**—The consignor in a bill of lading loses his right of stop-

page *in transitu*, upon the insolvency of the consignee, when, prior to the insolvency, the bill of lading has been transferred by indorsement to a purchaser for value, *bonâ fide*, & without

*Mentd.* *Simm v. Anglo-American Telegraph Co.*, *Anglo-American Telegraph Co. v. Spurling* (1879), 5 Q. B. D. 1880; *Joseph v. Webb*, *Joseph v. Lyons*, *Joseph v. Pidcock*, *Joseph v. Jones* (1883), Cab. & El. 262; *Kingston-upon-Hull Corpn. v. Harding*, [1892] 2 Q. B. 494; *Foster v. Tyne Pontoon & Dry Docks Co. & Renwick* (1893), 63 L. J. Q. B. 50; *Sheffield Corpn. v. Barclay* (1902), 8 Com. Cas. 49; *Monarch Motor Car Co. v. Pease* (1903), 19 T. L. R. 148.

**2299.** ————.]—**Intention to renounce rights.**—*MORDAUNT BROTHERS v. BRITISH OIL & CAKE MILLS, LTD.*, No. 2297, *ante*.

**2300.** ————.]—**Mere acknowledgment of sale.**—*MORDAUNT BROTHERS v. BRITISH OIL & CAKE MILLS, LTD.*, No. 2297, *ante*.

**2301.** ————.]—*POULTON & SON v. ANGLO-AMERICAN OIL CO., LTD.*, No. 2077, *ante*.

#### SUB-SECT. 3.—PLEDGE OR TRANSFER OF DOCUMENTS OF TITLE.

See Sale of Goods Act, 1893 (c. 71), s. 47; Factors Act, 1889 (c. 45), ss. 9, 10.

**2302. Whether seller's rights defeated.—Bills of lading—Pledgee subsequently becoming partner of pledger—Partnership agreement showing that seller unpaid.**—If the consignee of goods, to whom the bill of lading is indorsed in blank, assign it over as a security for acceptances given by the assignee, not amounting to the value of the goods, & afterwards by an agreement between them they become partners in the goods, by which agreement it appears that the consignor has not been paid for them, the assignee of the bill of lading cannot maintain trover against the consignor if he stop the goods *in transitu* upon the insolvency of the consignee.—*SALOMONS v. NISSEN* (1788), 2 Term Rep. 674; 100 E. R. 363.

*Annotation*:—*Distd.* *Cuming v. Brown* (1808), 9 East, 506.

**2303.** ————.]—**Transfer or pledge for value & without notice.**—*LICKBARROW v. MASON*, No. 2115, *ante*.

**2304.** ————.]—W. shipped at Leghorn 23 casks of oil, on account & by the order of L. at Liverpool, & transmitted to him a bill of lading. Before the arrival of the oil, L. indorsed the bill of lading, & deposited it with H., who advanced money on it, having previously advanced money on other goods, the property of L., deposited with him. On the arrival of the oil, L. having previously become bkpt., & W. not having been paid for it, W.'s agents claimed it of the master of the ship; but the latter delivered it to H., who afterwards sold the goods of L. as well as the oil of W. The net proceeds of the goods belonging to L. were sufficient to satisfy the debt due from L. to H. H. paid himself his debt, & deposited the net proceeds of W.'s oil with a third person, to abide the event of the award of an arbitrator to whom all disputes between W. & the assignees of L. were referred. The arbitrator having stated the above facts on his award for the opinion of this ct.:—*Held*: W., the unpaid vendor of the oil, had, at the time when his agents claimed it, no right to take possession on the insolvency of L., because the property in & the right to the possession was then vested in H., the indorsee of the bill of lading for value; & further, W. had not, by reason of such claim, any legal right to the possession of the goods after H.'s lien was satisfied: but in a ct. of equity, such transfer to H. would be treated as a

notice of the consignee's insolvency.—*KEMP v. CANAVAN* (1864), 15 L. C. L. R. 216.—*IR.*

**n.** ————.]—**Notice of purchaser's insolvency.**—*CLEMENTSON v. GRAND*

**Sect. 5.—Effect of disposition by buyer on seller's rights of lien and stoppage in transitu: Sub-sect. 3.]**

pledge or mtge. only, & therefore W., by his attempted stoppage *in transitu*, acquired a right to the goods in equity, subject to H.'s lien against the assignees of L.—*Re WESTZINTHUS* (1833), 5 B. & Ad. 817; 2 Nev. & M. K. B. 644; 3 L. J. K. B. 56; 110 E. R. 992.

**Annotations:—***Apld.* Spalding v. Ruding (1843), 6 Beav. 376. *Consd.* Rodger v. Comptoir d'Escompte de Paris (1869), 21 L. T. 33. *Apld.* Kemp v. Falk (1882), 7 App. Cas. 573. *Consd.* Sewell v. Burdick (1884), 10 App. Cas. 74. *Refd.* Phillips v. Huth (1840), 6 M. & W. 572; Broadbent v. Barlow (1861), 3 De G. F. & J. 570; The Marie Joseph (1866), Brown. & Lush. 449; Meyerstein v. Barber (1866), L. R. 2 C. P. 38.

**2305.** ————.]—In equity, a transfer of goods for valuable consideration by a consignee for a limited purpose, does not destroy the consignor's right of stoppage *in transitu*, *ultra* the particular lien of the transferee.

A. consigned goods of the value of £1,800 to B., who transferred the bill of lading to C., to secure £1,000. B. having become bkpt., C., as B.'s factor, claimed as against A.'s title to stop *in transitu*, a right to retain the whole, in satisfaction of a general balance due to him from B.:—*Held*: he was not entitled beyond the £1,000; & A.'s remedy against C. for the surplus was in equity.—*SPALDING v. RUDING* (1843), 6 Beav. 376; 12 L. J. Ch. 503; 1 L. T. O. S. 384; 7 Jur. 733; 49 E. R. 871; *on appeal* (1846), 15 L. J. Ch. 374, L. C.

**Annotations:—***Apld.* Berndtson v. Strang (1867), L. R. 4 Eq. 481; Coventry v. Gladstone (1868), L. R. 6 Eq. 44. *Consd.* Rodger v. Comptoir d'Escompte de Paris (1869), L. R. 2 P. C. 393. *Apld.* Kemp v. Falk (1882), 7 App. Cas. 573. *Consd.* Sewell v. Burdick (1884), 10 App. Cas. 74. *Refd.* The Marie Joseph (1866), Brown. & Lush. 449. *Mentd.* Pigott v. Pigott (1867), L. R. 4 Eq. 549.

**2306.** ————.]—Defts., merchants resident in Ireland, wrote to A., a merchant resident in London, authorising him "to take for us two cargoes" of Ibraila corn 1,000 to 1,500 quarters at 24s. to 24s. 3d., "payment by our acceptance at two or three months," & in postscript added, "You may go to 24s. 6d., if you find you cannot do the work at 24s. or 24s. 3d." A. made a bargain with R., a merchant resident in London, for a cargo by the "C.," & sent him a note commencing "Sold by order & for account of R. to our principals the cargo" of Bulgarian corn per "C." at 24s. 6d. per quarter, freight & insurance, "Sellers to pay a commission of 2 per cent. Payment in cash" in one week after receipt of documents. On the same day R. in his books debited A. with the price of the cargo, & sent A. the shipping documents with the bill of lading indorsed, & an invoice headed "A. bought of R." On the same day, A. wrote to defts. "to advise having purchased for your account the cargo of Bulgarian corn per 'C.' at 24s. 9d. per quarter C.F. & I., which is 3d. per quarter over your limit for Ibraila, but proportionately cheaper." In this letter were inclosed the shipping documents of the "C.," including the indorsed bill of lading, & an invoice headed "Invoice of a cargo, etc., bought by order & for account & risk" of defts.; & a draft for the price at 24s. 9d., drawn by A. on defts. Defts. returned the draft accepted, stating in the letter, "We note purchase of corn per 'C.' at 24s. 9d.

We would much rather have had Ibraila at 24s. or 24s. 3d." After this, whilst the bill was still current, & before the arrival of the "C.," A. failed. R. stopped the cargo of the "C.," treating A. as the purchaser, & claiming to be an unpaid vendor to him. Defts., on receiving an indemnity from R. against the bill, paid him the price less discount, at the rate of 24s. 6d., being less than the sum for which the bill was accepted, which was at the rate of 24s. 9d. The assignees of A., who had become bkpt., sued defts. on the bill. R. defended the action for them, on the ground that the consideration for the bill had failed. A case was stated for this ct., in which the correspondence, containing as above stated, was set out, & the ct. had power to draw inferences of fact:—*Held*: the indorsed bill of lading being assigned to defts. for value, R. had no right to stop *in transitu*; consequently, the payment of R. by defts. was in their own wrong; & the consideration for the bill of exchange had not failed, & pltf. were entitled to judgment.—*PENNELL v. ALEXANDER* (1854), 3 E. & B. 283; 23 L. J. Q. B. 171; 22 L. T. O. S. 274; 18 Jur. 627; 118 E. R. 1146.

**Annotations:—***Refd.* Huntrey v. Dale (1858), 31 L. T. O. S. 323; Risbourn v. Bruckner (1858), 27 L. J. C. P. 90; Southwell v. Bowditch (1876), 1 C. P. D. 374.

**2307.** ————.]—A bill of lading for the delivery of goods to order & assigns, is a negotiable instrument, which by indorsement & delivery passes the property in the goods to the indorsee, subject only to the right of the unpaid vendor to stop them *in transitu*. The indorsee may deprive the vendor of this right by indorsing the bill of lading for valuable consideration, although the goods are not paid for; even if bills have been given which are certain to be dishonoured, provided the indorsee for value has acted *bonâ fide* & without notice. A firm, M. & D., in France sold, through their agent in England, to S. & T. a lot of linseed cake, payable by bill at three months' date, & shipped the same. A bill of lading, signed by the master & indorsed by M. & D., was delivered to S. & T. in exchange for their acceptance at three months' date. Afterwards the bill of lading was redelivered to M. & D.'s agent to hold as security against the acceptance. T., a member of the firm of S. & T., subsequently obtained the bill of lading from M. & D.'s agent, by a fraudulent misrepresentation, & indorsed & delivered it to P. & co., for value, without notice of the fraud. Before the goods arrived in England, S. & T. became insolvent:—*Held*: (1) the firm of S. & T. acquired no new title to the goods by the fraud of T., as it merely invested them with the temporary power of transferring their property in the goods; (2) the right of M. & D., the vendors, to stop *in transitu* was gone, as the transfer to P. & co. was *bonâ fide*, & for a valuable consideration in ignorance of T.'s fraud.

An ownership which was at the time perfect in law, though voidable as to part, viz. the possession, cannot in principle be treated differently from an ownership voidable as to the whole, but is in the interim protected by the interposition of a *bonâ fide* purchaser for valuable consideration (*LORD CHELMSFORD, C.*)—*PEASE v. GLOAHEC, THE MARIE JOSEPH* (1866), L. R. 1 P. C. 219; Brown. & Lush. 449; 3 Moo. P. C. C. N. S. 556; 35 L. J. P. C. 66;

*TRUNK RY. CO.* (1877), 42 U. C. R. 263.—*CAN.*

**O.** ————.]—*Delivery orders.*—*HASTIE & CO. v. WARDEN* (1849), 21 Sc. Jur. 548.—*SCOT.*

**P.** ————.]—*M'NAUGHTON v. BAIRD & CO.* (1852), 24 Sc. Jur. 623; 1 Stuart, 1051.—*SCOT.*

**q.** ————.]—*Railway receipts.*—Railway receipts issued by a railway co. for goods delivered to them for carriage are instruments of title to the goods, & where the consignee of goods has handed such receipts to a third party by way of pledge to secure an advance, the consignor cannot stop the goods

*in transitu* without payment or tender to the holders of the receipts of the amount of such advance.—*RAMDAS VITHALDAS DURBAR v. AMERCHAND & CO., RAMDAS VITHALDAS DURBAR v. CHHAGANTAL PITAMBER (CONSOLIDATED APPEALS)* (1916), 85 L. J. P. C. 214.—*IND.*



15 L. T. 6; 12 Jur. N. S. 677; 15 W. R. 201; 2 Mar. L. C. 394, P. C.

*Annotations*:—*Generally*, *Reid*. The *Argentina* (1867), L. R. 1 A. & E. 370; *Cundy v. Lindsay* (1878), 26 W. R. 408. *Mentid*. *Re Overend Gurney, Ex p. Oakes & Peek* (1867), L. R. 3 Eq. 576.

**2308.** ————.]—Where notice to stop *in transitu* is given to shipowners, they are bound to forward it with reasonable diligence to the master of their ship. A notice so forwarded & received by the master is a valid & sufficient notice to him.

The purchaser of goods, shipped by the vendor, consigned them abroad, & indorsed the bill of lading to a bank as security for an advance. Afterwards & before the arrival of the ship the consignees sold the goods "to arrive" to sub-purchasers, to whom they were delivered. The purchaser having become bkpt., the unpaid vendor gave notice to the master, after the sub-sales, but before delivery & before payment of the freight, to stop the goods *in transitu*. The consignees remitted the proceeds of the sub-sales to the bank, who after repaying themselves their advance handed to the trustee of bkpt. the balance, which was less than the original purchase-money:—*Held*: the principles established by *Re Westzintus*, No. 2304, *ante*; & *Spalding v. Ruding*, No. 2305, *ante*, were applicable; the right of stoppage *in transitu* was not at an end when the notice was given; & the vendor was entitled to the balance after satisfaction of the bank's claim.

It is not consistent with my idea of the right of stoppage *in transitu* that it should apply to anything except to the goods which are *in transitu* (LORD SELBORNE, C.).—*KEMP v. FALK* (1882), 7 App. Cas. 573; 52 L. J. Ch. 167; 47 L. T. 454; 5 Asp. M. L. C. 1; *sub nom. Re KIELL*, *KEMP v. FALK*, 31 W. R. 125, II. L.

*Annotations*:—*Reid*. *Sewell v. Burdick* (1884), 10 App. Cas. 74; *Booth S.S. Co. v. Cargo Fleet Iron Co.*, [1916] 2 K. B. 570.

**2309.** ————.]—*CALIN v. POCKETT'S BRISTOL CHANNEL STEAM PACKET CO.*, No. 1352, *ante*.

**2310.** ———— **Knowledge that seller not paid in cash.**]—The property of goods passes by the indorsement & delivery of the bill of lading by the consignee to another *bonâ fide* for a valuable consideration & without collusion with the consignee, although the indorsee knew at the time that the consignor had not received money payment for his goods, but had taken the consignee's acceptances payable at a future day not then arrived; & after such assignment of the bill of lading the consignor cannot stop the goods *in transitu* upon the insolvency of the original consignee.—*CUMING v. BROWN* (1808), 9 East, 506; 103 E. R. 666.

*Annotation*:—*Reid*. *Jones v. Jones* (1841), 8 M. & W. 431.

**2311.** ———— **Bill indorsed to purchaser's factor.**]—The unpaid vendor may stop *in transitu* before the goods come to the hands of the vendee's factor, although the factor has the bill of lading, indorsed to order, in his hands, & is under acceptance to the vendee on a general account; wherefore, in such case, where the vendee became bkpt., & the factor also became bkpt., & the messenger under the factor's commission, upon the arrival of the ship, went on board, & seized the cargo, the agent of the vendor having previously given notice to the captain to deliver the cargo to him, & the captain having agreed thereto:—*Held*: trover would lie by the vendor against the assignee of bkpt. factor.—*PATTEN v. THOMPSON* (1816), 5 M. & S. 350; 105 E. R. 1079.

*Annotation*:—*Reid*. The *Marie Joseph* (1866), Brown. & Lush. 449.

**2312.** ———— **Bill obtained by fraud of purchaser.**]—A. has some rum in the West India Docks, which he sells to B. The rum is to be shipped by A. in a vessel chartered by B. Before the rum is delivered on board the vessel, B. gets a bill of lading from the captain; he then sells the rum in question to C., who pays B. for it, upon an indorsement of the bill of lading. A. being unpaid, & suspecting the solvency of B., takes some part of the rum forcibly from out of the vessel, & countermands the delivery of the rest. In trover by C. against A. to recover the rum:—*Held*: C. gained no good title under the bill of lading; such bill being fraudulent, inasmuch as B. procured it to be signed by the captain before the rum was delivered on board the ship.—*OSEY v. GARDNER* (1816), Holt, N. P. 405; 171 E. R. 286, N. P.

**2313.** ———— **Seller not parting with control.**]—Pltfs. shipped goods to the order of Messrs. D., & received a receipt for them from the mate in charge of the vessel. Before the vessel sailed, & before the bill of lading had been given to pltfs., Messrs. D. became insolvent, having previously indorsed the bill of lading to H. for valuable consideration without the knowledge of pltfs.:—*Held*: pltfs. had not parted with the control over the goods; & an injunction was granted to restrain the ship from sailing with the goods on board.—*NEWTON v. HUBBACK* (1854), 2 W. R. 339.

**2314.** ———— **Bill indorsed in blank.**]—B., a Dantzic merchant, sold wheat to W., an Amsterdam merchant, to be paid for by drafts, to be drawn by B. on C., a London merchant, against bills of lading. W. was in fact, though that was not disclosed to B., acting for P., another London merchant. W. wrote to C. opening a credit, on account of P., in favour of B., to be drawn on against bills of lading, P. to be debited with the amount. B. forwarded a bill of lading, indorsed by him in blank, to C. in a letter stating that, "according to instructions from W.," we hand you bill of lading, " & request you to follow " his instructions respecting the document "by whose order, & for whose account," we draw on you, "which drafts we recommend to your kind protection." On the day after C.'s receipt of this letter, the draft was left with C. for acceptance. P., on the same day, being in actual possession of the bill of lading, pledged it with G., who *bonâ fide* gave value for it. On the evening of the same day, P. was arrested on a criminal charge; & he afterwards became bkpt. C. did not accept the draft; & on the ensuing day, became bkpt. W. also failed. B. stopped the cargo *in transitu*. G. brought trover against him for the cargo. On a case stating the above facts, with power for the ct. to draw inferences of fact:—*Held*: B. *primâ facie* had the right to stop *in transitu*; & G., though a *bonâ fide* transferee for value of the endorsed bill of lading from P., was not entitled to the cargo, unless P. had, not merely possession of the bill of lading, but a right to transfer it; inasmuch as bills of lading are not negotiable to the same extent as bills of exchange; but C. was entitled to hand over the bill of lading to P.; the letter from B. not imposing any condition to prevent C. from doing so, & the ct., as an inference of fact, thought that C. had so handed it over to P.—*GURNEY v. BEHREND* (1854), 3 E. & B. 622; 23 L. J. Q. B. 265; 23 L. T. O. S. 89; 18 Jur. 856; 2 W. R. 425; 118 E. R. 1275.

*Annotations*:—*Consd.* The *Tigress* (1863), Brown. & Lush.

*Consd.* *Shepherd v. Harrison* (1869), L. R. 4 Q. B. 196;





ing creditor to his relinquishment of the bills of lading (ROSE, J.).—*Re ASHTON, Ex p. ASHTON* (1832), 2 Deac. & Ch. 5, Ct. of R.

2327. —.]—*WENTWORTH v. OUTHWAITE*, No. 2181, *ante*.

2328. —.]—A bill in equity will lie to enforce a right of stoppage *in transitu*. Goods were shipped by a vendor on board a ship belonging to the purchaser, but employed as a general trader. Four bills of lading were made, under which the goods were deliverable to the purchaser or assigns; three of the bills were kept by the vendor, & one by the master of the ship:—*Held*: the delivery on board the purchaser's ship was delivery to the purchaser so as to preclude stoppage *in transitu* before the delivery of the goods at the port of consignment.

If the goods are actually delivered to an agent of the vendee, employed by him to receive delivery, the vendor is divested of his right of stoppage *in transitu*. On the other hand, although there is an actual delivery to the vendee's agent, the vendor may annex terms to such delivery, & so prevent it from being absolute & irrevocable. In this case the goods were shipped on board the consignee's own ship & delivered into the possession of his own servant, the master, who signed bills of lading making the goods deliverable to the consignee or assigns. There was therefore a delivery to the agent for his principal & no control over the delivery was in terms reserved to the vendor. . . . Supposing *pltf.* to have been ignorant of the fact that the vessel . . . belonged to the consignee a question might have arisen whether the delivery could properly be held to be complete (LORD CHELMSFORD, L.C.).—*SCHOTSMAN v. IANCASHIRE & YORKSHIRE RY. CO.* (1867), 2 Ch. App. 332; 36 L. J. Ch. 361; 16 L. T. 189; 15 W. R. 537; 2 Mar. L. C. 485, L. C. & L. J.

*Annotation*:—*Consd. Berndtson v. Strang* (1867), L. R. 4 Eq. 481.

2329. —.]—(1) Where goods are stopped while in transit & before they reach their specified ultimate destination by notice from an unpaid vendor, the carrier is bound to act upon the notice by delivering the goods to, or according to the directions of, the vendor, & if he fails to do so he is liable to an action by the vendor for wrongful conversion.

(2) The vendor on his part, although he is not a party to the contract of affreightment, is bound to take the goods or give directions for their delivery on arrival & to discharge the carrier's lien for freight, & if he refuses to perform this obligation he is liable in damages to the carrier for the amount of the freight.

(3) If the conduct of a vendor who has stopped goods in transit prevents them from being carried on to their specified ultimate destination, he is liable for the freight not only in respect of the whole voyage to the place at which the goods are in fact landed, but also to the ultimate destination.

(4) The effect of stoppage *in transitu* is not to rescind the contract between the carrier & the purchaser or to vest the property in the goods in the unpaid vendor.—*BOOTH S.S. CO., LTD. v. CARGO FLEET IRON CO., LTD.*, [1916] 2 K. B. 570; 85 L. J. K. B. 1577; 115 L. T. 199; 32 T. L. R. 535; 13 Asp. M. L. C. 451; 22 Com. Cas. 9, C. A.

2330. — *Carrier delivering goods by mistake after notice*.—If a carrier, after notice from the vendor of goods to stop them *in transitu*, by mistake delivers them to the vendee, the sale is nevertheless rescinded, & the vendor may bring trover for them against the vendee.—*LITT v.*

*COWLEY* (1816), Holt, N. P. 338; 2 Marsh. 457; 7 Taunt. 169; 129 E. R. 68.

*Annotations*:—*Reid. Clay v. Harrison* (1829), 5 Man. & Ry. K. B. 17; *Whitehead v. Anderson* (1842), 9 M. & W. 518; *Booth S.S. Co. v. Cargo Fleet Iron Co.*, [1916] 2 K. B. 570.

2331. *Purchaser ceases to have insurable interest*—*Policy effected before stoppage void*.—*CLAY v. HARRISON*, No. 2325, *ante*.

2332. *Whether property revested in seller*.—*CLAY v. HARRISON*, No. 2325, *ante*.

2333. —.]—*WENTWORTH v. OUTHWAITE*, No. 2181, *ante*.

2334. —.]—*BOOTH S.S. CO., LTD. v. CARGO FLEET IRON CO., LTD.*, No. 2329, *ante*.

2335. *Duty of seller to pay carrier's freight*.—*F. & co.*, shipowners at Liverpool, requested *defts.* to purchase for them, through *defts.* Calcutta house, a quantity of cotton, to be shipped on board two ships of *F. & co.*, which were then on their way to Calcutta, consigned to *defts.*; & as the goods were to be shipped on owners' account, they consented to a nominal rate of freight being inserted in the bill of lading. Before the execution of the order, one of the ships, the *Royal Sovereign*, was transferred to *pltf.* *defts.*, through their Calcutta house, executed the order, & having no notice of the transfer to *pltf.*, shipped part of the cotton on board the *Royal Sovereign*, the master, who also had no notice of the transfer, signing bills of lading to *defts.* order "freight for the goods free on owners' account." Before the arrival of the ship in England *F. & co.* stopped payment, & *defts.* claimed to stop the goods *in transitu*. On her arrival *pltf.* immediately took possession of the ship, & claimed freight. On a case stated, raising the question whether *pltf.* were entitled as against *defts.* to freight, or to a sum equivalent to freight, for the carriage of the goods:—*Held*: *pltf.* were not so entitled.—*MERCANTILE BANK v. GLADSTONE* (1868), L. R. 3 Exch. 233; 37 L. J. Ex. 130; 18 L. T. 641; 17 W. R. 11; 3 Mar. L. C. 87.

*Annotation*:—*Reid. Keith v. Burrows* (1877), 2 App. Cas. 636.

2336. —.]—*BOOTH S.S. CO., LTD. v. CARGO FLEET IRON CO., LTD.*, No. 2329, *ante*.

#### SUB-SECT. 2.—REDELIVERY OF GOODS.

2337. *Duty to redeliver*.—(1) A merchant who purchases goods on his own credit for another, to whom he indorses a bill of lading of the goods, stands, for the purpose of stoppage *in transitu*, in the position of vendor; & the indorsement by him of one bill of lading to the vendee does not, of itself, defeat his right to stop *in transitu*.

The vendor claiming to stop need not represent to the master that the bill of lading is still in the hands of his vendee.

(2) Upon the vendor asserting his right to stop *in transitu*, the master, unless aware of some legal defeasance of such right, is bound to deliver the goods to him, & his refusal so to deliver constitutes a "breach of duty" within Admiralty Court Act, 1861 (c. 10), s. 6, for which the stop will be liable.

(3) The mere indorsement of one bill of lading by the vendor to the vendee does not defeat the vendor's right to stop.—*THE TIGRESS (OR TIGRIS)* (1863), Brown. & Lush. 38; 1 New Rep. 449; 32 L. J. P. M. & A. 97; 8 L. T. 117; 9 Jur. N. S. 361; 11 W. R. 538; 1 Mar. L. C. 323; 167 E. R. 286.

*Annotations*:—*As to (2) Reid. Booth S.S. Co. v. Cargo Fleet Iron Co.*, [1916] 2 K. B. 570. *Generally, Reid. Gaudet v. Brown, Argos (Cargo Ex), Gelpel v. Cornforth, The*

*Sect. 6.—Effect of exercise by seller of rights of lien and stoppage in transitu: Sub-sect. 2. Sects. 7 & 8: Sub-sect. 1.]*

Hewsons (1873), 28 L. T. 77; Glyn, Mills v. East & West India Dock Co. (1882), 7 App. Cas. 591. *Mentd.* The Princess Royal (1870), L. R. 3 A. & E. 41; The Patria (1871), L. R. 3 A. & E. 436.

**2338.** Liability in tort for failure to deliver.]—MILLS v. BALL, No. 2253, *ante*.

**2339.** —.]—The vendor of a quantity of tin shipped the same on board a ship bound to Leghorn by the orders of the vendee. The captain, by his bill of lading, undertook to deliver the tin to an individual at Leghorn. The tin being heavy, was placed at the bottom of the hold, with other goods over it. The vendee having become bkpt., the vendor required the captain to deliver up the tin, but did not tender the freight or offer to make any compensation to him for the trouble of unloading the vessel. The latter refused, alleging that he had signed a bill of lading to deliver the tin to another person:—*Held:* this was sufficient evidence of a conversion.—THOMPSON v. TRAIL (1826), 6 B. & C. 36; 2 C. & P. 334; 9 Dow. & Ry. K. B. 31; 5 L. J. O. S. K. B. 34; 108 E. R. 366.

*Annotations:—*Consd. Thompson v. Snail (1845), 1 C. B. 328. *Reid.* Cowas-Jee v. Thompson (1845), 5 Moo. P. C. C. 165; Tindall v. Taylor (1854), 4 E. & B. 219; The Bahia (1864), 11 Jur. N. S. 90.

**2340.** —.]—SCHOTSMANS v. LANCASHIRE & YORKSHIRE RY. CO., No. 2328, *ante*.

**2341.** —.]—The statement of claim alleged that pltf. as vendor of goods, delivered them to defts., a railway co., as carriers for reward, the goods being consigned to the intending purchasers; that afterwards & before the goods had been delivered to the consignees or claimed by them from defts., pltf. discovered that the consignees were insolvent, & as unpaid vendor, gave notice to defts. not to deliver the goods to the consignees, but to hold them to pltf.'s order, & before the goods were delivered to the consignees pltf. required defts. to redeliver them to him; that defts. refused to do so, & delivered them to the consignees who absconded without paying for the goods. Pltf. claimed their value, viz. £12 10s. 6d. as damages. Defts. paid that sum into ct. & pltf. took it out in satisfaction:—*Held:* the action was "founded on tort" & not "on contract" within County Courts Act, 1867 (c. 142), s. 5, & pltf. having recovered a sum exceeding £10 was not deprived of costs by County Courts Act, 1867 (c. 142), s. 5.—PONTIFEX v. MIDLAND RY. CO. (1877), 3 Q. B. D. 23; 47 L. J. Q. B. 28; 37 L. T. 403; 26 W. R. 209, D. C.

*Annotations:—*Distd. Fleming v. M. S. & L. Ry. (1878), 4 Q. B. D. 81. *Consd.* Booth S.S. Co. v. Cargo Fleet Iron Co., [1916] 2 K. B. 570. *Reid.* Bryant v. Herbert (1878), 3 C. P. D. 189; Taylor v. M. S. & L. Ry., [1895] 1 Q. B. 134. *Mentd.* Sachs v. Henderson (1902), 71 L. J. K. B. 392.

**2342.** —.]—ORMONDE CYCLE CO. v. BAILEY & LEETHAM (1895), 11 T. L. R. 219, D. C.

**2343.** —.]—BOOTH S.S. CO., LTD. v. CARGO FLEET IRON CO., LTD., No. 2329, *ante*.

#### PART VII. SECT. 7.

*r. Insolvency of purchaser.]—*Goods being sold, & part of the price paid at the time, but the purchasers becoming bkpt., & their estates sequestered before delivery:—*Held:* the sellers were entitled to retain the goods in payment of the general balance due to them by bkpts.—MEIN v. BOGLE & CO. (1828), 3 Fac. Coll. 390.—SCOT.

*t. Unpaid seller who is also warehouseman.]—*LANGE v. GRICE,

RICHARDSON v. GRICE (1876), 2 V. L. R. 251.—AUS.

*b. Retention of goods for separate debt.]—*A party having purchased three lots of sugar, of which he received delivery, but paid no part of the price; & having thereafter bought another lot as a separate transaction, for which ready cash was to be paid; & having paid the greater part of the price of the fourth lot, but having become bkpt. before delivery:—*Held:* the seller was entitled to retain the

**2344.** Person purchasing by mistake of carrier.]—LATT v. COWLEY, No. 2330, *ante*.

**2345.** — Factor of purchaser.]—PATTEN v. THOMPSON, No. 2311, *ante*.

#### SECT. 7.—RIGHT TO WITHHOLD DELIVERY.

*See* Sale of Goods Act, 1893 (c. 71), s. 39 (2).

**2346.** Insolvency of purchaser—Composition with creditors.]—READER v. KNATCHBULL (1780), 5 Term Rep. 218, n.; 101 E. R. 123.

*Annotations:—*Consd. Gibson v. Carruthers (1841), 8 M. & W. 321. *Reid.* Cutton v. Sanger (1828), 2 Y. & J. 459; Bowser v. Colby (1841), 1 Hare, 109.

**2347.** — Sale by purchaser before insolvency—Assent by original seller—Goods appropriated.]—STOVELD v. HUGHES, No. 2295, *ante*.

**2348.** — Goods unappropriated.]—Defts. sold to B. & co. 100 tons of zinc, unappropriated, upon certain terms of payment, giving them at the time of the contract four several documents to the following effect: "We hereby undertake to deliver to your order indorsed hereon, 25 tons merchantable sheet zinc off your contract of this date." Upon the faith of these documents pltf's bought of B. & co., & paid for, 50 tons of the zinc mentioned in the contract. B. & co. having failed, & the contract price being unpaid, defts. refused to deliver the zinc:—*Held:* the giving of these delivery orders or "undertakings" did not estop defts. from setting up, as against the vendees of B. & co., their right, as unpaid vendors, to withhold delivery.—FARMELOE v. BAIN (1876), 1 C. P. D. 445; 45 L. J. Q. B. 264; 34 L. T. 324.

**2349.** — Master of ship offering to accept delivery according to contract—Contract adopted by assignees in bankruptcy.]—*Assumpsit* by the assignees of a bkpt. The declaration in substance stated, that T., before his bkpcy., agreed to buy from deft. 2,000 quarters of linseed, free on board at Odessa, at 30s. 10d. per quarter, the shipment to be made on board the buyer's vessel on arrival at Odessa, which vessel was to be forthwith chartered for thence, & the amount of the invoice was to be paid, on handing over the same & the bills of lading to the buyers in London. The declaration then stated mutual promises by H. & deft., & averred that H. despatched a vessel to Odessa, which arrived there in a reasonable time, & was ready to receive the linseed on board; that before its arrival H. had become bkpt., but that the master of the ship was ready & offered to receive the linseed on board, & to give bills of lading, pursuant to the agreement; that deft. refused to deliver the linseed on board. The declaration further stated, that pltf's afterwards, within a reasonable time after the arrival of the vessel at Odessa, gave notice to deft. of their being ready & willing to pay for the linseed, on delivery in London, according to the agreement; yet deft. refused to deliver. Plea, that pltf's did not, within a reasonable time after the arrival of the vessel at Odessa, give notice to deft. of their

last lot of the sugar in security & payment of the price of the former ones.—LANDALE & CO.'S TRUSTEE v. BOGLE & CO. (1828), 6 Sh. (Ct. of Sess.) 360; 3 Fac. Coll. 390.—SCOT.

*b. —.]—*MELROSE & CO. v. HASTIE & CO. (1851), 13 Dunl. (Ct. of Sess.) 880; 23 Sc. Jur. 398.—SCOT.

*c. Delay in payment for previous consignment.]—*Delay in payment for a previous consignment does not of itself operate as a rescission of a contract or

intention to adopt the contract:—*Held*: the declaration disclosed a good cause of action, on which plffs. were entitled to recover, & the plea was no answer to the action.—*GIBSON v. CARPENTHERS* (1841), 8 M. & W. 321; 11 L. J. Ex. 138; 151 E. R. 1061.

*Annotations*:—*Consd.* *Bailey v. Thurston*, [1903] 1 K. B. 137. *Reid*. *Beckham v. Drake* (1849), 2 H. L. Cas. 579; *Griffiths v. Perry* (1859), 5 Jur. N. S. 1076; *Knight v. Burgess* (1864), 10 L. T. 90; *Smith v. Hudson* (1865), 6 New Rep. 103; *Schotsmans v. L. & Y. Ry.* (1867), 2 Ch. App. 332; *Berndtson v. Strang* (1868), 3 Ch. App. 588; *Morgan v. Bain* (1874), 44 L. J. C. P. 47; *Leask v. Scott* (1877), 46 L. J. Q. B. 576; *Re Cock, Ex p. Rosevear China Clay Co.* (1879), 11 Ch. D. 560; *Cassaboglou v. Gibb* (1883), 11 Q. B. D. 797; *Kendal v. Marshall Stevens* (1883), 11 Q. B. D. 356; *Booth S.S. Co. v. Cargo Fleet Iron Co.*, [1916] 2 K. B. 570.

**2350. Notwithstanding partial delivery.**—On Oct. 30, 1857, deft. entered into a written contract to sell & deliver to pltf. 400 tons of iron "to be delivered to any usual South Staffordshire district immediately, terms of payment, bill at four months date down." For this price pltf. gave his acceptance at four months, which deft. indorsed & paid to his bankers, & 100 tons of the iron were delivered by defts., & a written order on a party of whom he had purchased it to deliver 300 tons to pltf. on his order was given by deft. On Nov. 17 deft. suspended payment. On Nov. 19 pltf. indorsed & delivered deft.'s order for the iron to his own bankers as security for advances, & informed deft. he had done so. The order for the delivery of the iron was dishonoured.

On Feb. 10, 1858, pltf. was adjudicated a bkpt., & his acceptance, which became due on Mar. 4, was dishonoured, & deft.'s account debited with it by his bankers. The bank had not proved against pltf.'s estate, but claimed to be creditors of pltf. in respect thereof, & deft. had paid 8s. in the pound to them on pltf.'s acceptance. Pltf.'s estate had paid no dividend. At the time pltf.'s bill became due, the liabilities of deft. to pltf. exceeded those of pltf. to deft., pltf., as a bill broker, having indorsed bills bearing deft.'s name to an amount exceeding the balance due to deft. After the dishonour of pltf.'s acceptance this action was commenced:—*Held*: in accordance with the decision in *Valpy v. Oakeley*, No. 2604, *post*, the insolvency of pltf. gave deft. a right analogous to stoppage *in transitu* to stop the goods before they came to pltf.'s hands, & a partial delivery did not take the case out of that rule: it was immaterial whether the goods were specific or not; & *ex post facto* facts might be taken into consideration in reduction of damages; under the circumstances of the case, pltf. was only entitled to nominal damages.—*GRIFFITHS v.*

*PERRY* (1859), 1 E. & E. 680; 28 L. J. Q. B. 204; 32 L. T. O. S. 315; 5 Jur. N. S. 1076; 120 E. R. 1065.

*Annotations*:—*Apld.* *Re Edwards, Ex p. Chalmers* (1873), 8 Ch. App. 289. *Reid*. *Morgan v. Bain* (1874), 31 L. T. 616; *Erle County Natural Gas & Fuel Co. v. Carroll*, [1911] A. C. 105.

**2351. Contract empowering seller to withhold delivery.**—Pending payment of any moneys owing—Moneys owing under contract & on general account—Construction of contract.]—A contract contained a clause that the vendors might withhold delivery pending payment of any moneys owing:—*Held*: this meant moneys owing under the contract, & not moneys owing on general account.—*KLEIN v. SPILLERS & BAKERS, LTD.* (1897), 13 T. L. R. 186.

**Non-payment for instalments.**—See Nos. 1750–1757, *ante*.

## SECT. 8.—RESALE BY SELLER.

### SUB-SECT. 1.—IN GENERAL.

See Sale of Goods Act, 1893 (c. 71), s. 48 (2)–(1).

**2352. Right of seller to insist on purchaser taking goods.**—*HORE v. MILNER* (1797), Peake, 58, n.; 170 E. R. 78, N. P.

**2353. Purchaser refusing to accept goods.**—Seller requesting purchaser to sell on his behalf—Evidence of waiver of contract—Questions for jury.]—*GOMERY v. BOND*, No. 2407, *post*.

**2354. Whether court will order resale.**—To effect reduction of demand against buyer.]—The ct. refused to order pltf., who was the vendor of goods which remained in his possession, to sell the goods & apply the moneys produced by the sale in reduction of his demand on deft., who was the purchaser.—*WATSON v. MACHIN* (1837), Will. Woll. & Dav. 576; 1 Jur. 844.

**2355. Wrongful resale.**—Measure of damages—Loss sustained by non-delivery.]—*CHINERY v. VIALI*, No. 2672, *post*.

**2356. Whether amounting to rescission of contract.**—Entitling purchaser to recover deposit—Whether delivery of goods material.]—*PAGE v. COWASJEE EDULJEE*, No. 2387, *post*.

**2357. Inability of purchaser to meet bills.**—Remedy of seller—Action for difference in price.]—Where bills are given for a cargo, & owing to the inability of the acceptor to meet the bills, the cargo is sold by the drawer at a loss, the latter should sue for the difference in price, & not sue upon the bills.—*BEVAN v. STEVENSON* (1885), 1 T. L. R. 587, D. C.

justify a seller in refusing to deliver.—*HANG SHING FIRM v. LONLEY* (W. R.) & Co. (1910), 5 Hong Kong L. R. 89.—*HONG KONG*.

**d. Notification by purchaser of intention to deduct claim repudiated by vendor.**—Where a thing purchased is to be paid for in cash on delivery & the vendor is notified by the purchaser that he will deduct from the price the amount of a claim which the vendor denies, he is not bound to deliver.—*WINEARLS v. HOEY* (Man.), [1917] 2 W. W. R. 287.—*CAN.*

**e. Insolvency of agent.**—Retention of goods for separate debt.]—A party sold goods to a general agent, for which he received a bill accepted by the purchaser, & indorsed by the agent:—*Held*: not entitled, on the bkptcy. of the agent, to retain the bills & goods in satisfaction of a separate debt due by the agent.—*DUTHIE v. PATERSON & CATLEY* (1822), 1 Sh. (Ct. of Sess.) 532.—*SCOT.*

## PART VII. SECT. 8, SUB-SECT. 1.

**2355 i. Wrongful resale.**—Measure of damages—Loss sustained by non-delivery.]—*ROBSON v. McMICAEL* (N. W. T.) (1906), 3 W. L. R. 58.—*CAN.*

**f. Must be identical goods.**—On a re-sale under conditions of sale of imported goods at the risk of the purchaser, the vendor substituted for some of the original lots other lots of imported goods of the same description, quality & value:—*Held*: the goods resold must be substantially identical with those originally sold.—*MATTHEWS v. BENJAMIN* (1866), 3 W. W. & A'B. 124.—*AUS.*

**g. Obligations of seller.**—Duty to act *bona fide*.]—A seller of goods exercising the right of re-sale is bound to act *bona fide*, & to take reasonable precautions to obtain a proper price.—*VANSTONE & ROGERS v. SCOTT* (1908), 1 Alta. L. R. 462; 8 W. L. R. 919; 9 W. L. R. 257.—*CAN.*

**h. — Duty to give notice to purchaser of re-sale.**—*ROBINSON v. LONG* (N. B.), [1923] 3 D. L. R. 918.—*CAN.*

**k. — Duty to exercise power of re-sale within reasonable time.**—If a vendor, on breach of contract by non-payment of the purchase-money, elects to exercise his right of re-sale, not only is he bound to wait a reasonable time after giving notice to the purchaser of his intention to re-sell before actually re-selling, but he is also bound to exercise his right of re-sale within a reasonable time after the date of the breach.—*PRAG NARAIN v. MUL CHAND* (1897), 1 L. R. 19 All. 535.—*IND.*

**l. — — — — —**—*B. PARTHASARATHY CHETTY & Co. v. GAJAPATHY* (T. M.) NAIDU & Co. (1925), 1 L. R. 48 Mad. 787.—*IND.*

**m. — — — — —**—*PHUL CHAND-FATEH CHAND v. JUGAL KISHOR-GULAB LING* (1927), 8 L. R. Lah. 591.—*IND.*

**Sect. 8.—Resale by seller: Sub-sect. 2, A. & B.; sub-sect. 3.]**

**SUB-SECT. 2.—WHEN POWER EXERCISABLE.**

**A. In General.**

*See Sale of Goods Act, 1893 (c. 71), s. 48 (3), (4).*

**2358. Default in removing goods—After notice by seller.]—***GREAVES v. ASHLIN*, No. 1601, *ante*.

**2359. Purchase of goods on credit—Goods left in possession of seller.]—***CHINERY v. VIALI*, No. 2672, *post*.

**2360. Agency of necessity—Where actual commercial necessity to sell—Seller acting *bonâ fide*.]**—The doctrine of agency of necessity is not confined to cases of carriers of goods or of the acceptor of a bill of exchange for the honour of the drawer, but extends to a case where the sellers of goods to a purchaser abroad to whom, owing to war conditions, they cannot deliver them & with whom they are unable to communicate, resell the goods, purporting to act as the original purchaser's agents of necessity, if in the circumstances of the case there is an actual commercial necessity to sell the goods & the agents act *bonâ fide*:—*Held*: on the facts of the case, there was no such necessity & the sellers had not acted *bonâ fide*, & were not, therefore, agents of necessity to resell the goods.—*PRAGER v. BLATSPIEL, STAMP & HEACOCK, LTD.*, [1924] 1 K. B. 566; 93 L. J. K. B. 410; 130 L. T. 672; 40 T. L. R. 287; 68 Sol. Jo. 460.

*Annotation:—Refd. Jebara v. Ottoman Bank*, [1927] 2 K. B. 254.

**2361. Bankruptcy of purchaser—Seller retaining warrants for goods.]—**A quantity of tea was sold at a price to be paid at a future day. After the day had elapsed, the buyer paid a sum on account & wrote to the sellers, who had retained the warrants in their possession, requesting them to wait the arrival of the overland mail, & on its receipt to dispose of the tea. He afterwards became bkpt.:—*Held*: an application to the ct. for an order for sale is not improper or unnecessary.—*Re COLES, Ex p. TWINING* (1841), 1 Mont. D. & De G. 691; 10 L. J. Bcy. 60; 5 Jur. 536, Ct. of R.

**2362. — Before delivery.]—***Re NATHAN, Ex p. STAPLETON*, No. 2377, *post*.

**— Right of proof for loss in resale.]—***See Sub-sect. 3, post*.

**B. Default in Payment.**

**2363. Payment of earnest immaterial.]—**Earnest only binds the bargain, & on default in the vendee, vendor may sell to another.—*LANGFORD v. TILER* (1704), 1 Salk. 113; Holt. K. B. 96; 6 Mod. Rep. 162; 91 E. R. 104, N. P.

*Annotations:—Refd. Ryall v. Rolle* (1749), 1 Atk. 165; *Hinde v. Whitehouse* (1806), 7 East. 558; *Bloxam v. Sanders* (1825), 4 B. & C. 941; *Montague v. Baron* (1825), 5 Dow. & Ry. K. B. 532; *Petty v. Anderson* (1825), 3 Bing. 170; *Clay v. Harrison* (1829), 10 B. & C. 99; *Laidler v. Burlinson* (1837), 2 M. & W. 602.

**2364. Non-payment within customary time—Custom in hop trade.]—**A., a hop merchant, on several days in Aug., sold to B., by contract, various parcels of hops. Part of them were weighed & an account of the weights, together with samples, delivered to the vendee. The usual time of payment in the trade was the second

Saturday subsequent to the purchase. B. did not pay for the hops at the usual time, whereupon A. gave notice that unless they were paid for by a certain day they would be resold. The hops were not paid for, & A. resold a part, with the consent of B., who afterwards became bkpt., & then A. sold the residue of the hops without the assent of B. or his assignees. Account sales of the hops so sold were delivered to B., in which he was charged warehouse rent from Aug. 30. The assignees of B. demanded the hops of A., & tendered the warehouse rentcharges, etc.; & A. having refused to deliver them, brought trover. The jury found that deft. had not rescinded the contract of sale:—*Held*: the assignees were not entitled to maintain trover to recover the value of the hops, inasmuch as in order to maintain that action, the party must have not only a right of property but a right of possession, & although a vendee of goods acquires a right of property by the contract of sale, yet he does not acquire a right of possession to the goods until he pays or tenders the price.—*BLOXAM v. SANDERS* (1825), 4 B. & C. 941; 7 Dow. & Ry. K. B. 396; 107 E. R. 1309.

*Annotations:—Expld. Clay v. Harrison* (1829), 5 Man. & Ry. K. B. 17. *Apld. Winks v. Hassall* (1829), 9 B. & C. 372; *Wilmshurst v. Bowker* (1839), 5 Bing. N. C. 541 (*See 7 M. & G. 882*); *Milgate v. Kibble* (1841), 3 Man. & G. 100. *Consd. The Norway* (1864), Brown. & Lush. 226; *Donald v. Suckling* (1866), L. R. 1 Q. B. 585. *Apld. Re Edwards, Ex p. Chalmers* (1873), 8 Ch. App. 289; *Apprvd. Grice v. Richardson* (1877), 3 App. Cas. 319. *Apld. Adelphi Bank v. Halifax Sugar Refining Co.* (1887), 4 T. L. R. 21. *Refd. Miles v. Gorton* (1834), 2 Cr. & M. 504; *Scott v. England* (1844), 4 L. T. O. S. 141; *Re Oxley, Ex p. Turnbull* (1868), 19 L. T. 463.

**2365. Provision for payment on prompt day—Custom in tea trade.]—**By the custom of the tea trade, when teas are sold at a given prompt, or future day of payment, the buyer pays a deposit in part of the purchase-money, & the vendor retains the teas, or the warrants representing them, until the day of prompt, when if he fails to pay the balance of the purchase-money, the vendor is at liberty to resell the teas, & to charge the purchaser with any deficiency, together with interest from the prompt day, warehouse rent, etc.:—*Held*: where the buyer became bkpt. before the day of prompt, & the assignees refused to take the teas, or pay the balance of the purchase-money, the vendor might resell them, & prove for the amount of the deficiency.—*Re TATE, Ex p. MOFFATT* (1840), 1 Mont. D. & De G. 282; 4 Jur. 659, Ct. of R.; *affd.* (1841), 2 Mont. D. & De G. 170, L. C.

*Annotation:—Mentd. Re Gales, Ex p. Harrison* (1843), 1 L. T. O. S. 456.

**2366. Provision for payment by specified time—Subsequent tender by purchaser—Before resale by seller.]—***MARTINDALE v. SMITH*, No. 2053, *ante*.

**2367. Balance of instalments payable before removal of goods—Key of store delivered to purchaser—Seller retaining key of external enclosure.]—**Goods are sold to be paid for by instalments, the balance to be paid before removal. The vendor allows the vendee to place the goods under lock & key upon the vendor's premises, & delivers the key to the vendee, but retains the key of the external inclosure. The balance being unpaid, the vendee has not such a possession as will entitle

**PART VII. SECT. 8, SUB-SECT. 2.—A.**

**2359 i. Purchase of goods on credit—Goods left in possession of seller.]—**Ptfs. were the highest bidders for two horses offered for sale by auction. Deft. refused to accept ptfs.' note, & ptfs. agreed to furnish security before the next evening. Deft. told ptfs. the horses would be at their risk if left overnight at the farm where the

auction was held, & afterwards told ptfs. to leave the horses at a livery stable, which they did. Security was not furnished before the following evening, & deft. resold the horses:—*Held*: the property in the horses had not passed to ptfs., & deft. was justified in re-selling them.—*CHEW v. CROCKETT (Sask.)* (1912), 22 W. L. R. 384; 3 W. W. R. 32, 225.—*CAN.*

*n. Refusal of buyer to accept—After legal tender by seller.]—SIMSON v. GORA CHAND DOS* (1883), 1 L. R. 9 Calc. 473.—*IND.*

**PART VII. SECT. 8, SUB-SECT. 2.—B.**

**o. Deposit paid—Time & mode of payment of balance never agreed—Re-sale by seller before delivery.]—HEFFERNAN v. BERRY (1872), 32 U. C. R. 518.—*CAN.***



him to maintain trover against the vendor upon a wrongful removal & sale of the goods.—*MILGATE v. KEBBLE* (1841), 3 Man. & G. 100; Drinkwater, 225; 3 Scott, N. R. 358; 10 L. J. C. P. 277; 133 E. R. 1073.

*Annotations*.—*Distd. Chinery v. Viall* (1860), 5 H. & N. 288. *Consd. Donald v. Suckling* (1866), L. R. 1 Q. B. 585.

**2368. Condition for resale on non-payment by specified time—Conditional sale.**—Where goods are sold on condition that, if they are not paid for at a time specified, the owner may resell them, & the vendee shall be answerable for any loss on resale, such sale is conditional & not absolute. Therefore, if the vendee do not pay at the time, & the vendor resell at a loss, he cannot maintain *assumpsit* for goods bargained & sold, or goods sold & delivered, & the defence may be raised on *non assumpsit*.—*LAMOND v. DAVALL* (1847), 9 Q. B. 1030; 16 L. J. Q. B. 136; 11 Jur. 266; 115 E. R. 1569.

*Annotations*.—*Apld. Chinery v. Viall* (1860), 5 H. & N. 288. *Consd. Rogers v. Hadley* (1863), 2 H. & C. 227. *Refd. Pott v. Flather* (1847), 11 Jur. 735.

**2369. Price payable by cash against shipping documents—Neglect of purchaser to pay within reasonable time—Perishable goods.**—Where by a contract for the sale of perishable articles it is provided that payment is to be made "by cash . . . in exchange for" shipping documents, the buyer is under an obligation to pay within a reasonable time after the shipping documents are tendered to him, & if he does not do so the seller is entitled to sell the goods against him, & to claim the loss which he has suffered.—*RYAN v. RIDLEY & Co.* (1902), 19 T. L. R. 45; 8 Com. Cas. 105.

*Annotations*.—*Apld. The Miramichi*, [1915] P. 71. *Refd. Polenghi v. Dried Milk Co.* (1904), 92 L. T. 61.

#### SUB-SECT. 3.—LOSS SUSTAINED ON RESELL.

**2370. Recovery of damages.**—*HORE v. MILNER* (1797), Peake, 58, n.; 170 E. R. 78, N. P.

**2371.** —Where the purchaser of goods refuses to take them, the vendor, by reselling them, does not preclude himself from recovering damages for the breach of contract.

It is most convenient that when a party refuses to take goods he has purchased, they should be resold, & that he should be liable to the loss, if

any, upon the resale (*BEST, C.J.*).—*MACLEAN v. DUNN* (1828), 4 Bing. 722; 1 Moo. & P. 761; 6 L. J. O. S. C. P. 184; 130 E. R. 947.

*Annotations*.—*Consd. Lamond v. Davall* (1847), 9 Q. B. 1030. *Mentd. Goshell v. Archer* (1835), 2 Ad. & El. 500; *Taylor v. Salmon* (1838), 4 My. & Cr. 131; *Wolaston v. Osborn* (1853), 20 L. T. O. S. 274; *Williams v. Lake* (1859), 2 E. & E. 349; *Koenigsblatt v. Sweet*, [1923] 2 Ch. 314.

**2372.** —.—*RYAN v. RIDLEY & Co.*, No. 2369, *ante*.

**2373. — Measure of damages—Actual loss sustained by resale.**—Appls. having bought coal from resps., the latter made a contract with a coal merchant to supply them with the coal. Appls. broke their contract to accept the coal & resps. had to cancel their contract with the merchant & to pay him damages. At the time of appls.' breach there was no market for the particular kind of coal in question. In an arbn. between appls. & resps. the arbitrators found that resps. had resold the coal to the merchant & had acted reasonably in so doing.—*Held*: in the circumstances resps. were entitled to recover from appls., in addition to their own damages, the amount which they had had to pay to the coal merchant.—*WHITTAKER, LTD. v. BOWATER, LTD.* (1918), 35 T. L. R. 114.

**2374. — — — — — Damages incurred by seller—Consequent on purchaser's breach of contract.**—*WHITTAKER, LTD. v. BOWATER, LTD.*, No. 2373, *ante*.

**2375. Right to prove in bankruptcy—For loss sustained.**—*Re TATE, Ex p. MOFFATT*, No. 2365, *ante*.

**2376.** —.—*Hop merchants sold a quantity of hops to a person, who paid a small part only of the purchase-money, & shortly afterwards entered into a composition with his creditors. Creditors were to execute or assent to the composition deed within three months, or be precluded from the benefit of it. The vendors retained a lien on the hops according to the custom of the trade, & afterwards sold them for much less than the original purchase-money, & then claimed to share in the dividend under the composition deed, for the balance remaining due to them. They had not executed the deed, but had virtually assented to it:—Held: the vendors were not entitled to receive any dividend under the deed.*—*BUCK v. SHIPPAM* (1846), 1 Ph. 694; 41 E. R. 796; *sub*

#### PART VII. SECT. 8, SUB-SECT. 3.

**2370i. Recovery of damages.**—*JOHNSON v. SALMON* (B. C.), [1917] 2 W. W. R. 644; 36 D. L. R. 796.—*CAN.*

**2373 i.** — *Measure of damages—Actual loss sustained by resale.*—*FURNISS v. SAWERS* (1845), 3 U. C. R. 76.—*CAN.*

**2373 ii.** —.—*A ship was sold at auction by the marshal under an order of ct. in an action for seamen's wages. The ship was knocked down to J. for \$2,000. J. refusing to complete the purchase, the ship was re-sold by the marshal for \$1,900.—Held: J. was liable for the difference in price & the costs occasioned by his default.*—*Re JONES, HACKETT v. THE BLAKELEY* (1903), 8 Exch. C. R. 327.—*CAN.*

**2373 iii.** —.—*BROWN v. WALSH* (1919), 45 O. L. R. 646; 16 O. W. N. 285.—*CAN.*

**2373 iv.** —.—*If a purchaser of goods without just cause repudiates his contract this gives the vendor the right to accept the repudiation & end the contract. The vendor may then sell the goods at the market price & recover damages for the difference between the price received & the contract price.*—*REED & KEAST v. MCKENZIE, LTD.*, [1921] 3 W. W. R.

72; 14 Sask. L. R. 212.—*CAN.*

**2373 v.** —.—*McCOWAN v. BOWES* (N. S.), [1923] 3 D. L. R. 756.—*CAN.*

**2373 vi.** —.—*YULE & Co. v. MAHOMED HOSSAIN* (1896), 1 L. R. 24 Calc. 124; 1 C. W. N. 71.—*IND.*

**2373 vii.** —.—*CLIVE JUTE MILLS Co. v. ABRAHIM ARAB* (1896), 1 L. R. 24 Calc. 177.—*IND.*

**2373 viii.** —.—*BEST v. HAJI MUHAMMAD SAIT* (1898), 1 L. R. 23 Mad. 18.—*IND.*

**2373 ix.** —.—*MOLL SCHUTTE & Co. v. LUCHMI CHAND* (1898), 1 L. R. 25 Calc. 505; 2 C. W. N. 283.—*IND.*

**2373 x.** —.—*Pltf. sold to deft. a certain number of cases of embroidered muslin. Deft. took delivery of some of the cases, but refused to take delivery of, or pay for, the rest. Pltf. re-sold the goods refused by deft., & brought a suit against deft. for damages:—Held: the proper measure of damages was the difference between the contract price of the goods which deft. had refused to accept & the price realised by pltf. on the resale.*—*BASDEO v. SMIDT* (1899), 1 L. R. 22 All. 55.—*IND.*

**2373 xi.** —.—*O'BRIEN v. BARKER*, 4 J. R. N. S. 64.—*N.Z.*

**2373 xii.** —.—*LAING & SONS v. HAIN* (1853), 25 Sc. Jur. 405.—*SCOT.*

**p.** — *Dependent on seller acting within reasonable time.*—A clause in a contract for the sale of goods, which provides that the seller on the failure of the buyer to take delivery shall be at liberty at any time to re-sell the goods, & recover the loss resulting from such re-sale, gives to the seller a valid right to recover damages on the basis therein mentioned, but if that right is not exercised in a reasonable time, he is thrown back on his remedy of damages on the ordinary basis of the difference between the contract rate & the market rate at the date of the breach.—*HARICHAND & Co. v. GOSHO KABUSHIKI KAISHA* (1924), 1 L. R. 49 Bom. 25.—*IND.*

**q.** *Irregular sale by sheriff under fieri facias—Conditions of sale not complied with—Resale at a loss.*—*SMITH v. BACON* (1856), 14 U. C. R. 38.—*CAN.*

**r.** *Commission of agent for resale—Whether included in loss.*—*Defts. sold pltf. a motor car & subsequently repossessed & resold it upon pltf.'s*



**Sect. 8.—Resale by seller: Sub-sect. 3. Sect. 9.**

*nom.* BUSH v. SHIPMAN, 15 L. J. Ch. 356; 10 Jur. 507, L. C.

*Annotations:—*Consd. Pfeleger v. Browne (1860), 28 Beav. 391. *Refd.* Watson v. Knight (1854), 19 Beav. 369.

**2377. ——— Unless contract price in cash offered by trustee in bankruptcy or sub-purchaser.]**—When the purchaser of goods sold on credit becomes bkpt. before the vendor has parted with the possession of the goods, the trustee in the bkpcy. has a right to elect to complete the contract by paying the agreed price in cash within a reasonable time. But, if he does not do so, the vendor is entitled to treat the contract as broken, & to resell the goods without first tendering them to the trustee. The vendor is entitled to prove in the bkpcy. for damages for the breach of contract, the measure of damages, if the market is falling, being the difference between the contract price & the price obtained on the resale.—*Re* NATHAN, *Ex p.* STAPLETON (1879), 10 Ch. D. 586; 40 L. T. 14; 27 W. R. 327, C. A.

*Annotations:—*Refd. Tolhurst v. Associated Portland Cement Manufacturers (1900), Associated Portland Cement Manufacturers (1900) v. Tolhurst, [1902] 2 K. B. 660. *Mentd.* Pitts v. La Fontaine (1880), 5 App. Cas.

**SECT. 9.—SELLER RETAKING POSSESSION.**

**2378. Right to retake possession—Bankruptcy of buyer.]**—(1) If I send goods to B. from beyond sea to the use of B., & before these goods are paid for B. dies insolvent, I cannot have my goods again: but if I send goods to a factor to dispose of to my use, & he becomes bkpt.; these goods are not liable to the debts of such bkpt.

(2) A tradesman in London, by order of a tradesman in the country, sends goods to the latter, who does not appoint or name the carrier; afterwards the carrier embezzles the goods, the trader in the country must stand to the loss.—*GODFREY v. FURZO* (1733), 3 P. Wms. 185; 24 E. R. 1022, L. C.

*Annotations:—*As to (1) *Refd.* The Figlia Maggiore (1868), L. R. 2 A. & E. 106; Harris v. Truman (1881), 7 Q. B. D. 340; Burdick v. Sewell (1883), 10 Q. B. D. 363. *Generally, Mentd.* Ryall v. Howles (1750), 1 Ves. Sen. 348.

**2379. ———.]**—It is agreed between A. & B. that B. shall purchase of A. all the goods of a certain kind which A. shall send him at a fixed price, & that A. shall draw bills on B. for the amount of the purchase & also that B. shall accept other bills drawn by A. for his convenience, to cover which A. shall remit value to B. After they have acted some time under this agreement B. becomes bkpt. being under acceptances to a great amount. A., being ignorant of the bkpcy., sends a quantity of goods of the same kind together with other bills to B. for the purpose of discharging those acceptances which come into the hands of the assignees. A. afterwards himself discharges the acceptances. Under these circumstances B. is to be considered as the factor or banker of A. & as having only a qualified property in the goods & bills which were so sent for a particular purpose, the general property being in A. Therefore that purpose not being answered, A. may recover back from the assignees of B. the amount of those goods & bills.—*HOLLINGWORTH v. TOOKE* (1795), 2 Hy. Bl. 501; 126 E. R. 670, Ex. Ch.; *affg.* S. C.

*sub nom.* TOOKE v. HOLLINGWORTH (1793), 5 Term Rep. 215.

*Annotations:—*Distd. Bolton v. Puller (1796), 1 Bos. & P. 539. *Apld.* Parke v. Ellason (1801), 1 East, 544. *Consd.* *Re* Boldero, *Ex p.* Pease, Townend, Farley, Daniel & Banks (1812), 19 Ves. 25. *Apld.* Fleming v. Davidson (1843), 1 L. T. O. S. 112. *Consd.* Muttyloll Seal v. Dent (1853), 5 Moo. Ind. App. 328. *Refd.* Bloxam v. Sanders (1825), 4 B. & C. 941; Gibson v. Carruthers (1841), 8 M. & W. 321; Valpy v. Gibson (1847), 16 L. J. C. P. 241; *Re* Edwards, *Ex p.* Chalmers (1873), 28 L. T. 325; *Re* Tapenbeck, *Ex p.* Banner (1876), 2 Ch. D. 278.

**2380. ———.]**—Deft. delivered to A. some months before his insolvency, 5 horses to be used in a stage coach of which he had 2 only remaining when he went to prison, the 3 others having died, & A. having bought 3 in their place. On the day that A. went to prison, he sent a note authorising the delivery of the 2 original horses & the 3 new ones to deft. Any 2 of them were worth £30. In trover by the assignee for the 3 horses, deft. pleaded a sale of the 5 original horses to A., & an agreement that deft. might retake them, or any of them, at any time, if any part of the price was unpaid, & that £22 was still unpaid. No pressure or demand from deft. was shown:—*Held:* there was no evidence to show that there had been a *bonâ fide* transfer of the property in the 3 horses subsequently purchased to satisfy the debt of £22; & if there was any transfer, there was sufficient *primâ facie* evidence that it was voluntary.—*BOLTON v. SHERMAN* (1837), 2 M. & W. 395; Murp. & H. 141; 6 L. J. Ex. 147; 150 E. R. 811.

*Annotations:—*Refd. Brancker v. Molyneux (1840), 1 Man. & G. 710. *Bracegirdle v. Peacock* (1845), 8 Q. B. 174.

**2381. ———.]**—*FLEMING v. DAVIDSON* (1843), 1 L. T. O. S. 112.

**2382. ——— Fraudulent purchase—Though part payment made.]**—A. bought goods to a large amount from a tradesman, & paid to the tradesman £20, which was not, however, taken on account, A., in the opinion of the jury, having a preconceived intention of not paying for the goods, & having misrepresented her ability to pay:—*Held:* the tradesman was justified in rescinding the contract, & retaking the goods from A.'s house within a reasonable time; but he was guilty of excess in remaining in possession, by means of his servants, of a portion of A.'s house from Saturday morning to Monday, when the goods were taken away.—*DIXON v. HEWETSON* (1867), 16 L. T. 295, N. P.

**2383. Agreement to retake possession—Personal contract—Applicable only to seller & buyer.]**—An agreement between vendor & vendee of a chattel, that the former may resume the possession if the price be not duly paid, is a personal contract, not binding on alienor, or personal representative of vendee.—*Howes v. BALL* (1827), 7 B. & C. 481; 1 Man. & Ry. K. B. 288; 6 L. J. O. S. K. B. 106; 108 E. R. 802.

*Annotations:—*Distd. Walker v. Clyde (1861), 10 C. B. N. S. 381. *Refd.* Stainbank v. Shepard (1853), 13 C. B. 418; Congreve v. Evetts (1854), 10 Exch. 298; Castrique v. Imrie (1861), 7 Jur. N. S. 1076; Donald v. Suckling (1866), L. R. 1 Q. B. 585; Sewell v. Burdick (1884), 10 App. Cas. 74.

**2384. Effect of retaking possession—Whether amounting to rescission of contract—Rights of parties to recover sums unpaid—Hire-purchase agreement.]**—Pltfs. as "owners" of omnibuses & horses agreed to let them to G., the "hirer," who paid a large sum of money in advance, the balance to be paid by monthly instalments. The agreement was, that in case of breach or default, the

default in making payments as stipulated by the contract of sale. Defts. paid a commission to an agent for making the re-sale. The agent was

not paid a salary & if he had not made the re-sale the commission would not have been paid:—*Held:* the amount paid should be allowed to defts. in

accounting for the amount received upon the re-sale.—*KOHEN v. CULLEY, BREAY & DOVER, LITD.*, [1925] 4 D. L. R. 344; 57 O. L. R. 533.—*CAN.*

owners might seize the chattels, & in that event all money already paid under the agreement was to belong to them. Default was made in payment of an instalment & the owners seized the chattels. In consideration of the chattels being returned to the hirer, deft. paid the amount due, & became guarantor of the remaining instalments due. Upon two more instalments becoming in arrear, pltf. again seized & resumed the possession of the chattels. The owners then sued deft., the guarantor, for the amount of the two unpaid instalments & recovered judgment. On appeal by deft., the guarantor, from a judgment recovered against him in the county ct.:—*Held*: the hire-purchase agreement was primarily a sale & purchase agreement, & was determined by pltf., the owners, resuming possession of the chattels. By so doing they lost their right to sue G., the hirer, & therefore could not recover the unpaid instalments from deft., the guarantor. They could not resume possession & still recover unpaid instalments from the surety.—*HEWISON v. RICKETTS* (1894), 63 L. J. Q. B. 711; 71 L. T. 191; 10 R. 558, D. C.

*Annotation*:—*Distd. Brooks v. Beirnsstein*, [1909] 1 K. B. 98.

**2385.** ——— **Possession wrongfully retaken.**—In an action by the payee against the acceptor of a bill of exchange drawn for the balance of purchase-money of articles bought at a sale, it is no defence that two months after delivery of the goods to the vendee, the vendor forcibly retook possession of them; for the vendee cannot treat that act as a rescinding of the contract, but must bring trespass.—*STEPHENS v. WILKINSON* (1831), 2 B. & Ad. 320; 9 L. J. O. S. K. B. 231; 109 E. R. 1162.

**2386.** ——— **—**—Where the seller of goods, which have not been paid for according to the contract, retakes them from the buyer without his consent, although under circumstances inducing a suspicion of fraud in the buyer, such retaking would be no answer to an action by the seller for the price. Therefore, in an action of trespass by the buyer against the seller, for so taking the goods, pltf. is entitled to recover their full value, & the jury cannot, in estimating the damages, take into consideration the debt due to deft., nor treat it as being diminished *pro tanto* by the value of the goods retaken.—*GILLARD v. BRITTAN* (1841), 1 Dowl. N. S. 424; 8 M. & W. 575; 11 L. J. Ex. 133; 151 E. R. 1168.

*Annotations*:—*Consd. Johnson v. L. & Y. Ry.* (1878), 3 C. P. D. 499. *Refd. Lee v. Cooke* (1837), 2 H. & N. 581; *Edmonson v. Nuttall* (1864), 17 C. B. N. S. 280.

**2387.** ——— **—**—Action to recover the difference between the original price bid at public auction & the sum realised upon a resale, for the hull of a stranded vessel, sold by the master & purchased by deft., upon conditions of sale, which were appended to the memorandum of purchase, & signed after the sale by deft.'s agent on his behalf, which conditions differed materially from those appended to the catalogue of sale, & which were the conditions read out at the time of sale. Deft. paid the deposit upon the terms of the conditions of sale read at the auction, & took possession of the vessel, without having any formal transfer made to him. The vessel was laden with rice, which was soon afterwards, by order of the Board of Health, destroyed as a nuisance. Deft., having declined to complete

the purchase, the vendor resumed possession of the vessel, & resold it at a loss. The form of the action was by libel, according to the Roman Dutch law. Deft., in his answer, among other defences, denied that he had purchased under the conditions appended to the memorandum of sale, & prayed the dismissal of the action with costs; & in re-convention, for payment of the amount of the deposit, & damages he had sustained, to the amount of £1,000, for loss of profits & advantages from the vessel, her tackle, & implements. The judgment of the District Ct. was in favour of pltf., the judge of that ct. being of opinion that deft. purchased on the conditions of sale appended to the memorandum of purchase, & that, according to those conditions, pltf. had rightly resumed possession, & resold the vessel. The Supreme Ct., on appeal, reversed that judgment, & ordered judgment to be entered for deft., being of opinion, that pltf. having founded his claim upon an agreement which gave, among other things, a right of resale, with conditions different from those read at the auction, & having in consequence repossessed himself of the vessel & resold her, had thereby deprived himself of the right to recover from deft., & awarded deft. the damages claimed by his answer:—*Held*: (1) though the merits of the case were with pltf., neither the judgment of the District nor Supreme Ct. could be sustained, as there was no other agreement between the parties than the one founded on the conditions read out in the auction room at the sale; & pltf. having sued upon a different contract, was not entitled to recover, & ought to have been nonsuited; & (2) in the absence of any evidence of damage, deft. was not entitled to any judgment for damages; (3) although the act of pltf. in retaking the hull of the ship & selling her was wrongful, & entitled deft. to bring an action of trover, it did not amount to a rescission of contract. If, before the actual delivery, the vendor resells the property while the purchaser is in default, the resale will not authorise the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance which may be still due. The rule applies where there has been a delivery, & the vendor afterwards takes the property out of the possession of a purchaser, & resells it.—*PAGE v. COWASJEE EDULJEE* (1866), L. R. 1 P. C. 127; 3 Moo. P. C. C. N. S. 499; 12 Jur. N. S. 361; 16 E. R. 189; *sub nom. PAGE v. EDULJEE*, 14 L. T. 176, P. C.

**2388.** ——— **Hire with option of purchase—Right to recover arrears.**—The owner of furniture agreed to let it on hire on the terms of the hirer paying a lump sum in consideration of an option to purchase it at any time during the period of hiring, & further paying a monthly sum by way of rent. The agreement provided that the hirer might at any time terminate the hiring on giving a week's notice & delivering up the goods without prejudice to the owner's right to recover any arrears of rent, & that if the hirer did not duly perform the agreement the owner might retake possession of the furniture. The hirer being in arrear with the rent the owner retook possession under the agreement:—*Held*: the owner by so retaking possession had not abandoned his right to sue for the arrears of rent.—*BROOKS v. BEIRNSTEIN*, [1909] 1 K. B. 98; 78 L. J. K. B. 243; 99 L. T. 970, D. C.

## Part VIII.—Breach of the Contract.

### SECT. 1.—IN GENERAL.

**2389. Wrongful detention of goods by buyer—Refusal to accept bill of exchange—Retention of bill of lading—Measure of damages.]—***REW v. PAYNE*, DOUTHWAITE & Co., No. 1358, *ante*.

**2390. Agreement between parties—Declared not to be legally binding—Effect of.]—**By successive arrangements made before 1913 between an American firm & an English co. the American firm were constituted sole agents for the sale in the United States & Canada of tissues for carbonising paper supplied by the English co. The greater part of these tissues was manufactured for this English co. by another English co. By an arrangement made between the American firm & both English cos. in 1913 the English cos. expressed their willingness that the existing arrangements with the American firm, which were then for one year only, should be continued on the same lines for three years & so on for further periods of three years, subject to six months' notice. This document, after setting out the understanding between the parties, including several modifications of the previous arrangements, proceeded as follows: "This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement, & shall not be subject to legal jurisdiction in the law etc. either of the United States or England, but it is only a definite expression & record of the purpose & intention of the three parties concerned, to which they each honourably pledge themselves, with the fullest confidence, based on past business with each other, that it will be carried through by each of the three parties with mutual loyalty & friendly co-operation. This is hereinafter referred to as the 'honourable pledge' clause." Disputes having arisen between the parties, the English cos. determined this arrangement without notice. Before the relations between the parties were broken off the American firm had given & the first mentioned English co. had accepted certain orders for goods. In an action by the American firm for breach of contract & for non-delivery of goods:—*Held*: (1) the arrangement of 1913 was not a legally binding contract; (2) at the date of the arrangement of 1913 all previous agreements were determined by mutual consent, but the orders given & accepted constituted enforceable contracts of sale.—*ROSE & FRANK CO. v. CROMPTON (J. R.) & BROTHERS, LTD.*, [1925] A. C. 445; 94 L. J. K. B. 120; 132 L. T. 641; 30 Com. Cas. 163, H. L.

### PART VIII. SECT. 1.

**t. Non-shipment on date agreed—Subsequent correspondence & then refusal to deliver—Date of breach.]—***RE DIAMOND v. WALDRON*, 28 O. R. 478.—*CAN.*

**a. Declaration of intention not to perform.]—**Where a party, before the time stipulated for performing his contract, declares that he will not perform it, the other party may treat this as a breach & sue.—*DULLEA v. TAYLOR* (1873), 34 U. C. R. 12.—*CAN.*

### PART VIII. SECT. 2, SUB-SECT. 1.—A.

**b. Whether court will reduce price—When contract admitted.]—***BLAIN & CO. v. CALLAM* (1911), 13 W. A. L. R. 143.—*AUS.*

**c. Necessity for proof—Of agreed**

**price.]—**To sue for goods bargained & sold, pltf. must prove a certain price agreed upon.—*ELVIDGE v. RICHARDSON* (1846), 3 U. C. R. 149.—*CAN.*

**d. —Of defendant's request.]—**For goods sold & delivered, it is necessary to show deft.'s request, & the request being laid to other sums will not supply the defect.—*OGILVIE v. KELLY* (1847), 4 U. C. R. 474.—*CAN.*

**e. —Of agreement or delivery.]—**For goods sold & delivered, it is necessary to show deft.'s request, & the request being laid to other sums will not supply the defect.—*OGILVIE v. KELLY* (1847), 4 U. C. R. 474.—*CAN.*

**f. Non-return of goods—Whether action for price lies.]—**"Received of X. six boxes of axes, to be sold for him on commission, & when sold, I agree to account to him for those sold at the rate of, etc., & to return the remainder unsold, on demand"—*Held*: an action for goods sold & delivered would

**Arbitration—Award based on non-existent custom.]—***See* ARBITRATION, Vol. II., p. 475, No. 1186.

**Proof in bankruptcy.]—***See, generally*, BANKRUPTCY, Vol. IV., pp. 254–258, Nos. 2420–2447.

**—Effect of proof in right to sue.]—***See, generally*, BANKRUPTCY, Vol. IV., pp. 348–351, Nos. 3262–3287.

### SECT. 2.—REMEDIES OF THE SELLER.

#### SUB-SECT. 1.—ACTION FOR THE PRICE.

##### A. In General.

*See* Sale of Goods Act, 1893 (c. 71), s. 49 (1), (2).

**2391. Action by assignees of seller—Previous agreement by seller to sell goods to nominee of particular creditors.]—**A. & B., creditors of a trader, who had committed a secret act of bkpcy., pressed him for payment, when he offered goods, if a customer could be found. The creditors procured deft., to whom they were indebted, to purchase the goods, who with the assent of the trader credited A. & B. in account. In *assumpsit* by the assignees of the trader for the price of these goods:—*Held*: if the appropriation of the money to A. & B. was merely in consequence of the direction of the trader, it was revocable, & pltf. might recover; but if it was part of the contract that the payment should not be revocable, it was then a question whether this was a payment within 6 Geo. 4, c. 16, s. 82, which, *semble*, it was not.—*BRADBURY v. ANDERTON* (1834), 1 Cr. M. & R. 486; 5 Tyr. 152; 4 L. J. Ex. 21; 149 E. R. 1171.

**2392. Joinder of claims—By seller & indorsees of dishonoured bill given by purchaser—Embarrassment.]—**A claim in which the vendor of goods & the indorsees of a bill given by the purchaser to the vendor for the price jointly sue the purchaser to recover the price & also upon the dishonoured bill is embarrassing, & may therefore be struck out.—*SMITH v. RICHARDSON* (1878), 4 C. P. D. 112; 48 L. J. Q. B. 140; 40 L. T. 256; 27 W. R. 230, D. C.

*Annotation:—Reid. Hannay v. Smurthwaite*, [1893] 2 Q. B. 412.

**2393. Action for loss of interest through delay in payment.]—***ARMSTRONG v. ALLAN BROTHERS*, No. 1048, *ante*.

**2394. Contract to pay by instalments—Application of Sale of Goods Act, 1893 (c. 71), s. 49.]—**By a contract between pltf. & defts. for the con-

not lie for any of the axes not returned.—*DODDS v. DURAND* (1849), 5 U. C. R. 623.—*CAN.*

**g. Reduction of price on proof of sheriff's deed.]—**Where, on the sale of a chattel by pltf. to deft. for \$130, it was agreed that the price should be reduced to \$65, if deft. produced a deed from the sheriff showing that he had previously sold the chattel to deft. under an execution, pltf. may recover the price in an action for goods sold & delivered. It is deft.'s duty to produce the sheriff's deed, if he claims to reduce the price to the lesser sum.—*WOODS v. MCCANN* (1885), 25 N. B. R. 253.—*CAN.*

**h. Roofing of building—Neglect to follow directions given—Allegation by defendants that roofing useless—Whether action lies for price.]—***MINOTA LUMBER*

m. When action lies—Necessity for expiry of period of credit.]—Deft. purchased goods at auction, on the following terms: "Under £2 10s. cash

1. Of wire straightening machine—

*Sect. 2.—Remedies of the seller: Sub-sect. 1, C. (a) i., ii., & (b).]*

of the goods.—*FERGUSON v. CARRINGTON* (1829), 9 B. & C. 59; 7 L. J. O. S. K. B. 139; 109 E. R. 22.

*Annotations:—*Reid. *Bradbury v. Anderton* (1834), 1 Cr. M. & R. 486; *Strutt v. Smith* (1834), 1 Cr. M. & R. 312; *Kingsford v. Merry* (1856), 1 H. & N. 503. *Mentd.* *Selway v. Fogg* (1839), 5 M. & W. 83.

**2402.** ————*]*—Goods were sold upon the following terms: “7½ per cent. discount, bill at three months; 10 per cent. discount, cash in fourteen days.”—*Held*: the vendors could not sue in *indebitatus assumpsit* for goods sold & delivered within the fourteen days, even if the sale had been effected by fraud on the part of the vendee, so that trover might have been maintained for the goods.—*STRUTT v. SMITH* (1834), 1 Cr. M. & R. 312; 4 Tyr. 1019; 3 L. J. Ex. 357; 149 E. R. 1099.

**2403.** ————*]*—*BROOMFIELD v. SMITH*, No. 2455, *post*.

**2404.** ————*]*—*WEBB v. FAIRMANER*, No. 1960, *ante*.

**2405.** ————*Effect of payment into court.*—*DOWN (F. P.) & Co. v. TRELAVER CHINA & CHINA STONE CO.* (1903), 47 Sol. Jo. 277, C. A.

**2406. Necessity for delivery—Effect of refusal of buyer to take delivery.—*HANKEY v. SMITH* (1796), Peake, 57, n.; 170 E. R. 77.**

**2407.** ————*Assent of seller to refusal.*—Where the seller of goods upon the buyer's refusal to accept them requested the buyer to sell them for him, which the buyer agreed to do if he could, but did not:—*Held*: in an action by the seller for the price, the jury in considering whether the request made by the seller was a waiver of the contract of sale, could not take into their consideration whether such request was made under an ignorance of the law, & impression that his remedy was gone.—*GOMERY v. BOND* (1815), 3 M. & S. 378; 105 E. R. 653.

**2408.** ————*Of whole of goods contracted for.*—One agreed to deliver 100 bags of hops at a certain price by a certain time, & having delivered part, commenced an action for the price thereof before the expiration of the time for the delivery of the remainder:—*Held*: such action could not be maintained, the contract being entire.—*WADDINGTON v. OLIVER* (1805), 2 Bos. & P. N. R. 61; 127 E. R. 544.

*Annotations:—*Consd. *Oxendale v. Wetherell* (1829), 7 L. J. O. S. K. B. 264. *Reid.* *Kingdom v. Cox* (1848), 5 C. B. 522. *Mentd.* *Shipton v. Casson* (1826), 4 L. J. O. S. K. B. 199; *Dixon v. Clark* (1848), 5 C. B. 365.

**2409.** ————*]*—One who has agreed for the sale of 100 sacks of flour, cannot, after the delivery of part, recover for that part, debt. being willing to receive & pay for the whole.—*WALKER v. DIXON* (1817), 2 Stark, 281; 171 E. R. 647, N. P.; *subsequent proceedings*, Manning's Digest of Nisi Prius Reports, 2nd ed. 309.

*Annotations:—*Dtd. *Oxendale v. Wetherell* (1829), 9 B. & C. 386. *Reid.* *Kingdom v. Cox* (1848), 5 C. B. 522.

**2410.** ————*]*—*STUDDY v. SANDERS*, No. 1115, *ante*.

down; over that amount but under \$125, eleven months' credit on approved indorsed notes with interest.”—*Held*: an action would not lie upon the common counts until the time of credit had expired.—*SILLMAN v. McLEAN* (1855), 13 U. C. R. 544.—*CAN.*  
n. ————*]*—An action for goods bargained & sold, to be paid for by instalments, cannot be maintained until the full period of credit has expired.—*MOORE v. KUNTZ* (1879), 44 U. C. R. 309.—*CAN.*

o. ————*]*—*DALTON & RYAN*

**2411.** ————*]*—*KIRBY v. TROTTER* (1859), 1 F. & F. 544.

**2412.** ————*]*—*BRITISH & INDIA STEAM NAVIGATION CO. v. DE MATTOS, DE MATTOS v. BRITISH & INDIA STEAM NAVIGATION CO.*, No. 1557, *ante*.

**2413.** ————*]*—*STEINBERGER v. ATKINSON & CO., LTD.*, No. 2057, *ante*.

**2414.** ————*Delivery part of consideration for payment.*—If goods have actually been delivered by a vendor to a purchaser, & it appears that the delivery was part of the consideration for payment, a count for goods bargained & sold will not lie, but that for goods sold & delivered should be used.—*FORBES v. SMITH* (1863), 2 New Rep. 19; 11 W. R. 574.

*Compare* GUARANTEE, Vol. XXVI., pp. 19, 20, Nos. 78–90.

**2415. Necessity for demand.**—*MOSSE'S CASE* (1629), Het. 148; 124 E. R. 413.

*See, further*, CONTRACT, Vol. XII., pp. 426–427, Nos. 3426–3441, 3444.

**Sale on credit.**—*See* Part VI., Sect. 4, sub-sect. 4, C., *ante*.

**Proof of debt in bankruptcy.**—*See* BANKRUPTCY, Vol. IV., pp. 254–258, Nos. 2420–2447.

## ii. Particular Instances.

**2416. Whether action lies—Goods directed to be delivered against payment.**—One sent a letter by a carrier to a merchant for certain merchandise to send it to him, receiving a certain sum of money. The merchant sent the merchandise by the carrier, without receiving the money:—*Held*: the buyer should not be charged for the money, for it was a conditional bargain, & it was the folly of the merchant to trust the carrier with the wares.—*MAYE'S CASE* (1587), 4 Leon 7; Godb. 141; 74 E. R. 690.

**2417.** ————*Goods stopped in transitu.*—*KYMER v. SUWERCROPP*, No. 2400, *ante*.

**2418.** ————*After prosecution for fraud—Bill ignored.*—Deft., having obtained goods of pltf. a tradesman, & absconded without paying for them, pltf. caused her to be apprehended on a warrant for felony & the goods were taken out of her possession, she was committed for trial, but the bill of indictment was ignored & she was discharged:—*Held*: these circumstances did not preclude pltf. from suing her for the price of the goods, unless it was shown that they had been restored into his possession & proof of that fact lay upon deft.—*VEREY v. WILMOT* (1829), L. & Welsb. 37.

**2419.** ————*Goods lost at sea—After delay in shipment—Delay waived by buyer.*—*ALEXANDER v. GARDNER*, No. 1084, *ante*.

**2420.** ————*Provision for payment out of fund in seller's hands—Burden of proof of state of accounts.*—Pltf. & deft. agreed that deft. should recommend customers to pltf., who was a tailor, & that pltf. should allow deft. 10 per cent. upon the business so procured, to be received in clothes by deft. from time to time, as he might want them; & that a settlement of accounts should take place

to recover the price.—*TANKARD v. GIBBS* (1886), 12 V. L. R. 417.—*AUS.*

a. ————*Timber not according to specification.*—Where pltf. contracted under seal to deliver timber of certain specified dimensions, & it fell short of the size, but it was accepted & used:—*Held*: he might recover on the common counts.—*WHITE v. MANNING* (1856), 13 U. C. R. 640.—*CAN.*

r. ————*Sale of piano.*—*GREENZAN v. BURNS* (1886), 13 A. R. 481.—*CAN.*  
t. ————*Sale made by agent without*

(TRUSTEES) v. SIMMS (1817), 1 Nfld. L. R. 34.—*NFLD.*

PART VIII. SECT. 2, SUB-SECT. 1.—C. (a) ii.

p. *Whether action lies—Production of ship's receipt condition precedent.*—Pltf. contracted to sell to defts. a certain quantity of wheat, to be delivered alongside the ship on the railway pier, payment to be made on production of ship's receipt:—*Held*: the production of the ship's receipt was a condition precedent to the right



between the parties every six, or at farthest every twelve months. Pltf. having sued in debt for goods sold & delivered, & having merely proved the delivery & acceptance of clothes:—*Held*: (1) he could not recover, but on *nunquam indebitatus* he was bound to prove a settlement of accounts on which the balance was in his favour. (2) *Semble*, had there been no stipulation as to the settlement of accounts, it would have been sufficient for pltf. to prove the delivery & acceptance, & would have lain on deft. to prove a percentage due to him to the amount of what was so delivered.—*GAREY v. PYKE* (1839), 10 Ad. & El. 512; 2 Per. & Dav. 427; 113 E. R. 193.

**2421. — Agreement for barter & sale.**—Pltf. had sold saddlery to be paid for partly in money & partly in goods. It did not appear whether or not deft. had delivered the goods; & in an action of debt by pltf., on the common count for goods sold & delivered, the jury returned a verdict for the amount of the money only:—*Held*: under these circumstances it was no objection to the declaration, that pltf. had not declared upon the special contract.—*BULL v. PARKER* (1842), 2 Dowl. N. S. 345; 12 L. J. Q. B. 93; 7 Jur. 282.

*Annotation*:—*Refd.* *Bowen v. Owen* (1847), 11 Q. B. 130.

*See* *ANIMALS*, Vol. II., p. 258, Nos. 385–387.

**2422. — Agreement for barter—Default of one party.**—Where two parties agreed to barter goods for goods, & the balance being in favour of pltf., deft. omitted for nearly three years to send goods to meet it, upon which pltf. brought an action for goods sold & delivered:—*Held*: the lapse of time did not entitle pltf. to maintain such an action, but his remedy was by action against deft. for not delivering the goods pursuant to the contract between them.—*HARRISON v. LUKE* (1845), 14 M. & W. 139; 14 L. J. Ex. 248; 5 L. T. O. S. 130; 153 E. R. 423.

*Annotation*:—*Apld.* *Bracegirdle v. Hinks* (1851), 9 Exch. 361.

**2423. — Rescission of contract by one party—After part delivery—Time for payment not expired.**—*BARTHOLOMEW v. MARKWICK*, No. 1962, *ante*.

**2424. — Provision for payment on fulfilment of condition by seller—Fulfilment of condition rendered impossible by buyer.**—If, in the case of a contract of sale & delivery, which makes acceptance of the thing sold & payment of the price conditional on a certain thing being done by the seller, the buyer prevents the possibility of the seller fulfilling the condition, the contract is to be taken as satisfied.

By a written contract A. agreed to buy of B. a digging machine, if it fulfilled certain conditions, one of which was that it should be capable of excavating a given quantity of clay in a fixed time on a “properly opened up face” at the C. railway cutting. The machine failed at another cutting to excavate the required quantity, & on its being removed to the “C.” cutting & tried at a face not

“properly opened-up” one, & breaking down, after a few days work, A. refused to give it any further trial or to pay the price of the machine:—*Held*: B. was entitled to a decree against A. for payment of the price of the machine.—*MACKAY v. DICK* (1881), 6 App. Cas. 251; 29 W. R. 541, II. L.

*Annotations*:—*Consd.* *City of Dublin Steam Packet Co. v. R.* (1908), 24 T. L. R. 657. *Fold.* *Kleinert v. Abosso Gold Mining Co.* (1913), 58 Sol. Jo. 45. *Consd.* *Westacott v. Hahn*, [1917] 1 K. B. 605. *Apld.* *Harrison v. Walker*, [1919] 2 K. B. 453. That principle must be applied with care, & must be always considered in connection with the particular circumstances of each case (*McCARDIE, J.*). *Distd.* *Colley v. Overseas Exporters*, [1921] 3 K. B. 302. *Consd.* *United States Shipping Board v. Durrell*, [1923] 2 K. B. 739. *Refd.* *L. C. & D. Ry. v. S. E. Ry.*, [1893] A. C. 429; *Sprague v. Booth*, [1909] A. C. 576; *Hill v. Showell* (1918), 87 L. J. K. B. 1106; *Cohen v. Sellar*, [1926] 1 K. B. 536. *Mentd.* *Shepherd v. Henderson* (1881), 7 App. Cas. 49; *Butler (or Black) v. Fife Coal Co.*, [1912] A. C. 149; *Anglo-Newfoundland Development Co. v. Pacific Steam Navigation Co.*, [1924] A. C. 406.

—**Payment by acceptance of specific parcel of copper money—Counterfeit money.**—*See* *CONTRACT*, Vol. XII., p. 473, No. 3866.

—**Indivisibility of consideration.**—*See* *CONTRACT*, Vol. XII., p. 234, No. 1935.

—**Effect of recovery of judgment against stranger to contract.**—*See* *ESTOPPEL*, Vol. XXI., pp. 225, 226, No. 586.

—**For instalments delivered.**—*See* *CONTRACT*, Vol. XII., p. 166, No. 1213.

—**Delivery of goods in part payment—As bar to operation of Statute of Limitations.**—*See* *LIMITATION OF ACTIONS*, Vol. XXXII., pp. 382, 383, Nos. 652–656.

*Compare* *BUILDING CONTRACTS*, Vol. VII., pp. 365, 366, No. 133.

(b) *Where Property has Not Passed.*

*See* *Sale of Goods Act*, 1893 (c. 71), s. 49 (2).

—**When property transferred.**—*See* *Part IV.*, Sect. 1, *ante*.

**2425. Whether action maintainable—Person in tortious possession of goods.**—Where goods were sold “to be paid for by B.’s bill on P. without recourse on the buyer in case of its not being paid”; although the buyer then knew the bill to be worth nothing, he is not liable to an action of *indebitatus assumpsit* for the value of the goods.

The wines were not to be paid in money, but were to be bartered against a bill of exchange, & it was expressly stipulated, that the buyer was not to be liable in case the bill should be dishonoured. Therefore he never was indebted to pltf. for the price of the wines, & the law cannot imply a promise on his part to pay for them. . . . Deft. is not a purchaser of the goods, but a person who has tortiously got possession of them. . . . Pltf. should have brought trover, or an action of deceit. (*LORD ELLENBOROUGH*).—*READ v. HUTCHINSON* (1813), 3 Camp. 352; 170 E. R. 1408, N. P.

*Annotations*:—*Apld.* *Selway v. Fogg* (1839), 5 M. & W. 83. *Refd.* *Bristol v. Wislmore* (1823), 1 B. & C. 514; *Rumsey v. N. E. Ry.* (1863), 14 C. B. N. S. 641.

*authority.*—*OLAND v. BERTRAM* (1887), 7 R. & G. 512; 8 C. L. T. 61.—*CAN.*

a. — **Sale of pilings—Question for jury.**—*CLARK v. SCAMMELL* (1892), 31 N. B. R. 265.—*CAN.*

b. — **Sale of second-hand motor trucks.**—*HALL MOTORS, LTD. v. ROGERS* (1919), 44 O. L. R. 327; 15 O. W. N. 231; 46 D. L. R. 639.—*CAN.*

c. — **Provision for repossession—Taking of repossession—Effect of on contract.**—The repossession by a seller in accordance with a provision therefor in an agreement for the sale of goods on deferred payments is not a rescission of the agreement & a bar to recovery of the purchase-price.—*NICHOLS &*

*SHEPARD Co. v. CHAMBERLAIN* (Sask.), [1918] 3 W. W. R. 308.—*CAN.*

d. — **Sale of goods by description—Whether action lies on refusal to give delivery.**—Where in a contract for the sale of goods by description the property in the goods has passed to the buyer, *Indian Contract Act*, s. 120, does not deprive the seller of the form of action for goods bargained & sold, & such an action can be brought for the price of the goods on the buyer refusing to take delivery.—*FINLAY, MUIR & Co. v. RADHAKISHEN GORIKISSEN* (1909), 1 L. R. 36 Cal. 736.—*IND.*

e. — **Vessel lost at sea.**—*ELTON, HAMMOND & Co. v. PORTEOUS* (1808), 14 Fac. Coll. 48.—*SCOT.*

**PART VIII. SECT. 2, SUB-SECT. 1.—C. (b).**

f. **Whether action lies—Attempt on part of purchaser to cancel order.**—An order for the supply of goods executed under seal is not revocable before acceptance as an ordinary order might be: &, if the goods have been supplied, the vendor may sue for the price which the purchaser has covenanted to pay, notwithstanding the purchaser has attempted to cancel the order, returned the goods & refuses to carry out the purchase. In such a case the vendor is not restricted to an action for damages for the breach of contract.—*GAAR SCOTT Co. v. OTTOSON* (1911), 21 Man. L. R. 462.—*CAN.*



*Sect. 2.—Remedies of the seller: Sub-sect. 1, C. (b) & (c), D. (a) & (b), E. (a) & (b) i.]*

**2426. —Sale from bulk—No appropriation.]—**A. sold to B., by sample, 24 sacks of flour, part of a lot of 217 sacks belonging to A., which were lying at the warehouse of one M. & he also gave B. a delivery order on M., in pursuance of which M. transferred 24 sacks of flour to B.'s name in his books; & afterwards delivered 12 sacks of the flour to B., which B. paid for. No appropriation of any particular 24 sacks was ever made for B. The flour contained in the 12 sacks delivered was found, on examination, not to correspond with the sample, & B. consequently refused to accept or pay for the remaining 12:—*Held*: A. could not recover the price of these 12 sacks in an action for goods sold & delivered; *qu.*: whether in such a case, goods bargained & sold would lie.—*ELLIOTT v. HEGINBOTHAM* (1848), 2 Car. & Kir. 545.

**2427. When action lies—Agreement to pay on particular day—If delivery not required before.]—**Pltfs. declared on a contract by defts. to purchase certain iron of pltfs., alleging a promise by defts., "that if the delivery of the iron should not be required by defts. on or before Apr. 30, 1845, the iron was to be paid for by defts. on the day & year last aforesaid;" & averring that pltfs. had always been ready & willing to deliver the iron in terms of the contract; that Apr. 30 was past before the commencement of the suit; but that defts. had not paid for the iron:—*Held*: (1) under the avowment of readiness & willingness to deliver the iron, pltfs. were not bound to show that any specific iron had been appropriated by them for that purpose; (2) pltfs. were entitled to recover on the above contract the full price of the iron, & not merely the damages which they had sustained by defts.' breach of contract.—*DUNLOP v. GROTE* (1845), 2 Car. & Kir. 153.

**2428. Meaning of payable on a day certain irrespective of delivery.]—***STEIN, FORBES & Co. v. COUNTY TAILORING Co.*, No. 2487, *post*.

**2429. —.]—***MULLER, MACLEAN & Co. v. LESLIE & ANDERSON*, [1921] W. N. 235.

#### (c) Void and Illegal Contracts.

*See CONTRACT*, Vol. XII., pp. 274, 276, Nos. 2237-2244, 2248-2258; *CONFLICT OF LAWS*, Vol. XI., pp. 402-403, Nos. 729-738.

**Contract with alien enemy.]—***See ALIENS*, Vol. II., p. 155, No. 255, & pp. 102 *et seq*.

**Effect of Sunday Observance Act, 1877 (c. 7).]—***See TIME*.

**Impossibility of performance.]—***See CONTRACT*, Vol. XII., pp. 381-382, Nos. 3149-3153.

#### D. By Whom Maintainable.

##### (a) In General.

**2430. Effect of resale by seller to third party.]—**Deft. bought goods by auction upon the condition that they were to be cleared away at the buyer's expense in fourteen days & the price paid on or before delivery; if any lots remained uncleared after the time allowed the deposit money should

be forfeited the goods resold & the loss on resale made good by the present purchaser. The broker gave a bought note which allowed fourteen days for receiving & delivery:—*Held*: (1) only the buyer had fourteen days to deliver, but the seller was bound to deliver instantly. (2) *Semble*: after a resale of goods by a vendor as upon default made by the first purchaser he cannot recover against the first purchaser for goods bargained & sold.—*HAGEDORN v. LAING* (1815), 6 Taunt. 162; 1 Marsh. 514; 128 E. R. 996.

*Annotation:—As to (2) Refd. Lamond v. Davall* (1847), 9 Q. B. 1030.

**2431. Effect of resale by buyer to third party—Before payment.]—**A purchaser at an auction can, before payment, make a complete bargain & sale of the article which he has bought, to a third party, so as to maintain an action for goods bargained & sold.—*SCOTT v. ENGLAND* (1844), 2 Dow. & L. 520; 14 L. J. Q. B. 43; 4 L. T. O. S. 141; 9 Jur. 87.

**2432. Whether by party having no property in goods.]—**Goods of deceased husband remained in the wife's, pltf.'s, possession, who was not his extrix., nor ever took out letters of administration. The wife married again, & while living with the man as wife, the man sold the goods to deft., & received the price with the wife's knowledge, who apparently concurred in the sale. After the sale the man was convicted of bigamy, he having a wife living at the time he married pltf. of which pltf. was not aware. Pltf. then sued deft. for the price of the goods:—*Held*: she was not entitled to recover.

Pltf. does not show that she had any property in the goods (*LORD CAMPBELL, C.J.*).—*WALLER v. DRAKEFORD* (1853), 1 E. & B. 749; 22 L. J. Q. B. 274; 17 J. P. 663; 17 Jur. 853; 118 E. R. 616; *sub nom. DRAKEFORD v. WALLER*, 1 Saund. & M. 114; 21 L. T. O. S. 87.  
*Annotation:—Refd. Richards v. Johnson* (1859), 5 Jur. N. S. 520.

**2433. Whether new owner of business—Execution of order for goods directed to late owner—Buyer unaware of change in ownership.]—**Defts., who had been in the habit of dealing with B., sent a written order for goods directed to B. Pltf., who on the same day had bought B.'s business, executed the order without giving defts. any notice that the goods were not supplied by B.:—*Held*: pltf. could not maintain an action for the price of the goods against defts.

The admitted facts are, that defts. sent to a shop an order for goods, supposing they were dealing with Brocklehurst. Pltf., who supplied the goods, did not undeceive them. It pltf. were now at liberty to sue defts., they would be deprived of their right of set-off as against Brocklehurst. When a contract is made, in which the personality of the contracting party is or may be of importance, as a contract with a man to write a book, or the like, or where there might be a set-off, no other person can interpose & adopt the contract. As to the difficulty that defts. need not pay anybody, I do not see why they should, unless they have made a contract either express or implied. I

*g.* —.]—K. agreed to buy from R. five bales of chrome orange twists, "or any part thereof that may be in a merchantable condition *ex* City of Cambridge, or other vessel or vessels" with specific marks & numbers, each bale containing 500 lbs., at so much per lb., to be paid for on or before delivery. K. took delivery of, & paid for, only one bale, but rejected the others. R. brought a suit for the price of the four bales rejected:—*Held*: the property in the goods did not pass to deft. by the

terms of the contract, nor was the delivery that was taken by him of the one bale a delivery of "part of the goods" within Contract Act, ss. 78 & 92: the suit, therefore, did not lie.—*MITCHELL REID & Co. v. BULDEO DOSS KHETTRY* (1887), 1 L. R. 15 Calc. 1.—*IND.*

#### PART VIII. SECT. 2, SUB-SECT. 1.—D. (a).

##### b. Foreigner forwarding prohibited

*goods to United States.]—Qu.*: whether a foreigner forwarding prohibited goods to a place in the United States so situated as to furnish a strong presumption that they would be smuggled, can maintain an action for the price of such goods.—*SAWYER v. MANAHAN* (1826), Tay. 315.—*CAN.*

*k. Foreign corporation.]—*UNION INDIA RUBBER Co. v. HIBBARD (1856), 6 C. P. 77.—*CAN.*

##### l. Assignees of vendor.]—Pltfs. as

decide the case on the ground that defts. did not know that plff. was the person who supplied the goods, & that allowing plff. to treat the contracts as made with him would be a prejudice to defts. (BRAMWELL, B.).—*BOULTON v. JONES* (1857), 2 H. & N. 564; 27 L. J. Ex. 117; 157 E. R. 232; *sub nom.* *BOLTON v. JONES*, 30 L. T. O. S. 188; 3 Jur. N. S. 1156; 6 W. R. 107.

*Annotations*.—**Consol. Greer v. Downs Supply Co.**, [1927] 2 K. B. 28. **Reid. Lindsay v. Cundy** (1876), 34 L. T. 314; **British Waggon Co. v. Lea** (1880), 5 Q. B. D. 149; **Jager's Sanitary Woollen System Co. v. Walker** (1897), 77 L. T. 180; **Said v. Butt**, [1920] 3 K. B. 497.

2434. Seller & indorsees of dishonoured bill given by purchaser—Embarrassment.]—SMITH v. RICHARDSON, No. 2392, *ante*.

(b) *Particular Instances.*

**Executor or administrator.]—***See* EXECUTORS, Vol. XXIII., pp. 68, 299, Nos. 522, 3643-3650, Vol. XXIV., No. 6436.

**Agent—Agent contracting for disclosed & named principal.]—See AGENCY, Vol. I., pp. 620-622, Nos. 2457-2470.**

— Agent contracting in own name for undisclosed principal.]—See AGENCY, Vol. I., pp. 625, 626, Nos. 2497-2509.

**Auctioneer.]—**See AUCTION & AUCTIONEERS, Vol. III., pp. 38-41.

*E. Against Whom Maintainable.*

(a) *In General.*

2435. Goods sold to one party—Delivered at buyer's request to third party.] — KENT v. DE'AUBENY (1677), 3 Keb. 756; 84 E. R. 994; *sub nom.* KENT v. DERBY, 1 Vent. 311.

2436. — —.]—HANCOCK v. HANCOCK, No. 1561, *ante*.

2437. --- - -.]—HANDFORD v. HANDFORD,  
No. 1560, *ante*.

2438. Goods resold by seller—After default by buyer.]—HAGEDORN v. LAING, No. 2430, *ante*.

**2439.** —.]—Deft. directed pltf. to make a coat for him. He afterwards wrote to say he should have no occasion for it, & directed pltf. to dispose of it for him. Pltf. accordingly sold the coat, & apprised deft. of his so doing.—*Held*: upon these facts, that an action was maintainable for goods sold & delivered to deft.—*GILLET v. FINUCANE* (1841), 11 L. J. C. P. 61.

**2440. Person on whose credit goods supplied.]—**When a tradesman makes out an account for goods in the name of a particular person, it must be taken that they were furnished on the credit of such person, unless it be shown by unequivocal evidence that the credit was in fact given to another.—*STOKR v. SCOTT* (1833), 6 C. & P. 241; 172 E. R. 1224, N. P.

**2441. — Question of fact.]**—In an action for the price of goods sold, the question being on whose credit they were supplied, & the entries in the trader's books being doubtful, the question is for the jury.

assignees of vendor, could not recover for lumber sold & services & supplies furnished, as the vendor would at the most only be entitled to an accounting. —ROYAL BANK v. SCHAFFNER (1909), 44 N. S. R. 89.—CAN.

**PART VIII. SECT. 2, SUB-SECT. 1.—**  
**E. (a).**

m. *Whether joint contractor.*].—A. contracts by deed with B. to sell him certain timber off his lot, to be paid for by B. at certain fixed times. B. being in default A., supposing C. to have a joint interest in the timber with B., sues B. & C. on an implied *assumpsit*:

Entries in trade books are not like documents which a judge is to construe; but are to be looked at with all the other evidence in the case (MARTIN, B.).—CHARLTON v. ALLEN (1861), 2 F. & F. 549, N. P.

**2442. Person having interest in goods—Seller unaware of interest—& goods not supplied on such person's credit.]—**(1) One who has an interest in goods at the time of their being ordered, is liable for their payment ; though the vendor may not know of his interest at the time, nor have supplied the goods upon his credit.

(2) An inchoate interest at the time is sufficient. Therefore, where a person was to have an interest in goods, if they arrived safely, & in good condition, which they afterwards did, he was held to be liable for their payment.—*MELHUISE v. PEARSON* (1827), 5 L. J. O. S. K. B. 78.

**2443. Person ordering goods.**—If a person of full age orders clothes, however extravagantly & absurdly, & they are delivered to him, he is bound to pay for them.—*BURGHART v. ANGERSTEIN* (1834), 6 C. & P. 690; 172 E. R. 1421; *sub nom.* *BURKHARDT v. ANGERSTEIN*, 1 Mood. & N. 458, N. P.

*Annotations*:—**Refd.** *Ryder v. Wombwell* (1868), L. R. 3 Exch. 90; *Nash v. Inman* (1908), 77 L. J. K. B. 626

2444. Person not party to contract of sale.]—  
BEALE v. MOULS, No. 2477, *post*.

**2445. Effect of joinder of claims—Against purchaser & person holding out as purchaser.]—**Where a tradesman claims against the real purchaser of goods in the same action that he claims against a person who held himself out as the purchaser:—*Held*: the claim against the latter cannot be sustained.—*JONES v. ASHWIN & IVORY* (1883), Cab. & El. 159.

(b) *Particular Instances.*

i. *In General*

**2446. Successor to deceased buyer—Where seller unaware of buyer's death—& goods retained by successor.]—**A., a publisher, had for some years supplied a periodical work to W. as fast as the numbers came out. W. died & A., not knowing of his death, continued sending the numbers of the work by the stage coach, addressed to W. These numbers were received by B., who had succeeded to the property of W., & there was no evidence that B. had ever offered to return them :—*Held* : A. might maintain an action for goods sold & delivered against B., though at the time of the deliveries A. was not aware of the death of W.—**WEATHERBY v. BANHAM** (1832), 5 C. & P. 228 ; 17 E. R. 950, N. P.

**2447. Alleged joint contractor—Evidence of joint contract.**—C., representing that he was acting for the step-brother of the other deft. D., bought a business & lease of premises in his own name, & carried on the business for about three years, & then assigned to deft. D., who referred the persons, plffs. among others, who supplied goods on her

— *Held*: though A. might sue B. alone on an implied *assumpsit*, yet that, being concluded by the deed as to the parties liable on the contract, he could not sue B. & C. jointly.—**ARMSTRONG v. ANDERSON** (1847), 4 U. C. R. 113. — **CAN.**

n. Purchaser reselling after knock-out purchase at auction.] — GRANT v. WHITZMAN (1921), 55 N. S. R. 16. — CAN.

PART VIII. SECT. 2, SUB-SECT. 1.---  
E. (b) i.

*o. Tenant in common.*—DOYLE v. TAYLOR (1837). Ber. [325], 201.—CAN.

p. *Joint debtors.*].—WILSON v. STUART (1911), 16 W. L. R. 403; 20 Man. L. R. 507.—CAN.

9. *Mortgagees.*] — Goods were supplied to a party engaged in general commerce, and, in addition, for the substitution of stock previously mortgaged. Goods were sold in ignorance of the mtgee., which was registered. Mtgor. became bkpt. In an action by the seller of the goods against the mtgees., on the ground that the goods were furnished to the mtgor. as agents of mtgees.:—*Held:* the mtgees. were not liable under the mtge.; nor was the mtgor. their agent, no such relationship having been disclosed at the

*Sect. 2.—Remedies of the seller: Sub-sect. 1, E. (b) i., ii., iii., iv., v., vi. & vii., F. & G.]*

orders, to C. for a reference, who certified that she was respectable & able to pay. C. then got D. to assign all to him by a bill of sale for an alleged debt:—*Held*: the judge at the trial was right, on this evidence, in telling the jury that there was no evidence to fix C. with liability to pay pltf's. for goods so supplied to D.—*Block v. Cox* (1860), 2 L. T. 517, Ex. Ch.

**2448. Transferor of business—Where goods supplied in name of transferor—& transfer unknown to seller.**—Deft., to whom pltf. had given credit for goods supplied, transferred the business to his son-in-law without notice to pltf's. After the transfer the goods were supplied to the shop by pltf's. as usual, & sent in the name of def't. The jury having found that pltf's. had no knowledge of def't. having gone out of the business, judgment was entered for pltf's.—*FORE STREET WAREHOUSE CO. v. JEACOCKES* (1884), 1 T. L. R. 8.

### ii. Principal and Agent.

**Authority of agent to purchase.**—*See AGENCY, Vol. I., pp. 346–352, 353, Nos. 571–609, 616.*

**Effect of del credere agency.**—*See AGENCY, Vol. I., pp. 280, 566, 568, Nos. 123, 124, 127, 2118, 2126.*

**Liability of agent—Agent contracting for disclosed & named principal.**—*See AGENCY, Vol. I., pp. 622–624, Nos. 2471–2491.*

**Agent contracting in his own name for undisclosed principal.**—*See AGENCY, Vol. I., pp. 626–628, Nos. 2510–2525.*

**Contract on behalf of foreign principal.**—*See AGENCY, Vol. I., pp. 649–650, Nos. 2687–2701.*

**Liability of master—Servant ordering goods.**—*See AGENCY, Vol. I., p. 355, Nos. 628–641.*

**Liability of principal—Contracts made by agent.**—*See AGENCY, Vol. I., pp. 567–594, 651, Nos. 2120–2281, 2702–2705.*

**Goods entrusted to agent.**—*See AGENCY, Vol. I., pp. 562–567.*

**Liability of person ordering goods for another.**—*See AGENCY, Vol. I., p. 623, Nos. 2480, 2481.*

**Principal's rights against agent—Contracts entered into by agent on principal's behalf.**—*See AGENCY, Vol. I., pp. 460, 461, Nos. 1474–1477.*

**Ratification by principal—Of purchase by agent—Acceptance of goods bought.**—*See AGENCY, Vol. I., p. 411, Nos. 1086–1088.*

### iii. Master and Servant.

**Liability of master—Expenses of servants' livery—Part exchanged for plain clothes.**—*See MASTER & SERVANT, Vol. XXXIV., p. 124, No. 950.*

time of the making of the purchases. The mtgr. was only the agent of the mtgrs. for the purposes of the mtge., & had no power to pledge their credit.—*BROWNING v. PITTS* (1885), 7 Nfld. L. R. 73.—Nfld.

### PART VIII. SECT. 2, SUB-SECT. 1.—E. (b) vii.

**r. Agreement by patrons to send milk & receive cheese in return or its price—Sale by managing committee—Who are liable on such contract.**—*GILL v. MORRISON* (1876), 26 C. P. 124.—CAN.

**t. Change of business name on sale of business—No other indication of change of ownership—Vendor of property not liable.**—*RICHARDS v. ROWE* (1886), 4 Man. L. R. 112.—CAN.

**a. Material for construction of building—Liability of owner for price.**—*ROGERS LUMBER CO. v. GRAY & HOSMER (Sask.)* (1913), 23 W. L. R. 920; 10 D. L. R. 698; 4 W. W. R. 294.—CAN.

**b. Promissory note given for price of goods—Action on note failing—Whether action lies on original consideration.**—*WYTON v. HILLE* (1915), 32 W. L. R. 925; 9 W. W. R. 591; 25 D. L. R. 89; 25 Man. L. R. 772.—CAN.

**c. Board of trustees of church.**—*ROGERS LUMBER YARDS v. BROCK METHODIST CHURCH* (1915), 31 W. L. R. 547.—CAN.

**d. Delivery cash against documents—Deposit of documents with bank—Advance by bank with knowledge of rights of unpaid vendor—Liability of**

bank.]—*VANCOUVER HARBOUR TRADING CO. v. OGAWA OVERSEAS TRADING CO. & ROYAL BANK OF CANADA*, (1924), 33 B. C. R. 347.—CAN.

### PART VIII. SECT. 2, SUB-SECT. 1.—F.

**2449 i. Recovery on quantum valebant.**—In cases in which something has been done under a special contract, but not in strict accordance with the terms of the contract, although the party cannot recover the remuneration stipulated for in the contract because he had not done that which was to be the consideration of it, still, if the other party has derived any benefit from the work done, as it would be unjust to allow him to retain that without paying for it, the law implies a promise upon his part to pay such a remuneration as the benefit

### iv. Partners and Co-Adventurers.

**Liability of partners—Joint adventure.**—*See PARTNERSHIP, Vol. XXXVI., pp. 324, 325, Nos. 50–62, 64, 66.*

**Liability of firm for acts of partner.**—*See PARTNERSHIP, Vol. XXXVI., pp. 362, 363, Nos. 392–396.*

**Disclaimer.**—*See PARTNERSHIP, Vol. XXXVI., p. 356, No. 331.*

**Individual partners—For transactions previous to association.**—*See PARTNERSHIP, Vol. XXXVI., p. 378, Nos. 549–551.*

**Estate of deceased partner—Goods not delivered before death.**—*See PARTNERSHIP, Vol. XXXVI., p. 386, No. 606.*

**Tests of partnership.**—*See PARTNERSHIP, Vol. XXXVI., pp. 320–342.*

*Compare ESTOPPEL, Vol. XXI., p. 220, No. 552.*

### v. Parent and Child.

*See INFANTS, Vol. XXVIII., pp. 220, 221, Nos. 792–806.*

### vi. Receivers.

*See COMPANIES, Vol. X., pp. 748, 801, 803, Nos. 4678, 5077, 5091; RECEIVERS.*

### vii. Other Cases.

**Boards of guardians.**—*See CORPORATIONS, Vol. XIII., pp. 393, 394, Nos. 1183–1185.*

**Churchwardens.**—*See ECCLESIASTICAL LAW, Vol. XIX., pp. 291, 294, Nos. 825–827, 886.*

**Clubs & members.**—*See CLUBS, Vol. VIII., pp. 515–518.*

**Liability of contractor to pay sub-contractor.**—*See BUILDING CONTRACTS, Vol. VII., pp. 422, 426, Nos. 354, 355, 372.*

**Members of cost-book companies.**—*See COMPANIES, Vol. X., pp. 1099–1102, Nos. 7705–7731.*

**Committee of charitable institution.**—*See AGENCY, Vol. I., p. 360, No. 698.*

**Members of provident societies.**—*See INDUSTRIAL, ETC. SOCIETIES, Vol. XXVIII., p. 122, No. 37.*

**Personal representatives.**—*See EXECUTORS, Vol. XXIV., pp. 560, 561, 651, Nos. 5993–6002, 6776.*

**Liability of Treasury—Goods supplied to county courts.**—*See COUNTY COURTS, Vol. XIII., p. 448, No. 5.*

**Trustee in bankruptcy.**—*See BANKRUPTCY, Vol. V., pp. 1106, 1107, Nos. 9022–9025.*

**Goods supplied for use of H.M. Forces.**—*See AGENCY, Vol. I., pp. 656, 657, Nos. 2739–2742, 2746, 2747.*

**Goods supplied to ships.**—*See SHIPPING.*

### F. Amount Recoverable.

**2449. Recovery on quantum valebant.**—B. agrees to purchase of A. a gun for the sum of 45 guineas; but it is stipulated, that A. shall take a

gun of B.'s, valued at 30 guineas, in part payment, B. having refused to deliver his gun & complete the contract, A. is entitled to recover the sum of 45 guineas as the stipulated price.—*FORSYTH v. JERVIS* (1816), 1 Stark. 437; 171 E. R. 522, N. P.

*Annotation*:—*Mentd.* *Marson v. Short* (1835), 2 Bing. N. C. 118.

**2450.** —. —.]—A. sells to B. a bowsprit which at the time of sale appears to be perfectly sound, but which, after being used some time, turns out to be rotten; in the absence of fraud A. is entitled to recover from B. what the bowsprit was apparently worth at the time of delivery.—*BLUETT v. OSBORNE* (1816), 1 Stark. 384; 171 E. R. 504, N. P.

*Annotations*:—*Consd.* *Jones v. Bright* (1829), 5 Bing. 533; *Shepherd v. Pybus* (1842), 3 Man. & G. 868. *Refd.* *Brown v. Edgington* (1841), 2 Man. & G. 279.

**2451.** —. —.]—*BAINES v. PAYNE* (1828), 1 Chitty on Pleading, 7th ed. 357.

*Annotation*:—*Apld.* *Keys v. Harwood* (1816), 2 C. B. 905.

**2452.** —. —.]—*OXENDALE v. WETHERELL*, No. 1731, *ante*.

**2453. Recovery on quantum meruit.**—Where a contract for the sale of goods, which have been delivered to & retained by the purchaser, is void by reason of its having been made on a Sunday, a subsequent promise to pay will entitle the vendor to recover the value upon a *quantum meruit*.—*WILLIAMS v. PAUL* (1830), 6 Bing. 653; 4 Moo. & P. 532; 8 L. J. O. S. C. P. 280; 130 E. R. 1433.

*Annotation*:—*Distd.* *Simpson v. Nicholls* (1838), 3 M. & W. 240.

**Recovery of interest.**—*See* Part VI., Sect. 4, sub-sect. 11, *ante*.

#### G. Defences.

**2454. Validity of defence—Inability of purchaser to recover against underwriter.**—A., a merchant in London, having an order in 1810, from B., a merchant in Perth, for goods to be shipped from London to Dundee, sends the goods to the wharf on Sat. Feb. 24, the vessel then taking in goods for Dundee, being the *K.*, unarmed, which had been substituted by the Shipping co. for the *D.*, armed, the co. announcing, on Feb. 23 & 24, to all who

inquired that the *K.* & not the *D.* was to sail on the 25th, Sundays & Thursdays being the regular sailing days. A. dispatches the invoice on Feb. 27 dated on that day, with advice that the goods had been sent by the *D.* not naming the 24th as the day when the goods were sent to the wharf, & leaving it to be inferred from the date of the invoice that the furnishing was made on the 27th, & that the sea risk did not commence till Mar. 1. The *K.* sails with the goods on Feb. 25, & is captured on Mar. 2 by a privateer. Action brought by A. against B. for the price of the goods & held below that he could not recover. The judgment affirmed above; the Lord Chancellor being of opinion that if B. had insured upon the representation sent him, he could not have recovered from the underwriter.—*ARNOT v. STEWART* (1817), 5 Dow, 274; 3 E. R. 1327, 11. L.

*Annotation*:—*Consd.* *Wimble v. Rosenberg*, [1913] 3 K. B. 743.

**2455. — Non-expiry of period for credit.**—In *indebitatus assumpsit* or debt for goods sold & delivered, deft. may prove, under the general issue, that the goods were sold on a credit which had not expired at the time of action brought.—*BROOMFIELD v. SMITH* (1836), 1 M. & W. 542; 2 Gale, 114; Tyr. & Gr. 929; 5 L. J. Ex. 155; 150 E. R. 550.

*See, further*, Sub-sect. 1, C. (a) i., *ante*.

**2456. — Misrepresentation—Articles retained by buyer.**—*LOMI v. TUCKER*, No. 1924, *ante*.

**2457. —** —.]—Deft. in an action for goods bargained & sold at a specific price, will not be allowed to show, either in bar of the action or in mitigation of damages, that there was a false representation of the quality of the goods, unless it be specially pleaded.—*WOODHOUSE v. SWIFT* (1836), 7 C. & P. 310.

**2458. —** —.]—A prospective bidder for articles about to be sold at an auction sale saw the sellers as to whether there might be difficulty in obtaining possession of the articles owing to Govt. impressment, & he was informed that the Govt. had been satisfied & the sale was to be allowed. Subsequently a subordinate Govt. official intimated that he wanted the articles for the Govt., but his action was repudiated on

conferred upon him is reasonably worth.—*WATEROUS v. MORROW* (1879), Cass. Dig., 2nd ed. 138.—*CAN.*

**2449 ii.** —. —.]—*BOULAY v. R.* (1910), 30 C. L. T. 523; 43 S. C. L. 61.—*CAN.*

**2449 iii.** —. —.]—*J. I. CASE THRESHING MACHINE CO. v. BRILLON & BRILLON* (Sask.) (1922), 70 D. L. R. 720.—*CAN.*

**2449 iv.** —. —.]—A contract was made by correspondence for the delivery at St. John's of a cargo of the best Gowie screened coal. The first coal that was delivered from the ship's side was found to be of an inferior quality. A protest was made respecting the coal & finally the contract was repudiated. In an action to recover back the price paid for the cargo:—*Held*: the price which should be paid by the purchasers for the 150 tons actually delivered to them should be the sum which upon assessment was found to be the real value of the coal & not the contract price.—*TESSIER v. N. ATLANTIC COLLIERIES* (1909), 9 Nfld. L. R. 422.—*NFLD.*

**2449 v.** —. —.]—Where there was a contract for sale of 16,000 sheep at 5s. per head, & only 830 were delivered, some of them being legally scabby, pltf. was only allowed to recover on a *quantum valebant*.—*SMITH v. JOHNSTON* (1881), 3 N. Z. L. R. C. A. 270.—*N.Z.*

**2449 vi.** —. —.]—*WYETT v. SMITH & SMITH* (1908), 28 N. Z. L. R. 79.—*N.Z.*

**e. Whether action lies on quantum meruit.**—*HARQUAIL CO., LTD. v. ROY* (1912), 11 E. L. R. 190; 41 N. B. R. 255; 7 D. L. R. 282.—*CAN.*

**f. —.** —.]—In an action for the price of goods, where the sale is admitted, the fact that the parties disagree both as to the amount & price does not prevent the judge from finding on a *quantum meruit*.—*HEFFER v. KOKATT*, [1918] 2 W. W. R. 996; 11 Sask. L. R. 251; 42 D. L. R. R. 322.—*CAN.*

**g. —.** —.]—*MACFARLANE v. CAIR* (1872), 8 B. L. R. 459; 17 W. R. 211.—*IND.*

**h. Per lineal foot or stick.**—Where pltf. by writing agreed to furnish timber, to be paid for at a certain rate per foot, lineal measure:—*Held*: he was entitled to recover such price per lineal foot according to the length of each stick, not according to the length of a bridge constructed of the timber, & for which it was obtained.—*BROWN v. ZIMMERMAN* (1857), 15 U. C. R. 563.—*CAN.*

**k. Loss of profits—On prevention of completion by purchaser.**—In a contract for the sale & delivery of gas if the vendor, not being in default, is prevented by the wrongful act of the purchaser from fulfilling his obligation to deliver, he is entitled to the compensation he would have received but for such wrongful act.—*KOHLER v.*

*THOROLD NATURAL GAS CO.* (1915), 52 S. C. R. 415.—*CAN.*

**l. Action for balance of price of goods—Dispute as to quantity sold.**—*LE PAGE v. LAIDLAW LUMBER CO., LTD.* (1919), 43 O. L. R. 400.—*CAN.*

**m. Noncompliance of purchaser with Canadian Wheat Board Regulations—Right of vendor to extra price—After agreement on price.**—*O'NEAL v. VERNON FRUIT UNION (B. C.)* (1922), 68 D. L. R. 556.—*CAN.*

#### PART VIII. SECT. 2, SUB-SECT. 1.—G.

**n. Validity of defence—Mistaken reference in invoice of goods.**—*GLASSFORD COOK & CO. v. MOORE & CO.* (1899), 25 V. L. R. 430.—*AUS.*

**o. — Illegality.**—*JORGENSEN v. HARRIS BROTHERS* (1912), 14 W. A. L. R. 180.—*AUS.*

**p. — Readiness to deliver.**—*STINSON v. BRANIGAN* (1853), 10 U. C. R. 210.—*CAN.*

**q. — Allowing account to accumulate contrary to agreement.**—*WINCH v. WELLER* (1854), 11 U. C. R. 233.—*CAN.*

**r. — Set-off.**—*CROUCHER v. GUNN* (1881), 2 R. & G. 370.—*CAN.*

**t. — Goods not delivered in a "satisfactory condition."**—Pltf. contracted to deliver to deft. a mowing machine, to be delivered in a satisfactory working condition, & brought

**Sect. 2.—Remedies of the seller: Sub-sect. 1, G. & H.; sub-sect. 2, A.]**

application to his superior officer. This incident was not disclosed to the prospective bidder, who attended the sale, when the articles were knocked down to him. After the sale the Govt. intervened to prevent removal, & shortly after impressed:—*Held*: the purchaser was not entitled to rescind the contract on the ground of essential error induced by the seller, & was liable for the price, the property in the articles having passed to him on the fall of the hammer.—*SHANKLAND & Co. v. ROBINSON & Co.*, [1920] S. C. (H. L.) 103; 57 Sc. L. R. 400, 11. L.

**2459. — Breach by seller.]—Declaration on an agreement by plffs. to sell & deliver to deft., & by deft. to purchase, as many of plffs.' N. Gas Coals, equal in quality to a cargo before shipped on trial, as one steam vessel to be sent by deft. could fetch in nine months from S. to L. Breach: that deft. refused to send a steam vessel to fetch divers cargoes of coals. Third plea: that, before any breach by deft., plffs. broke the contract by delivering coal which was no part thereof gas coal equal in quality to the cargo shipped on trial, but was inferior thereto, & wholly unfit for deft.'s purposes, as plffs. well knew. Fourth plea: that, before any breach by deft., plffs. broke the contract by detaining an unreasonable time, & beyond the time permitted by the contract, the vessel sent by deft. to receive the coal:—*Held*: neither of the pleas was an answer to the declaration.—*JONASSOHN v. YOUNG* (1863), 4 B. & S. 296; 2 New Rep. 390; 32 L. J. Q. B. 385; 10 Jur. N. S. 43; 11 W. R. 962; 122 E. R. 470.**

*Annotations:—Consd. Freeth v. Burr* (1874), L. R. 9 C. P. 208; *Reuter v. Sala* (1879), 4 C. P. D. 239. *Refd. Simpson v. Crippin* (1872), L. R. 8 Q. B. 14; *Corcoran v. Proser* (1873), 22 W. R. 222; *Honok v. Muller* (1881), 50 L. J. Q. B. 529; *Jackson v. Rotax Motor & Cycle Co.*, [1910] 2 K. B. 337.

**— Breach of warranty.]—See Part III., Sect. 19, sub-sect. 2, C. (a), ante.**

**2460. — Seller reselling before delivery to purchaser—Purchaser in default.]—PAGE v. COWASJEE EDULJEE**, No. 2387, *ante*.

**2461. — Payment after action brought.]—Declaration in the common form, for goods sold & delivered claiming £120. Pleas: (a) Never**

indebted; (b) “& for a further plea deft. says,” that the goods were sold under a warranty that when delivered they did not correspond with the warranty & thereupon before suit, disputes arose between plffs. & deft. in respect of the alleged breach of warranty; & after the commencement of the suit & after the last pleading it was agreed that plffs. should accept from deft. £80 in settlement of the debt sought to be recovered in the action; & deft. thereupon paid & plffs. accepted £80 in satisfaction & discharge of their said debt. On demurrer to the second plea:—*Held*: the plea being pleaded generally, must be taken to be pleaded to the whole causes of action; & as it alleged the payment after action to have been in satisfaction of the debt only, it was bad for leaving unanswered any damages to which plffs. might be entitled.—*ASH v. POUPEVILLE* (1867), L. R. 3 Q. B. 86; 8 B. & S. 825; 37 L. J. Q. B. 55; 16 W. R. 191.

**— Pendency of arbitration.]—See ARBITRATION**, Vol. II., p. 352, No. 276.

**2462. — Goods not made according to order—Burden of proof.]—In an action for the value of an article ordered of plff. by deft., but returned by deft. to plff., it is incumbent on plff. to prove, that it was made agreeably to the order.—*HAYDEN v. HAYWARD* (1808), 1 Camp. 180; 170 E. R. 920, N. P.**

**2463. — ———.]—In an action for goods sold & delivered, to which deft. pleads payment of money into ct., & that plff. has not sustained damage to a greater amount, on which issue is joined; it is competent for deft. to show at the trial that the goods in question were not made according to order, but that he had, at the request of plff., retained & used some of them, for a trial.—*MAINWORTHY v. PAGE* (1839), 3 Jur. 126.**

**2464. — Mistake in telegram of acceptance—By telegraph clerk.]—Deft. wrote to plffs. inquiring upon what terms they could supply him with 50 rifles. Plffs. having answered, stating terms, they received a telegram from deft. directing them to forward “the rifles.” They accordingly forwarded 50 rifles. It turned out that the message as directed to be sent by deft. was for “three” rifles, but the telegraph clerk had mistaken the word “three” for “the.” Deft. refused to**

the machine to deft.'s field where, in the course of a trial which he proceeded to make, a wheel became broken which plff. promised to replace. Five witnesses swore that the wheel was a material part of the machine, & there was some evidence that it was not:—*Held*: plff. could not recover the price, as the machine was never delivered in a satisfactory working condition.—*LAWLOR v. MUMFORD* (1882), 4 R. & G. 35.—*CAN.*

**a. — Machines unsuitable—Defendant not returning them after trial.]—ABELL ENGINE & MACHINE WORKS Co. v. MCGUIRE** (1901), 21 C. L. T. 358; 13 Man. L. R. 454.—*CAN.*

**b. — Giving of time on limit bond.]—KELLY v. THOMPSON** (1902), 35 N. B. R. 718.—*CAN.*

**c. — Sale by unstamped measure—Onus of proof.]—HUGHES v. CHAMBERS** (1902), 22 C. L. T. 333; 14 Man. L. R. 163.—*CAN.*

**d. — Inferior quality of potatoes.]—GODWIN v. SAWYER** (Y. T.) (1906), 5 W. L. R. 102.—*CAN.*

**e. — Accord & satisfaction.]—STEINE v. O'NEIL** (N. W. P.) (1907), 6 W. L. R. 125.—*CAN.*

**f. — Counterclaim.]—HYDE v. REID** (1908), 8 W. L. R. 555.—*CAN.*

**g. — Delay in delivery of goods.]—EDMONTON IRON WORKS v.**

**CRISTALL** (1910), 15 W. L. R. 659, 3 Alta. L. R. 338.—*CAN.*

**h. — Agreement for purchase to be inoperative—Until fulfilment of certain conditions.]—To an action for the purchase-price of an engine, deft. set up two defences: (1) that the engine was not as represented by plffs., (2) that the agreement for purchase was not to be operative until the fulfilment of certain conditions, which were not fulfilled:—*Held*: deft. gave an order for an engine to plffs. on certain conditions this order was accepted before cancellation by deft.; & there was, therefore, a completed contract between the parties: & as the engine was delivered to deft. according to the agreement plffs. were entitled to succeed.—*WATEROUS ENGINE WORKS Co. v. WELLS* (1910), 15 W. L. R. 717.—*CAN.***

**k. — Defective construction of furnace.]—CROCKET v. MCKAY** (N. S.) (1911), 9 E. L. R. 398, 399.—*CAN.*

**l. — Payment to agent.]—CHAPMAN v. PREST** (N. S.) (1911), 9 E. L. R. 201.—*CAN.*

**m. — ———.]—BRUCE STEWART & Co., LTD. v. WEDLOCK** (P. E. I.) (1913), 12 E. L. R. 408.—*CAN.*

**n. — Failure to scale timber.]—Under an agreement whereby defts. purchased all timber on plff.'s land, to**

be paid for after defts. had removed the timber & had had it scaled by a Govt. official scaler, defts. loaded a scow with timber, which was allowed to drift away & was lost before an official scaling could take place:—*Held*: as the failure to scale was the fault of defts., they could not set that up as an answer to an action for the recovery of the price of the timber.—*RICH v. NORTH AMERICAN LUMBER Co., LTD.* (1913), 18 B. C. R. 543.—*CAN.*

**o. — Non-delivery of material part of engine.]—BRITISH CANADIAN AGRICULTURAL TRACTOR v. EARLE** (1914), 20 D. L. R. 319.—*CAN.*

**p. — Goods not answering description in contract—Defendants not examining goods on receipt.]—IRON-SIDES v. VANCOUVER MACHINERY Co.** (1914), 26 W. L. R. 754; 29 W. L. R. 781; 15 D. L. R. 693; 20 D. L. R. 195; 20 B. C. R. 427.—*CAN.*

**q. — ———.]—HAIRFORD BROTHERS & Co. v. ROBERTSON** (1832), 6 Wils. & S. 1.—*SCOT.*

**r. — Condition precedent unfulfilled.]—A contract for the supply of machinery contained provision for payment of the price by certain instalments to be paid after production of the certificate of the purchaser's engineer that such instalments were due & payable. A portion of the**



accept more than 3 rifles:—*Held*: in an action for the price of the remaining 47 rifles, deft. was not bound by the mistake of the telegraph clerk, & plffs. therefore could not recover.—*HENKEL v. PAPE* (1870), L. R. 6 Exch. 7; 40 L. J. Ex. 15; 19 W. R. 106; *sub nom.* *HENCKEL v. PAPE*, 23 L. T. 419.

—*Set-off*.]—*See* SET-OFF.

**Contracts not under seal**—**Contracts with corporation**.]—*See* CORPORATIONS, Vol. XIII., pp. 391–394, Nos. 1166, 1167, 1175, 1184, 1185, 1192.

**Notice of statutory defence**.]—*See* COUNTY COURTS, Vol. XIII., p. 496, No. 465.

#### H. Practice and Procedure.

**Evidence—Of matters forming part of res gesta.**]

—*See* EVIDENCE, Vol. XXII., pp. 59, 60, Nos. 335–339.

**Admissibility of unstamped receipt**.]—*See* EVIDENCE, Vol. XXII., pp. 266, 267, Nos. 2509, 2513.

**Interrogatories**.]—*See* DISCOVERY, Vol. XVIII., pp. 219, 220, Nos. 1673–1680.

#### SUB-SECT. 2.—DAMAGES FOR NON-ACCEPTANCE.

##### A. In General.

*See* Sale of Goods Act, 1893 (c. 71), s. 50 (1).

**2465. When action lies—Sale by auctioneer—Failure to take away goods**.]—In an action on the case, for not taking away goods sold by public auction, & for a loss on the resale, pltf. may recover on the count for goods bargained & sold; & it is no objection to his right to recover on that count, that he has not the goods then to deliver, in case he had a verdict.—*MERTENS v. ADCOCK* (1803), 4 Esp. 251; 170 E. R. 709, N. P.

*Annotations*:—*Obtd.* *Hagedon v. Laing* (1815), 1 Marsh. 514. *Consd.* *Lamond v. Davall* (1847), 9 Q. B. 1030.

**2466. —Delivery by instalments—Parol variation of time for delivery**.]—Where deft. agreed by a written contract to purchase of plffs. 300 hogs of bacon, to be delivered at fixed times & in specified quantities, & after a part of the bacon had been delivered, requested plffs. as the sale was dull, not to press the delivery of the residue; to which plffs. assented; this was to be understood only as a parol dispensation of the performance of the original contract, in respect to the times of the delivery, & therefore was not affected by Stat. Frauds; deft. was held liable for not accepting the residue within a reasonable time afterwards.—*CUFF v. PENN* (1813), 1 M. & S. 21; 105 E. R. 8.

*Annotations*:—*Distd.* *Goss v. Nugent* (1833), 5 B. & Ad. 58. *Overd.* *Stead v. Dawber* (1839), 10 Ad. & El. 57. *Refd.* *Marshall v. Lynn* (1840), 6 M. & W. 109; *Ogle v. Vane* (1867), L. R. 2 Q. B. 275; *Tyers v. Rosedale & Ferryhill Iron Co.* (1873), L. R. 8 Exch. 305; *Sanderson v. Graves* (1875), L. R. 10 Exch. 234; *Hartley v. Hyman*, [1920] 3 K. B. 475. *Mentd.* *Emmet v. Dewhurst* (1851), 3 Mac. & G. 587.

machinery having been rejected by the purchaser, an action was brought by the sellers for the unpaid balance of the purchase-price without production of the engineer's certificate that the balance sued for was due & payable:—*Held*: the production of a certificate from the engineer had not been made a condition precedent to the right to recover payment & accordingly the action was competent.—*HOWDEN & CO., LTD. v. POWELL DUFFRYN STEAM COAL CO., LTD.*, [1912] 1 S. C. 920; 49 Sc. L. R. 605; [1912] 1 S. L. T. 357.—*SCOT.*

1. —*Ship requisitioned by Government*.]—*CLADDAGH S.S. Co., LTD. v.*

*STEVEN & CO.*, [1919] S. C. (H. L.) 132; [1919] 1 S. L. T. 31; 56 Sc. L. R. 619.—*SCOT.*

#### PART VIII. SECT. 2, SUB-SECT. 1.—H.

a. **Failure to recover for whole of goods—Whether new action lies for amount disallowed**.]—Where in *assumpsit* for goods sold & delivered, pltf. has recovered the value of part of the goods contained in his bill of particulars, but not the whole, some of the items being disallowed by the jury, under the judge's direction, as not proved, no new action can be maintained for such items.—*RAMSAY v. HAMILTON* (1844), 2 Kerr, 511.—*CAN.*

**2467. —Sale of future goods**.]—If a man sells goods to be delivered on a future day, & neither has the goods at the time, nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving them by consignment, but means to go into the market & buy the goods which he has contracted to deliver; he cannot maintain an action for damages for non-performance of the contract.—*BRYAN v. LEWIS* (1826), Ry. & M. 386; 171 E. R. 1058, N. P.

*Annotations*:—*Overd.* *Hibblewhite v. M'Morine* (1839), 5 M. & W. 462. *Refd.* *Mortimer v. M'Callan* (1840), 6 M. & W. 58; *Thacker v. Hardy* (1878), 4 Q. B. D. 685. *Mentd.* *Elsworth v. Cole* (1836), 6 L. J. Ex. 50; *Wells v. Porter* (1836), 2 Bing. N. C. 722; *Re Wade, Ex p. Wade* (1856), 25 L. J. Boy. 7, n.; *Sikes v. Wild* (1861), 1 B. & S. 587.

**2468. —**]—A contract for the sale of goods, to be delivered at a future day, is not invalidated by the circumstance that at the time of the contract, the vendor neither has the goods in his possession, nor has entered into any contract to buy them, nor has any reasonable expectation of becoming possessed of them by the time appointed for delivering them, otherwise than by purchasing them after making the contract.—*HIBBLEWHITE v. M'MORINE* (1839), 5 M. & W. 462; 8 L. J. Ex. 271; 3 Jur. 509; 151 E. R. 195.

*Annotations*:—*Refd.* *Mortimer v. M'Callan* (1840), 6 M. & W. 58; *Ramloll Thackoorseydass v. Soojumnull Dhondmull* (1818), 4 Moo. Ind. App. 339; *Thacker v. Hardy* (1878), 4 Q. B. D. 685. *Mentd.* *Grizewood v. Blane* (1851), 11 C. B. 526; *Sikes v. Wild* (1861), 1 B. & S. 587.

**2469. —Goods deliverable on future day—Bankruptcy of purchaser before day**.]—*BOORMAN v. NASH*, No. 2504, *post*.

**2470. —Sale of unascertained goods**.]—*BOSWELL v. KILBORN*, No. 1064, *ante*.

**2471. —Failure to give notice of readiness to ascertain**.]—The goods being deliverable at buyer's option until Nov., a letter of his at the end of Oct. declining to receive them, & treating them as the seller's:—*Held*: a sufficient breach.

The letters contain sufficient evidence of a refusal to receive in Nov. Evidence of notice of readiness to weigh is not necessary. Deft. could have had the wool weighed if he wished.—*BYLES, J.*—*HAWK v. FREUND* (1858), 1 F. & F. 294, N. P.

**2472. —Goods deliverable at buyer's option—Rejection during option**.]—*HAWK v. FREUND*, No. 2471, *ante*.

**2473. —Acceptance of tender—Obligation to order goods**.]—*A.-G. v. STEWARDS & CO., LTD.* (1901), 18 T. L. R. 131, H. L.

*Annotations*:—*Refd.* *Berk v. International Explosives Co.* (1901), 7 Com. Cas. 20; *Kensington & Knightsbridge Electric Lighting Co. v. Notting Hill Electric Lighting Co.* (1918), 87 L. J. K. B. 565.

**2474. —**]—A firm of contractors signed a tender addressed to the Asylums Committee of the London County Council whereby they agreed on the acceptance of the tender to supply all or any of the goods named in the schedule if & to the extent the same should be ordered by the committee, & in any quantity. It was also

b. *Costs—What court will take into consideration—Unnecessary number of defendants' witnesses*.]—*VAIR v. UNITED FRUIT & PRODUCE CO. (Man.)* (1905), 2 W. L. R. 54.—*CAN.*

#### PART VIII. SECT. 2, SUB-SECT. 2.—A.

**2470 i. When action lies—Sale of unascertained goods**.]—*BUTTERICK PUBLISHING CO. v. WHITE* (1914), 28 W. L. R. 941; 6 W. W. R. 1394; 18 D. L. R. 636; 8 Alta. L. R. 55.—*CAN.*

c. —*Necessity for tender*.]—Where deft. in this country ordered certain articles of clothing from pltf. in England, & on arrival here they were received by pltf.'s agent, who did not



*Sect. 2.—Remedies of the seller: Sub-sect. 2, A.*

provided that the quantities stated in the schedule were those which were estimated as the probable requirements for the period of the contract, but the committee might at their option require the supply & delivery under any item in the schedule of goods in excess of the quantity specified in such item, & the goods were to be delivered at the asylums in such quantities at such time & in such manner as the committee or the steward might order from time to time. The committee did not order the amounts specified in the schedule to the tender form, & the contractors claimed that they were entitled to supply goods to the full amount therein specified:—*Held*: on the true construction of the contract contained in the document of tender, the Asylums Committee were under no obligation to order any of the goods, but the firm of contractors were bound to deliver the goods specified as & when they obtained orders for them from the committee.—*PERCIVAL, LTD. v. LONDON COUNTY COUNCIL, ASYLUMS & MENTAL DEFICIENCY COMMITTEE* (1918), 87 L. J. K. B. 677; 82 J. P. 157; 16 L. G. R. 367.

— *Necessity for readiness to deliver.*—See Part VI., Sect. 1, sub-sect. 3, *ante*.

— *What constitutes non-acceptance.*—See Part VI., Sect. 3, sub-sect. 3, A., *ante*.

— *What constitutes delivery.*—See Part VI., Sect. 2, sub-sect. 2, *ante*.

**2475. Who may sue—Agent real principal.**—Where pltf. made a written contract for the sale of goods, in which he described himself as the agent of A., & the buyer accepted & paid the price of a portion of the goods, & had then notice that pltf. was himself the real principal in the transaction, & not the agent of A.:—*Held*: pltf. might sue in his own name for the non-acceptance of & non-payment for the residue of the goods.—*RAYNER v. GROTE* (1846), 15 M. & W. 359; 16 L. J. Ex. 79; 8 L. T. O. S. 474; 153 E. R. 888.

*Annotations*:—*Consd.* *Cox v. Hubbard* (1847), 4 C. B. 317. *Refd.* *Schmaltz v. Avery* (1851), 16 Q. B. 655; *Tetley v. Shand* (1871), 25 L. T. 658. *Mentd.* *Gillet v. Offor* (1855), 18 C. B. 905.

**2476. Against whom action lies—Administrator.**—Pltfs. entered into an agreement with C. to supply him with a certain quantity of slate immediately; with a certain other quantity monthly, at a fixed price; & with any further quantity, monthly, that C. might require. C. engaged to receive the slate, not exceeding 200 tons per month; & the agreement was to be in force till Jan. 1, 1838:—*Held*: pltfs. might sue the administrator of C. for refusing to receive slate sent, in pursuance of the contract, after C.'s death & before Jan. 1, 1838.—*WENTWORTH v. COCK* (1839), 10 Ad. & El. 42; 2 Per. & Dav. 251; 8 L. J. Q. B. 230; 3 Jur. 340; 113 E. R. 17.

*Annotations*:—*Consd.* *Cooper v. Jarman* (1866), L. R. 3 Eq. 98. *Mentd.* *Taylor v. Caldwell* (1863), 2 New Rep. 198.

**2477. Director—Joining board after formation of contract.**—The declaration contained a

tender them to nor leave them with deft., but demanded payment for them, which was refused:—*Held*: an action for goods sold & delivered would not lie, but pltf. should have declared specially for the non-acceptance.—*LANE v. MELVILLE* (1833), 3 O. S. 124.—*CAN.*

d. — *Purchaser repudiating contract before goods have passed.*—*GOLD MEDAL FURNITURE CO. v. HOMESTEAD ART CO. (Alta.)* (1919), 45 D. L. R. 253.—*CAN.*

e. — *Sale of hay—Failure to*

*give shipping orders within reasonable time—Waiver of breach.*—*SCOTT (JAMES) & CO., LTD. v. MCCAIN PRODUCE CO., LTD.* (1920), 47 N. B. R. 230.—*CAN.*

f. — *Reservation of property in vendor—Non-acceptance by purchaser.*—If by the terms of a contract for purchase of a certain chattel the property therein is not to vest in the purchaser until the price is paid in full, the vendor's remedy on non-acceptance is for damages, & he cannot claim for the balance of the purchase-price.—

count for not accepting or paying for machinery made for defts., according to a special contract, & also a count for goods bargained & sold. Defts. were members of a provisional committee of a co., which had entered into a written contract for the machinery before M., one of defts., joined the committee. Under this contract pltf. was to have monthly payments on account of the work while in progress, not exceeding the price of the work done & materials supplied for the time being. After M. joined the committee, several payments were made on account of the work, & alterations suggested & adopted, with his sanction; & he also took an active part in superintending the work & making experiments with it:—*Held*: there was no ground for implying a new contract after M. joined the committee; & his acquiring an interest in the subject-matter of the contract previously entered into would not make him liable on such contract; he was not liable on the count for goods bargained & sold, because, if the property in successive portions of the machinery, while the work was in progress, did pass from time to time by the payments on account, it passed according to the terms of the special contract, to which he was not a party.—*BEALE v. MOULS* (1847), 10 Q. B. 976; 5 Ry. & Can. Cas. 105; 16 L. J. Q. B. 410; 11 Jur. 845; 116 E. R. 370.

*Annotation*:—*Mentd.* *Newton v. Belcher* (1848), 6 Ry. & Can. Cas. 38.

**2478. Discovery.**—In an action for a breach of contract in not accepting goods, to which deft. pleaded fraud, a judge having made an order for the inspection of correspondence between pltfs. & the consignors of the goods & pltfs. & their broker, after the contract & alleged breach:—*Held*: the order was properly made in the exercise of the discretion of the judge.—*COLMAN v. TRUMAN* (1858), 3 H. & N. 871; 32 L. T. O. S. 134; 157 E. R. 720; *sub nom.* *COLEMAN v. TRUMAN*, 28 L. J. Ex. 5.

*Annotations*:—*Distd.* *Chartered Bank of India, Australia & China v. Rich* (1863), 4 B. & S. 73. *Refd.* *Woolley v. North London Ry.* (1869), L. R. 4 C. P. 602; *Cossey v. L. B. & S. C. Ry.* (1870), L. R. 5 C. P. 146; *Fenner v. London & South Eastern Ry.* (1872), L. R. 7 Q. B. 767.

**2479. Interrogatories.**—Where in an action for not taking fruit & for the price of it, the statement of claim gave the number of pots of fruit sold, leave was refused to deft. to administer interrogatories as to the weight of the fruit sold before delivering the statement of defence.—*ANON.* (1876), 1 Char. Cham. Cas. 100.

**2480. Joinder of third party—Sub-purchaser—Alleged breach of warranty by vendor.**—To a claim by pltfs. for not accepting 183 chests of shellac according to contract, defts., among other defences, raised the defence that the shellac was not of the quality contracted for. Defts. had contracted with Messrs. R. & Messrs. T. respectively for the sale to them of 50 chests on the same terms as their contract with pltfs., & defts. cited Messrs. R. & T. under R. S. C., Ord. 16, r. 18. Messrs. R. consented to be bound by the judgment in the action as to the quality of the shellac:—*Held*: Messrs. R. & T. had been

*HOFFMAN v. McLAUGHLIN MOTOR CAR CO., LTD.*, [1921] 1 W. W. R. 259; 56 D. L. R. 724.—*CAN.*

g. — *Improper rejection of goods.*—*SIGURDSON v. ROBINSON (WILLIAM) CO., LTD.*, [1925] 2 D. L. R. 19.—*CAN.*

h. — *Against trustee in bankruptcy of insolvent purchaser.*—*RE THOMPSON KNITTING CO., Ex p. BRAVER & WOLF*, [1925] 2 D. L. R. 1007; 56 O. L. R. 625.—*CAN.*

k. *Admissibility of evidence—To prove verbal agreement of defendant—*

properly cited under R. S. C., Ord. 16, r. 18, & the ct. directed under r. 21 that Messrs. T. should be at liberty to appear & defend the action so far as regarded the question of the quality of the shellac & they should be bound by the finding of the jury on that question.—*BENECKE v. FROST* (1876), 1 Q. B. D. 419; 45 L. J. Q. B. 693; 34 L. T. 728; 24 W. R. 669; 3 Char. Pr. Cas. 32.

*Annotations*:—*Apld.* *Schneider v. Batt* (1880), 50 L. J. Q. B. 389. *Consd.* *Hornby v. Cardwell* (1881), 8 Q. B. D. 329. *Refd.* *Barton v. L. & N. W. Ry.* (1888), 38 Ch. D. 144.

### B. Defences to Action.

*See* Sale of Goods Act, 1893 (c. 71), s. 50 (1).

**2481. All goods not ready for delivery—Sale of fruit—Delivery when available.**—*SCRIMSHAW v. WESTBY* (1704), 6 Mod. Rep. 302; 87 E. R. 1041.

**2482. Seller unable to deliver—Action by auctioneer—Failure to remove goods sold—Re-sale by auctioneer.**—*MERTENS v. ADCOCK*, No. 2465, *ante*.

**2483. Credit unexpired.**—Credit unexpired is no defence to a count for not accepting goods, if they have not been accepted according to the contract.—*FOSTER v. EADES* (1860), 2 F. & P. 103, N. P.

**2484. Plaintiff suing under different contract.**—*PAGE v. COWASJEE EDULJEE*, No. 2387, *ante*.

**2485. Arbitration clause—Award made—Plaintiff not heard by arbitrators.**—Deft. contracted to buy of pltf. certain cotton to arrive in Liverpool, per ship or ships, from Bombay, Mar. or Apr. shipment, on the terms of the rules of the Cotton Brokers' Asscn. of Liverpool, by which it was stipulated that the name of the ship should be given to the buyer within two calendar months "after the date of shipment named in the contract," & that in default thereof the buyer might cancel the contract; & also that "in case of any dispute arising out of any contract" the matter should be referred to two members of the Cotton Brokers' Asscn. for settlement. Pltf. gave the name of the ship, on which the cotton was shipped within two calendar months after Apr., but not within two calendar months after Mar., when the cotton was actually shipped. Deft. therefore disputed his liability to accept the cotton, & caused arbitrators to be appointed in the mode provided for by the rules, who, upon having the documents, but neither of the parties, before them, & without giving pltf. any opportunity of being heard, made an award in favour of deft., on the ground that the shipment was not declared in time. Pltf., however, sued deft. for not accepting the cotton, & deft. pleaded the award in bar to such action:—*Held*: (1) the dispute, though involving the question as to the construction of the contract, was one which by the rules the parties agreed to refer; (2) the fact of pltf. not having had any opportunity of being heard before the arbitrators was no answer to the plea of the award, but was only a ground for applying to the equitable jurisdiction of the ct., to have the award set aside.—*THORBURN v. BARNES* (1867), L. R. 2 C. P. 384; 36 L. J. C. P. 184; 16 L. T. 10; 15 W. R. 623; 2 Mar. L. C. 459.

*Annotations*:—*As to* (2) *Refd.* *Bache v. Billingham*, [1894]

1 Q. B. 107; *Oppenheim v. Mahomed Haneef*, [1922] 1 A. C. 482; *Scrimaglio v. Thornett & Fehr* (1924), 131 L. T. 174. *Generally*, *Mentd.* *Sadler v. Smith* (1869), L. R. 4 Q. B. 214.

**2486. — Conflict of laws.**—A vendor resident in Scotland, & a purchaser resident in England, agreed for the sale & purchase of goods to be delivered in Scotland. The agreement contained a clause that any dispute should be "settled by arbn. by two members of the London Corn Exchange, or their umpire, in the usual way." The vendor brought an action against the purchaser in the Scottish ct. for non-acceptance of the goods according to contract. The purchaser pleaded the arbn. clause. The Scottish ct. held that the arbn. clause, not being good according to Scottish law, afforded no defence to the action:—*Held*: the intention of the parties gathered from the whole contract, was that it should be governed by English law, & the arbn. clause, being good in English law, & not fundamentally opposed in principle to the law of Scotland, was a good defence to the action.—*HAMLIN & CO. v. TALISKER DISTILLERY*, [1894] A. C. 202; 71 L. T. 1; 58 J. P. 540; 10 T. L. R. 479; 6 R. 188, H. L.

*Annotations*:—*Consd.* *Crosland v. Wrigley* (1895), 73 L. T. 60; *South African Breweries v. King*, [1899] 2 Ch. 173. *Apld.* *Spurrier v. La Cloche*, [1902] A. C. 446; *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 1 Ch. 354. *Consd.* *Pena Copper Mines v. Rio Tinto Co.* (1911), 105 L. T. 846; *Jones v. Oceanic Steam Navigation Co.*, [1924] 2 K. B. 730. *Apld.* *N. V. Kwik Hoo Tong Handel Maatschappij v. Finlay*, [1927] A. C. 604. *Refd.* *Royal Exchange Assee. Corp'n. v. Sjöforsakrings Akt. Vega*, [1902] 2 K. B. 384; *Hansen v. Dixon* (1906), 96 L. T. 32; *Hicks v. Maxton* (1907), 1 B. W. C. C. 150; *Re Mackenzie, Mackenzie v. Edwards-Moss*, [1911] 1 Ch. 578; *Cameron v. Cuddy*, [1914] A. C. 651; *Sanderson v. Armour* (1922), 91 L. J. P. C. 167. *Mentd.* *Déchène v. City of Montreal* (1894), 11 R. 319.

**2487. Failure of plaintiff to tender documents—No agreement or trade usage.**—By a contract in writing, dated Sept. 17, 1915, pltf. agreed to sell & defts. to buy "about 12,000 dressed sheepskins for prompt shipment & about 33,000 ditto for shipment as quickly as possible . . . c.i.f. London or Liverpool. Payment: Net cash against documents on arrival of the steamer." The goods were shipped by three different steamers. The first two shipments were taken up & paid for, but defts. refused to take up the documents for the third shipment on the ground that they had never been tendered to them, & that they were not informed of the vessel's arrival until a date outside the contract date for delivery:—*Held*: in these circumstances defts. had been guilty of breach of contract.

It is said that pltf. should have tendered the documents to defts. at deft.'s office. In the absence of any express stipulation to this effect or some trade usage or course of business between the parties importing such a stipulation, I doubt whether the obligation on the vendor exists (*ATKIN, J.*).—*STEIN, FORBES & CO. v. COUNTY TAILORING CO.* (1916), 86 L. J. K. B. 448; 115 L. T. 215; 13 Asp. M. L. C. 422.

*Annotation*:—*Mentd.* *Colley v. Overseas Exporters*, [1921] 3 K. B. 302.

**2488. Illegality of contract.**—By Seeds, Oils & Fats Order, 1919, made under Defence of the

*To receive certain amount of oil.*—*NOBLE v. SPENCER* (1868), 27 U. C. R. 210.—*CAN.*

**1. Claim for price of goods—Whether different from claim for damages for non-acceptance.**—A claim for the price of goods sold is a cause of action of a different nature from a claim for damages for non-acceptance of goods pursuant to a contract.—*ANDERSON WRIGHT & CO. v. KALA-GARLA SUJINARAIN* (1885), 1 L. R. 12 Calc. 339.—*IND.*

### PART VIII. SECT. 2, SUB-SECT. 2.—B.

**m. Failure to deliver goods.**—*KENNEDY v. JOYCE* (N. W. T.) (1905), 1 W. L. R. 197.—*CAN.*

**n. Delay in delivery.**—*GAAR SCOTT CO. v. OTTOSON* (1911), 16 W. L. R. 663; 21 Man. L. R. 462.—*CAN.*

**o. —.**—*BUDDREE DOSS v. RALLI* (1881), 1 L. R. 6 Calc. 678; 8 C. L. R. 294.—*IND.*

**p. —.**—Where a person who

agreed to purchase certain goods repudiated the contract on the ground that the goods were not tendered by the seller within the time alleged to have been agreed, & thereupon the seller accepting the repudiation sued him for damages for breach of contract, & the buyer pleaded non-liability not only on the ground that the goods were not tendered within the agreed time but also on the ground that the goods tendered were not of the agreed quality:—*Held*: the buyer, having

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Realm Regulations, "a person shall not either on his own behalf or on behalf of any other person buy or sell or otherwise deal in . . . any of the articles specified in the schedule hereto, whether situated within or without the United Kingdom, except under & in accordance with the terms of a licence issued by or under the authority of the Food Controller." Linseed oil was one of the articles specified in the schedule.

During the operation of the Order pltf. sold to deft. a quantity of linseed oil. Pltf. had a licence under the Order, & before entering into the contract he asked deft. whether he had a licence under the Order, & deft. told pltf. that he had. Deft. in fact had not a licence. The licence to pltf. provided that sales for delivery within the United Kingdom were only to be made to persons holding a licence. Pltf., being induced by the misrepresentation of deft. & in the honest belief that he had a licence, entered into the contract of sale. Deft. subsequently refused to accept delivery of the linseed oil on the ground that the contract was illegal, as he, deft., had no licence under the Order. In a claim for damages for non-acceptance of the oil:—*Held*: as deft. had no licence, the contract of sale was prohibited by the Order & was therefore illegal, & as the prohibition was in the public interest no claim could be made under the contract.—*Re MAHMOUD & ISPAHANI*, [1921] 2 K. B. 716; 125 L. T. 161; *sub nom.* MAHMOUD v. ISPAHANI, 90 L. J. K. B. 821; 37 T. L. R. 489; 26 Com. Cas. 215, C. A.

**2488. Impossibility of performance—Government restrictions on export.**—By contracts dated Nov. 1 & 2, 1917, a firm of jute manufacturers contracted to sell to a firm of merchants certain quantities of jute goods, one half to be delivered in Jan. & the remainder in Feb. 1918, delivery to be f.o.b. Dundee. On the passing of the Jute (Export) Order, dated Nov. 27, 1917, the sellers wrote the buyers asking for a guarantee that the goods would not be exported from the United Kingdom, or if the goods were for export for the necessary permit from the War Office. Application was made for a permit, but it was refused. The buyers then cancelled the contracts. In an action for damages at the instance of the sellers for breach of contract:—*Held*: the Jute (Export)

repudiated the contract on one ground, viz. that the goods were not tendered within the time agreed, could not plead non-liability on another ground, viz., that the goods were not of the agreed quality.—*NANNIER (alias RAMIER) v. N. M. RAYALU IYER, NAGASAMY IYER & Co.* (1925), 1 L. R. 49 Mad. 781.—*IND.*

**q. Contract cancelled by mutual consent.**—[*GEDDES BROTHERS v. AMERICAN NATIONAL RED CROSS*, [1921] 1 W. W. R. 185; 55 D. L. R. 194; 61 S. C. R. 143.—*CAN.*]

**r. Representation in Chinese not understood by buyer—No consensus ad idem.**—[*AH SHAIN SHOKE v. MOOTHIA CHETTY* (1899), 1 L. R. 27 Calc. 403; 1 L. R. 27 Ind. App. 30; 4 C. W. N. 453.—*IND.*]

**t. Goods not in possession of seller when contract made.**—[*MULCHAND CHANDOLIA v. KUNDANMULL* (1919), 1 L. R. 47 Calc. 458.—*IND.*]

**PART VIII. SECT. 2, SUB-SECT. 2.—C. (a).**

**2490 i. Actual loss sustained.**—[*PHILLIPS v. MERRITT* (1843), 2 C. P. 513.—*CAN.*]

**2490 ii.**—[*CHAPMAN v. LARIN* (1879), 4 S. C. R. 349.—*CAN.*]

Order & the refusal of the permit had not the effect of voiding the contract, there being no contractual terms, express or implied, as to the market in which the goods were to be disposed of, & accordingly the buyers were in breach of contract in refusing to take delivery.—*McMASTER & Co. v. COX, McEuen & Co.*, [1921] S. C. (H. L.) 24; 58 Sc. L. R. 70, H. L.

—[*Compare CONTRACT*, Vol. XII., pp. 392–398, Nos. 3201–3228.

**Breach of warranty.**—[Part III., Sect. 19, sub-sect. 2, C. (a), *ante*.]

**Exercise of right of rejection.**—[See Part VI., Sect. 3, sub-sect. 3, *ante*.]

**Deed of arrangement—Action by dissenting creditor.**—[See *BANKRUPTCY*, Vol. V., p. 1145, No. 9293.

**C. Measure of Damages.**

**(a) In General.**

See Sale of Goods Act, 1893 (c. 71), s. 50 (2), & generally, *DAMAGES*, Vol. XVII., pp. 78 *et seq.*

**2490. Actual loss sustained.**—[*LAIRD v. PIM*, No. 2395, *ante*.]

**2491.**—[*CORT v. AMBERGATE, ETC.*, RY. Co., No. 1472, *ante*.]

**2492.**—[*BIRCHGROVE STEEL CO., LTD. v. SHAW'S BROW IRON CO.* (1891), 7 T. L. R. 246, H. L.; *affg.* S. C. *sub nom.* SHAW'S BROW IRON CO., LTD. v. BIRCHGROVE STEEL CO., LTD. (1889), 6 T. L. R. 50, C. A.]

**2493.**—[*Goods resold.*—*MACLEAN v. DUNN*, No. 2371, *ante*.]

—[Where a contract is repudiated & the article resold within a reasonable time from the repudiation, the measure of damages is the difference between the price of the article at the time of the contract & of the resale.—*STEWART v. CAUTY* (1841), 8 M. & W. 160; 2 Ry. & Can. Cas. 616; 10 L. J. Ex. 348; 5 Jur. 411; 151 E. R. 992.]

**2495.**—[*Re NATHAN, Ex p. STAPLETON*, No. 2377, *ante*.]

**2496.**—[—(1) Where one party to a contract repudiates it upon grounds which give him no right to repudiate, he waives the obligation upon the other party, who accepts such repudiation, to show that he is ready & willing to perform the contract even though facts are subsequently discovered by the first party which would have

**2490 iii.**—[*SAWYER v. BASKERVILLE* (1891), 10 Man. L. R. 652.—*CAN.*]

**2490 iv.**—[*IMPERIAL BANK v. HULL* (1901), 5 Terr. L. R. 313.—*CAN.*]

**2490 v.**—[In estimating the amount to be allowed to the vendor for damages for the deliberate & unjustifiable refusal by the buyer to accept the goods bargained for, the judge or jury trying the action is not limited by Sale of Goods Act, R. S. M., 1902 (c. 152), s. 49 (b), to the difference between the contract & the market price, but may, under sect. 49 (a), allow any loss directly & actually resulting in the ordinary course of events, from the buyer's breach of contract.—*BANK OF OTTAWA v. WILTON* (1909), 10 W. L. R. 331.—*CAN.*]

**2490 vi.**—[Deft. agreed to buy tobacco from pltf. at the rate of \$300 per week. This deft. failed to do & ultimately ceased to deal with pltf. :—*Held*: pltf. could not recover damages simply by showing an estimate of loss from failure to purchase.—*Crowe v. Gough* (1910), 8 E. L. R. 45.—*CAN.*]

**2490 vii.**—[*SOMERVILLE BROTHERS v. TROTTER (Alta.)* (1912), 21 W. L. R. 143.—*CAN.*]

**2490 viii.**—[*BRUNSWICK BALKE COLLENDER Co. OF CANADA, LTD. v.*

*FAISETTO* (1915), 34 O. L. R. 386; 9 O. W. N. 27.—*CAN.*]

**2490 ix.**—[*PROVINCIAL FOX CO. v. TENNANT* (1915), 48 N. S. R. 555.—*CAN.*]

**2490 x.**—[*CONSOLIDATED PLATE GLASS CO. v. MCKINNON DASH CO.* (1918), 41 O. L. R. 188; 13 O. W. N. 225; 40 D. L. R. 47.—*CAN.*]

**2490 xi.**—[*BRADLEY v. BAILEY (ONT.)* (1922), 66 D. L. R. 441.—*CAN.*]

**2490 xii.**—[*GENERAL SUPPLY CO. OF CANADA, LTD. v. O'NEILL MORRIS MACHINERY CO. (Alta.)*, [1923] 2 W. W. R. 928.—*CAN.*]

**2490 xiii.**—[In an action for damages for non-acceptance of goods, the measure of damages is the estimated loss directly & naturally resulting in the ordinary course of events from the buyer's breach of contract.—*RECORD FOUNDRY & MACHINE CO., LTD. v. GARSON*, [1923] 2 D. L. R. 142; 50 N. B. R. 110.—*CAN.*]

**2493 i.**—[*Goods resold.*—Action for price of goods sold. Pltf. shipped goods which deft. refused to accept. Pltf. then resold, & now sued for their loss :—*Held*: pltf. had fully performed their contract & are entitled to recover their loss.—*HAFFNER v. CUMMING* (1908), 9 W. L. R. 621.—*CAN.*]

justified his repudiation if it had been based upon them.

(2) In a contract for delivery by instalments the ct. must see whether each party was ready & willing to perform his part of the contract at the time for delivery of each instalment (COLLINS, M.R.).

A contract provided for the sale of rosewood for shipment in 1903, to be delivered at Hull in instalments during that year, cash payable against bill of lading. While the first consignment of rosewood was on the sea, the buyers repudiated the contract & refused to accept any rosewood under it upon the ground that the seller had committed a breach of a collateral oral agreement not to supply rosewood to any other person in the trade during 1903. When the bill of lading for the first consignment was tendered to the buyers they refused to accept it or to pay for the rosewood comprised in it; the rosewood was therefore sold by the seller as against the buyers, & the seller claimed as damages from the buyers for their refusal to accept the consignment the difference between the contract price & the price at which it was sold as against the contract. The second consignment, consisting of the balance of the rosewood, was likewise refused by the buyers on the same ground & sold as against them. It subsequently came to the knowledge of the buyers that a portion of the rosewood in the first consignment did not answer the description of the quality of rosewood in the contract, & it was admitted that there was some inferiority in a portion that would be compensated for by an allowance of about 6 per cent. on the value of the consignment. The second consignment was in accordance with the contract. The seller having sued the buyers for damages for not accepting the rosewood, the judge at the trial found as a fact that the collateral oral agreement relied upon by the buyers had never been entered into:—*Held*: (3) the original repudiation of the contract by the buyers was wrongful, & by refusing to take delivery of the consignments on arrival on the ground that they had already repudiated the entire contract the buyers had waived the performance of conditions precedent on the part of the sellers; (4) the sellers were entitled to damages based upon the difference between the contract price of the rosewood & the price at which it had been sold by them as against the contract.—*BRAITHWAITE v. FOREIGN HARDWOOD CO.*, [1905] 2 K. B. 543; 74 L. J. K. B. 688; 92 L. T. 637; 21 T. L. R. 413; 10 Asp. M. L. C. 52; 10 Com. Cas. 189, C. A.

*Annotations*:—*As to* (1) *Consd.* *Taylor v. Oaks*, *Roncoroni* (1922), 127 L. T. 267; *British & Beningtons v. North Western Cachar Tea Co.*, [1923] A. C. 48. *Refd.* *McKenna v. City Life Assoc.* (1919), 88 L. J. K. B. 1223. *As to* (3) *Refd.* *Colley v. Overseas Exporters*, [1921] 3 K. B. 302. *Generally*, *Refd.* *Acties Nord-Ostorsø Rederiet v. Casper*, *Edgar* (1923), 28 Com. Cas. 222.

**2497.** —[A vendor gave a warranty of sound workable condition on the sale of a horse. The warranty was fulfilled, but the purchaser wrongfully refused delivery, & returned the horse. The vendor then put it up at auction as “in dispute,” & without a warranty, when it was sold for about £40 less than the contract price. In an action for the difference between the price realised at the auction & the contract price:—*Held*: (1) this was not the proper form of action; (2) the action must be for damages; (3) the conditions of the auction sale were not a test of the value of the horse, the auction being of a horse “in dispute,” & without warranty, & quite different from the original contract conditions; (4) pltf. was not entitled to more than nominal

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damages, as he had failed to prove his damages to be the difference between the contract price & the price realised at the auction.—*MACKLIN v. NEWBURY SANITARY LAUNDRY* (1919), 63 Sol Jo. 337, D. C.

**2498.** — *Nominal damages—Rise in market price.*—Where the seller brings an action for the non-acceptance of goods the price of which has risen since the contract was made, the judge is bound to tell the jury only to give nominal damages (MARTIN, B.).—*PREHN v. ROYAL BANK OF LIVERPOOL* (1870), L. R. 5 Exch. 92; 39 L. J. Ex. 41; 21 L. T. 830; 18 W. R. 463.

*Annotations*:—*Refd.* *Wallis Chlorine Syndicate v. American Alkali Co.* (1901), 17 T. L. R. 656. *Mentd.* *Re Oriental Commercial Bank* (1871), L. R. 12 Eq. 501; *Larios v. Bonany y Gurety* (1873), L. R. 5 P. C. 346; *Re General South American Co.* (1877), 7 Ch. D. 637; *Re English Bank of the River Plate, Ex p. Bank of Brazil*, [1893] 2 Ch. 438; *Banque Populaire de Bienne v. Cavé* (1895), 1 Com. Cas. 67; *Barnett v. Hart* No. 1 (1903), 48 Sol Jo. 14; *Wilson v. United Counties Bank*, [1920] A. C. 102; *Sassoon v. International Banking Corp.*, [1927] A. C. 711.

**2499.** *Conditions of resale differing from contract conditions.*—*MACKLIN v. NEWBURY SANITARY LAUNDRY*, No. 2497, *ante*.

**2500.** — *Difference between contract price & cost of production—Sale of coal.*—Pltf. co., colliery owners, contracted to supply, & deft. co., dealers in coal, in London, contracted to purchase, 3,250 tons of old Silkestone coal, at 19s. a ton, to be delivered to & taken by defts. at the pit's mouth in equal monthly quantities, extending over a period of nine months. During several of the months defts. failed to send waggons forward to accept the full quantity they were bound to accept, & which pltf. were ready & willing to supply in such months, & defts. therein made default. The coal of pltf.'s colliery was a perishable coal, deteriorating rapidly in quality if stacked or stored above ground, & it was not the ordinary course of business, nor a reasonable course for the colliery owner, to raise such coal, except to supply contracts previously entered into, & it was raised as far as possible from day to day to supply the waggons arriving to receive it, into which it was delivered direct from the pit's mouth. Such coal already raised could be, & frequently was, sold in small quantities in the London Coal Exchange by colliery owners, when a truck of coal had been refused by a customer, or had been sent astray, or when from any other reason coals already raised were left on their hands, but not otherwise.

An action was brought by pltf. to recover damages from defts. for breach of contract in failing to take the full monthly quantity of coals:—*Held*: the amount of damages pltf. were entitled to recover was the difference between the cost of raising the coal, added to the value of the coal itself remaining unraised in the mine, whatever those two heads of calculation might amount to, & the contract price of 19s. a ton, & such amount could be accurately calculated & ascertained by persons familiar with the subject, without actually raising & selling the coal which, being of a perishable nature, was not readily or profitably to be so disposed of, & pltf. were not bound to have so raised & sold it.—*SILKESTONE & DODSWORTH COAL & IRON CO., LTD. v. JOINT STOCK COAL CO., LTD.* (1876), 35 L. T. 668; 41 J. P. 41.

**2501.** — *No available market.*—The damages for the breach of a forward contract to accept goods for which there is no market, is the full amount of the damage actually sustained, the person who broke the contract not being put to additional cost by reason of the other party not

**Sect. 2.—Remedies of the seller: Sub-sect. 2, C. (a) & (b).]**

doing what he ought to do, as a reasonable man, & he on the other hand not being bound to do otherwise than in the ordinary course of his business.

Pltfs. contracted to sell to deft. 15,000 tons of cannel coal in weekly quantities, the deliveries not to commence before June, at 26s. per ton, payable by monthly instalments, deft. not to sell in certain specified places.

Deft. repudiated the contract in July, but pltfs. attempted to come to terms with him, & did not treat it as broken until Sept., when, there being no regular market for cannel coal, they tried without advertising to find another purchaser, according to the ordinary course of their own business. After several failures, the coal was sold at 19s. per ton:—*Held*: pltfs. were entitled to the full amount of the difference between the contract price & that which they obtained.—*DUNKIRK COLLIERY Co. v. LEVER* (1879), 41 L. T. 633, C. A.; *affd. sub nom. ELLIS LEVER & Co. v. DUNKIRK COLLIERY Co.* (1880), 43 L. T. 706, H. L.

**2502.** ———.]—The Vic co. were in voluntary liquidation. Before the winding up they had ordered certain machines to be made by a firm of engineers, which, owing to the winding up, they were unable to accept. The creditors put in a claim for damages for £1,167 13s. 6d., being the amount of the profits which they estimated they would have made, if the contract had been carried out. The liquidators rejected this claim, & the judge referred the matter to the district registrar for an inquiry for what sum, if any, appcts. should be allowed to prove in the winding up in respect of the items of machinery included in their claim, ordered by the co. but not delivered. The registrar divided the machines as to which claims were made into two classes: (a) Machines which had been completed by the creditors before the date of the winding up, retained by the creditors for a time, & then somewhat altered & sold to other customers at a price less than the contract price. On these he allowed the difference between the price realised & the contract price plus the estimated cost of the alterations, a sum amounting

to £28 instead of £162 19s. claimed. (b) Machines which would have been wholly or partially manufactured by the creditors, on which they had done no work, but for some of which they had purchased subordinate parts ready made, which they had afterwards used in fulfilling other orders. On these the registrar thought that the creditors were entitled to have the loss of profits taken into account; but he held that the actual loss directly or naturally resulting from the breach of contract did not amount to anything approaching the whole of such prospective profit, & he assessed the damages at £280 instead of the £1,002 1s. 3d. claimed. There was no available market for the goods & no evidence that claimants could not have carried out the contract as well as all their other contracts:—*Held*: claimants were entitled to the whole of the profits which they claimed.—*RE VIC MILL, LTD.*, [1913] 1 Ch. 465; 82 L. J. Ch. 251; 108 L. T. 444; 57 Sol. Jo. 404, C. A.

*Annotations*:—*Consd. Hill v. Showell*, Edwin (1918), 87 L. J. K. B. 1106; *Swift v. Board of Trade*, [1925] A. C. 520.

**2503. Unmanufactured article—Not loss of anticipated profits.]**—The ordinary rule as to the measure of damages in case of breach of contract to accept a manufactured article, applies equally in the case of an unmanufactured article.

Where, therefore, in the case of an unmanufactured article, there is a market price at the date of breach, the profits that would have arisen from the contract, & the losses sustained through its breach, cannot be considered as elements of the damage.—*TREDEGAR IRON & COAL Co. v. GIELGUD* (1883), 1 Cab. & El. 27.

**Where available market.]**—See Part VIII. Sect. 1, sub-sect. 2, C. (b), *post*.

**Special damages.]**—See Sect. 3, sub-sect. 8, *post*.

**Assessment of damages—Amount due in foreign currency.]**—See DAMAGES, Vol. XVII., p. 159, No. 600.

*(b) Where Available Market.*

See Sale of Goods Act, 1893 (c. 71), s. 50 (3).

**2504. Difference between contract price & market price—At date of breach.]**—Where a person, who had contracted for a certain quantity of oil, to be delivered to him at a future day, at a certain price, became bkpt. before that day arrived, & obtained

**2503 i. Unmanufactured article—Not loss of anticipated profits.]**—*ONTARIO LANTERN Co. v. HAMILTON BRASS MANUFACTURING Co.* (1890), 27 A. L. 346.—CAN.

**a. Whether agent's commission allowed.]**—It appeared in an action to recover damages for breach of contract that pltf. had, through his agent, contracted to sell & deft. to purchase certain sheep, & that deft. had refused to complete the purchase. There was evidence that pltf. was liable to pay the agent commission:—*Held*: the commission payable by pltf. to his agent was not an item of damage recoverable in the case.—*O'NEILL v. WHITTAKER* (1918), 18 S. R. N. S. W. 39; 35 N. S. W. W. N. 12.—AUS.

**b. Whether separate action lies—Redelivery of wheat.]**—*Semble*: if in an action upon the case for not manufacturing 400 bushels of wheat into flour, pltf. recover damages equal to the value of the wheat delivered to deft., he cannot bring an action for goods sold, for part of the wheat which had, in point of fact, been redelivered to pltf., such redelivery should have been given in evidence in mitigation of damages.—*ANDRUS v. BURWELL* (1826), Tay. 382.—CAN.

**c. ———.]**—A. wishing to procure a water-wheel which, with the existing water power, would be sufficient to

drive the machinery in his mill, C. undertook to put in a "four-foot Sampson turbine wheel," which he warranted would be sufficient for the purpose. The wheel was subsequently put in, but proving insufficient, A. sued C. for breach of the warranty & recovered \$438 damages. C. having subsequently sued A. for the price, A. offered to give evidence in mitigation of damages that the wheel was worthless & of no value to him:—*Held*: such evidence was inadmissible, for that the facts offered in mitigation might have, & for all that appeared had, formed a ground for the recovery of damages in the action on the warranty, & therefore could not be set up in this action.—*CHURCH v. ABELL* (1877), 1 S. C. R. 442.—CAN.

**d. Actual loss proved.]**—*SAWYER-MARSEY Co. v. SZLACHETKA* (1912), 21 W. L. R. 580; 2 W. W. R. 751; 5 Sask. L. R. 224; 4 D. L. R. 442.—CAN.

**e. Repudiation of contract by purchaser—Vendor only accepting repudiation at later date—Time for fixing damages.]**—When the purchaser refuses to make a contract for purchase of goods, if the vendor, instead of accepting the repudiation, claims the balance of the purchase-price as if the property in the goods had passed to the purchaser, & only at the trial of the

action (the ct. having found that the property had not passed) amends to claim damages, the purchaser has a right to claim that the date of the trial be taken as the time for fixing the damages & if at that time the market-price of the goods exceeds the contract-price no damages are recoverable.—*CHRISTENSEN v. CHASE*, [1920] 2 W. W. R. 673.—CAN.

**PART VIII. SECT. 2, SUB-SECT. 2.—C. (b).**

**2504 i. Difference between contract price & market price—At date of breach.]**—*LENNON v. SCARLETT* (1921), 29 C. L. R. 499.—AUS.

**2504 ii. ———.]**—*MOORE v. LOGAN* (1855), 5 C. P. 294.—CAN.

**2504 iii. ———.]**—*GEORGE v. GLASS* (1856), 14 U. C. R. 514.—CAN.

**2504 iv. ———.]**—*BRUNSKILL v. MAIR* (1856), 15 U. C. R. 213.—CAN.

**2504 v. ———.]**—*BRADLEY v. BAILEY & JASPIERSON* (1920), 48 O. L. R. 612; 57 D. L. R. 673; 19 O. W. N. 340.—CAN.

**2504 vi. ———.]**—*CANADIAN FUR AUCTION SALES Co., LTD. v. EDMONTON HIDE & FUR Co., LTD.* (Alta.), [1924] 3 D. L. R. 178.—CAN.

**2504 vii. ———.]**—*COHEN v. CASSIM NANA* (1876), 1 L. R. 1 Calc. 264; 25 W. R. 273.—IND.



his certificate :—*Held* : (1) he was nevertheless liable to an action for not accepting & paying for the oil, & (2) the proper measure of damages was the difference between the price which he had contracted to pay for the oil, & the market price at the time when the contract was broken.—*BOORMAN v. NASH* (1829), 9 B. & C. 145 ; Dan. & Ll. 269 ; 7 L. J. O. S. K. B. 150 ; 109 E. R. 54.

*Annotations* :—*As to* (1) *Refd.* *Gibson v. Carruthers* (1841), 8 M. & W. 321 ; *Johnson v. Skatte* (1869), L. R. 4 Q. B. 700. *As to* (2) *Apld.* *Brown v. Muller* (1872), L. R. 7 Exch. 319. *Refd.* *Green v. Bicknell* (1838), 8 Ad. & El. 701 ; *Re Gales, Ex p. Harrison* (1843), 1 L. T. O. S. 456 ; *Re Willis* (1849), 4 Exch. 530. *Generally, Mentd.* *Re Barlow, Ex p. Sheppard* (1841), 2 Mont. D. & De. G. 431 ; *Knight v. Burgess* (1864), 10 L. T. 90.

**2505.** ————]—The difference between the contract price of a cargo of oil of merchantable quality, which certain persons had agreed to purchase, but had refused to accept, & the market price of the oil, at the time of refusal, cannot be proved under a fiat of bkpey., issued against those persons upon an act of bkpey. committed subsequent to the refusal.—*GREEN v. BICKNELL* (1838), 8 Ad. & El. 701 ; 3 Nev. & P. K. B. 634 ; 1 Will. Woll. & H. 504 ; 7 L. J. Q. B. 271 ; 112 E. R. 1004.

*Annotations* :—*Distd.* *Re Tate, Ex p. Moffatt* (1841), 2 Mont. D. & De. G. 170. *Consd.* *Wooley v. Smith* (1846), 3 C. B. 610. *Distd.* *Re Routledge, Ex p. Bateman* (1856), 8 De G. M. & G. 263. *Consd.* *Bottleley v. Stainsby* (1862), 12 C. B. N. S. 477. *Refd.* *Re Coles, Ex p. Twining* (1841), 1 Mont. D. & De. G. 691 ; *Re Gales, Ex p. Harrison* (1843), 1 L. T. O. S. 456 ; *Bury v. Allen* (1845), 1 Coll. 589 ; *Johnson v. Skatte* (1869), L. R. 4 Q. B. 700. *Mentd.* *Re Barlow, Ex p. Sheppard* (1841), 2 Mont. D. & De. G. 431.

**2506.** ————]—*BOSWELL v. KILBORN*, No. 1064, *ante*.

**2507.** ————]—*GINNER v. KING* (1890), 7 T. L. R. 140, C. A.

**2508.** ————]—*Not date of repudiation.*—Where A. contracted for the purchase of wheat, “to be delivered at Birmingham as soon as vessels could be obtained for the carriage thereof” ; & subsequently, the market having fallen, gave the seller notice that he would not accept it if it were delivered, the wheat being then on its transit to Birmingham. In an action against A. for not accepting the wheat :—*Held* : the proper measure of damages was the difference between the contract price & the market price on the day when the wheat was tendered to him for acceptance at Birmingham & refused ; & not on the day when the notice was received by the seller.—*PHILLPOTTS v. EVANS* (1839), 5 M. & W. 475 ; 9 L. J. Ex. 33 ; 151 E. R. 200.

*Annotations* :—*Consd.* *Cort v. Ambergate, Nottingham & Boston & Eastern Junction Ry.* (1851), 17 Q. B. 127. *Refd.* *Ripley v. McClure* (1849), 4 Exch. 345 ; *Hochster v. De la Tour* (1853), 2 E. & B. 678 ; *Reid v. Hoskins* (1855), 5 E. & B. 729 ; *Stray v. Russell* (1859), 28 L. J. Q. B. 279 ; *Danube & Black Sea Ry. & Kustendjie Harbour Co. v. Xenos* (1861), 11 C. B. N. S. 152 ; *Unwin v. Clark* (1866), 7 B. & S. 400 ; *Frost v. Knight* (1872), L. R. 7 Exch. 111.

**2509.** ————]—*Unless repudiation treated as breach.*—By a contract, made on May 24, 1895, defts. purchased from plffs. a cargo of maize, to be shipped from a port in the Argentine Republic about July 15. The market was then falling, & on May 28, the buyers repudiated the contract, & on July 24 plffs. brought this action for damages for non-acceptance of the goods. The prices at that time were falling continuously, & there was no prospect of their recovery. If plffs. had resold about July 24, when they brought

this action the loss on the the contract price of the cargo would have been £1,557, but they did not resell until the vessel & cargo arrived at her port of call on Sept. 5, when the loss was £3,807 :—

*Held* : the measure of damages was the sum of £1,557, being the difference between the contract price & the market price on July 24, when plffs. accepted defts.’ repudiation by bringing this action, as, having regard to the falling prices, plffs. ought to have resold at that time, & ought not to have waited until the arrival of the cargo on Sept. 5.—*ROTH & Co. v. TAYSEN, TOWNSEND & Co. & GRANT & Co.* (1895), 73 L. T. 628 ; 12 T. L. R. 100 ; 8 Asp. M. L. C. 120 ; 1 Com. Cas. 240 ; *affd. on appeal* (1896), 12 T. L. R. 211, C. A.

*Annotations* :—*Apld.* *Nickoll & Knight v. Ashton, Edridge, [1900] 2 Q. B. 298.* *Refd.* *Tredegar Iron & Coal Co. v. Hawthorn* (1902), 18 T. L. R. 716.

**2510.** ————]—If the other party chooses to treat the repudiation as a breach, then matters proceed on the footing that there has been a breach & the damages must be assessed as for a breach on that date, & he would be bound to act reasonably in the circumstances, that is to say, to take advantage of any mitigating circumstances there might be (*COLLINS, M.R.*).

Repudiation is of no effect unless it is acted upon by the other party. If acted upon by the other party there is what is called an anticipatory breach of contract, & the damages are to be calculated as on the date of the acceptance of the repudiation—as if the contract had then run out (*MATTHEW, L.J.*).—*TREDEGAR IRON & COAL CO., LTD. v. HAWTHORN BROTHERS & Co.* (1902), 18 T. L. R. 716, C. A.

*Annotation* :—*Refd.* *Martin v. Stout*, [1925] A. C. 359.

**2511.** ————]—*On arrival of goods.*—A. agreed with B. to buy, on arrival, one-third part of a cargo of tea, to be brought from China in a certain vessel being only such part as would be consigned to A. It was agreed that the tea should be delivered at Belfast. It was also further agreed that in case of non-arrival, or a new agreement in China inconsistent with that contract, the first agreement was to be of no effect. Advice of the arrival of the cargo was sent to B. to Belfast. B. before the arrival, discharged A. from liability to perform the agreement, but afterwards retracted the discharge.

The difference in value between one-third of the proceeds of the cargo & the value of one-third of the cargo within a convenient time after the arrival of the vessel at Belfast, will be the measure of damages (*PARKE, B.*).—*RIPLEY v. MCCLURE* (1849), as reported in 18 L. J. Ex. 419 ; 14 L. T. O. S. 180 ; *on appeal, sub nom.* *MCCLURE v. RIPLEY*, 5 Exch. 140, Ex. Ch.

*Annotations* :—*Mentd.* *R. v. James* (1850), 4 Cox, C. C. 217 ; *S. E. Ry. v. Brogden* (1850), 3 Mac. & G. 8 ; *Cort v. Ambergate, Nottingham & Boston & Eastern Junction Ry.* (1851), 17 Q. B. 127 ; *Hochster v. De la Tour* (1853), 2 E. & B. 678 ; *Smith v. McGuire* (1858), 27 L. J. Ex. 465 ; *Danube & Black Sea Ry. & Kustendjie Harbour Co. v. Xenos* (1861), 11 C. B. N. S. 152 ; *Frost v. Knight* (1872), L. R. 7 Exch. 111 ; *Byrne v. Van Tienhoven* (1880), 5 C. P. D. 344 ; *Taylor v. Oakes, Roncoroni* (1922), 127 L. T. 267.

**2512.** ————]—*At reasonable time after request to withhold delivery.*—By a written contract plff. agreed to deliver & defts. to accept, a certain quantity of iron, of greater value than £10, in the month of June. On June 2, & again in the middle

**2504 viii.** ————]—In the case of a sale, if the purchaser does not perform his part of the contract he is liable in damages to the seller, the measure of damages being the difference between the contract price & the price which

the seller could have obtained for the article at the time of the breach of contract.—*PRAG NARAYN v. MUL CHAND* (1897), 1 L. R. 19 All. 535.—*IND.*

**2504 ix.** ————]—*O’NEILL v. RUSH & PALMER* (1847), 12 I. L. R.

34.—*IR.*

*1. Contract price of stone delivered at railway station.*—*MONTEFIORE v. PARKIN* (1907), 26 N. Z. L. R. 1317.—*N.Z.*



**Sect. 2.—Remedies of the seller: Sub-sect. 2, C. (b).  
Sect. 3: Sub-sect. 1.]**

of June, one of defts. saw pltf., & verbally requested him to allow the delivery of the iron to stand over, & pltf. verbally consented to his request. On Aug. 1 pltf. pressed defts. to take delivery, & defts., after some correspondence, wrote on Aug. 9 asking for further time. Pltf. again waited, but without result. On Oct. 20 pltf. brought his action for non-acceptance of the goods in accordance with the terms of the written contract. It was contended by defts. that by reason of the arrangement to postpone delivery & acceptance made before any breach of the contract, pltf. could not recover upon the original contract, there never having been readiness & willingness to deliver or any tender of delivery on pltf.'s part under such contract; & that pltf. could not rely on any new or substituted contract to accept at a later date, such contract being verbal only:—*Held*: the true effect of what took place between the parties being that pltf. voluntarily withheld delivery at the request of defts., no new contract being substituted for the original written contract, pltf. was entitled to maintain his action; & the damages must be estimated according to the market price of iron at a reasonable time after the last request of defts. to withhold delivery.—*HICKMAN v. HAYNES* (1875), L. R. 10 C. P. 598; 44 L. J. C. P. 358; 32 L. T. 873; 23 W. R. 872.

*Annotations*:—*Consd.* Levey v. Goldberg, [1922] 1 K. B. 688. *Refd.* Plevins v. Downing (1876), 1 C. P. D. 220; Hartley v. Hymans, [1920] 3 K. B. 475; British & Benlughtons v. North Western Cachar Tea Co., [1923] A. C. 48. *Mentd.* Morrell v. Studd & Millington, [1913] 2 Ch. 648; Morris v. Baron, [1915] A. C. 1.

**SECT. 3.—REMEDIES OF THE BUYER.**

**SUB-SECT. 1.—IN GENERAL.**

**2513. Action by company not under seal.]**—By a contract made with a co. incorporated under Cos. Act, 1862 (c. 89), for the purpose of excavating & working coal mines, deft. contracted to supply the co. with a pumping engine & machinery for the use of one of the co.'s mines:—*Held*: as the engine & machinery were necessary for the purposes for which the co. was formed, the co. could maintain an action for the breach of such contract, although it was not under seal.—*SOUTH OF IRELAND COLLIERY CO. v. WADDLE* (1869), L. R. 4 C. P. 617; 38 L. J. C. P. 338; 17 W. R. 896, Ex. Ch.

*Annotations*:—*Refd.* Wells v. Kingston-upon-Hull Corpn. (1875), L. R. 10 C. P. 402; Hunt v. Wimbledon L. B. (1878), 3 C. P. D. 208.

**2514. Service out of the jurisdiction—When granted.]**—*WANCKE v. WINGREN*, No. 1431, *ante*.

**2515. ———.]**—Leave will not be granted under R. S. C., Ord. 11, r. 1 (c), to a purchaser of goods under a c.i.f. contract from a foreign vendor to serve notice of a writ of summons on the vendor outside the jurisdiction in an action for breach of contract, where the essential breach on which the action is founded is the failure to ship the goods

at the foreign port, upon the allegation of the purchaser that the breach is the failure to tender shipping documents within the jurisdiction.—*JOHNSON v. TAYLOR BROTHERS & Co., LTD.*, [1920] A. C. 144; 89 L. J. K. B. 227; 122 L. T. 130; 36 T. L. R. 62; 64 Sol. Jo. 82; 25 Com. Cas. 69, H. L.

*Annotations*:—*Apld.* Rosler v. Hilbery, [1925] Ch. 250. *Refd.* Aron v. Comptoir Wegmont, [1921] 3 K. B. 435; Diamond Alkali Export Corpn. v. Bourgeois, [1921] 3 K. B. 443; Hemelryek v. Lyall Shipbuilding Co., [1921] 1 A. C. 1. *Re Schintz, Schintz v. Warr*, [1926] Ch. 710.

**2516. Failure to deliver—Right to repurchase by agreement—Repurchase at advantage in price—**

**—Right of seller to benefit.]**—A contract for the sale of oats by pltf. to defts., made in the form known as the American Grain Contract of the London Corn Trade Assocn., provided that "in case either party shall suspend payment of his debts . . . the other party shall be entitled immediately to resell or repurchase as the case may be." Before delivery of any portion of the goods pltf. suspended payment & defts. repurchased. At the date of the repurchase the market price was less than the contract price:—*Held*: pltf. was not entitled to recover from defts. the difference between the contract price & the market price at the date of the repurchase.—*SIMMONDS v. MILLAR & Co.* (1898), 15 T. L. R. 100; 4 Com. Cas. 64.

**2517. Joinder of parties—Claim against seller for breach of condition as to packing—Claim against carrier for delivery in bad condition.]**—Pltf. brought an action against deft. for the price of goods sold & delivered, the contract being one to deliver goods f.o.r. at P. Station for transmission to deft. at Exeter. Deft., by his defence, pleaded, first, that pltf. failed to deliver the goods in good condition, & therefore, did not fulfil his contract; & secondly, that if he did deliver them in good condition, he committed a breach of an implied term of his contract so to pack the goods that they should be reasonably fit to stand the ordinary risks of transit by rail. He also raised the same point against pltf. by way of counterclaim, & claimed damages. To that counterclaim he joined the G. W. Ry. co. as defts., & alleged against them that the goods having been delivered to them at P. Station in good condition, they, in breach of their duty as carriers, so treated them that when they arrived at their destination they were in bad condition, & claimed damages against them. He further pleaded that if the goods at the date of their delivery to the railway co. were in a good condition he claimed to recover damages against them, & alternatively, in the event of its being found that the goods at the date of their delivery to the railway co. were in bad condition, he claimed to recover damages against pltf. On an application by pltf., the judge at chambers refused to order that the counterclaim, in so far as it joined the railway co. as defts. to the counterclaim, should be struck out:—*Held*: the claims were not strictly alternative, so as to be mutually exclusive; but the relief claimed against the railway co. was sufficiently "connected with the

**PART VIII. SECT. 3, SUB-SECT. 1.**

**g. Failure to deliver—Right to repurchase by agreement—Whether statutory or common law rights affected.]**—Where a contract for the sale & purchase of wheat provides that should the seller not make delivery on or before the day appointed the buyer reserves the right to buy a sufficient amount of grain to fill the contract at the market price, the words, "I shall

reserve the right to buy," are pure surplusage & do not give the buyer any greater or less rights than he would have at common law & under Sale of Goods Ordinance, c. 39, C. O.—*TAINTER v. MCKINNON*, [1918] 1 W. W. R. 776; 39 D. L. R. 483; 13 Alta. L. R. 54.—*CAN.*

**h. ———. Right to repudiate.]**—*YODALEN v. ANGEHRN & PIEL*, [1914] T. P. D. 254.—*S. AF.*

**k. Action for money paid on behalf of seller—Payment for removal of goods fled to premises.]**—*WILSON v. MASON* (1876), 38 U. C. R. 14.—*CAN.*

**l. ———. Payment of freight to get possession of goods—Goods sold to be delivered free of freight.]**—*GILBERT v. McDONALD* (1889), 28 N. B. R. 102.—*CAN.*

**m. Right to reference for damages—After prima facie evidence of breach.]**—

original subject of the cause or matter" within Jud. Act, 1873 (c. 66), s. 24 (3), to enable the claim against the railway co. to be joined with the claim against pltf.—*SMITH v. BUSKELL, BUSKELL v. SMITH & GREAT WESTERN RY. CO.*, [1919] 2 K. B. 362; 88 L. J. K. B. 985; 121 L. T. 301; 35 T. L. R. 523; 63 Sol. Jo. 589, C. A.

**2518. Liability of seller for faulty construction of goods—Measure of damages—Costs of action by sub-vendee against purchaser.]**—Pltfs. having undertaken the repairs of a steamship for the owners, employed defts., an engineering co., to construct a new crank shaft. Defts. agreed to do so, upon the terms of their not being responsible for failure of material or workmanship beyond the replacement of faulty work supplied by them. In an action by pltfs. against the shipowners to recover the price of the shaft which had been supplied by defts., the shipowners counterclaimed for damages for breach of contract in consequence of the shaft having broken down on a voyage. Pltfs., after communicating with defts., who thereupon repudiated all responsibility, defended the counterclaim. The shipowners succeeded on their counterclaim, the shaft being found to have been of faulty workmanship. In an action by pltfs. to recover from defts. the costs of the shipowners' counterclaim, as damages resulting from defts.' breach of contract:—*Held*: the terms on which defts. had supplied the shaft did not relieve them from paying these costs; & pltfs. were entitled to recover the costs of the counterclaim except so far as they were increased by any issue other than the faultiness of the material or workmanship of the shaft.—*PRINCE OF WALES DRY DOCK CO. (SWANSEA), LTD. v. FOWNES FORGE & ENGINEERING CO., LTD.* (1904), 90 L. T. 527; 9 Asp. M. L. C. 555, C. A.

**2519. Failure of seller to perform condition—To provide adequate machinery—Damages.]**—Pltf. contracted with a mining co. to remove waste rock then lying in the waste dump at the mine within a period of two years, provided it did not exceed 50,000 tons, the co. to provide a crusher, & the rock so crushed to be put on rails & made available for sale. The crusher provided was capable only of crushing 3 tons per hour, & as the co. never did anything to put it in a condition to do more, the work, owing to the incapacity of the crusher, had to be stopped. Pltf. claimed damages:—*Held*: as it appeared from the written contract that both parties had agreed that something should be done, which could not effectually be done unless both concurred in doing it, although there were not express words to that effect in the contract, it must be construed as meaning that each party had agreed to do all that was necessary to be done on his part for the carrying out of the work. Defts. had failed to provide an adequate crusher, & had therefore failed to carry out their part of the contract.—*KLEINERT v. AROSSO GOLD MINING CO., LTD.* (1913), 58 Sol. Jo. 45, P. C.

*Annotation:—Refid. Colley v. Overseas Exporters*, [1921] 3 K. B. 302.

**2520. Rule of Produce Brokers' Association—Whether bar to exercise of common law rights.]**—

By two contracts made in Nov. 1918, the sellers, W. H. & co., sold to the buyer 3½ tons of Ceylonese essence of citronella, c.i.f. Marseilles. The contracts contained (*inter alia*) provisions as follows: "Delivery: shipment from Ceylon beginning of Dec. Terms: terms of the General Produce Brokers' Assocn., London." One of the terms of the Assocn. Rule 9 (f.) provided that "whenever . . . the seller had failed to fulfil the terms of the contract the buyer shall close by invoicing back the produce to the seller at once, at a price & weight to be fixed by arbn., which price shall be not less than 2 per cent. & not more than 10 per cent. over the estimated market value of the shipment contracted for on the day on which the default occurs, the difference to be due in cash in seven days."

The sellers committed a breach of both contracts by failing to ship the citronella at the time agreed. Negotiations took place between the parties; the buyer informed the sellers that he had already resold the citronella to buyers in France, but that he would be willing to extend the time for shipment if his buyers in France would consent to such extension. The French buyers agreed that, subject to their being allowed an abatement of the price, they would accept delivery if shipment was made not later than Jan. 23, 1919, & on this being communicated to them the sellers undertook to ship by that date.

The sellers again made default. The parties went to arbn., the buyer claiming as special damages what he would have made if he had been able to carry out his contract of resale to his buyers in France, & the sellers contending that no special damage was recoverable, & that in any event a sum of money was payable to them by the buyer in consequence of the operation of Rule 9 (f.). The umpire stated a case under Arbitration Act, 1889 (c. 49), s. 7, & submitted three questions for the ct.'s opinion:—*Held*: (1) in the circumstances the buyer was entitled to recover the special damage claimed; (2) Rule 9 (f.) was not an exclusive remedy & did not prevent the buyer from exercising his ordinary legal rights at common law; (3) in a case in which a buyer was entitled to recover special damage Rule 9 (f.) did not operate to give a defaulting seller the right to recover a sum from the buyer which could be set off against the sum payable as special damage.—*Re FL. BOURGEOIS & WILSON, HOLGATE & CO.* (1920), 25 Com. Cas. 260, C. A.

*Annotation:—Generally, Consd. Lancaster v. Turner*, [1921] 2 K. B. 222.

**2521. Time for making claim.]**—By a contract between sellers in London & buyers in New York a quantity of sodium cyanide was sold f.o.b. Havre, payment to be by net cash against documents in London by confirmed irrevocable credit. The contract provided by condition 4: "After the delivery order or any other document of title has been issued to the buyers, all risks are for account of buyers," & by condition 5, "Any claims in relation to weight, quality, or otherwise must be made in writing & delivered to the sellers

*COOK v. PATTERSON* (1884), 10 A. R. 645.—CAN.

**n. Right to recover money paid—Illegal sale.]**—Where money is paid on account of the purchase price of an article sold under a contract, made illegal by statute, the purchaser may recover, if he is not in *part delicto* with the vendor, & also if he is one of a class of persons that the legislature has sought to protect by the statute in question.—*HAUG BROTHERS & NEI-*

*LERMOE v. MURDOCH* (1916), 32 W. L. R. 572; 33 W. L. R. 442; 9 W. W. R. 474, 1064; 25 D. L. R. 666; 8 Sask. L. R. 126.—CAN.

**o. — Agreement for return on breach of condition.]**—*FARMERS ADVOCATE v. MASTER BUILDERS CO.*, [1917] 3 W. W. R. 1095; 38 D. L. R. 409; 28 Man. L. R. 340.—CAN.

**p. Whether right to recover part payment of price—Where buyer repudiates or abandons contract before comple-**

*tion.]*—Where after a part payment has been made under a contract of sale the purchaser, before completion, repudiates or abandons the contract, he can recover such payment only where there is something in the contract indicating an intention that he may do so.—*DUCHYZYSCZN v. BRONFMAN*, [1921] 1 W. W. R. 284; 56 D. L. R. 678; 14 Sask. L. R. 59.—CAN.

**q. Where no substantial performance by seller—Alternative remedies—**

*Sect. 3.—Remedies of the buyer: Sub-sects. 1 & 2, A.]*

within ten days of the date of delivery to the purchaser of the delivery order or other documents of title. Claims after such period will not be recognised." The goods were defective & the buyers made a claim more than ten days after the delivery of the documents to the buyers' bankers in London against cash, & they contended that, as both parties knew that condition 5 could not be complied with, it had no effect:—*Held*: condition 5 did not refer to the original issue of the documents of title under condition 4 to the buyers' London bankers, who for that purpose would be their agents, but to the handing over of the documents for the purpose of their coming into the possession of the person who was to take delivery as the ultimate purchaser, & therefore, as a proper effect could be given to condition 5, & as the buyers' claim was out of time under condition 5, even when so construed, the buyers' claim failed.—*TAYLOR (G. F.) & Co. v. OFVERBERG (E.) & Co.* (1923), 39 T. L. R. 637, C. A.

**2522. — Two weeks from delivery of goods—C.i.f. contract—Delivery of documents not sufficient to bar claim.]—**A contract for the sale of goods on c.i.f. terms contained a clause which provided that "no claims shall be valid unless made in writing within two weeks after the goods are delivered." The buyers made a claim under the contract. At the time when the claim was made more than two weeks had elapsed since delivery of the documents, but two weeks had not elapsed since delivery of the goods to the buyers from the ship. The sellers contended that the claim was out of time:—*Held*: the delivery contemplated by the contract was delivery of the goods from the ship to the buyers, & the claim was therefore within the time allowed.—*SCRIVEN BROTHERS v. SCHMOLL FILS & Co. INC.* (1924), 40 T. L. R. 677.

**Liability of broker as principal—Custom inconsistent with arbitration clause.]—***See AGENCY*, Vol. I., p. 636, No. 2584.

**Arbitration—Award directing delivery or payment in default.]—***See ARBITRATION*, Vol. II., p. 494, No. 1360.

**Effect of foreign judgment—For different cause of action.]—***See CONFLICT OF LAWS*, Vol. XI., p. 468, No. 1235.

**Action by joint purchasers.]—***See CONTRACT*, Vol. XII., p. 25, Nos. 38, 39.

**Jurisdiction of county court.]—***See COUNTY COURTS*, Vol. XIII., pp. 461, 462, Nos. 109, 115, 116.

**SUB-SECT. 2.—ACTION FOR NON-DELIVERY.**

**A. In General.**

*See Sale of Goods Act, 1893 (c. 71), s. 51 (1).*

**2523. When action lies—Agreement for barter—Sufficiency of pleading.]—**If A. & B. agree to exchange horses, & B. give a sum of money to A. to bind the bargain, A. may maintain an action against B. for not delivering his horse, without alleging any delivery of, or offer to deliver, his own to B., for the payment of earnest money vests

the property of pltf.'s horse in B. But in such an action A. must allege a demand on B. for his horse; stating that B. did not deliver, though often requested so to do, is not sufficient; & such a defective allegation may be taken advantage of on a general demurrer.—*BACH v. OWEN* (1793), 5 Term Rep. 409; 101 E. R. 229.

*Annotations:—*Consd. *Bowdell v. Parsons* (1808), 10 East, 359. *Expld.* *Radford v. Smith* (1838), 3 M. & W. 254.

**2524. — Sale by broker—Authority of broker cancelled before sale note made out.]—***FARMER v. ROBISON* (1805), 2 Camp. 339, n.

*Annotation:—*Refd. *Bell v. Balls*, [1897] 1 Ch. 663.

**2525. — Purchase by agents—Subsequent revocation of authority.]—**Pltfs., who were brokers, bought goods of deft., on account of H. & by his authority. The purchase was made in their own names, but the vendor was told that there was an unnamed principal. Pltfs. afterwards, under a general authority from H., contracted to sell the same goods, which deft. had not yet delivered. H., on hearing of the latter contract, told pltfs. that he would have nothing to do with the goods, either as buyer or seller; & in this they acquiesced. Deft. then refused to deliver the goods, & pltfs. sued him for damages sustained by them in consequence:—*Held*: the renunciation of the contract by H., & pltf.'s acquiescence in it, formed no objection to the right of pltfs. to recover.—*SHORT v. SPACKMAN* (1831), 2 B. & Ad. 962; 109 E. R. 1400.

*Annotations:—*Consd. *Calder v. Dobell* (1871), 40 L. J. C. P. 224. *Refd.* *Fawkes v. Lamb* (1862), 31 L. J. Q. B. 98.

**2526. —.]—***HARRISON v. LUKE*, No. 2422, ante.

**2527. — Sale of specific goods.]—**Where in an action against a party for not delivering certain sacks of flour to arrive by a ship at a certain port, it appeared, from the terms of the contract, that a specific thing was contracted for:—*Held*: it was not enough for pltf. to show that the ship arrived with an equal quantity of flour on board to that contracted to be delivered, but he must show that the specific flour contracted for arrived in that ship.—*HINCKER v. JAMES* (1846), 7 L. T. O. S. 65.

**2528. — Goods warehoused—Delivery order to vendee—Refusal of warehouseman to deliver.]—**Where goods stored in a warehouse are sold, & a warrant for them delivered to the vendee upon payment of the purchase-money, & the warehouseman refuses to deliver the goods to the purchaser upon presentation of the warrant, an action lies against the vendor for the non-delivery of the goods.—*THOL v. HINTON* (1855), 4 W. R. 26.

**2529. How far contract to be set out.]—**(1) It is not necessary, in an action for non-delivery of goods sold, to set out more of the contract than relates to the breach.

(2) Demand of delivery of the goods sold is sufficient proof of an averment that pltf. was ready & willing to perform his part of the contract, although that demand was made by his servant when he was not himself present to have done so, if required on the spot. Special *assumpsit* is the proper form of such an action.—*SQUIER v. HUNT* (1816), 3 Price, 68; 146 E. R. 193.

**2530. Necessity for readiness to receive & pay—**

*Whether right to damages barred by ineffective rejection of goods.]—*The fact that the buyer has ineffectively elected to reject the goods & treat the contract as repudiated does not debar him from subsequently falling back upon the alternative remedy for damages.—*POLLOCK & Co. v. MACRAE*, [1922] S. C.

(H. L.) 192.—*SCOT.*

r. —.—.]—Where there has been no substantial performance of a contract of sale, the purchaser has the option to cancel the contract or to avail himself of the *actio quanti minoris*.—*CEDARMONT STORE v. WEBSTER*, [1922] T. P. D. 106.—*S. AF.*

**PART VIII. SECT. 3, SUB-SECT. 2.—A.**

t. *When action lies—Action by grain broker—Custom of trade.]—*CANADIAN GRAIN CO., LTD. v. MITTEN BROTHERS, [1922] 1 W. W. R. 1109; 63 D. L. R. 438; 15 Sask. L. R. 257.—*CAN.*

**Averment of—Demand of delivery—Demand by servant.]—***SQUIER v. HUNT*, No. 2529, *ante*.

—[*See* Part VI., Sect. 1, sub-sects. 2 & 3, *ante*.

**What constitutes delivery.]—***See* Part VI., Sect. 2, sub-sect. 2, *ante*.

**2531. Agreements to grant lease with proviso for supply of goods—Whether grant of lease condition precedent to supply.]—**By an agreement under seal between defts. & pltf., after reciting that pltf. had erected a factory & works on land belonging to defts. for the purpose of carrying on the manufacture of patent fuel, & that defts. had made advances to pltf. towards their erection, & had agreed to grant a lease of the land & buildings to pltf., “& to enter into certain other arrangements for the supply of coal for the manufactory & otherwise, on the terms & conditions hereinafter mentioned,” it was agreed, amongst other things, that defts. should grant a lease of the land & buildings to pltf. for the term of twelve years from Mar. 25 then last, at a peppercorn rent, & that immediately on such lease being so granted, pltf. should mortgage the same to defts. as a security for their advances; that all the coal consumed & used by pltf. for the purpose of his manufacture during the term of twelve years should be bought of defts., provided defts. could & should supply him with the quantity that should from time to time be required by him, or to such extent as the defts. could supply, & defts. should charge for the same a certain price, & no more; & pltf. should use & consume no other coal at the factory during the term than that which was bought & purchased of defts., excepting in the event of pltf. requiring more coal than defts. could & should supply him with: that defts. should not be compelled to supply more than 500 tons per week; & that in case defts. should, from some substantial cause, be unable to supply small coal to the extent agreed upon, defts. should give to pltf. six months’ notice of the same, & pltf. should then be at liberty to obtain his supply from any other source: that in the lease to be granted there should be covenants by pltf. not to use the premises for any other purpose than for the manufacture of patent fuel; & that the agreement, to be determinable as aforesaid, should continue for the term of twelve years from the date thereof. In an action for breach of the implied covenant by defts. in the agreement to supply 500 tons of coal to pltf. weekly:—*Held*: (1) the granting of the lease by defts. was not a condition precedent to pltf.’s right to the coal; (2) the inability of defts. to supply the coal did not exonerate them from liability on the covenant, unless the six months’ notice had been given according to the agreement; (3) the covenant of defts. was limited to the supply of coal for the purpose of the patent fuel manufacture.—*WOOD v. COPPER MINERS’ CO.* (1854), 14 C. B. 428; 2 C. L. R. 1735; 23 L. J. C. P. 209; 1 Jur. N. S. 65; 139 E. R. 176; *on appeal* (1856), 17 C. B. 594, n., Ex. Ch.

*Annotations:—Generally, Mentd. Shu v. Edwards* (1854), 2 C. L. R. 749; *Bowes v. Croll* (1856), 6 E. & B. 255; *Martin v. Smith* (1874), L. R. 9 Exch. 50.

**2532. — Supply limited to particular purpose.]—***WOOD v. COPPER MINERS’ CO.*, No. 2531, *ante*.

**2533. — Proviso terminable on notice—Necessity for notice.]—***WOOD v. COPPER MINERS’ CO.*, No. 2531, *ante*.

**2534. — Statement of purpose for which goods required—Necessity for.]—**(1) By an agreement under seal, reciting, amongst other things, that pltf. had erected a factory, etc., for the purpose of

carrying on the manufacture of patent fuel, etc., & that defts. had agreed to grant a lease of the land, etc., to pltf., & to enter into certain other arrangements “for the supply of coal for the manufactory,” & otherwise, on the terms therein mentioned, it was agreed, amongst other things, that all the coals consumed by pltf. for the purpose of his manufacture during a certain term, should be purchased of defts., & that defts. should not be compelled to supply more than 500 tons weekly. In an action against defts. for a breach of the implied contract to deliver 500 tons of coal weekly, the declaration averred that pltf. was at all times, etc., ready to receive that quantity, of which defts. had notice, & required defts. to deliver the same, & that “he had done all things on his part, & all things had happened, to entitle him to have the said 500 tons of coals in each week delivered to him,” etc.:—*Held*: the declaration was sufficient, although it contained no specific averment that the supply was required by pltf. for the purpose of the manufacture of patent fuel.

(2) Defts. by their third plea alleged, that, before the accruing of the causes of action, & from thence hitherto, pltf. had wholly discontinued & abandoned the manufacture of the said fuel upon the terms of the agreement:—*Held*: a good plea, upon the assumption that it meant a permanent abandonment of the works, & not, as pltf. in his replication averred, a mere temporary suspension thereof in consequence of defts.’ failure to deliver the stipulated quantity of coal.—*WOOD v. COPPER MINERS’ CO.* (1856), 17 C. B. 561; 25 L. J. C. P. 166; 139 E. R. 1195.

**2535. Joinder of third party—Embarrassment of plaintiff.]—**In an action against defts. for non-delivery of certain iron rods of the quality contracted for, defts. proceeded to bring in H., a foreigner, as a third party, under R. S. C., Ord. 16, r. 18, on the ground that they had contracted with him in respect of the iron rods so supplied & upon the same terms. It was not denied that the clause as to quality was the same as between pltf. & defts. on the one hand & defts. & H. on the other. Pltf., however, relied upon certain admissions made by defts. as regards the subject-matter of the contract, which showed that the action was, as between pltf. & defts., an undefended one. It further appeared that the case had already been set down for trial, & would be reached in a day or two. Upon application made by defts., under R. S. C., Ord. 16, r. 21, to give directions as to the mode of trial:—*Held*: the ct. had power to consider whether the case was one in which a third party ought to be allowed to come in, & ought to refuse the application where the effect of such third party being introduced would be to embarrass & delay pltf.—*SCHNEIDER v. BATT & CO.* (1880), 50 L. J. Q. B. 389, C. A.; *subsequent proceedings* (1881), 8 Q. B. D. 701, C. A.

**2536. Service out of jurisdiction.]—***NATHAN v. SEITZ* (1888), 4 T. L. R. 570, D. C.

**Action by agent.]—***See* AGENCY, Vol. I., pp. 651, 652, Nos. 2706, 2708.

**Against whom action lies—Broker—Custom of trade.]—***See* AGENCY, Vol. I., p. 636, No. 2581.

— **Contracting so as to be personally liable.]—***See* AGENCY, Vol. I., p. 637, No. 2586.

**Jurisdiction of county court.]—***See* COUNTY COURTS, Vol. XIII., p. 463, No. 128.

**Discovery.]—***See* DISCOVERY, Vol. XVIII., p. 136, No. 808.

**Liability of surety.]—***See* GUARANTEE, Vol. XXVI., pp. 79, 80, No. 569.

*Sect. 3.—Remedies of the buyer: Sub-sect. 2, B. (a).]*

*B. Defences to Action.*

*(a) In General.*

*See Sale of Goods Act, 1893 (c. 71), s. 51 (1).*

**2537. Absence of binding contract.]—A.** having proposed to sell goods to B., gave him a certain time at his request to determine whether he would buy them or not; B. within the time determined to buy them, & gave notice thereof to A.; yet A. was not liable in an action for not delivering them, for B. not being bound by the original contract, there was no consideration to bind A.—*COOKE v. OXLEY* (1790), 3 Term Rep. 653; 100 E. R. 785.

*Annotations:—Consd.* Adams v. Lindsell (1818), 1 B. & Ald. 681. *Apld.* Routledge v. Grant (1828), 4 Bing. 653. *Distd.* Warlow v. Harrison (1859), 1 L. T. 211. *Consd.* Stevenson v. McLean (1880), 5 Q. B. D. 346. *Refd.* Humphries v. Carvalho (1812), 16 East, 45; Dickinson v. Dodds (1876), 2 Ch. D. 463; Bristol, Cardiff & Swansea Aerated Bread Co. v. Maggs (1890), 44 Ch. D. 616; Raeburn & Verel v. Burness (1895), 1 Com. Cas. 22. *Mentd.* Re Hoyle, *Ex p.* Waters (1873), 21 W. R. 554.

**2538.** —.]—Pltfs., guardians of the poor of K., with a view to obtaining tenders for meat, etc. for the use of the workhouse issued an advertisement stating that they would receive tenders for the supply of the workhouse with meat for three months, from 30 to 50 stone, more or less, per week, describing the sort of meat; that sealed tenders were to be sent to the clerk of the corpn.; & that all contractors would have to sign a written contract after acceptance of the tender. Deft. wrote to pltfs. to say, that he proposed to supply the workhouse with meat, according to advertisement, for the ensuing three months, at 6d. per pound. This tender was accepted by pltfs., & deft. was informed, that he was appointed butcher; but, immediately afterwards, he wrote to pltf. to say, that he declined the appointment:—*Held*: as a written contract was to be executed, the acceptance of the tender did not form a binding contract, so as to render deft. liable for refusing to supply the workhouse with meat, in accordance with his tender.—*KINGSTON-UPON-HULL GOVERNOR, ETC. OF THE POOR v. PETCH* (1854), 10 Exch. 610; 3 C. L. R. 196; 24 L. J. Ex. 23; 19 J. P. 40; 156 E. R. 583.

*Annotation:—Refd.* Leney v. Taplin (1869), 21 L. T. 204.

**2539. Alteration of deed of sale.]—Where** by arts. under seal deft. bound himself under a penalty to deliver to pltf., by a certain day, "the whole of his mechanical pieces, as per schedule annexed"; the schedule forms part of the deed, which, without it, would be insensible; & therefore in covenant for the breach of the contract in not delivering the pieces; in which pltf., after setting out the arts. executed by deft., averred that to the arts. there was then & there annexed & subscribed a certain schedule of the several pieces of mechanism agreed to be delivered, etc.; upon *non est factum* pleaded, it is competent to deft. to show in his defence, that at the time of the execution of the arts. the schedule was not annexed, but that in fact it was afterwards subscribed & annexed by the witness to the arts., who was the agent of both parties, immediately after the execution of the arts., & after one of the parties had left the room; though the pieces mentioned in the schedule so annexed were such as had been agreed upon by the parties before the execution

of the arts.—*WEEKS v. MAILLARDET* (1811), 14 East, 568; 104 E. R. 719.

*Annotations:—Distd.* Dyer v. Green (1847), 1 Exch. 71. *Refd.* Hibblewhite v. M'Morine (1840), 6 M. & W. 200; West v. Steward (1845), 14 M. & W. 47; Daines v. Heath (1847), 3 C. B. 938; Vint v. Vint (1888), 4 T. L. R. 630. *Mentd.* England v. Downs (1840), 2 Beav. 522; The Queensland Land & Coal Co., Davis v. Martin, [1894] 3 Ch. 181; Re Deprez, Henriques v. Deprez, [1917] 1 Ch. 24.

**2540.** —.]—Pltfs., a corpn., required & advertised for between 300 & 500 tons of granite spalls for workhouse purposes to be delivered by a particular day. Defts. sent in a tender which was accepted. The usual form of contract used by pltfs. was sent to defts. Two days later defts. sent back the contract signed by them, agreeing to deliver the quantity by the day fixed, but adding the words "Weather & other circumstances permitting." Four days later pltfs. wrote to defts. acknowledging the receipt of the signed contract, but pointing out that they, pltfs., had erased the words "other circumstances." On the same day defts. wrote to pltfs. that they had put the order in hand. Four days later pltfs. affixed their common seal to the contract. Defts. did not execute any part of their contract by the day specified, alleging that want of ships & stress of weather had prevented them from so doing. After a month's delay pltfs. were obliged to purchase granite spalls at a higher price than that tendered by defts., & brought their action for damages for breach of the agreement:—*Held*: as defts. had assented to the alteration in the contract made by pltfs., there was mutuality between the parties at the time the seal was affixed, & pltfs. were entitled to succeed in their action.—*DARTFORD UNION GUARDIANS v. TRICKETT & SONS* (1888), 59 L. T. 754; 53 J. P. 277; *affd.* (1889), 5 T. L. R. 619, C. A.

*Annotation:—Mentd.* Dewhurst v. Salford Union Grdns. (1924), 41 T. L. R. 151.

**2541. Accord & satisfaction.]—In** an action for not delivering a pianoforte to pltf., according to the agreement of defts.' testator to do so at pltf.'s return to England, the exors. pleaded that pltf. had bought another piano from testator, & accepted it in satisfaction & discharge of testator's promise stated in the declaration. No specific evidence being given in support of the plea:—*Held*: the lapse of twenty years from the making a contract to be performed in a future event did not of itself prove the allegations in the plea, whether taken as a plea of accord & satisfaction of the original contract, or of performance of it.—*SIBONI v. KIRKMAN* (1836), 1 M. & W. 418; 2 Gale, 51, 53; Tyr. & Gr. 777; 5 L. J. Ex. 212; 150 E. R. 497; *subsequent proceedings, sub nom.* *KIRKMAN v. SIBONI* (1838), 4 M. & W. 339, Ex. Ch. *Annotations:—Mentd.* Cooper v. Slade (1858), 6 H. L. Cas. 746; Cross v. Williams (1862), 6 L. T. 434.

**2542.** —.]—To a declaration upon a contract for the delivery of 600 loads of timber at Dantzic, deft. pleaded, that, after the accruing of the causes of action, & before suit, it was agreed between pltfs. & deft., that deft. should deliver to pltf. in London certain other timber, & that such other timber should be accepted & received by pltfs. in full satisfaction & discharge of all causes of action upon the contract in the declaration mentioned; that deft., in part performance of such agreement, delivered to pltfs., & they accepted & received of him, 143 loads, on the terms

**PART VIII. SECT. 3, SUB-SECT. 2.—B. (a).**

**2537 i.** *Absence of binding contract.]—OGILVIE FLOUR MILLS CO., LTD. v.*

*MORROW CEREAL CO.* (1918), 41 O. L. R. 58; 39 D. L. R. 463; 130 O. W. N. 483.—*CAN.*

*a.* — *For particular form of delivery.]—VANBUSEKIRK v. GREEN*

(1850), 12 N. B. R. (1 Han.) 25.—*CAN.*

**2541 i.** *Accord & satisfaction.]—REID v. ROBERTSON* (1876), 25 C. P. 568.—*CAN.*



aforesaid, in full satisfaction & discharge of the causes of action in the declaration mentioned, so far as they related to 143 loads of timber in the contract mentioned; & that deft., within a reasonable time, tendered plaintiffs the residue of the timber to complete the contract:—*Held*: the plea was neither good as a plea of accord & satisfaction, for want of an averment of satisfaction; nor as a plea of performance, there being no averment, express or implied, that the substituted agreement was accepted in satisfaction.—*GABRIEL v. DRESSER* (1855), 15 C. B. 622; 3 C. L. R. 415; 24 L. J. C. P. 81; 24 L. T. O. S. 272; 3 W. R. 236; 139 E. R. 568.

*Annotations*:—*Mentd.* Blagrove v. Bristol Waterworks Co. (1856), 1 H. & N. 369; *Chappell v. Davidson* (1856), 18 C. B. 194; *Traherne v. Gardner* (1857), 8 E. & B. 161; *Goldsmid v. Hampton* (1858), 4 Jur. N. S. 1108.

**2543. Performance.**—*SIBONI v. KIRKMAN*, No. 2541, *ante*.

**2544.** —.]—*GABRIEL v. DRESSER*, No. 2542, *ante*.

**2545. Extension of time of delivery.**—Declaration, in *assumpsit*, stated that pltf. agreed to buy, & deft. to sell, a cargo to be delivered "on the 20th to the 22nd instant," to be paid for by acceptance three months from delivery; & that afterwards, before the 22nd, pltf., at request of deft. gave time for the delivery to the 24th; breach, that deft., though requested, on 24th, to deliver, had not, on 24th or any other time, delivered; special damage by rise of price between the agreement & breach. Plea, that the giving of time was part of a contract for the sale of goods at the price of above £10; & that there was no part acceptance, or earnest, or note or memorandum in writing. Replication, that the giving of time was not part of the contract, etc. It appeared that there was a written contract, as stated in the declaration, for the delivery "on the 20th to the 22nd"; but, the 22nd falling on Sunday, pltf., at deft.'s request, verbally agreed to enlarge the time to the 23rd or 24th. The price fluctuated between the time of the agreement & the 24th, being higher on the last day. It was understood that the enlargement of time would postpone the delivery of the three months' acceptance:—*Held*: on these facts deft. under Stat. Frauds, s. 17, was entitled to the verdict, the enlargement of time having materially varied the contract, substituting for it a new contract on a similar consideration, & not being merely a dispensation from performance on a particular day.—*STEAD v. DAWBER* (1839), 10 Ad. & El. 57; 2 Per. & Dav. 447; 9 L. J. Q. B. 101; 113 E. R. 22.

*Annotations*:—*Appl.* Marshall v. Lynn (1840), 6 M. & W. 109. *Distd.* Ogle v. Vane (1867), L. R. 2 Q. B. 275. *Consd.* Hickman v. Haynes (1875), L. R. 10 C. P. 598; *Morris v. Baron*, [1918] A. C. 1; *British & Beningtons v. N. W. Cachar Tea Co.*, [1923] A. C. 48. *Refd.* Martindale v. Smith (1841), 1 Q. B. 389; *Moore v. Campbell* (1854), 10 Exch. 323; *Noble v. Ward* (1867), L. R. 2 Exch. 135; *Tyers v. Rosedale & Ferryhill Iron Co.* (1874), 29 L. T. 751; *Plevins v. Downing* (1876), 1 C. P. D. 220; *Williams v. Moss Empires*, [1915] 3 K. B. 242. *Mentd.* Coldham v. Showler (1846), 3 C. B. 312; *Emmet v. Dewhurst* (1851), 3 Mac. & G. 587.

**2546. Absence of request to deliver.**—*JONES v. GIBBONS*, No. 1613, *ante*.

**2547.** —.]—In Sept. 1913, defts. by their representative contracted to sell to pltf. 50 dozen red Welsh roller skins at 27s. per dozen "delivery

as required." Between the middle of Nov. 1913, & the end of Sept. 1914, defts. delivered 20 dozen skins at the request of pltf. in 4 lots of 5 dozen each, but no further deliveries took place nor were any requested by pltf., their manager having forgotten the existence of the contract. In June, 1915, defts.' representative left their employ, & in July, 1915, pltf. gave him a personal order for & accepted delivery of 50 dozen skins of the same kind & at the same price as that specified in the contract with defts. Between June, 1915, & Apr. 1916, another representative of defts. called upon pltf. for orders, but was told there was nothing for him. In Nov. 1915, defts. by letter offered pltf. 20 to 30 dozen skins similar to those previously supplied to them & at the same price, but pltf. replied that they had bought some time ago their requirements for the next year. In July, 1917, pltf. requested the delivery of the remaining 30 dozen skins under the contract, but defts. refused to deliver them, alleging that the contract was no longer in existence. Pltf. having brought an action in the county ct. to recover damages for defts.' breach of contract in refusing to deliver the remaining skins, the county ct. judge held that pltf. had abandoned the contract, but whether he was right or wrong on that point that they behaved in such a way that defts. reasonably believed that pltf. considered the contract was at an end, & gave judgment for defts.:—*Held*: (1) an inordinate delay on the part of both sides having taken place it was not necessary, in order to put an end to the contract, for defts. to give notice to pltf. that if they did not request further deliveries defts. would cancel the contract, & there was evidence upon which the county ct. judge could find that the contract had been abandoned; (2) upon the facts the count ct. judge was justified in finding that pltf. were estopped from denying that the contract had come to an end.—*PEARL MILL CO. v. IVY TANNERY CO.*, [1919] 1 K. B. 78; 88 L. J. K. B. 134; 120 L. T. 28; 24 Com. Cas. 169, D. C.

*Annotation*:—*Refd.* Hartley v. Hymans, [1920] 3 K. B. 475.

**2548. Part of goods wrongfully taken by purchaser—Trespass.**—To a declaration on a contract for the sale of growing trees, alleging for breach, that, although deft. had permitted pltf. to fell & carry away certain of the trees, he refused to permit him to fell & carry away the residue, deft. pleaded, that, after the promise & before breach pltf. fraudulently felled & carried away trees which were not sold to him, exceeding in number & value the residue which trees so fraudulently felled & carried away were taken by pltf. in fraudulent substitution of the trees purchased by him as in the declaration mentioned; that pltf. kept the trees so fraudulently felled & carried away by him; & that therefore deft. refused to permit him to fell & carry away the residue of the trees contracted for:—*Held*: the plea was bad, inasmuch as it showed not a rescission or abandonment of the contract by pltf., but a mere act of trespass, or wrongful act, for which deft. might have a remedy.—*LEWIS v. CLETON* (1854), 14 C. B. 245; 2 C. L. R. 1350; 23 L. J. C. P. 68; 22 L. T. O. S. 259; 18 Jur. 291; 2 W. R. 230; 139 E. R. 101.

*Annotation*:—*Mentd.* Wilkin v. Reed (1854), 15 C. B. 192.

**2545 i. Extension of time of delivery.**—*MOLSON v. BRADBURN* (1866), 25 U. C. R. 457.—*CAN.*

**2546 i. Absence of request to deliver.**—*LOCKIE v. REID & CO., LTD.*, [1916] St. R. Qd. 10.—*AUS.*

**2546 ii.** —.]—*ANDERSON v. VANSITTART* (1849), 5 U. C. R. 335.—*CAN.*

**2546 iii.** —.]—*MASSEY-HARRIS CO. v. ZWICKER* (1907), 3 E. L. R. 193.—*CAN.*

**b. — Within time limited.**—*TINANT v. RUPERT*, [1921] 3 W. W. R. 152.—*CAN.*

**c. Refusal by buyer to accept part—Offer to reconsider refusal.**—In an

action by the purchaser for return of the deposit & for damages for non-delivery of the sheep:—*Held*: a refusal by the purchaser to accept some of the sheep which he should have accepted, which refusal the jury found the purchaser was willing to reconsider, did not entitle the vendor to refuse to deliver the sheep which the purchaser



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**2549. Abandonment of purpose for which goods required.]—**WOOD *v.* COPPER MINERS CO., No. 2531, *ante*.

**2550. Mistake of agent—Contract repudiated before delivery.]—**Commission agents, having a chattel to sell at a fixed price, & their salesman having by mistake agreed to sell it at one-third of that price, & the mistake having been explained, & the contract repudiated, before the chattel was delivered:—*Held*: the purchaser could not sue to enforce its delivery.—ISAAC *v.* BOULNOIS (1863), 11 W. R. 341.

**2551. Sale of unascertained goods—Failure of manufacturer to deliver to seller.]—**By a contract in writing the sellers sold to the buyers "200 tons 5 per cent. more or less," of Australasian beef tallow of two specified brands, 1919 make, shipment to be made from Australia during the months between May & Aug. The contract provided that should the shipment be delayed by strikes or other case of *force majeure* the time of shipment should be extended by one month. Should the delay exceed one month buyers should have the option of cancelling the contract forthwith or of accepting the goods for shipment as soon as possible, but should shipment not be possible within twelve months from the date of shipment originally stipulated contract to be void. The sellers, although they contracted as principals, were the agents of the Q. M. E. co. which manufactured tallow of the brands specified at two works in Australia. The Q. M. E. co. did not in fact manufacture tallow in 1919 at one of their works, although they could have done so & could have produced tallow of the brand manufactured at those works. They produced during 1919 only 161 tons of beef tallow of the other specified brand at their other works, but production of tallow at those works was prevented by a strike of employees between June 23 & Sept. 8 which resulted in a complete cessation of operations. The buyers elected to extend the time for delivery, but no delivery was made, although the Q. M. E. co. offered to deliver the 161 tons when shipment was possible. The buyers claimed in an arbitration to recover damages for the non-delivery of 39 tons, namely, the difference between 161 tons & 200 tons:—*Held*: (1) inasmuch as the contract was for the sale of unascertained goods & not of specific goods an implied term could not be read into the contract exonerating the sellers from liability if the co. who manufactured the goods did not for any reason manufacture them, & there was in consequence no frustration or cancellation of the contract; (2) as the contract was for the sale of "200 tons, 5 per cent. more or less," of tallow the sellers could comply with their obligation under the contract by delivering 5 per cent. less than 200 tons, namely, 190 tons, & therefore the sellers could only be held liable in damages for not delivering up to 190 tons.—*Re* THORNETT & FEHR & YUILLS, LTD., [1921] 1 K. B. 219; *sub nom.* THORNETT & FEHR *v.* YUILLS, LTD., 90 L. J. K. B.

was willing to accept.—FRANCIS *v.* LYON (1907), 4 C. L. R. 1023.—AUS.

d. —.—.]—ROBERTSON *v.* HAYES (1857), 15 U. C. R. 293.—CAN.

e. *Sale to partnership—Dissolution of partnership before delivery.]—*Defts. contracted to deliver lumber to a firm of three partners. Before delivery the firm was dissolved, & defts. refused to carry out their contract. In an action brought in the individual names of the three partners for damages

for non-delivery:—*Held*: the dissolution of the firm was no justification in law for defts.' refusal to carry out their contract.—MCCRANEY *v.* MCCOOL (1890), 19 O. R. 470; 18 A. R. 217.—CAN.

#### PART VIII. SECT. 3, SUB-SECT. 2.—B. (b).

2553 i. *What amounts to impossibility—Illegality of performance—Embargo.]—*MOYNEUR, LTD. *v.* DOMINION SUGAR

361; 124 L. T. 218; 37 T. L. R. 31; 20 Com. Cas. 59, D. C.

*Annotation:—As to (1) Dtd. Re Badische Co., Re Bayer Co., Re Griesheim Elektron, Re Kalle, Re Berlin Aniline Co., Re Meister Lucius & Bruning, [1921] 2 Ch. 331.*

2552. *Conduct of buyers.]—*ROSE & FRANK CO. *v.* CROMPTON (J. R.) & BROTHERS, LTD., No. 2390, *ante*.

*Impossibility of performance.]—See* Sub-sect. 2, B. (b), *post*.

*Delivery by instalments—Right to repudiate.]—See* Part VI., Sect. 2, sub-sect. 9, C., *ante*.

*Right of stoppage in transitu.]—See* Part VII., Sect. 4, *ante*.

*Right of unpaid seller to withhold delivery.]—See* Part VII., Sect. 7, *ante*.

*Resale by unpaid seller.]—See* Part VII., Sect. 8, *ante*.

#### (b) Impossibility of Performance.

*See* Sale of Goods Act, 1893 (c. 71), s. 51 (1), & generally, CONTRACT, Vol. XII., pp. 368 *et seq.*

2553. *What amounts to impossibility—Illegality of performance—Embargo.]—*BOUCHER *v.* LAWSON (1735), Cunn. 144; *Lee temp. Hard.* 85; 94 E. R. 1116; *subsequent proceedings* (1736), *Lee temp. Hard.* 194.

*Annotations:—Refd.* Newberry *v.* Colvin (1830), 1 Cr. & J. 192; Ashinall *v.* Wood (1857), 3 Jur. N. S. 232. *Mentd.* Yates *v.* Hall (1785), 1 Term Rep. 73; Jackson *v.* Blanche (Owners), [1908] A. C. 126.

2554. —.—.—.]—Rice was shipped at Rangoon on defts.' steamship for Galatz under bills of lading which contained the exception "restraint of princes." On June 18, the ship being then at Beyrout, defts. were informed by a govt. official at Galatz that the importation of rice from Rangoon was prohibited by law, & that the discharge would not be permitted. The law did not, in fact, prohibit the importation of rice. On June 23, by order of defts. & contrary to the wish of plffs., the indorsees of the bills of lading, the ship proceeded to London, where the rice was sold at a loss:—*Held*: defts. were not justified in treating the contract as being, on June 23, impossible of performance, & were therefore liable in damages for non-delivery of the rice.—BRUNNER *v.* WEBSTER & BARRACLOUGH (1900), 16 T. L. R. 217; 5 Com. Cas. 167.

2555. —.—.—.]—Defts. failed (*inter alia*) to deliver for export an instalment of about 10 tons of aniline oil during Dec. & Jan. 1914, 1915. For practically the whole of these months there was an absolute prohibition of the export of aniline oil by Order in Council:—*Held*: there was no obligation on defts., the sellers, the contract being f.o.b., to use their best endeavours to procure a licence for export, & they were not liable for the non-delivery of the 10 tons.—BRANDT (H. O.) & CO. *v.* MORRIS (H. N.) & CO., LTD., [1917] 2 K. B. 784; 87 L. J. K. B. 101; 117 L. T. 196, C. A.

*Annotations:—Expld.* Brightman *v.* Tate, [1919] 1 K. B. 463. *Mentd.* Federi Akt. Transatlantic *v.* Drughorn, [1918] 1 K. B. 394; Ariadne S.S. Co. *v.* McKelvie, [1922] 1 K. B. 518.

—.—.—.]—*See* CONTRACT, Vol. XII., pp. 392-395, Nos. 3202-3213.

Co., LTD. (1921), 20 O. W. N. 120; 58 D. L. R. 132.—CAN.

2553 ii. —.—.—.]—SCHMIDT *v.* WILSON & CANHAM, LTD. (1920), 47 O. L. R. 194; 18 O. W. N. 15.—CAN.

f. —.—.— *Restriction on import in form stipulated—Import of proprietary medicine not permitted in bulk.]—*MCCARTER, BURR CO., LTD. *v.* HARRIS (Alfa.), [1922] 3 W. W. R. 929; 70 D. L. R. 420.—CAN.

g. —.—.— *Trading with enemy.*

**2556. Failure of supply—Contract to supply timber for repairs.]**—Pltf. declared against defts. for not delivering, for the repairs of certain premises, sufficient timber growing thereon, according to their covenant. Defts. pleaded, that there was not timber growing on the premises sufficient & proper for the repairs:—*Held*: the plea, though informal for not stating that there was not timber sufficient for the repairs or any part thereof, was good, except on special demurrer.—*SNELL v. SNELL* (1825), 4 B. & C. 741; 7 Dow. & Ry. K. B. 249; 4 L. J. O. S. K. B. 44; 107 E. R. 1236.

*Annotation*:—*Reid*. Smith v. Jennings (1840), 4 Jur. 1160.

**2557. — Goods requisitioned by government.]**—Deft. entered into a contract for the sale to pltf. of 50 tons of Blairgowrie raspberries. Deft. was the agent of K. & H., & both parties expected that the raspberries would be K. & H.'s raspberries. K. & H. had sold a quantity of raspberries to buyers on behalf of the govt., as well as to private buyers. As the crop was not sufficient to satisfy all the orders which K. & H. had received, the Army Council served upon K. & H. a requisition, requiring them to place at the disposal of the Army Council 363 tons of raspberries, & to deliver the same to such persons & in such quantities as the Director of Army Contracts might direct. K. & H. delivered to the Govt. all the raspberries that were gathered subsequently, & pltf. only obtained 9 tons under their contract. In an action by pltf. for breach of contract:—*Held*: (1) deft. was liable as a contracting party, although both parties intended that the raspberries should be K. & H.'s raspberries; (2) the requisition served upon K. & H. was a valid requisition under the regulation 2b. of the Defence of the Realm Regulations Consolidated, as being a notice of intention to take possession of the raspberries when gathered; an exercise of the powers of the Army Council under the regulation for the purpose of procuring a necessary supply for the use of the troops was an exercise of their powers for the purpose of securing the public safety or the defence of the realm; & therefore deft. was protected by Defence of the Realm (Amendment) No. 2 Act, 1915 (c. 37), s. 1 (2), against liability in respect of the non-fulfilment of the contract, as far as it was due to the interference of the Army Council & he was only liable in respect of the balance.—*LIPTON, LTD. v. FORD*, [1917] 2 K. B. 647; 86 L. J. K. B. 1241; 116 L. T. 632; 33 T. L. R. 459; 15 L. G. R. 699.

*Annotations*:—As to (2) *Consd.* Brightman v. Tate (1919), 35 T. L. R. 209; Hudson's Bay Co. v. MacLay (1920), 36 T. L. R. 469. *Appl.* Gurney v. Houghton (1920), 123 L. T. 706. *Reid*. Shuttler v. Rolfe (1920), 36 T. L. R. 828.

—See CONTRACT, pp. 381, 382, 396.  
398, Nos. 3149–3152, 3216, 3226.

**2558. — Express proviso relating to impossibility.]**—By agreement in writing defts. sold to pltf. 250 bales of Manila hemp, shipment to be made from a port or ports in the Philippine Islands sailer or sailers between May 1 & July 31, 1898;

he agreement contained a clause that if the goods did not arrive from loss of vessel or other unavoidable cause the contract was to be void. In consequence of the Spanish American war it was in a business sense impossible for defts. to ship hemp by sailer between the specified dates, but in Sept. they shipped hemp, which would otherwise have satisfied the contract, by steamer, & on Oct. 27 declared it against the contract; pltf. refused to accept this declaration, & returned it to defts., who, on Nov. 4, wrote that it was the only declaration that they were in a position to make:—*Held*: (1) the stipulations as to shipment by sailer or sailers between the specified dates were conditions precedent & the declaration was bad; it was not an implied condition of the contract that it should be possible to ship by sailer between these dates; defts. were not protected by the express condition as to non-arrival of the goods, the non-arrival not having been occasioned by any unavoidable cause within the meaning of the contract; (2) the damages were to be ascertained by reference to the market price on Nov. 4, the day on which defts. finally notified their inability to make a declaration in accordance with the contract.

The difference between the contract price & the market price on Nov. 4, is the measure of damages (*LORD RUSSELL, C.J.*).—*ASHMORE & SON v. COX (C. S.) & Co.*, [1899] 1 Q. B. 436; 68 L. J. Q. B. 72; 15 T. L. R. 55; 4 Com. Cas. 48.

*Annotations*:—As to (1) *Appl.* Blackburn Bobbin Co. v. Allen, [1918] 2 K. B. 467; Sargant v. Paterson (1923), 129 L. T. 471. *Reid*. Nickoll & Knight v. Ashton, Edridge, [1900] 2 Q. B. 298.

**2559. — — — — —.]**—A contract for the supply of bunker coal by a coaling co. to shippers was made in Dec. 1914, after the commencement of war, in a pre-war form of contract, which provided for the cancellation of the contract, by the suppliers in case either Great Britain or France became engaged in war with any other Power. A slip, however, was attached to the contract, which provided that, "notwithstanding the war clauses in the attached contract . . . depots, will supply during the present hostilities . . . & should circumstances arise to further interfere in any manner with the supply, shipment, carriage, or delivery of coals, this contract is subject to cancellation by the suppliers":—*Held*: the difficulty of obtaining vessels owing to the shortage of ships, & the rise of freights, which was evidence of such shortage, were an "interference" within the meaning of the slip, & the suppliers were entitled to cancel the contract.—*SCHIEPVAART MAATSCHAPPIJ GYLSEN v. NORTH AFRICAN COALING CO.* (1916), 85 L. J. K. B. 1386; 114 L. T. 755; 13 Asp. M. L. C. 339.

*Annotation*:—*Reid*. Tennants, Lancashire v. Wilson (1917), 23 Com. Cas. 41.

**2560. — — — — —.]**—Whether contract void or voidable.]—Defts. agreed by a contract of Mar. 6, 1913, to build a steamer for pltf. By clause 5: "The steamer, unless the construction thereof

—Where a contract for the sale & delivery of foreign goods is made between a British vendor & a British purchaser, & during the continuance, the country where the goods are manufactured becomes enemy territory by hostile occupation, trading with persons in which is forbidden to British subjects by the laws of the realm, the vendor, if he has not the goods in his possession, may legally refuse to deliver on the ground that to obtain the specified goods is not then legally possible.—*ROSS BROTHERS, LTD. v. SHAW & CO.*, [1917] 2 L. R. 367.—*IR.*

**2557 i. — Failure of supply—Goods requisitioned by government.]**—*OCKERBY & CO., LTD. v. MURDOCK* (1916), 22 C. L. R. 420.—*AUS.*

**2557 ii. — — — — —.]**—*GELLING v. CRESPIN* (1917), 23 C. L. R. 443; 34 N. S. W. N. 194.—*AUS.*

**h. — — — — —.]**—*LESSON v. NORTH BRITISH OIL & CANDLE CO.* (1874), 1 L. R. 8 C. L. 309.—*IR.*

**2558 i. — Express proviso relating to impossibility.]**—*GENEST v. LEGER* (1921), 67 D. L. R. 494.—*CAN.*

'War or other ex-

ceptional cause"—*Difficulty only in performance no defence.*—A contract for the supply of a manufactured article contained this clause, "In the event of work being interrupted by . . . war or other exceptional cause, the sellers shall not be bound to make delivery at the time specified." The sellers declined to supply the full amount required, & in defence to an action for damages, pleaded this clause & averred the difficulty in obtaining supplies of raw materials owing to the war:—*Held*: the clause did not excuse performance of the

*Sect. 3.—Remedies of the buyer : Sub-sect. 2, B. (b) & C. (a).]*

shall be delayed by fire, strike, or lock out, or any other unpreventable cause . . . shall be completed ready for trial by Oct. 30, 1914."

By agreement the date of completion was subsequently extended to Jan. 30, 1915. By clause 12: "In case the builders become bkpt. or insolvent or fail or be unable to deliver the steamer within eight months from the date agreed by this contract, thereupon the contract shall become void, & all moneys paid by the purchasers shall be repaid to them with interest at 5 per cent. . . . except only in the event of France becoming engaged in a European war, when the above limit of eight months shall be extended equal to the duration of the war, but in no case to exceed eighteen months in all."

The builders contended that in the events which had happened the clauses became operative on July 30, 1916, & the contract then became void. The purchasers claimed the ship or damages for non-delivery, & contended (*inter alia*) that the builders were not entitled to say the contract was void, but that it was only voidable at the purchaser's option:—*Held*: clause 12 became operative on July 30, 1916, & as the inability to perform the contract was not due to any default of defts., the contract was void except for the repayment of the money already paid by pltf's., & was not merely avoidable at their option.—*NEW ZEALAND SHIPPING CO. v. SOCIÉTÉ DES ATELIERS ET CHANTIERS DE FRANCE*, [1919] A. C. 1; 87 L. J. K. B. 746; 118 L. T. 731; 34 T. L. R. 400; 62 Sol. Jo. 519; 14 Asp. M. L. C. 211, H. L.; *affg.* S. O. *sub nom.* *Re NEW ZEALAND SHIPPING CO. & SOCIÉTÉ DES ATELIERS ET CHANTIERS DE FRANCE*, [1917] 2 K. B. 717, C. A.

*Annotations*:—*Refd.* *Re Suarez, Suarez v. Suarez*, [1918] 1 Ch. 176; *Lebeaupin v. Crispin*, [1920] 2 K. B. 714; *Quesnel Forks Gold Mining Co. v. Ward*, [1920] A. C. 222. *Mentd.* *Re Meyrick's Settlement*, *Meyrick v. Meyrick*, [1921] 1 Ch. 311; *Cohen v. Sellar*, [1926] 1 K. B. 536.

**2561.** — "Unforeseen contingencies excepted"—Source of contingencies not specified.]—A contract provided for the delivery of goods "unforeseen contingencies excepted." No particular source from which they were to come was stipulated. Unforeseen political complications prevented the supply of the goods from the source contemplated by the sellers, but it was not shown that the goods could not have been procured from other sources:—*Held*: the above clause did not protect the sellers from liability to deliver the goods.—*WILLS (GEORGE) & SONS, LTD. v. CUNNINGHAM (R. S.) SON & CO.*, [1924] 2 K. B. 220; 93 L. J. K. B. 1008; 131 L. T. 400; 40 T. L. R. 108.

**2562.** — Performance not naturally impossible—Fundamental basis of contract not disturbed.]—By a contract dated Aug. 16, 1922, the sellers sold to the purchasers about 1,000 boxes of Smyrna sultanias at 60s. a cwt. c.i.f. London to be shipped from Smyrna by steamer to London during Sept. 1922. Smyrna at the date of the contract

was in the occupation of the Greeks. On Sept. 9, 1922, it was taken by Turkish forces & shipment became impossible, with the result that the sellers did not ship any of the goods. The buyers claimed damages & the dispute went before arbitrators, who stated a case for the opinion of the ct. under Arbitration Act, 1889 (c. 49), s. 7.

The sellers said that they were excused from performance on the grounds that the contract became illegal when the port of shipment came under Turkish control, as a state of war at that time existed between England & Turkey; & that a state of circumstances had arisen which made the contract impossible of performance & that differed totally from the conditions with reference to which the contract was made:—*Held*: (1) mere impossibility of performance did not discharge a party where performance was not naturally impossible, unless such a state of affairs had arisen as displaced the fundamental basis of the contract. In the absence of any strike, war or *force majeure* clause, the buyers were entitled to damages for failure of the sellers to deliver; (2) as the point of illegality had not been taken at the hearing before the arbitrators, & was not raised in the case stated, it could not be taken afterwards.—*SARGANT (W. J.) & SONS v. PATERSON (ERIC) & CO.* (1923), 129 L. T. 471; 39 T. L. R. 378.

—Inability to perform contract at profit.]—*See CONTRACT*, Vol. XII., p. 405, Nos. 3264-3271.

—*Sec, further, CONTRACT*, Vol. XII., pp. 395-399, Nos. 3214-3228.

*C. Measure of Damages.*

(a) In General.

*See Sale of Goods Act*, 1893 (c. 71), s. 51 (2) & generally, *DAMAGES*, Vol. XVII., pp. 78 *et seq.*

**2563. Whether actual loss sustained.]**—The measure of damages is the damage sustained by pltf. in consequence of the breach of contract.

Defts., by their agents, contracted with pltf., & bought & sold notes were exchanged. The note was as follows:—"Bought for account of Levin & Adler, of William Bird & co. 200 tons Calder, No. 1, pig iron, at 45s. per ton, free on board at Glasgow. Cash at fourteen days against Dixon's delivery order or bill of lading, at buyer's option." Pltf. within the fourteen days, accepted one of Dixon's orders, & paid the money: the order was as follows—"I hereby undertake to deliver free on board here (at Glasgow), when required, 200 tons No. 1 pig iron, to the party lodging this document with me. For W. Dixon—John Campbell." Dixon offered other iron, but refused Calder:—*Held*: as the order was not inconsistent with the contract, & might have produced Calder iron, pltf. was justified in accepting it, but upon its failing to produce it, he was not bound by such acceptance, but might repudiate it & sue the defts. for the non-delivery of Calder iron, without presentment of the order.—*LEVIN v. BIRD* (1850), 16 L. T. O. S. 324, N. P.

contract, in respect that, although the war had caused an increase in the price of raw materials & some delay in their delivery, it had not rendered the obtaining of them impossible.—*BLACKLOCK & MACARTHUR, LTD. v. KIRK*, [1919] S. C. 57; 56 Sc. L. R. 84; [1918] 2 S. L. T. 267.—*SCOT.*

**1. — Performance not naturally impossible.]**—*HURNANDRAI FULCHON v. PRAGDAS BUDHSEN* (1922), 1 L. R. 47 Bom. 344.—*IND.*

**m. — Cause beyond reasonable**

*control.*]—*SAMUEL v. BLACK LAKE ASBESTOS & CHROME CO., LTD.* (1920), 48 O. L. R. 561; 58 D. L. R. 270; 19 O. W. N. 328.—*CAN.*

**n. — Unforeseen circumstances.]**—Where a person has contracted to deliver goods, which are not part of his own stock in trade, & are known not to be, & has taken due care in placing his order for these goods with a manufacturer, he will not be responsible for any delay in the delivery that may be caused by unforeseen circum-

stances, such as strikes, or sickness among workmen.—*TAYLORS v. MACLELLANS* (1891), 19 R. (Ct. of Sess.) 10; 29 Sc. L. R. 23.—*SCOT.*

**PART VIII. SECT. 3, SUB-SECT. 2.—C. (a).**

**2563 i. Whether actual loss sustained.]**—*AUSTRALIAN SMELTING CO., LTD. v. BRITISH BROKEN HILL PROPRIETARY CO., LTD.* (1896), 22 V. L. R. 190.—*AUS.*

**o. — Nominal damages.]**—*WEB-*

**2564.** —.]—**BRITISH & INDIA STEAM NAVIGATION CO. v. DE MATTOS, DE MATTOS v. BRITISH & INDIA STEAM NAVIGATION CO., No. 1557, ante.**

**2565.** — **Nominal damages—Acceptance of composition.**—**GRIFFITHS v. PERRY, No. 2550, ante.**

**2566.** — **No available market.**—**Deft.** in Jan., 1872, agreed to furnish **pltf.** with 666 sets of wheels & axles according to tracings, 100 of which were to be delivered at stated intervals in the months of Feb., Mar., & Apr., free on board at Hull; guarantee three years & three months from time of shipments. **Pltfs.** were under a contract with a Russian railway co. to deliver them 1,000 waggons, 500 on May 1, 1872, & 500 on May 31, 1873; & they were bound to pay two roubles per waggon for each day's delay in delivery. In the course of the negotiations between **pltf.** & **deft.**, **deft.** was informed of this contract, but neither the precise day for the delivery nor the amount of the penalties was mentioned. Delay occurred in the delivery of the 100 sets of wheels; & **pltf.**, in consequence, had to pay certain penalties, but the Russian co. consented to take one rouble a day, amounting in the whole to £100. **Pltfs.**, having brought an action against **deft.** for the delay, sought to recover as damages the £100:—**Held:** **pltf.** were not entitled as damages, as matter of right, to the amount of penalties; but the jury might reasonably have assessed the damages at that amount.

It is, no doubt, quite settled that, on a contract to supply goods of a particular sort, which at the time of the breach can be obtained in the market, the measure of damages is the difference between the contract price & the market price at the time of the breach. Where, from the nature of the article, there is no market in which it can be obtained, this rule is not applicable (**BLACKBURN, J.**).—**ELBINGER ACT. v. ARMSTRONG (1874), L. R. 9 Q. B. 473; 43 L. J. Q. B. 211; 30 L. T. 871; 38 J. P. 774; 23 W. R. 127.**

**Annotations:**—**Consd. Hinde v. Liddell (1875), L. R. 10 Q. B. 265; Hydraulic Engineering Co. v. McIlaffie (1878), 4 Q. B. D. 670. Apld. Grébert-Borgnis v. Nugent (1885), 15 Q. B. D. 85.**

**2567.** —.]—**Deft.** contracted to supply to **pltf.** 2,000 pieces of grey shirtings, to be delivered on Oct. 20 certain, at so much per piece, **deft.** being informed that they were for shipment. Shortly before Oct. 20, **deft.** informed **pltf.** that he would be unable to complete his contract by the time specified, on which **pltf.** endeavoured to get the shirtings elsewhere, but, there being no market in England for it, that kind of shirtings could only be procured by a previous order to manufacture it. **Pltf.**, therefore, in order to ship according to his contract with his sub-vendee, procured 2,000 pieces of other shirtings of a somewhat superior quality, at an increase of price, which the sub-vendee accepted, but paid no advance in price to **pltf.** **Pltf.** sought to recover against **deft.** for the breach of his contract, the difference between what he paid for the substituted shirtings & **deft.**'s contract price. It

was admitted at the trial that the shirtings that **pltf.** bought were the nearest in price & quality that could be got by Oct. 20; & the jury returned a verdict for the amount claimed:—**Held:** there being no market for the article contracted for, the measure of damages was the value of it at the time of breach; & **pltf.** having done the best thing he could, was entitled to recover the difference in the price.—**HINDE v. LIDDELL (1875), L. R. 10 Q. B. 265; 44 L. J. Q. B. 105; 32 L. T. 449; 23 W. R. 650.**

**Annotations:**—**Refd. Blackburn Bobbin Co. v. Allen, [1918] 1 K. B. 540; Montevideo Gas & Drydock Co. v. Clan Line Steamers (1921), 37 T. L. R. 544.**

— **Goods resold.**—**See No. 2575, post.**

**2568.** — **Goods resold—Loss of anticipated profits by sub-vendee.**—**PETERSON v. AYRE, No. 2695, post.**

**2569.** —.]—**Defts.** contracted with **pltf.** to deliver goods to him of a particular shape & description at certain prices & by instalments at different times. When the contract was made **defts.** knew that, except as to price, it corresponded with & was substantially the same as a contract which **pltf.** had entered into with a French customer of his, & that it was made in order to enable **pltf.** to fulfil such last-mentioned contract. **Defts.** broke their contract, & there being no market for goods of the description contracted for, **pltf.**'s customer recovered damages against him in the French ct. to the amount of £28. In an action against **defts.** for their breach of contract:—**Held:** **pltf.** was not only entitled to recover as damages the amount of profit he would have made had he been able to fulfil his contract with his customer, but also damages in respect of his liability to such customer, & in estimating such last-mentioned damages the £28 which the French ct. had given might be treated as not an unreasonable one at which such damages might be assessed.—**GRÉBERT-BORGNIS v. NUGENT (1885), 15 Q. B. D. 85; 54 L. J. Q. B. 511; 1 T. L. R. 434, C. A.**

**Annotations:**—**Apld. Levi v. S. E. Ry. (1886), 2 T. L. R. 817. Consd. Hammond v. Bussey (1887), 20 Q. B. D. 79. Apld. Vickers v. Church Extension Assocn. (1888), 4 T. L. R. 674. Consd. Re Fl. Bourgeois & Wilson, Holgate (1920), 25 Com. Cas. 269. Apld. Patrick v. Russo-British Grain Export Co., [1927] 2 K. B. 535. Refd. Re Hall & 11m (1927), 137 L. T. 585.**

**2570.** — **Measure of damages unaffected.]**

—(1) **Pltfs.** chartered **defts.**' ship for carriage of a cargo of cotton seed from Alexandria to the United Kingdom. The charterparty provided that the master was to sign bill of lading at any rate of freight & as customary at port of lading without prejudice to the stipulation of the charterparty. There was also a cesser of liability clause. A cargo was shipped under the charterparty at Alexandria by an on account of the charterers, & a bill of lading was given containing an exception, which was not in the charterparty, protecting the shipowners from liability for damage arising from any act, neglect, or default of the pilot, master, or mariners. The cargo was lost by the negligence of the master. In an action for non-delivery of the cargo the jury found that there was no special custom at Alexandria with regard

**STER & Co. v. CRAMOND IRON CO. (1875), 2 R. (Ct. of Sess.) 752; 12 Sc. L. R. 496.—SCOT.**

**p.** — **Market value below contract price.**—**BRENNER v. CONSUMERS METAL CO. (1918), 41 O. L. R. 534; 13 O. W. N. 333; 41 D. L. R. 339.—CAN.**

**2568 i.** — **No available market.**—On the failure of **deft.** to deliver a second-hand separator which it had sold to **pltf.** he was unable to find another

of the same capacity & quality, & bought a larger one from another co. In an action for damages for non-delivery:—**Held:** since **pltf.** could not buy on the market an article similar to that which he had bought from **deft.**, the measure of damages was the loss he had actually suffered through **deft.**'s default.—**CASWELL v. MATHEW MOODY & SONS CO., [1926] 1 W. W. R. 113; 20 Sask. L. R. 252.—CAN.**

**2566 ii.** —.]—**JUGMOHANDAS VURJIWANDAS v. NUSSERWANJI JE-**

**HANGIR KHAMBATTA (1902), I. L. R. 26 Bom. 744.—IND.**

**2566 iii.** —.]—**M'NEILL v. RICHARDS, [1899] 1 I. R. 79.—IR.**

**q.** — **Estimated loss directly & naturally resulting.**—In an action by **pltf.** claiming damages for short delivery:—**Held:** while the resort to market value is one of the commonest it is not a conclusive test in determining the amount of damages, but is merely an aid, & in the absence of evidence of market value, **pltf.** were

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to the form of bill of lading in use there:—*Held*: whether such finding were right or wrong, the terms of the charterparty did not authorise the giving of a bill of lading containing the before mentioned exception &, even if they did, in the absence of express provision to the contrary, as between the shipowners & the charterers only, the charterparty could be regarded as constituting the contract; & the bill of lading must be looked on as a mere receipt for the goods; & consequently defts. were liable for the non-delivery of the cargo.

(2) Pltfs. having sold the cargo "to arrive," at a price less than the market value of the goods at the port of discharge at the time when the cargo should have arrived:—*Held*: in estimating the damages such market value must be looked to, & not the price at which pltfs. had sold the cargo.

(3) The charterparty provided that sufficient cash for ship's disbursements should be advanced, if required, to the captain by the charterers on account of freight subject to insurance only. Pltfs. having advanced sums for ship's disbursements on account of freight as provided for in the charterparty:—*Held*: in estimating the damages for non-delivery of the cargo, only the unpaid freight must be deducted from the market value of the goods, not the advanced freight as well.—*RODOCANACHI v. MILBURN* (1886), 18 Q. B. D. 67; 56 L. J. Q. B. 202; 56 L. T. 594; 35 W. R. 241; 3 T. L. R. 115; 6 Asp. M. L. C. 100, C. A.

*Annotations*:—*As to* (1) *Consd. M el-Tryvan Ship Co. v. Kruger*, [1907] 1 K. B. 809; *Slater v. Hoyle & Smith*, [1920] 2 K. B. 11. *Refd.* *Temperley S.S. Co. v. Smyth*, [1905] 2 K. B. 791. *As to* (2) *Consd. The Leitrim*, [1902] P. 256; *Wertheim v. Chicoutimi Pulp Co.*, [1911] A. C. 301. *Folld.* *Williams v. Agius*, [1914] A. C. 510. *Apld.* *Jamal v. Moolla Dawood*, [1916] 1 A. C. 175. *Distd.* *Watts v. Mitsul*, [1917] A. C. 227. *Apld.* *Sheik Mohammad Habib Ullah v. Bird* (1921), 37 T. L. R. 405. *Refd.* *Montevideo Gas & Drydock Co. v. Clan Line Steamers* (1921), 37 T. L. R. 544. *As to* (3) *Consd.* *Dufourcet v. Bishop* (1886), 18 Q. B. D. 373. *Generally, Refd.* *Lebeaupin v. Crispin*, [1920] 2 K. B. 714; *Taylor v. Bank of Athens*, *Pinnock v. Bank of Athens* (1922), 91 L. J. K. B. 776; *de Hall & Pim* (1927), 137 L. T. 585.

2571. —.]—The rule that the damages to which a purchaser is entitled for non-delivery of goods is the difference between the contract price & the market price at the time when they ought to have been delivered is not affected by the fact that before the date of delivery the purchaser had resold the goods for less than the market price.

Delay [in delivery] might have prejudiced him; but the amount of prejudice was no longer a matter of speculation, it had been put to the test by the goods being actually sold; & he was rightly, as I think, only held entitled to recover the difference between the market price at the date of due delivery & the price he actually got. But when there is no delivery of the goods the position is quite a different one. The buyer never gets them, & he is entitled to be put in the position in which he would have stood if he had got them at the due date. That position is the

position of a man who has goods at the market price of the day, & barring special circumstances, the defaulting seller is neither mulct in damages for the extra profit which the buyer would have got owing to a forward resale at over the market price, nor can he take benefit of the fact that the buyer has made a forward resale at under the market price (*LORD DUNEDIN*).—*WILLIAMS BROTHERS v. ED. T. AGIUS, LTD.*, [1914] A. C. 510; 83 L. J. K. B. 715; 110 L. T. 865; 30 T. L. R. 351; 58 Sol. Jo. 377; 19 Com. Cas. 200, H. L.

*Annotations*:—*Consd.* *Weir v. Dobell*, [1916] 1 K. B. 718. *Apld.* *Slater v. Hoyle & Smith*, [1920] 2 K. B. 11. *Refd.* *Jamal v. Moolla Dawood*, [1916] 1 A. C. 175; *Lebeaupin v. Crispin*, [1920] 2 K. B. 714; *Montevideo Gas & Drydock Co. v. Clan Line Steamers* (1921), 37 T. L. R. 544; *Sheik Mohammad Habib Ullah v. Bird* (1921), 37 T. L. R. 405; *Taylor v. Bank of Athens*, *Pinnock v. Bank of Athens* (1922), 91 L. J. K. B. 776.

2572. — — —.]—*MOHAMMAD HABIB ULLAH (SHEIK) v. BIRD & Co.*, No. 1585, *ante*.

*Compare* No. 2588, *post*.

2573. — — — *Damages paid to sub-purchase.*]—*GRÉBERT-BORGNIS v. NUGENT*, No. 2569, *ante*.

2574. — — — *Resale price evidence of value.*]—In an action for damages for non-delivery of goods, where the same class of goods is not obtainable in the market, at the place of delivery, the price on a sub-sale by a purchaser, is evidence of the value of the goods, & the amount by which such price on sub-sale exceeds the contract price may be recovered as damages, although the seller at the time of the contract had no notice of the sub-sale.—*STROUD v. AUSTIN & Co.* (1883), Cab. & El. 119.

2575. — — — *No available market.*]—The buyers, merchants, bought Russian wheat of a certain description for delivery on a named date, & before that date resold the wheat to a third party at a profit. The sellers failed to deliver. On that date & subsequently there was no market for Russian wheat of the said description. At the time of sale the sellers knew that the buyers were buying for resale:—*Held*: the buyers were entitled as damages to the difference between the contract price & the resale price.—*PATRICK v. RUSSO-BRITISH GRAIN EXPORT CO.*, [1927] 2 K. B. 535; 137 L. T. 815; 43 T. L. R. 724.

2576. — — — *Purchase of substituted goods—Value of substituted goods.*]—A. contracted with B. to repair a steam threshing machine, undertaking to get it ready for harvesting time. A new fire-box being needed, C. engaged to make one for A. "in about a fortnight" but failed in the performance of his contract, & A., who had paid C. for the article, was obliged to get one made elsewhere, at an additional cost; but this he did not do in time to enable him to perform his contract with B., although there was ample time for him to have done so after C. had broken his contract; whereupon B. sued A. who paid him £20 to settle the action:—*Held*: A. was entitled to recover from C. the sum he had paid for the fire-box, & the extra cost incurred in getting another; but the compensation paid by A. to B. was not such a damage as might fairly &

entitled to recover the estimated loss directly & naturally resulting in the ordinary course of events from sellers breach of contract.—*BOCHNER v. SMITH* (1910), 49 N. S. R. 435.—*CAN.*

2574 i. — *Goods resold—Resale price evidence of value.*]—*FRANCIS v. LYON* (1907), 4 C. L. R. 1023.—*AUS.*

r. — *Purchase of substituted goods.*]—Action on a contract to deliver cordwood, required for the purpose of

burning brick. Pltff. proposed to prove that during the delay occasioned by deft.'s neglect to deliver, the price of bricks fell considerably, & he claimed to recover for this loss:—*Held*: such evidence was rightly rejected; & the measure of damages was only the difference between the price specified in the contract & that actually paid for the wood procured by pltf. elsewhere, together with compensation for his trouble.—*FEEHAN v. HALLINAN* (1855),

13 U. C. R. 440.—*CAN.*

a. — *Loss of profits—Within contemplation of parties.*]—*DOYLE v. JACOBS* (1872), 11 N. S. W. S. C. R. 77.—*AUS.*

b. — *Fulfilment of sub-sale by other goods in stock immaterial.*]—*MUHAMMAD HABIB-ULLAH v. BIRD & Co.* (1921), 1 L. R. 43 All. 257.—*IND.*

c. — — —.]—*SYKES v. GEEK*, [1920] 1 W. W. R. 741.—*CAN.*



reasonably be considered either as arising naturally from C.'s breach of contract, on such as might reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract as the probable result of the breach of it.—*PORTMAN v. MIDDLETON* (1858), 4 C. B. N. S. 322; 27 L. J. C. P. 231; 4 Jur. N. S. 689; 6 W. R. 598; 140 E. R. 1108; *sub nom.* *PORTMAN v. NICHOL*, 31 L. T. O. S. 152.

*Annotations* :—*Refd.* *Dingle v. Hare* (1859), 7 C. B. N. S. 145; *Gee v. L. & Y. Ry.* (1860), 6 H. & N. 211; *Wilson v. L. & Y. Ry.* (1861), 3 L. T. 859.

**2577.** — **Difference between contract price & price of substituted goods.**—*LIDDELL v. LIDDELL*, No. 2567, *ante*.

**2578.** — **Purchaser prevented from executing orders.—Thereby enabled to execute more profitable orders.**—A litigant should not be refused a reasonable opportunity of stating facts which on the face of them are possibly relevant merely because the judge at the trial thinks that he will probably not succeed in establishing his case. Therefore in an action for damages for breach of a contract to deliver raw material, whereby plffs. were prevented from executing orders which they had obtained, evidence is admissible to show that plffs. were in consequence enabled to execute other orders, whereby they made profits which might be taken into consideration in reduction of the damages which they had sustained by deft.'s breach of contract.—*HILL & SONS v. SHOWELL (EDWIN) & SONS, LTD.* (1918), 87 L. J. K. B. 1106; 119 L. T. 651; 62 Sol. Jo. 715, H. L.

— **Where delivery delayed.**—*See* Sub-sect. 2, C. (b), *post*.

— **Where available market.**—*See* Sub-sect. 2, C. (c), *post*.

**2579.** **Where price prepaid.**—In *assumpsit* for a breach of contract, in not delivering a quantity of linseed pursuant to a contract of sale, it appeared in evidence, that plffs., pursuant to contract, had paid part of the purchase-money to the vendor in advance; that deft., at the time when the linseed ought to have been delivered, had given notice of his inability to perform the contract, but the money was not returned until after the action was commenced, when the amount was paid into ct., with interest up to the time it was so paid in, as a condition for a commission to examine witnesses abroad, & was only obtained out of ct. by plffs. a short time before the trial:—*Held*: in estimating the damages, plffs. were not entitled to take the price of linseed at the time of the trial as a criterion; & plffs. not having proved that they had sustained any special damage from the non-delivery of the seed, & the non-return of the money, the repayment of the money advanced, with simple interest upon it, & payment of the difference between the contract price & the price of the linseed at the time when it ought to have been delivered, was that to which plffs. were entitled; & the jury having found accordingly, the verdict was right.—*STARTUP v. CORTAZZI* (1835), 2 Cr. M. & R. 165; 5 Tyr. 697; 4 L. J. Ex. 218.

*Annotations* :—*Apld.* *Phillips v. Evans* (1839), 5 M. & W. 474. *Refd.* *Hochster v. De La Tour* (1853), 2 E. & B. 678; *Frost v. Knight* (1870), L. R. 5 Exch. 322. *Mentd.* *Evans v. Hutton* (1842), 12 L. J. C. P. 17.

**2580.** — **The measure of damages for the**

**d. — No right to consequential damages.**—In an action of damages for breach of bargain, pursuer is only entitled to the loss occasioned by non-delivery of the article purchased, & not to the consequential damage arising from the non-delivery having been the

cause of volding or preventing a sale of other property previously belonging to pursuer.—*DUNLOP (SCOU GAL'S TRUSTEE) v. M'KELLAR* (1815), 18 Fac. Coll. 382.—*SCOT*.

**2579 i. Where price prepaid.**—Where the buyer of goods which the seller has

non-delivery of goods, paid for at the time of purchase, is, the difference between that price & the highest price the goods have attained up to the time of trial.—*ELLIOT v. HUGHES* (1863), 3 F. & F. 387, N. P.

**2581. Compensation paid to third party.—Arising out of non-delivery.**—*PORTMAN v. MIDDLETON*, No. 2576, *ante*.

**2582. Damages fixed by contract.**—Deft. entered into the following contract:—Sold to pltf. 5,000 tons of iron rails at £11 5s. per ton, delivered f.o.b., Newport, the delivery to commence by Jan. 15, & to be completed by May 15. In the event of defts. exceeding the time of delivery they shall pay by way of fine 7s. 6d. per ton per week. In the event of ships not being ready within fourteen days, notice being given, then payment to be made against wharf warrants for each 500 tons stacked & being to buyer's order. Defts. made default in the delivery of the iron, which was delivered during the months of May, June, July, August, & completed in Sept.:—*Held*: the fine to be paid for delay in delivery ought to be calculated from the time at which the contract was to be completed, viz., May 15.—*BERGHEIM v. BLAENAVON IRON & STEEL CO., LTD.*, (1875) L. R. 10 Q. B. 319; 44 L. J. Q. B. 92; 32 L. T. 451; 23 W. R. 618.

**2583.** — **The Spanish Govt. contracted with applts. for the building of four torpedo boats, delivery to be within periods varying from six & a half months to seven & three-quarter months from the date of the contracts. The contracts provided that "The penalty for later delivery shall be at the rate of £500 per week for each vessel." The vessels having been delivered many months after the stipulated period & the price paid, the Spanish Govt. claimed from applts. payment of £500 for each week of late delivery:—*Held*: (1) the sum of £500 a week was to be regarded as liquidated damages & not as a penalty, & the Spanish Govt. were entitled to recover; (2) payment in full of the price of the vessels without reservation was no waiver of the claim for damages for delay in delivery.—*CLYDEBANK ENGINEERING & SHIPBUILDING CO. v. CASTONEDA DON JOSE RAMOS YZQUIERDO*, [1905] A. C. 6; 74 L. J. C. P. 1; 91 L. T. 666; 21 T. L. R. 58, H. L.**

*Annotations* :—*As to* (1) *Apld.* *Diestal v. Stevenson*, [1906] 2 K. B. 345; *Webster v. Bosanquet*, [1912] A. C. 394.

*Consd.* *Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.*, [1915] A. C. 79. *Refd.* *Public Works Comrs. v. Hills*, [1906] A. C. 368; *Kilmer v. British Columbia Orchard Lands*, [1913] A. C. 319; *Admiralty Comrs. v. S.S. Chekiang*, [1926] A. C. 637.

**2584.** — **Defts., coal exporters at Newcastle, entered into a contract with pltf. for the sale & delivery to him in Germany of a quantity of coal, of which part was to be screened & part small coal, at certain prices per ton c.i.f. The contract, which was drawn up by defts., contained the following clause: "Penalty for non-execution of this contract by either party 1s. per ton on the portion unexecuted, & the amount of proved loss, if any, on freight actually arranged by us." In an action to recover damages for non-delivery of the coal, pltf. claimed that the 1s. per ton mentioned in the contract was a penalty & might be disregarded, & that he was entitled to recover the difference between the contract price & the**

agreed to deliver has paid for them at the time of the sale, the measure of damages to which he is entitled for non-delivery is the value of the goods at the date of the trial.—*PEEBLES v. PREIFER*, [1918] 2 W. W. R. 877; 11 Sask. L. R. 249.—*CAN.*



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market price in Germany, which difference was much in excess of 1s. per ton:—*Held*: notwithstanding that the parties had called the 1s. per ton a penalty & that the loss caused to pltf. by the non-delivery might be different in the case of the screened coal & of the small coal & that the difference between the contract & market prices was easily ascertainable, the 1s. per ton was to be treated as liquidated damages.—*DIESTAL v. STEVENSON*, [1906] 2 K. B. 345; 75 L. J. K. B. 797; 96 L. T. 10; 22 T. L. R. 673; 12 Com. Cas. 1.

2585. —.]—A contract for the sale of Japanese peas to be shipped from abroad contained a clause providing that disputes should be referred to arbn.; it also contained a clause, numbered 8 in the contract, providing that if the sellers made default in shipping or declaring shipment the contract should be closed by invoicing back the goods at such price, whether higher or lower than the contract price, as the London Corn Trade Asscn. should determine; that the Asscn. should if requested by either party declare the closing price; that this price should be accepted as final by all parties, & that settlement should be made on the basis of that price by net cash not later than a certain date. The sellers failed to ship or tender any goods under the contract. They then applied to the Asscn. to declare a closing price & gave notice to the buyers that they were doing so. The market price had fallen since the date of the contract. The Asscn. declared a closing price at which if the goods were invoiced back to the sellers a balance would be found in their favour. The sellers claimed this balance; the buyers refused to pay it, & the dispute was referred to arbitrators, who awarded, subject to a special case, that the buyers should pay the balance to the sellers:—*Held*: (1) clause 8 applied, notwithstanding that the sellers were the party in default, & that they were entitled to the balance in their favour after the goods had been invoiced back to them by the buyers at the closing price properly declared by the Asscn.; (2) the closing price should be fixed with reference to the date on which the buyers received notice of the sellers' inability to perform their contract.

*Qu.*: whether the clause would apply if the sellers' default were voluntary, or if the parties

were merely gambling in differences.—*LANCASTER v. TURNER (J. F.) & Co., LTD.*, [1924] 2 K. B. 222; 93 L. J. K. B. 1024; 131 L. T. 525; 29 Com. Cas. 207, C. A.

—.]—*See, generally*, DAMAGES, Vol. XVII., pp. 136 *et seq.*

2586. *Non-delivery & delayed delivery distinguished.*—*WILLIAMS BROTHERS v. ED. T. AGIUS, LTD.*, No. 2571, *ante*.

2587. *Effect of provision for margin.*—*Re THORNETT & FEHR & YUILLS, LTD.*, No. 2551, *ante*.

*Proof in bankruptcy.*—*See* BANKRUPTCY, Vol. IV., pp. 256–258, Nos. 2440–2446.

(b) *Delay in Delivery.*

*See* Sale of Goods Act, 1893 (c. 71), s. 51 (2).

2588. *General rule—Difference between market price at date of due & actual delivery.*—In the case of late delivery the measure of damages in order to indemnify the purchaser is the difference between the market price at the respective dates of due & actual delivery of the goods purchased; but if the purchaser has resold them at a price in excess of that prevailing at the date of delivery he must in estimating his damages give credit therefor. In an action for damages for breach of contract dated Mar. 13, 1900, to deliver 3,000 tons of moist wood pulp between Sept. 1 & Nov. 1 of that year applt. claimed to recover 27s. 6d. a ton, the difference between 70s., the market price at the port of delivery on the due date, & 42s. 6d., the market price at the same place on the date of actual delivery; but it appeared that he had sold the goods at 65s. a ton, involving a loss to him of only 5s. a ton:—*Held*: he was entitled to recover only 5s. a ton. As the ct. below had on the evidence decreed that amount on 2,000 tons only, their lordships increased the amount by £250 in respect of the remaining 1,000 tons, together with a further amount as subsequently agreed between the parties.—*WERTHEIM v. CHICOUTIMI PULP Co.*, [1911] A. C. 301; 80 L. J. P. C. 91; 104 L. T. 226; 16 Com. Cas. 297, P. C. *Annotations*:—*Distd.*, *Williams v. Agius*, [1914] A. C. 510; *Slatcr v. Hoyle & Smith*, [1920] 2 K. B. 11. *Apld.* *Taylor v. Bank of Athens, Pinnock v. Same* (1922), 91 L. J. K. B. 776. *Reid*, *British Westinghouse Electric & Manufacturing Co. v. Underground Electric Ry. of London*, [1912] A. C. 673; *Hill v. Showell* (1918), 87 L. J. K. B. 1106.

2589. *Loss of profits.*—In an action for the non-delivery of a ship at the time contracted for,

2587 i. *Effect of provision for margin.*—In estimating the damages for breach of contract, no allowance should be made in favour of defts. on account of the use of the words "about" & "approximate" & the damages should be based on the actual deficiencies.—*SUSMAN v. BAKER* (1919), 44 O. L. R. 39.—*CAN.*

e. — *Damages based on minimum.*—*CURSETJI JEHAINGIR KHAM-BATTA v. CROWDER* (1894), 1 L. R. 18 Bom. 299.—*IND.*

f. *Purchase for resale—Purpose known to vendor—Difference between contract price & price to sub-purchaser.*—*Pitt*, having contracted with S. to furnish railway ties, of which defts. had notice, defts. agreed to furnish pltf. with a certain quantity of ties. In an action for breach of such sub-contract:—*Held*: the measure of damages was the difference in value upon each tie between what pltf. was to pay defts. & to receive from S.—*WATROUS v. BATES* (1856), 5 C. P. 366.—*CAN.*

g. *Duty of purchaser to mitigate loss—Whether bound to buy against seller—Before failure of delivery evi-*

*dent.*—*MONTREAL WATERPROOF CLOTHING Co. v. FLORENCE (Ont.)* (1922), 70 D. L. R. 370.—*CAN.*

h. *Difference between contract price & price after lapse of reasonable time for delivery.*—*RAMJI MADAUJI v. RANGAYYA CHETTI* (1863), 1 Mad. 168.—*IND.*

k. — *No time specified for delivery.*—In an action by a vendee against a vendor for non-performance of a contract to deliver goods which specifies no time for delivery, the measure of damages is the difference between the contract price & that which goods of a like description bore on the lapse of a reasonable time for delivery.—*MANSUK DASS v. RANGAYYA CHETTI* (1863), 1 Mad. 162.—*IND.*

l. *Where time for delivery extended.*—Where time for delivery is extended:—*Held*: the damages for non-delivery should be calculated with reference to the last date, if any, to which the contract was extended, or, to the date on which the contract was finally broken, namely, by deft.'s repudiation.—*KIDAR NATH BEHARI LAL v. SHIMDHU NATH-NANDU MAL*

(1926), 1 L. R. 8 Lah. 198.—*IND.*

m. *No market available.*—Substantial damages may be recovered for non-delivery of chattels, even where no market price can be proved.—*WILLIS v. MARSHALL & COPELAND* (1882), 1 N. Z. L. R. 28 (S. C.).—*N.Z.*

PART VIII. SECT. 3, SUB-SECT. 2.—C. (b).

2588 i. *General rule—Difference between market price at date of due & actual delivery.*—*MACAULEY v. HORGAN*, [1925] 2 I. R. 1.—*IR.*

2588 ii. —.]—In the case of late delivery of goods the measure of damages is the difference between the market price at the respective dates of due & actual delivery of the goods purchased, irrespective of the profit the purchaser might have made if the goods had been delivered duly. If the purchaser has resold the goods he must in estimating his damages give credit therefor.—*TWEESPRUIT DAVIES, LTD. v. MICHELSEN*, [1914] C. P. D. 995.—*S. AF.*

2589 i. *Loss of profits.*—*LEONARD & SONS v. KREMER* (1912), 20 W. L. R.

the jury gave as damages the difference between the profits she would have earned if delivered at that time, when freights were high, & the profits she did earn when delivered seven months later, when freights were low. That being the measure of damages agreed to at the trial, the ct. refused to disturb the verdict.

*Semle*: as in the case of a breach of a contract to pay money, the interest of the money is the measure of damages, so in the case of a breach of a contract to deliver a chattel, the measure of damages should be the average profit made by the use of such a chattel.—*FLETCHER v. TAYLEUR* (1855), 17 C. B. 21; 25 L. J. C. P. 65; 26 L. T. O. S. 60; 139 E. R. 973.

*Annotations*.—*Consd.* *Gee v. L. & Y. Ry.* (1860), 30 L. J. Ex. 11. *Expld.* *Duckworth v. Ewart* (1863), 33 L. J. Ex. 24. *Distd.* *Sapwell v. Bass*, [1910] 2 K. B. 486. *Apld.* *Credito Italiano v. Swiss Bankverein* (1916), 114 L. T. 776. *Refd.* *Wilson v. L. & Y. Ry.* (1861), 9 C. B. N. S. 632; *Wilson v. Newport Dock Co.* (1866), 14 L. T. 230; *British Columbia Saw Mill Co. v. Nettleship* (1868), L. R. 3 C. P. 499; *Gracie Owners v. Argentine Owners, The Argentine* (1889), 61 L. T. 706. *Mentd.* *Hobbs v. L. & S. W. Ry.* (1875), 32 L. T. 252.

2590. —.]—Deft. contracted to sell to plffs. 75 tons of caustic soda,—a commodity not ordinarily procurable in the market,—at a given price, to be delivered on the rails at Liverpool for Hull, 25 tons in June, 25 tons in July, & 25 tons in Aug.; but he failed to deliver any until Sept. 16, between which day & Oct. 26 he delivered 26 tons in all. At the time of entering into the contract, deft. was aware that plffs. were buying the soda for a foreign correspondent, but did not know until the end of Aug. that it was destined for St. Petersburg. Plffs. had in fact contracted to sell the soda to A., a merchant at St. Petersburg, at an advanced price; & A. had contracted to sell it to B., a soap manufacturer at that place, for a still further advance. In consequence of the late delivery of the 26 tons, plffs. were compelled to pay a higher rate of freight & insurance. This amounted to £40 17s. For their failure to deliver the remainder to A., they were called upon to pay & actually paid £159, which A. claimed as the compensation he had been obliged to pay to B. for the failure to perform his sub-contract with him. In an action by plffs. to recover from deft. damages for the breach of his contract with them, it was conceded that they were entitled to recover the difference between the price, on the 49 tons undelivered, at which he had sold the caustic soda to them, & the price at which they had contracted to sell it to A.,—in other words, the loss of profit on the resale:—*Held*: they were also entitled to recover the £40 17s. the excess of freight & insurance, which was the necessary result of defts.' breach of contract; but deft. was not chargeable with the £159 which plffs. had paid to A. to compensate B. for the loss of his bargain, —this being too remote a damage.—*BORRIES v. HUTCHINSON* (1865), 18 C. B. N. S. 445; 5 New Rep. 281; 34 L. J. C. P. 169; 11 L. T. 771; 11 Jur. N. S. 267; 13 W. R. 386; 114 E. R. 518.

*Annotations*.—*Consd.* *Williams v. Reynolds* (1865), 6 B. & S. 495. *Apld.* *Elbinger Akt. v. Armstrong* (1874), L. R. 9 Q. B. 473; *Hinde v. Liddell* (1875), L. R. 10 Q. B. 265. *Distd.* *Thol v. Henderson* (1881), 8 Q. B. D. 457. *Expld.* *Grébert-Borgnis v. Nugent* (1885), 15 Q. B. D. 85. *Distd.*

147; 4 Alta. L. R. 152; 1 W. W. R. 642.—CAN.

2589 ii. —.]—*BROWN v. HOPE* (1912), 20 W. L. R. 907; 17 B. C. R. 220; 2 O. L. R. 615.—CAN.

n. — *Goods required for special purpose—Purpose known to seller.*—*CORBETT v. TAYLOR* (1879), 5 V. L. R. (Law) 455.—AUS.

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*Kasler & Cohen v. Slavovski* (1927), 96 L. J. K. B. 850. *Refd.* *Davies v. Ingram* (1867), 17 L. T. 33; *Horne v. Mid. Ry.* (1872), L. R. 7 C. P. 583; *Ströms Bruks Akt. v. Hutchison*, [1905] A. C. 515.

2591. — *Goods required for special purpose—Not known to seller.*—Where on the sale of a chattel, the buyer intends it for a special purpose, but the seller supposes it is for another & more obvious purpose, the buyer can recover, as damages for the non-delivery according to the contract, the loss of profit which might have been made from the purpose supposed by the seller, provided the buyer has actually sustained damages to that or a greater amount. Defts. agreed to sell & deliver to plffs. within a certain time the hull of a floating boom derrick; but they did not deliver it till six months after the specified time. Plffs., who were large coal merchants in the port of London, purchased the hull in order to place in it, as they in fact did, large hydraulic cranes & machinery for the purpose of transhipping their coals direct from colliers into barges. The hull was the first vessel of the kind ever built, & plff.'s special purpose was entirely novel, & was unknown to defts. Defts. believed that plffs. were purchasing the hull for the purpose of using her as a coal store. If plffs. had been prevented using the hull for their special purpose, they would either have sold her to be used in the hulk trade, as a coal store, or, if unable to do so, would have used her themselves as a store, & this was the most obvious use to which such a vessel was capable of being applied by persons in the coal trade; but the hulk trade is a distinct branch of the coal trade, & was no part of plffs.' business. Had the hull been purchased for this purpose, the delay in the delivery would have occasioned loss to the amount of £420. Plffs. actually suffered damage to a much larger amount from not having the hull ready for their special purpose at the time fixed for the delivery:—*Held*: plffs. were entitled to the £420 as the damages which defts. must be taken to have contemplated would result from the non-performance of their contract.—*CORY v. THAMES IRONWORKS CO.* (1868), L. R. 3 Q. B. 181; 37 L. J. Q. B. 68; 17 L. T. 495; 16 W. R. 456.

*Annotations*.—*Folld.* *Re Trent & Humber Co., Ex p. Cambrian Steam Packet Co.* (1868), L. R. 6 Eq. 396. *Consd.* *Elbinger Akt. v. Armstrong* (1874), L. R. 9 Q. B. 473; *Bostock v. Nicholson*, [1904] 1 K. B. 725; *Payzu v. Saunders*, [1919] 2 K. B. 581. *Apld.* *Montevideo Gas & Drydock Co. v. Clan Line Steamers* (1921), 37 T. L. R. 544. *Refd.* *British Columbia Saw Mill Co. v. Nettleship* (1868), L. R. 3 C. P. 499.

2592. —.]—*HYDRAULIC ENGINEERING CO. v. MCHAFFIE*, No. 1616, *ante*.

2593. —.]—*STEAM HERRING FLEET, LTD. v. RICHARDS (S.) & CO., LTD.* (1901), 17 T. L. R. 731.

2594. *Increased freight & insurance.*—*BORRIES v. HUTCHINSON*, No. 2590, *ante*.

2595. *Penalties payable to third party—Arising out of delay.*—*ELBINGER ACT. v. ARMSTRONG*, No. 2566, *ante*.

2596. *Useless expenditure—Manufacture of other goods.*—*HYDRAULIC ENGINEERING CO. v. MCHAFFIE*, No. 1616, *ante*.

2597. *Compensation paid—Loss of bargain by sub-purchasers.*—*BORRIES v. HUTCHINSON*, No. 2590, *ante*.

o. — — — —.]—*ANTONIOU v. ARNETT*, [1921] 2 W. W. R. 52; 16 Alta. L. R. 311; 58 D. L. R. 495.—CAN.

p. — — — — *Goods bought for resale.*—*CENTAUR CYCLE CO. v. HILL* (1903), 22 C. L. T. 253; 21 C. L. T. 121, 209; 1 O. W. R. 229, 377, 401, 639; 2 O. W. R. 1025; 3 O. W. R. 255, 354; 7 O. L. R. 110, 411.—CAN.

q. — — — — *Car required for hire—Offer of substitute by seller refused.*—*KEAYS v. SHELL GARAGE, LTD. (B. C.)*, [1920] 3 W. W. R. 859; 54 D. L. R. 265.—CAN.

r. *Useless expenditure—Employment of workman while waiting for goods.*—*STEWART v. STONEWALL GRAVEL, LTD. (Man.)*, [1919] 1 W. W. R. 344.—CAN.

X X

*Sect. 3.—Remedies of the buyer: Sub-sect. 2, C. (b) & 1.*

**2598.** *Loss of wages.*—STEAM HERRING FLEET, LTD. v. RICHARDS (S.) & CO., LTD. (1901), 17 T. L. R. 731.

**2599.** *Effect of purchaser reselling goods.*—WERTHEIM v. CHICOUTIMI PULP Co., No. 2588, ante.

*(c) Where Available Market.*

See Sale of Goods Act, 1893 (c. 71), s. 51 (3).

**2600.** *"Available market"—Existence a question of fact.*—MARSHALL & Co. v. NICOLL & SON (1919), 56 Sc. L. R. 615, H. L.

**2601.** *Application to goods made to specification—Not bought & sold in open market.*—MARSHALL & Co. v. NICOLL & SON (1919), 56 Sc. L. R. 615, H. L.

**2602.** *Difference between contract price & market price—At date of breach.*—In *assumpsit* for not delivering goods upon a given day, the true measure of damages is the difference between the contract price & that which goods of a similar quality & description bore, on or about the day when the goods ought to have been delivered.—GAINSFORD v. CARROLL (1824), 2 B. & C. 624; 4 Dow. & Ry. K. B. 161; 2 L. J. O. S. K. B. 112; 107 E. R. 516. *Annotation*:—CONS. Shaw v. Holland (1846), 15 M. & W. 136.

**2603.** ———. ]—Where a contract to deliver goods at a certain price is broken, the proper measure of damages in general is the difference between the contract price & the market price of such goods at the time when the contract is broken (TINDAL, C.J.).—BARROW v. ARNAUD (1846), 8 Q. B. 604; 6 L. T. O. S. 453; 10 Jur. 319; 115 E. R. 1004, Ex. Ch.

**2604.** ———. ]—Deft. contracted with plffs. to sell them 500 tons of iron, to be delivered in parcels at stated times, & paid for by bills at three months each, which were accordingly accepted by plffs. & handed to deft. The times for delivery of the iron elapsed while the bills were current. Both bills were dishonoured; & plffs. afterwards became bkpt. Part of the iron was never delivered. The assignees of plffs. bought a special

action on the contract, claiming the entire value of the iron not delivered:—*Held*: they could recover only the difference, if any, between the contract price of the iron, & the market price at the time of the breach of contract to deliver; & the giving of the bills made no difference in this respect, as they had been dishonoured before action brought.—VALPY v. OAKELEY (1851), 16 Q. B. 941; 20 L. J. Q. B. 380; 17 L. T. O. S. 124; 16 Jur. 38; 117 E. R. 1142.

*Annotations*:—*Apld.* Griffiths v. Perry (1859), 1 E. & E. 680. *Refd.* *Re* Edwards, *Ex p.* Chalmers (1873), 8 Ch. App. 289; Erie County Natural Gas & Fuel Co. v. Carroll, [1911] A. C. 105.

**2605.** ———. ]—PETERSON v. AYRE, No. 2695, post.

**2606.** ———. ]—Deft. sold a quantity of naphtha to pltf. at 2s. 2d. a gallon by sample; on the faith of this contract pltf. next day resold the naphtha, by sample, to H. at 2s. 6d. a gallon. Deft. failed to deliver the naphtha according to his agreement. The market price of naphtha rose to 5s. 9d. a gallon, so that pltf. was unable to perform his sub-contract with H. except at a greatly increased price. On a writ of inquiry to assess damages, the jury found a verdict for pltf. for £437 10s., being the full difference between 2s. 2d. & 5s. 9d. a gallon. On a motion to reduce damages:—*Held*: the damages were rightly assessed, & the proper measure of damage is the difference between the contract price & the market price at the time of the breach.

It is clear that, when a contract of this description is broken, the purchaser is entitled to the difference between the contract price & the market price at or about the time when the contract ought to have been performed (WILDE, B.).—JOSLING v. IRVINE (1861), 6 H. & N. 512; 30 L. J. Ex. 78; 4 L. T. 251.

*Annotations*:—*Consd.* The St. Cloud (1863), Brown. & Lush. 4. *Apld.* Brown v. Muller (1872), L. R. 7 Exch. 319.

**2607.** ———. ]—The buyer of goods under a general contract for the sale of them, which is without reference to a particular time of delivery, is entitled to damages with reference to the market price of the goods at the time the contract was broken (POLLOCK, C.B.).—BRADY v. OASTLER

**2599 i.** *Effect of purchaser reselling goods.*—RUBENS v. MARAIS (1920), 41 N. L. R. 119.—S. AF.

**t. Interest until date of payment.**—The measure of damages for delay in delivery is the amount of interest at the legal rate upon the value of the goods until the date of judgment.—HAMULTON v. HUDSON'S BAY Co. (1884), 1 B. C. R., pt. 2, 1, 176.—CAN.

**a. Effect of extension of time.**—When after the seller of goods has failed to deliver them at the agreed time the buyer has agreed to an extension of time for delivery, if the seller fails to perform the new agreement the buyer is entitled to recover damages computed in the ordinary way.—MUHAMMAD HABIB ULLAH v. BRD & Co. (1921), L. R. 48 Ind. App. 175.—IND.

**PART VIII. SECT. 3, SUB-SECT. 2.—C. (c).**

**2602 i.** *Difference between contract price & market price—At date of breach.*—GODARD v. FREDERICTON BOOM Co. (1869), 1 Han. 544.—CAN.

**2602 ii.** ———. ]—WEST v. RUTLEDGE (1878), 1 P. & B. 674.—CAN.

**2602 iii.** ———. ]—JOHNSTON v. HURB (Man.) (1905), 1 W. L. R. 565.—CAN.

**2602 iv.** ———. ]—WATTS & Co. v. MOHLER (B. C.) (1908), 7 W. L. R. 627.—CAN.

**2602 v.** ———. ]—PEOPLE'S COAL

Co. v. PORT HOOD RICHMOND RY. COAL Co. (1909), 43 N. S. R. 514.—CAN.

**2602 vi.** ———. ]—THOMPSON v. WILSON (1911), 18 W. L. R. 606.—CAN.

**2602 vii.** ———. ]—SHIELDS v. LANDRETH (Sask.), [1919] 1 W. W. R. 763; 45 D. L. R. 330.—CAN.

**2602 viii.** ———. ]—In a suit for the non-delivery of goods agreed to be sold by deft. to pltf. in a case where no money has passed, the measure of damages is in general the difference, if any, between the agreed price & the market value on the day when the goods ought to have been delivered.—SHARMAN v. GOUR SHAH BANGALLY (1863), Marsh. 542.—IND.

**2602 ix.** ———. ]—SIMSON v. VIRAYYA (1886), 1 L. R. 9 Mad. 359.—IND.

**2602 x.** ———. ]—SHAW v. BILL (1884), 1 L. R. 8 Mad. 38.—IND.

**2602 xi.** ———. ]—MACKERTICH v. NOBO COOMAR RAY (1903), 1 L. R. 30 Calc. 477; 7 C. W. N. 431.—IND.

**2602 xii.** ———. ]—The measure of damages in an action for non-delivery is the difference between the contract rate & the market rate at the expiry of the period agreed upon as the time for delivery in the contract.—MUTTHAYA MANIAGARAN v. LEKKU REDDIAR (1914), 1 L. R. 37 Mad. 412.—IND.

**2602 xiii.** ———. ]—Where the breach of contract is in respect of goods to be delivered at a future date, the

ordinary rule applies that the measure of damages is the difference between the contract rate & the market rate at the date of the breach, & the date of breach must be considered to be the date when the seller ought to have tendered goods according to the contract & failed to do so.—RAMCHANDRA RAMVALLABH v. VASANTJI SONS & Co. (1920), 1 L. R. 45 Bom. 129.—IND.

**2602 xiv.** ———. ]—MARSHALL & Co. v. NICOLL & SON, [1919] S. C. 244; 56 Sc. L. R. 178; [1920] 1 S. L. T. 79.—SCOT.

**2602 xv.** ———. ]—VAN ES v. BEYERS' TRUSTEES & BOSMAN (1884), 3 S. C. 9.—S. AF.

**2602 xvi.** ———. ]—WALD v. DISLER, [1918] C. P. D. 305.—S. AF.

**2602 xvii.** ———. ]—Where a contract for the sale of goods of a marketable nature is repudiated by either seller or purchaser, the damages are the difference between the contract price & the market price on the day for fulfilment of the contract, or the day of repudiation, whichever occurs last, a little latitude being presumably allowed to enable the party injured to buy or sell similar goods on the market, as the case may be.—AMOD BAYAT v. DOHERTY (1919), 40 N. L. R. 44.—S. AF.

**2602 xviii.** ———. ]—JOUBERT BROTHERS v. ABRAHAMSON, [1920] C. P. D. 103.—S. AF.

**2602 xix.** ———. ]—KAPLAN v. KROOMER, [1920] C. P. D. 618.—S. AF.

(1864), 3 H. & C. 112; 33 L. J. Ex. 300; 11 L. T. 681; 11 Jur. N. S. 22.

*Annotations* :—*Reid*, *Ogle v. Vane* (1868), L. R. 3 Q. B. 272. *Mentd*, *Chinnock v. Ely* (1864), 5 New Rep. 183.

**2608.** ———.]—On Apr. 1, pltf. & defts., who were cotton brokers at Liverpool, entered into a contract, by which defts. agreed to sell to pltf. 500 piculs China cotton, at 16½*d.* per lb., to be delivered in Aug., guaranteed fair. On May 25, pltf. made a contract to sell to M. & A. the same quantity & quality of cotton at 19½*d.* per lb., to be delivered in Aug. It is the practice at Liverpool for purchasers of cotton to resell before the time for delivery. Defts. had not fulfilled their contract on the last day of Aug., on which day the price of cotton was 18½*d.* In an action for breach of contract whereby pltf. was incapacitated from performing his contract with M. & A. :—*Held* : the measure of damages was the difference between the contract price & the market price on the last day for delivery, & pltf. was not entitled to recover damages for the loss of profit from that contract.—

*WILLIAMS v. REYNOLDS* (1865), 6 B. & S. 495; 6 New Rep. 293; 34 L. J. Q. B. 221; 12 L. T. 729; 11 Jur. N. S. 973; 13 W. R. 940; 122 E. R. 1278.

*Annotations* :—*Consd.* *Patrick v. Russo-British Grain Export Co.*, [1927] 2 K. B. 535. *Reid*, *Stroms Bruks Akt. v. Hutchison* (1905), 74 L. J. P. C. 130; *Williams v. Agrulis*, [1914] A. C. 510; *Slater v. Hoyle & Smith*, [1920] 2 K. B. 11.

**2609.** ———.]—*ELBINGER ACT. v. ARMSTRONG*, No. 2566, *ante*.

**2610.** ———.]—*WILLIAMS BROTHERS v. ED. T. AGIUS, LTD.*, No. 2571, *ante*.

**2611.** ———.]—By a contract made in Bombay on Oct. 11, 1917, applts. bought from resp. 1,200 tons of steam coal, to be delivered by instalments of 200 tons monthly to a depot in Bombay which applts. used, it being provided that an indent was to be furnished by the buyers, & that the coal was to be delivered from stock. The supply of coal in India was subject to Govt. regulations which provided that railway waggons were to be supplied only on indents signed by the actual consumers & certified. The buyers furnished a certified indent for the coal signed by an ice factory, & providing for the coal being unloaded at B. railway station. The sellers having failed to deliver part of the coal contracted for, the buyers sued them for damages. The appellate ct. dismissed the suit on the ground that the buyers had not proved that they had suffered any loss by reason of the undelivered coal not reaching the indentors. There was a market for coal at B. at the time of the breach :—*Held* : the contract could not be treated as one for the delivery of coal for the purpose only of supplying the indentor, & the buyers were entitled to recover the difference between the market price & the contract price when the breach occurred.—*KESHAVLAL BROTHERS & Co. v. DIWANCHAND & Co.* (1923), L. R. 50 Ind. App. 142, P. C.

**2612.** ———.]—In Nov. 1925, applts., P., defts. in the action, sold to resps. H., an unascertained cargo of Australian wheat. Without waiting to receive the cargo, H. resold it to other buyers upon the same terms except as to price, & further sub-sales followed in a series of string contracts. In Jan. 1926, P. appropriated a particular cargo to the contract, & thereupon all the contracts on the string became contracts for the sale of that particular cargo. In the events which happened P. refused to deliver the cargo to H. admitting that for his own purposes he had deliberately broken the contract. H. claimed damages, & the dispute was referred to arbn. H. contended that he was entitled to the profit which he

would have made on the resale by him, & also to all damages which he might be called upon to pay by reason of his inability to deliver to his sub-buyers. The arbitrators awarded, subject to the opinion of the ct. on a special case, that H. could recover only the difference between the price which he had contracted to pay to P. & the market price at the date of the breach. On argument of the special case the judge decided in favour of H.'s contention, holding on the facts that at the time when the contract was made it must have been in the contemplation of the parties that the cargo would be resold :—*Held* : the material date for ascertaining what was in the contemplation of the parties was the date when the contract was made & not the date when the cargo was appropriated to the contract, & on the findings of the arbitrators there was no material to support the decision of the judge that a resale was within the contemplation of the parties at the date of the contract, & therefore the damages payable by P. must be limited to the difference between the price which H. was to pay under the contract & the market price at the date of the breach.

—*HALL (R. & H.), LTD. v. PIM (W. H.) JUNIOR & Co., LTD.* (1927), 32 Com. Cas. 144; *sub nom. Re HALL (R. & H.), LTD. & PIM (W. H.) JUNIOR & Co.*, 137 L. T. 585, C. A.

*Annotation* :—*Consd.* *Patrick v. Russo-British Grain Export Co.*, [1927] 2 K. B. 535.

**2613.** ———.]—*Not date of repudiation.*—

If a vendor has time until a given day to deliver goods, & on a prior day, when the prices are low, he refuses to proceed with the contract, after which the price rises, the purchaser, not rescinding, is entitled to recover the difference between the contract price & the higher price which the goods bear on the last day appointed for the fulfilment of the contract.—*LEIGH v. PATERSON* (1818), 8 Taunt. 510; 2 Moore, C. P. 588; 129 E. R. 493.

*Annotations* :—*Folld*, *Phillpots v. Evans* (1839), 5 M. & W. 474. *Consd.* *Startup v. Macdonald* (1841), 2 Man. & G. 395. *Reid*, *Hochster v. De La Tour* (1853), 2 E. & B. 678; *Loder v. Kekule* (1857), 3 C. B. N. S. 128; *Danube, etc. Ry. v. Xenos* (1861), 11 C. B. N. S. 152; *Frost v. Knight* (1870), L. R. 5 Exch. 322.

**2614.** ———.]—*Unless repudiation accepted as breach.*—*ASHMORE & SON v. COX (C. S.) & Co.*, No. 2558, *ante*.

**2615.** ———.]—*TREDEGAR IRON & COAL CO., LTD. v. HAWTHORN BROTHERS & Co.*, No. 2510, *ante*.

**2616.** ———.]—*Anticipatory breach.*—(1) By Sale of Goods Act, 1893 (c. 71), s. 51 (3), "Where there is an available market for the goods . . . the measure of damages," for non-delivery, "is *prima facie* to be ascertained by the difference between the contract price & the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver" :—*Held* : where the time for delivery is fixed by reference to the happening of an event, it is fixed within the meaning of the sect.

(2) Where there is an anticipatory breach by a seller of a contract to deliver at a fixed date goods for which there is a market, the true rule as to the measure of damages is that the buyer, without buying against the seller, may bring his action at once, but if he does so his damages must be assessed with reference to the market price of the goods at the time when they ought to have been delivered under the contract. If the action comes on for trial before the contractual date for delivery has arrived, the ct. must arrive at that price as best it can. To this rule there is one exception for the benefit of the defaulting seller, namely,

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that if he can show that the buyer acted unreasonably in not buying against him, the date to be taken is the date at which the buyer ought to have gone into the market to mitigate damages.—*MELACHRINO v. NICKOLL & KNIGHT*, [1920] 1 K. B. 693; 89 L. J. K. B. 906; 122 L. T. 545; 36 T. L. R. 143; 25 Com. Cas. 103.

*Annotations:—As to (1) Reidd. Millett v. Van Heek*, [1921] 2 K. B. 369.

**2617.** ————.]—*MILLETT v. VAN HECK & Co.*, No. 1588, *ante*.

**2618.** ———— *Action heard before time for delivery.*—Deft. in Apr. agreed to sell & plffs. to buy 3,000 tons of coal, at 8s. 6d. per ton, "to be taken during the months of May, June, July, & Aug." No coal having been taken by plffs. in May, deft. wrote on May 31 desiring plffs. to consider the contract cancelled. Plffs. did not assent to this; but on June 11, deft. definitely refused to deliver any coal, & on July 3, plffs. brought an action for this breach. At the trial, which took place on Aug. 13, plffs. proved that the price of coal had risen during the whole period since the beginning of May, & was still rising. No evidence was given to show whether plffs. could have gone into the market & obtained a new contract for coals:—*Held*: in the absence of evidence on the part of deft., plffs. could have obtained a new contract on such terms as to mitigate their loss, the true measure of damages was the sum of the differences between the contract price & the market price at the several periods for delivery, notwithstanding that the last period had not elapsed when the action was brought, or when the cause was tried.—*ROPER v. JOHNSON* (1873), L. R. 8 C. P. 167; 42 L. J. C. P. 65; 28 L. T. 296; 21 W. R. 384.

*Annotations:—Distd. Dunkirk Colliery Co. v. Lever* (1879), 41 L. T. 633; *Shaw's Brow Iron Co. v. Birchgrove Steel Co.* (1889), 6 T. L. R. 50; *Roth v. Taysen, Townsend* (1896), 1 Com. Cas. 306. *Consd. Michael v. Hart*, [1902] 1 K. B. 482. *Apld. Melachrino v. Nickoll & Knight*, [1920] 1 K. B. 693. *Refd. Tyers v. Rosedale & Ferryhill Iron Co.* (1875), L. R. 10 Exch. 195; *Johnstone v. Milling* (1886), 16 Q. B. D. 460; *Re South African Trust & Finance Co.*, *Ex p. Husch* (1896), 74 L. T. 769. *Mentd. Berghelm v. Blaenavon Iron & Steel Co.* (1875), 44 L. J. Q. B. 92; *Sapwell v. Bass* (1910), 102 L. T. 811.

**2619.** ————.]—*MELACHRINO v. NICKOLL & KNIGHT*, No. 2616, *ante*.

**2620.** ———— *Instalment deliveries.*—Pltf. bought of deft. 500 tons of iron, to be delivered in about equal proportions in Sept., Oct., & Nov. 1871. In Aug. 1871, deft. gave notice to pltf. that he did not intend to deliver any iron. In Dec. pltf. commenced an action for non-delivery, & claimed as damages the difference on Nov. 30 between the contract & market prices of the iron:—*Held*: the proper measure of damages was the sum of the differences between the contract & market prices of one-third of 500 tons on Sept. 30, Oct. 31, & Nov. 30, respectively.—*BROWN v. MULLER* (1872), L. R. 7 Exch. 319; 41 L. J. Ex. 214; 27 L. T. 272; 21 W. R. 18.

*Annotations:—Apld. Roper v. Johnson* (1873), L. T. R. 8

**2620i.** ———— *Instalment deliveries.*—*COOVERJEE BHOJA v. RAJENDRA NATH MUKERJEE* (1909), I. L. R. 36 Calc. 617.—*IND.*

**2620 ii.** ————.]—*BILASIRAM THAKURDAS v. GUBBAY* (1916), I. L. R. 43 Calc. 305.—*IND.*

**2620 iii.** ————.]—*HAJEE ISMAIL & SONS v. WILSON & Co.* (1918), I. L. R. 41 Mad. 709.—*IND.*

**2620 iv.** ————.]—*IRELAND & SON v. MERRYTON COAL CO.* (1894), 21 R. (Ct. of Sess.) 989; 31 Sc. L. R. 834;

2 S. L. T. 134.—*SCOT.*

**2624 i.** ———— *Time for delivery extended at seller's request.*—Deft. agreed to deliver to pltf. one thousand bushels of flax in Nov. 1909. The flax was not delivered in November; & at deft.'s request pltf. postponed time of delivery until Jan. 15, 1910. The flax was not then delivered, & the pltf. sued for damages for breach of the contract:—*Held*: pltf. was entitled to damages based on the market price of flax on Jan. 15, 1910.—*GLENN v. SCHAFFER* (1911), 18 W. L. R. 671;

C. P. 167. *Consd. Dunkirk Hall Colliery Co. v. Lever* (1879), 41 L. T. 633; *Roth v. Taysen, Townsend & Grant* (1895), 73 L. T. 628. *Refd. Peek v. Derry* (1887), 37 Ch. D. 541; *Michael v. Hart*, [1902] 1 K. B. 482; *Melachrino v. Nickoll & Knight*, [1920] 1 K. B. 693.

**2621.** ————.]—*A manufacturer of iron contracted, in May, 1871, to sell to a co. 150 tons of iron at a specified price per ton, delivery to be 20 tons per month. The deliveries were not duly made under the contract. In Jan. 1872, the vendor filed a petition for liquidation by arrangement. At that time a considerable quantity of iron remained to be delivered, & the market price of iron had risen very much. It appeared that in some cases the co. had bought iron in the market to supply the deficiency in the monthly deliveries. It did not appear that any actual request had been made by the vendor for the postponement of the deliveries:—Held: the co. could prove in the liquidation only for the differences between the contract price of the iron & the market prices of the days when the respective deficient deliveries were made.—Re Voss, Ex p. LLANSAMLET TIN PLATE CO.* (1873), L. R. 16 Eq. 155.

**2622.** ————.]—*ROPER v. JOHNSON*, No. 2618, *ante*.

**2623.** ————.]—*BARNINGHAM v. SMITH*, No. 1764, *ante*.

**2624.** ———— *Time for delivery extended at seller's request.*—By bought & sold notes signed by brokers acting both for pltf. & deft., the last of which was dated Apr. 25, pltf. bought of deft. 500 tons of iron, the delivery to extend over three months. None of the iron was delivered by July 25. A correspondence ensued between the brokers & deft.'s agent until Feb. following, from which a jury might properly come to the conclusion that pltf. waited for the delivery of the iron at the request of deft.; he then went into the market & bought, the price of iron being higher than at the end of July:—*Held*: as pltf. had not bound himself to wait, there was no alteration of the contract within Stat. Frauds, & therefore in an action for breach of contract he might recover from deft. the difference between the contract price of the iron & the market price in Feb.—*OGLE v. VANE (EARL)* (1868), L. R. 3 Q. B. 272; 9 B. & S. 182; 37 L. J. Q. B. 77; 16 W. R. 463, Ex. Ch.

*Annotations:—Consd. Tyers v. Rosedale & Ferryhill Iron Co.* (1873), L. R. 8 Exch. 305. *Distd. Re Voss, Ex p. Llansamlet Tin Plate Co.* (1873), L. R. 16 Eq. 155. *Apld. Hickman v. Haynes* (1875), L. R. 10 C. P. 598; *Blackburn Bobbin Co. v. Allen* (1918), 87 L. J. K. B. 1085. *Refd. British Columbia Saw-Mill Co. v. Nettleship* (1868), L. R. 3 C. P. 499; *Shaw's Brow Iron Co. v. Birchgrove Steel Co.* (1889), 6 T. L. R. 50; *Wilson v. London & Globe Finance Corp.* (1897), 14 T. L. R. 15; *Brandt v. Morris*, [1917] 2 K. B. 784; *Morris v. Baron*, [1918] A. C. 1; *Hartley v. Hymans*, [1920] 3 K. B. 475; *Levey v. Goldberg*, [1922] 1 K. B. 688; *British & Beningtons v. N. W. Cachar Tea Co.*, [1923] A. C. 48.

**2625.** ———— *Failure to deliver documents under c.i.f. contract.*—*SHARPE (C.) & Co. v. NOSAWA & Co.*, No. 1805, *ante*.

**2626.** ———— *Duty of buyer to mitigate loss.*—By a contract made in Oct. 1899, defts. sold to

4 Sask. L. R. 166.—*CAN.*

**2624 ii.** ————.]—*GLADSTONE v. SEWBUX* (1878), 4 C. L. R. 106.—*IND.*

**2624 iii.** ————.]—*RAYMOND & Co. v. FRIEDLANDER BROTHERS, LTD.* (1905), 25 N. Z. L. R. 371.—*N.Z.*

**b.** ———— *Time extended by mutual arrangement.*—*DONALD (A. B.), LTD. v. CORRY & Co.*, [1916] N. Z. L. R. 228.—*N.Z.*

**2626 i.** ———— *Duty of buyer to mitigate loss.*—*SANSCHAGRIN v. ECHO*



2629 i. *Loss of profit on sub-sale.*—  
YEAST v. KNIGHT & WATSON (Alta.),  
[1919] 2 W. W. R. 467.—CAN.



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K. B. 945; 136 L. T. 219; 42 T. L. R. 674; 70 Sol. Jo. 942.

**2637. Performance by instalments.]—TAYLOR v. NEVILLE** (prior to 1746), cited in 3 Atk. at p. 384; 26 E. R. 1021.

**Annotations:—***Consd.* Buxton v. Lister (1746), 3 Atk. 383. *Apld.* Adderley v. Dixon (1824), 1 Sim. & St. 607. *Dbtd.* Pollard v. Clayton (1855), 1 K. & J. 462. *Refd.* Fothergill v. Rowland (1873), 43 L. J. Ch. 252.

**2638. Agreement to be made complete by subsequent acts.]—BUXTON v. LISTER**, No. 2633, *ante*.

**2639. Sale of specific goods.]—TAYLOR v. NEVILLE** (prior to 1746), cited in 3 Atk. at p. 384; 26 E. R. 1021.

**Annotations:—***Consd.* Buxton v. Lister (1746), 3 Atk. 383. *Apld.* Adderley v. Dixon (1824), 1 Sim. & St. 607. *Dbtd.* Pollard v. Clayton (1855), 1 K. & J. 462. *Refd.* Fothergill v. Rowland (1873), 43 L. J. Ch. 252.

**2640. —.]—Specific performance of a contract for the sale of a barge, stores, etc., decreed in equity upon a claim.—CLARINGBOULD v. CURTIS** (1852), 21 L. J. Ch. 541.

**Annotation:—***Refd.* Behnke v. Bede Shipping Co., [1927] 1 K. B. 649.

**2641. —.]—If there has been an engagement to appropriate to a certain individual a particular cargo or a particular part of a larger cargo, as for example "100 quarters of wheat out of 500 quarters which I have now sent," in either of these cases equity will interfere to enforce performance of the engagement.—HOARE v. DRESSER** (1859), 7 H. L. Cas. 290; 28 L. J. Ch. 611; 33 L. T. O. S. 63; 5 Jur. N. S. 371; 7 W. R. 374; 11 E. R. 116, H. L.; *reversg.* S. C. *sub nom.* DRESSER v. HOARE, 26 L. J. Ch. 51, C. A.

**Annotation:—***Consd.* *Re* Wait, [1927] 1 Ch. 606.

**2642. —.]—A contract for the sale of goods, as, for example, of 500 chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell 500 chests of the particular kind of tea which is now in my warehouse in Gloucester, is a contract relating to specific property, & which would be specifically performed (LORD WESTBURY, C.).—HOLROYD v. MARSHALL** (1862), 10 H. L. Cas. 191; 33 L. J. Ch. 193; 7 L. T. 172; 9 Jur. N. S. 213; 11 W. R. 171; 11 E. R. 999, H. L.

**Annotations:—***Consd.* Belding v. Read (1865), 3 H. & C. 955. *Apld.* Leatham v. Amor (1878), 47 L. J. Q. B. 581.

*Consd.* Clements v. Matthews (1883), 11 Q. B. D. 808. *Dbtd.* *Re* Wait, [1927] 1 Ch. 606. *Refd.* *Re* Marine Mansion Co. (1867), L. R. 4 Eq. 601; Fothergill v. Rowland (1873), 43 L. J. Ch. 252; *Re* D'Epineuil (2), Tadmam v. D'Epineuil (1882), 20 Ch. D. 758; Joseph v. Lyons (1884), 15 Q. B. D. 280; Reeves v. Barlow (1884), 12 Q. B. D. 436; *Re* Clarke, Coombe v. Carter (1887), 36 Ch. D. 348; Hilton v. Tucker (1888), 57 L. J. Ch. 973; Tailby v. Official Receiver (1888), 13 App. Cas. 523; Morris v. Delobel-Filip, [1892] 2 Ch. 352; *Re* Lind, Industrials Finance Syndicate v. Lind, [1915] 2 Ch. 345. *Mentd.* Reeve v. Whitmore, Martin v. Whitmore (1863), 4 De G. J. & Sm. 3; *Re* Barker, *Ex p.* Gorely (1864), 5 New Rep. 22; Dean v. Byrnes (1864), 3 Moo. P. C. C. N. S. 92; Langton v. Waring (1865), 18 C. B. N. S. 315; Brown v. Bateman (1867), L. R. 2 C. P. 272; Tebb v. Hodge (1869), 38 L. J. C. P. 217; Trotter v. Watson (1869), 1 Hop. & Colt. 216; Thompson v. Cohen (1872), L. R. 7 Q. B. 527; *Re* Cook, *Ex p.* Izard (1874), 30 L. T. 7; Anon., [1875] W. N. 203; Greenbirt v. Smece (1876), 35 L. T. 168; *Re* Bamford, *Ex p.* Games (1879), 12 Ch. D. 314; Baghott v. Norman (1880), 41 L. T. 787; Lazarus v. Andrade (1880), 5 C. P. D. 318; Collyer v. Isaacs (1881), 19 Ch. D. 342; *Re* Jones, *Ex p.* Nichols (1883), 22 Ch. D. 782; Walker v. Bradford Old Bank (1884), 12 Q. B. D. 511; Harding v. Harding (1886), 17 Q. B. D. 442; Ross v. Army & Navy

Hotel Co. (1886), 34 Ch. D. 43; Thomas v. Kelly (1888), 13 App. Cas. 506; *Re* Turcan (1888), 58 L. J. Ch. 101; *Re* Pyle Works (1890), 44 Ch. D. 534; *Re* Standard Manufacturing Co. (1891), 60 L. J. Ch. 292; Church v. Sago, Froy, Claimant (1892), 67 L. T. 800; Administrator-General of Jamaica v. Lascelles, De Mercado, *Re* Rees' Bankruptcy, [1894] A. C. 135; *Re* Dallas, [1904] 2 Ch. 385; *Re* Reis, *Ex p.* Clough (1904), 91 L. T. 592; Ward, Lock v. Long, [1906] 2 Ch. 550; National Provincial & Union Bank of England v. Charnley, [1924] 1 K. B. 431; Performing Right Soc. v. London Theatre of Varieties, [1924] A. C. 1.

**2643. — Property in goods not passed—Growing timber.]—JAMES JONES & SONS, LTD. v. TANKERVILLE (EARL)**, No. 2657, *post*.

**2644. — Wheat not appropriated.]—"Ascertained goods" in Sale of Goods Act, 1893 (c. 71), s. 52, mean goods identified in accordance with the agreement after the time a contract of sale is made (ATKIN, L.J.).**

By a c.i.f. contract of Nov. 20, 1925, W. bought 1,000 tons of a special wheat *ex Challenger*, expected to load in Dec. at Oregon. By a c.i.f. contract of Nov. 21, W. sold 500 tons of this parcel to sub-purchasers. The wheat was shipped in bulk at Oregon on Dec. 21, & a bill of lading for the 1,000 tons forwarded to W., who received it on Jan. 4, 1926. The purchase-money was due on Feb. 6, *i.e.* thirty-three days after sight, & on Feb. 5, although the sub-purchasers had never received any bill of lading, warrant, delivery order or any document of title representing the goods, & the 500 tons were never appropriated, they gave W. their cheque for their 500 tons less the half freight payable at destination. W. having paid this cheque to his bank & hypothecated the 1,000 tons bill of lading became bkpt. before the ship arrived. The trustee having redeemed this bill of lading claimed to retain the entire 1,000 tons leaving the sub-purchasers their remedy in damages:—*Held*: (1) the 500 tons were not specific or ascertained goods in respect of which specific performance of the contract of sale would be ordered as the remedy of the sub-purchasers under Sale of Goods Act, 1893 (c. 71), s. 52; (2) there never was any such appropriation or identification of, or any such obligation to deliver, a particular 500 tons, as to effect an equitable assignment giving the sub-purchasers a beneficial interest therein or a lien in respect thereof.—*Re* WAIT, [1927] 1 Ch. 606; 71 Sol. Jo. 56; *sub nom.* *Re* WAIT, TRUSTEE v. HUMPHRIES & BOBBETT, 96 L. J. Ch. 179; 136 L. T. 552; *sub nom.* *Re* WAIT, *Ex p.* COLLINS, 43 T. L. R. 150, C. A.

**2645. — Ship.]—A ship comes within the description of "goods" in Sale of Goods Act, 1893 (c. 71), since by sect. 62 (1) "goods" include all chattels personal other than things in action & money." Under sect. 52 of the Act the ct. may direct specific performance of the sale of a ship.—BEHNKE v. BEDE SHIPPING CO., LTD., [1927] 1 K. B. 649; 96 L. J. K. B. 325; 136 L. T. 667; 43 T. L. R. 170; 71 Sol. Jo. 105; 32 Com. Cas. 134; 17 Asp. M. L. C. 222.**

**2646. Sale of unascertained goods.]—HOLROYD v. MARSHALL**, No. 2642, *ante*.

**2647. —.]—THAMES SACK & BAG CO., LTD. v. KNOWLES & CO., LTD.**, No. 1053, *ante*.

**2648. Effect of delay.]—In contracts relating to commodities fluctuating from day to day in market price, the ct. expects persons to be unusually vigilant & active in asserting their right**

C. L. R. 504.—AUS.

**2648 i. Effect of delay.]—CRAIG & CO. v. HAMILTON** (1823), 2 Sh. (Ct. of Sess.) 347.—SCOT.

**2648 ii. —.]—A seller who is in mora in delivering the article sold may be sued by the purchaser for**

**PART VIII. SECT. 3, SUB-SECT. 3.**

**2639 i. Sale of specific goods.]—In Scotland the breach of a contract for the sale of a specific subject gives the party aggrieved the legal right to sue for implement, & although he may elect to do so he cannot be compelled to**

resort to the alternative of an action for damages unless implement is shown to be impossible.—*STEWART v. KENNEDY* (1890), 15 App. Cas. 75.—SCOT.

**e. — Specific performance with abatement for deficiency in quantity.]—BURGES v. WILLIAMS** (1912), 15

to specific performance, which it is inequitable to grant after such an interval, & when the parties may be no longer in the same position.

Bill by a co. for smelting & manufacturing iron, against proprietors of coal mines adjoining their works, for specific performance of an agreement to sell to the co., at a fixed price per ton, all of certain beds of coal, estimated to contain from 120,000 to 150,000 tons, to be raised & delivered by defts. at the rate of 500 tons per week, & the co. to drain the beds; & for an injunction to restrain defts. from selling any part to other persons. The bill averred, that the coal was very conveniently situate with reference to the co.'s iron works, which adjoined thereto; & that the co. had the power, by means of their engines & pits, to drain the beds, & had occasion for a large quantity of coal of that particular description. Demurrer allowed, mainly on ground of laches, the co. having neglected to file their bill until eleven months after they discovered that defts. had ceased to deliver the coal, & were referred by defts. to their solrs.—*POLLARD v. CLAYTON* (1855), 1 K. & J. 462; 25 L. T. O. S. 50; 1 Jur. N. S. 342; 3 W. R. 349; 69 E. R. 540.

*Annotation*.—*Mentd.* Abinger v. Ashton (1873), L. R. 17 Eq. 358.

**2649. Vicinity & convenience of situation.]—***POLLARD v. CLAYTON*, No. 2648, *ante*.

**2650. Damages difficult to estimate.]—***POLLARD v. CLAYTON*, No. 2648, *ante*.

**2651. Damages inadequate remedy.]—***FALCKE v. GRAY*, No. 2653, *post*.

**2652. —.]—***COHEN v. ROCHE*, No. 2636, *ante*.

**2653. Parties not on equal footing—Purchaser taking advantage of ignorance of vendor.]—**A ct. of equity will entertain a bill for specific performance of a contract for sale of a valuable chattel where adequate compensation cannot be obtained at law; but in a case where it was proved that the price was greatly inadequate, & the purchaser knew it to be so, the ct., under the circumstances, refused to decree specific performance, & dismissed the bill, although it would not have given relief to a vendor seeking to set aside the contract.—*FALCKE v. GRAY* (1859), 4 Drew. 651; 29 L. J. Ch. 28; 33 L. T. O. S. 297; 5 Jur. N. S. 645; 7 W. R. 535; 62 E. R. 250.

*Annotation*.—*Apld.* Macdonald v. Eyles, [1921] 1 Ch. 631.

**2654. Contract containing negative stipulation.]—**A contract for the sale of chattels to pltf. contained an express negative stipulation not to sell to any other manufacturer. The ct. granted an injunction to restrain the breach of the negative stipulation, although the contract was one of which specific performance would not have been granted.—*DONNELL v. BENNETT* (1883), 22 Ch. D. 835; 52 L. J. Ch. 414; 48 L. T. 68; 47 J. P. 342; 31 W. R. 316.

*Annotations*.—*Consd.* Davis v. Foreman, [1894] 3 Ch. 654;

specific performance of the contract of sale, & also for damages sustained by him by reason of such delay.—*KAISER BROTHERS v. WESLEYAN CHURCH* (1901), 12 C. T. R. 107.—*S. AF.*

**2648 iii. —.]—***EISELE v. AURET*, [1904] T. H. 156.—*S. AF.*

**2648 iv. —.]—***RHODESIA COLD STORAGE, ETC. CO. v. BEIRA COLD STORAGE LTD. (IN LIQUIDATION)* (1905), 2 Buch. A. C. 253.—*S. AF.*

**f. Sale of goods to be manufactured—Where capable of identification & of peculiar value to purchaser.]—**The ct. will decree specific performance of a contract for the manufacture & sale of saw logs, where they are capable of being identified & possess a peculiar value for the purchaser.—*STEVENSON v. CLARKE* (1854), 4 Gr. 540.—*CAN.*

**MOND** (1854), 4 Gr. 657.—*CAN.*

**h. —.]—***FARWELL v. WALBRIDGE* (1858), 6 Gr. 634.—*CAN.*

**k. Where mutual mistake—Goods not in place or possession believed to be.]—**Specific performance of a contract for the sale of certain machinery was refused on the ground of mutual mistake, where both parties had acted in good faith & believed the machinery to be at a certain place, whereas, the fact was that it had been wrongfully seized by a third party & taken away, & pltf., although claiming that the title therein had passed to him, refused to take any steps to recover the same.—*HAMILTON v. SMYTHE* (1913), 24 O. W. R. 809; 4 O. W. N. 1572; 13 D. L. R. 55.—*CAN.*

*Grimston v. Cunningham*, [1894] 1 Q. B. 125. *Apld.* Metropolitan Electric Supply Co. v. Ginder, [1901] 2 Ch. 799. *Mentd.* Powell v. Hemsley (1909), 78 L. J. Ch. 741.

#### SUB-SECT. 4.—INJUNCTION.

*See, generally*, INJUNCTION, Vol. XXVIII., pp. 361 *et seq.*

**2655. Whether granted—Where specific performance would not be decreed.]—**The ct. will not interfere by injunction to restrain the breach of a contract for the sale & delivery of chattels which it could not specifically perform. Accordingly where the lessee of a colliery contracted to raise & deliver to pltf. all the get of coals in the colliery at a fixed price for five years, & subsequently agreed for the sale of the colliery, to other parties:—*Held*: the ct. had no jurisdiction to grant an injunction to restrain the breach of contract.—*FOTHERGILL v. ROWLAND* (1873), L. R. 17 Eq. 132; 43 L. J. Ch. 252; 29 L. T. 414; 38 J. P. 244; 22 W. R. 42.

*Annotations*.—*Consd.* Donnell v. Bennett (1883), 22 Ch. D. 835. *Apld.* Davis v. Foreman (1894), 8 R. 725. *Consd.* Keith, Provs. v. National Telephone Co., [1894] 2 Ch. 147. *Re Wait*, [1927] 1 Ch. 606. *Refd.* Metropolitan Electric Supply Co. v. Ginder, [1901] 2 Ch. 799. *Mentd.* Talby v. Official Receiver (1888), 13 App. Cas. 523; Whitwood Chemical Co. v. Hardman (1891), 64 L. T. 716.

**2656. — Contract containing negative stipulation.]—***DONNELL v. BENNETT*, No. 2654, *ante*.

**2657. Damages inadequate remedy.]—**By contracts contained in letters deff. sold to pltf. certain growing timber on his estates, pltf. being entitled to enter on the estates with their servants to fell the timber, to erect saw mills for the purpose of cutting it up, & to remove the timber when so cut up. Considerable sums were paid by pltf. to deff. under these contracts & pltf. erected saw mills, bothies for their workmen, & other erections on the estates, & they removed a considerable part of the timber. Deff. then purported to repudiate the contracts, & forcibly, by his servants & agents, prevented pltf. from entering on the estates to cut the timber, pulled down the saw mills & bothies erected by pltf., & carried away parts of the machinery. In an action by pltf. for an injunction to restrain deff. from preventing the due execution of the contracts, & for damages:—*Held*: (1) in such a case damages only would not be an adequate remedy for what pltf. had suffered, & they were entitled to an injunction as well as damages. *Qu.*: whether a contract for the sale of timber to be cut by the purchaser does not confer an interest at law if such a nature as to make the licence to enter *ab initio* an irrevocable licence.

(2) As soon as the purchaser has severed the timber, the legal property in the severed trees vests in him (*PARKER, J.*).—*JAMES JONES & SONS, LTD. v. TANKERVILLE (EARL)*, [1909] 2 Ch. 440;

**l. Agreement to repurchase—Delay in demanding repurchase while market rising.]—***MITSUI & Co. v. BROWN* (1919), 27 B. C. R. 502.—*CAN.*

**m. Goods disposed of to bona fide purchaser.]—**Specific performance of a contract of purchase & sale will not be granted where the subject-matter has been disposed of to a bona fide purchaser.—*SHAKINOVSKY v. LAWSON* [1904], T. S. 326.—*S. AF.*

**n. Joinder of alternative claim—Cancellation & damages.]—**In an action on a contract of sale for specific performance it is competent for the plaintiff to claim in the alternative cancellation & damages for breach.—*HAS v. SIMPSON*, [1904] T. S. 254.—*S. AF.*

**Sect. 3.—Remedies of the buyer: Sub-sects. 4, 5, 6**

78 L. J. Ch. 674; 101 L. T. 202; 25 T. L. R. 714.

**Annotations:—***As to (1) Refd.* Walmiha Sawmilling Co. v. Walone Timber Co., [1926] A. C. 101. *As to (2) Refd.* Kersell v. Timber Operators & Contractors, [1927] 1 K. B. 298. *Generally, Refd.* Thames Sack & Bag Co. v. Knowles (1918), 88 L. J. K. B. 585; Cohen v. Roche, [1927] 1 K. B. 169. *Mentd.* Hurst v. Picture Theatres, [1915] 1 K. B. 1; Joel v. International Circus & Christmas Fair (1920), 124 L. T. 459; *Re* Wait, [1927] 1 Ch. 606.

**2658. Damages awarded in addition.]—**JAMES JONES & SONS, LTD. v. TANKERVILLE (EARL), No. 2057, *ante*.

**SUB-SECT. 5.—ACTION IN TORT.**

*See, generally, TROVER.*

**2659. Basis of claim—Right of property—No right of possession.]—**JAMES v. PRICE (1773), Lofft, 219; 98 E. R. 619.

**2660. ——— After appropriation of goods.]—**LANGTON v. HIGGINS, No. 1128, *ante*.

**2661. ———.] —**ARONSON v. MOLOGA HOLZINDUSTRIE A/G LENINGRAD, No. 2687, *post*.

**2662. ——— Right of possession—& right of property.]—**MILGATE v. KEBBLE, No. 2367, *ante*.

**2663. ——— Whether affected by default in payment.]—**MARTINDALE v. SMITH, No. 2053, *ante*.

**2664. ———.]—**CHINERY v. VIAL, No. 2672, *post*.

**2665. ——— Seller's lien determined by conversion.]—**Pltf. agreed to buy of deft. a stack of hay for £86, to be paid for as taken away, & to be removed by May 31. Part of the hay was removed & paid for by pltf. before May 31, & in Aug. the remainder was cut up & used by deft.:—*Held*: as deft.'s lien on the hay was determined by the act of conversion, pltf. was entitled to the possession of the hay, & might maintain an action of trover.—GURR v. CUTHBERT (1843), 12 L. J. Ex. 309.

**2666. ———.]—**JOHNSON v. LANCA-SHIRE & YORKSHIRE RY. CO. & WIGAN WAGGON CO., LTD., No. 2674, *post*.

**2667. Secret repurchase by seller—Bill not obtainable from purchaser—Action by purchaser's assignees.]—**A. sold goods to B. to be paid for by a bill at two months, & not being able to obtain it from B. & doubting his solvency, A. employed his broker to repurchase them in his own name, which was done, although at a great loss. B. afterwards became bkpt., without knowing that the goods had been repurchased by the broker on account of A. In an action of trover, brought by the assignees of B. against A. for the goods:—*Held*: they were not entitled to recover, as the transaction was not fraudulent on the part of A.—HARRIS v. LUNELL (1819), 1 Brod. & Bing. 390; 4 Moore, C. P. 10.

**Annotation:—***Refd.* Lackington v. Combes (1839), 8 Scott, 312.

**2668. Goods subject to lien—Creditor's lien—Knowledge of & assent to by purchaser—Trover against creditor.]—**A person who buys a chattel, upon which creditors have a lien by express agreement with the vendor, in ignorance of such

agreement, but after the purchase assents to it, is bound by his assent; & though he has paid the purchase-money to the vendor, he cannot maintain trover for the chattel against a creditor, who detains it for his lien.—NORRIS v. WILLIAMS (1833), 1 Cr. & M. 842; 2 L. J. Ex. 257; 149 E. R. 639.

**2669. ——— Wrongful removal by third party—Purchaser's right of action after lien satisfied.]—**LORD v. PRICE, No. 2050, *ante*.

**2670. Seller estopped from denying purchaser's title.]—**In trover for goods, deft. pleaded that the assignees of M., a bkpt., were interested in the goods as tenants in common with pltf., & that defts., by the leave & licence of the assignees converted, etc. Replication, that the assignees were not so interested; & issue thereon. Deft. had sold the goods to pltf. as the sole purchaser, & had ordered the warehouseman, in whose hands they were, to weigh them over, which had been done, & the goods transferred into pltf.'s name in the warehousemen's books. Afterwards the assignees of M. gave notice of their claim to deft., & he ordered the warehousemen to detain the goods, which were still in their hands:—*Held*: as between deft. & pltf., the sale & transfer were conclusive of the latter being sole proprietor; & therefore, the alleged title of the assignees, supposing evidence of it to have been receivable under the special plea upon which pltf. had tendered issue, would not have been an available defence.—KIERAN v. SANDARS (1837), 6 Ad. & El. 515; 1 Nev. & P. K. B. 625; Will. Woll. & Dav. 267; 6 L. J. K. B. 145; 112 E. R. 197.

**2671. Defence to action—Stoppage in transitu or lien.]—***Semble*: stoppage in transitu, lien & similar defence may be specially pleaded in trover, along with not possessed.—EYRE v. SCOVELL (1847), 9 L. T. O. S. 84; *subsequent proceedings* (1818), 5 C. B. 701.

**2672. Measure of damages—Resale by seller before delivery—Difference between contract price & market value.]—**Pltf. agreed to buy of deft. a quantity of sheep, at a fixed price each, to be paid for on delivery, & to be taken away in a fortnight. Pltf. then took away 5 of the number, & paid for the 5. Before the expiration of the fortnight deft. sold the remainder to another person. In an action against deft. for breach of contract, the declaration containing also a count in trover:—*Held*: the proper measure of damage to be recovered was not the full value of the sheep, but only the difference between the price pltf. agreed to give for them, & their fair market value during the time he was entitled to them.

Where there has been no default on the part of the vendee, if the vendor is guilty of an act of conversion of the goods sold, the vendee is entitled to maintain an action against him for that conversion, & he has such a right of property & possession as is necessary to entitle a party to maintain such action (BRAMWELL, B.).—CHINERY v. VIAL (1860), 5 H. & N. 288; 29 L. J. Ex. 180; 2 L. T. 466; 8 W. R. 629.

**Annotations:—***Apld.* Johnson v. Stear (1863), 15 C. B. N. S. 339. *Consd.* Attack v. Bramwell (1863), 3 B. & S. 520; Johnson v. L. & Y. Rly. & Wigan Wagon Co. (1878), 3 C. P. D. 499. *Distd.* Mulliner v. Florence (1878), 3 Q. B. D. 484. *Apld.* Hlort v. L. & N. W. Rly. (1879), 4 Ex. D. 188. *Consd.* Armstrong v. Allan (1892), 67 L. T. 417. *Apld.*

**PART VIII. SECT. 3, SUB-SECT. 5.**

**2661 i. Basis of claim—Right of property.]—**O'ROURKE v. LEE (1859), 18 U. C. R. 609.—CAN.

**o. ——— Right of possession.] —**BUTTERS v. STANLEY (1871), 21 C. P. 402.—CAN.

**p. Conversion of goods—Right of purchaser to join seller as third party.]—**In an action for the conversion of goods, deft. may bring in the person who sold him the goods as a third party.—CONFEDERATION LIFE ASSOCN. v. LABATT (No. 2) (1898), 18 P. R. 260.—CAN.

**q. Mistake—Delivery of wrong article.]—**A. entered B.'s store for block salt for cattle. B. said he had only loose salt & produced an 80 lb. sack, which had been previously opened, & drew A.'s attention to the fact that the salt was dirty. A. said it was all right & took the sack away.

*Belsize Motor Supply Co. v. Cox*, [1914] 1 K. B. 244. *Refd.* *Donald v. Suckling* (1866), L. R. 1 Q. B. 585; *Row v. Payne*, *Douthwaite* (1885), 53 L. T. 932; *London Joint Stock Bank v. British Amsterdam Maritime Agency* (1910), 104 L. T. 143; *Cohen v. Roche*, [1927] 1 K. B. 169. *Mentd.* *Toms v. Wilson* (1863), 4 B. & S. 455.

**2673.** — **Buyer unable to deliver to sub-seller—Price of resale.**—Pltf. purchased champagne lying at depts.' wharf at 14s. per dozen, & resold it at 24s. to the captain of a ship about to leave England. Defts. refused to deliver the wine & pltf. was unable to fulfil his contract, champagne of a similar quality not being procurable in the market. Defts. had no knowledge of the sale, or of the purpose for which pltf. required delivery of the champagne. In an action for the conversion:—*Held*: pltf. was entitled, as damages, to the price at which he had sold the champagne. —*FRANCE v. GAUDET* (1871), L. R. 6 Q. B. 199; 40 L. J. Q. B. 121; 19 W. R. 622.

*Annotations*:—*Distd.* *Horne v. Mid. Ry.* (1873), L. R. 8 C. P. 131; *Johnson v. Hook* (1883), 31 W. R. 812. *Mentd.* *The Star of India* (1876), 1 P. D. 466; *Attenborough v. London & St. Katherine Docks Co.* (1878), 26 W. R. 583.

**2674.** — **Action against stranger—Full value of goods—Without deduction of price.**—Pltfs., being under contract to sell waggons, employed L. to make them according to sample at a certain price. L. then employed deft. waggon co. to make them according to sample at a lower price. The co. afterwards proposed to receive payment direct from pltfs., who consented & were authorised by L. to pay them. Some waggons were delivered by the waggon co. to deft. railway co. to the order of pltfs. Pltfs. sent a complaint to the waggon co. that the waggons were unequal to sample, but did not reject them; & they informed L., & also the waggon co., that they would dispose of the waggons at the best price obtainable, & hold L. responsible for loss. L. rejected the waggons. Pltfs. gave notice to the railway co. not to deliver the waggons without their order, but the railway co. nevertheless delivered them to the waggon co., who refused to give them up. In an action against both cos. for conversion:—*Held*: (1) the property in the goods & the right to possession of them having passed to pltfs., both defts. were liable; (2) the arrangement for the advantage of the waggon co., that they should receive direct payment from pltfs., had not created any relationship between them which would prevent the application of the ordinary rule as to the measure of damages in trover against mere strangers; & pltfs. were, therefore, entitled to recover the full value of the goods at the time of the conversion, without deduction of the price.—*JOHNSON v. LANCASHIRE & YORKSHIRE RY. CO. & WIGAN WAGGON CO., LTD.* (1878), 3 C. P. D. 499; 39 L. T. 448; 27 W. R. 459.

*Annotation*:—*Generally*, *Refd.* *Royal Mail S.S. Co. v. MacIntyre* (1911), 16 Com. Cas. 231.

**2675.** — **Sale induced by fraud—Resale by buyer.**—L. ordered deft. to buy for him rupee paper; deft. sold rupee paper of his own to L., whilst he fraudulently led L. to believe that it belonged to third persons. The value of rupee paper afterwards became considerably less, but L. held for many months what deft. had sold to him, & ultimately resold it at a loss of £43,000;—*Held*: the measure of damages was not the amount of the loss ultimately sustained by L.,

but the difference between the price which he paid for the rupee paper & the price which he would have received if he had resold it in the market forthwith after purchasing it.—*WADDELL v. BLOCKEY* (1879), 4 Q. B. D. 678; 48 L. J. Q. B. 517; 41 L. T. 458; 27 W. R. 931, C. A.

*Annotation*:—*Mentd.* *Cavendish-Bentinck v. Fenn* (1887), 57 L. T. 773.

—*See, generally*, *DAMAGES*, Vol. XVII., pp. 130 *et seq.*

#### SUB-SECT. 6.—BREACH OF CONDITIONS AND WARRANTIES.

*See* Part III., Sect. 19, *ante*.

#### SUB-SECT. 7.—FAILURE OF CONSIDERATION.

*See* Sale of Goods Act, 1893 (c. 71), s. 54; & *generally*, *CONTRACT*, Vol. XII., pp. 224 *et seq.*

**2676.** **Right to recover money paid—Partial failure of consideration—Mutual mistake.**—Where deft. received from his principal abroad a bar of silver, & took it to pltfs., who melted it, & sent a piece to an assayer to be assayed at deft.'s expense, & paid a price for the bar to deft., as for the number of ounces of silver which by the assay it was calculated to contain, which number was afterwards discovered to exceed the true number:—*Held*: pltfs. might, after having offered to return the bar, have money had & received against deft. for the price thus paid to him under a mistake, although deft. had forwarded his account to his principal, & in it had placed the price received to the credit of his principal.—*COX v. PRENTICE* (1815), 3 M. & S. 344; 105 E. R. 641.

*Annotations*:—*Distd.* *Devaux v. Connolly* (1849), 8 C. B. 640. *Refd.* *Bradbury v. Anderton* (1831), 1 Cr. M. & R. 486; *McCarthy v. Colvin* (1839), 9 Ad. & El. 607; *Aiken v. Short* (1856), 1 H. & N. 210; *Continental Caoutchouc & Gutta Percha Co. v. Kleinwort* (1901), 90 L. T. 474; *Baylis v. London (Bp.)*, [1913] 1 Ch. 127. *Mentd.* *Holland v. Russell* (1861), 1 B. & S. 424; *Pollard v. Bank of England* (1871), L. R. 6 Q. B. 623; *Beavor v. Marler* (1898), 14 T. L. R. 289.

**2677.** — *Pltfs., merchants in London, ordered of deft., a merchant at Singapore, two parcels, of 25 tons & 150 tons respectively, of terra japonica, "provided it can be laid down here, all charges included, at 18s. per cwt." Deft. sent to pltfs. invoices & bills of lading representing that two parcels, respective of those weights, had been shipped to their order, & at the same time, drew bills upon them for the price, which pltfs., upon the faith of the representation contained in the invoices & bills of lading, accepted, & duly paid. Upon the arrival of the goods in London, the net weight, exclusive of packages, which consisted of baskets & leaves, proved to be 24 tons & 132½ tons only. Pltfs. took the goods, & sold them; & now brought money had & received to recover back the sum overpaid, as upon a partial failure of consideration. Upon a special case, stating it to be the custom at Singapore to purchase terra japonica by gross weight as packed, & in London to sell it net:—*Held*: pltfs. were entitled to recover.—*DEVAUX v.**

He gave the contents, found afterwards to be nitrate of soda, to the cattle who died. In an action against B.:—*Held*: although neither a question of warranty express or implied, nor negligence arose, in the circumstances defts. must be held responsible for the loss resulting from their mistake in giving the wrong

article to pltfs.—*CARLIN & STRICKLAND v. MCAUSLAND & SPENCE* (1921), 70 D. L. R. 769; 30 B. C. R. 351.—*CAN.*

#### PART VIII. SECT. 3, SUB-SECT. 7.

**2677 i.** **Right to recover money paid—Partial failure of consideration.**—

*GEORGIAN BAY LUMBER CO. OF ONTARIO v. THOMPSON* (1874), 35 U. C. R. 64.—*CAN.*

*r.* — *For ascertained & liquidated amount.*—*McGREGOR v. BISHOP* (1887), 14 O. R. 7.—*CAN.*

*t.* — *Total failure of considera-*

*Sect. 3.—Remedies of the buyer: Sub-sects. 7 & 8.]*

CONOLLY (1849), 8 C. B. 640; 19 L. J. C. P. 71; 14 L. T. O. S. 546; 137 E. R. 658.

*Annotation:—*Refd. Behrend v. Produce Brokers Co., [1920] 3 K. B. 530.

**2678.** ———.]—BEHREND & Co. v. PRODUCE BROKERS CO., No. 1897, *ante*.

**2679.** ——— Total failure of consideration—Breach of warranty—Rescission by purchaser.]—In an action for the breach of a warranty of a horse, pltf. failed to prove a warranty at the time of sale, but it appeared that he had returned the horse to deft., who stated that he would keep it without prejudice, but he afterwards used it & offered to sell it to a third person:—*Held*: by so doing, he rescinded the original contract of sale; & the jury having found a verdict for pltf., for the sum paid for the horse, the ct. refused to disturb it.—LONG v. PRESTON (1828), 2 Moo. & P. 262; 7 L. J. O. S. C. P. 14.

**2680.** ———.]—HEAD v. TATTERSALL, No. 1256, *ante*.

**2681.** ——— Breach of implied condition as to title.]—There is no implied warranty of title from the mere contract of sale itself, & a vendor is not liable for a bad title unless there be fraud on his part, or an express warranty, or what is equivalent thereto by declarations or conduct. Such warranty may be raised by the usage of trade, or by the nature of the trade carried on by the seller. Where articles are bought in a shop professedly carried on for the sale of goods, the shopkeeper must be considered as warranting that any purchaser will have a good title to keep the goods purchased.

A harp having been pledged to deft., a pawnbroker, by a party who had no title to it, deft. being ignorant of that fact, sent it for sale to an auctioneer after the expiration of the time for redemption. The auctioneer, describing the sale as consisting of unredeemed pledges & other effects, sold the harp to pltf., who having been compelled to restore it to the true owner, brought an action against deft. on an alleged breach of title to sell, & for money had & received:—*Held*: as the auctioneer had no authority to sell the harp, except as a forfeited pledge, deft. was to be considered as selling that right only which he himself had, & as undertaking merely that the article was a forfeited pledge, & that he was not cognisant of any defect of title. *Seem*: pltf. could have recovered back the purchase-money for it on the count for money had & received, as upon a consideration that had failed, if there had been a mutual understanding that the bargain should be rescinded provided the seller should prove not to have a good title.—MORLEY v. ATTENBOROUGH (1849), 3 Exch. 500; 18 L. J. Ex. 148; 12 L. T. O. S. 532; 13 J. P. 427; 13 Jur. 282; 154 E. R. 943.

*Annotations:—*Distd. Sims v. Marryat (1851), 17 Q. B. 281; Biddle v. Green (1857), 27 L. J. Ex. 33. *Consd.* Hall v. Conder (1857), 2 C. B. N. S. 22. *Apld.* Eichholtz v. Bannister (1864), 17 C. B. N. S. 708. *Folld.* Richardson v. Crosbie (1876), cited in Turner on Pawnbrokers Act, 1872, 2nd ed. at p. 63, n. *Apld.* Raphael v. Burt (1884), Cab. & El. 325. *Consd.* Calipe v. Thomson (1902), 66 J. P. 313. *Refd.* Bandy v. Cartwright (1853), 8 Exch. 913; Aiken v. Short (1856), 1 H. & N. 210; Emmerton v. Mathews (1862), 7 H. & N. 586; Bagueley v. Hawley (1867), L. R. 2 C. P. 625; Wood v. Baxter (1883), 49 L. T. 45; Benton v. Campbell, Parker, [1925] 2 K. B. 410. *Mentd.* Colleen v. Wright (1857), 8 E. & B. 647; Smith v. Neale (1857), 2 C. B. N. S. 67; Baylis v. London (Bp.), [1913] 1 Ch. 127; *Re* Thellusson, *Ex p.* Abdy (1919), 88 L. J. K. B. 1210.

<sup>t</sup>*ion*—Breach of warranty of title.]—BROAD v. NICKLE (1896), 3 Terr. L. R. 382.—CAN.

a. What amounts to consideration—Credit to one purchaser of excess goods delivered to another—Failure of

2682.

—.]—Though there is no warranty of title on the mere sale of chattels, it may be implied from the declaration or conduct of the vendor.

Deft., a professed dealer in prints, bought some in his shop, & then & there resold them to pltf., who afterwards discovered that they had been stolen, & gave them up to the real owner:—*Held*: deft. sold as owner, & pltf. was entitled to recover from him the price he had paid for them.—EICHHOLTZ v. BANNISTER (1864), 17 C. B. N. S. 708; 5 New Rep. 87; 34 L. J. C. P. 105; 11 Jur. N. S. 15; 13 W. R. 96; 144 E. R. 284; *sub nom.* EICOLTZ v. BANNISTER, 12 L. T. 76.

*Annotations:—*Apld. R. v. Sampson (1885), 52 L. T. 772. *Refd.* Bagueley v. Hawley (1867), L. R. 2 C. P. 625; Wood v. Baxter (1883), 49 L. T. 45; Raphael v. Burt (1884), Cab. & El. 325; Benton v. Campbell, Parker, [1925] 2 K. B. 410.

**2683.** ———.]—Pltf. bought a motor car from deft. & used it for several months. It then appeared that deft. had had no title to it, & pltf. was compelled to surrender it to the true owner. Pltf. sued deft. to recover back the purchase-money that he had paid as on a total failure of consideration:—*Held*: notwithstanding that he had had the use of the car the consideration had totally failed, & he was entitled to get the purchase-money back. The use of the car that he had had was no part of the consideration that he had contracted for, which was the property in & lawful possession of the car, whereas what he got was an unlawful possession which exposed him to the risk of an action at the suit of the true owner.—ROWLAND v. DIVALL, [1923] 2 K. B. 500; 92 L. J. K. B. 1041; 129 L. T. 757; 67 Sol. Jo. 703, C. A.

**2684.** ——— Goods not answering description.]—An unstamped bill of exchange, indorsed in blank, purporting to be a foreign bill, was sold, without recourse, by the holder, who was not a party to the bill. It proved to have been drawn in this country, & was therefore unavailable for want of a stamp, & could not be enforced against the parties. The vendor & purchaser at the time of the sale were both alike ignorant of this defect:—*Held*: the purchaser was entitled to recover back the price from the vendor, on the ground that the article sold as a foreign bill did not answer the description by which it was sold. Though it would have been otherwise, the sale being without any warranty, & there being no fraud, had the latent defect been one consistent with the article being a foreign bill.—GOMPERTZ v. BARTLETT (1853), 2 E. & B. 849; 2 C. L. R. 395; 23 L. J. Q. B. 65; 22 L. T. O. S. 99; 18 Jur. 266; 2 W. R. 43; 118 E. R. 985.

*Annotations:—*Consd. Hall v. Conder (1857), 2 C. B. N. S. 22. *Distd.* Kennedy v. Panama, etc. Mail Co. (1867), L. R. 2 Q. B. 580. *Refd.* Gurney v. Womersley (1854), 4 E. & B. 133; Pooley v. Brown (1862), 11 C. B. N. S. 566; Azemar v. Casella (1867), L. R. 2 C. P. 677; Leeds Bank v. Walker (1883), 11 Q. B. D. 84; Raphael v. Burt (1884), Cab. & El. 325; *Re* Addlestone Linoleum Co. (1887), 37 Ch. D. 191. *Mentd.* Aiken v. Short (1856), 1 H. & N. 210; *Re* Lawrence, Mortimore & Schrader (1861), 4 L. T. 184; Jolliffe v. Baker (1883), 11 Q. B. D. 255.

**2685.** ——— Non-delivery.]—PORTMAN v. MIDDLETON, No. 2576, *ante*.

**2686.** ——— Action against infant trader.]—Where an infant trader enters into a contract for the sale of goods & is paid the price by the purchaser, but subsequently fails to deliver the goods, the purchaser cannot recover the price in an action for money had & received, even though the contract was for the infant's benefit,

purchaser to deliver excess.]—FEATHERSTONE v. VANALLEN (1884), 12 A. R. 133.—CAN.



unless it can be proved that in substance the cause of action arose *ex delicto*.—COWERN v. NIELD, [1912] 2 K. B. 419; 81 L. J. K. B. 865; 106 L. T. 984; 28 T. L. R. 423; 56 Sol. Jo. 552, D. C.

*Annotations*:—**Consd.** Roberts v. Gray, [1913] 1 K. B. 520; Stocks v. Wilson, [1913] 2 K. B. 235. **Refd.** Leslie v. Sheill [1914] 3 K. B. 607.

**2687.** ———. ———. ———.]—By a contract dated Dec. 4, 1925, resp., Aronson, bought from applt. 1,000 Russian cubic fathoms of Leningrad pulpwood "now ready for shipment." The contract provided (*inter alia*) that if any of the goods should not be removed before the closing of the navigation season they should remain at the risk of the buyers & at the expense of the sellers. Resp. paid the price of the pulpwood on Dec. 19, 1925, but was not able to remove any of it before the navigation season closed. In June, 1926, when navigation was again open, he sent a steamer to Leningrad for the wood, & he then found that applt. had meanwhile resold half of the total quantity to other buyers. Applt. tendered fresh cut pulpwood in place of that which they had wrongfully resold. Resp.'s local agent at Leningrad protested that the fresh cut wood did not comply with the contract; but in order to avoid having to pay a large sum for dead freight he allowed the fresh cut wood to be loaded on the steamer, while reserving the right of resp. to claim damages. The claim was referred to arbn. in accordance with an arbn. clause in the contract, & the arbitrator awarded resp. £1,000 damages, subject to the opinion of the ct. on a special case. It was admitted in the arbn. that the fresh cut pulpwood which was actually shipped, although it did not comply with the terms of the contract, was equal in value to the wood which should have been shipped:—*Held*: the property in the pulpwood bought by resp. passed to him on payment of the price in Dec. 1925, & by subsequently reselling part of the wood to other purchasers applt. had been guilty of conversion for which they were liable in damages; or as applt. had been unable to deliver goods which they had sold, resp. could claim a return of his money on the ground of failure of consideration. The umpire had fixed the amount of the damages, of applt. were liable in law, at £1,000; & as the amount of the damages was a question of fact for him, the ct. would not interfere with his finding.—ARONSON v. MOLOGA HOLZINDUSTRIE A/G LENINGRAD (1927), 32 Com. Cas. 276, C. A.

**2688.** ———. ———. ———.]—**Order prohibiting delivery.**—The Food Controller, by an Order dated May 16, 1917, directed that all cargoes of beans, peas & pulse which had arrived, or should thereafter arrive, in the United Kingdom should be placed & held at the disposal of the Food Controller.

A cargo of beans arrived in London on May 13, 1917, & on May 16, pltf., under a contract dated Apr. 18, 1917, for a part of it, was given a delivery note, & he paid the invoice price. The Order was announced in the daily newspapers on the morning of May 17, & the public were not aware of it earlier. Pltf. claimed that under this Order defts. could not give delivery, that there was a total failure of consideration under the contract, & that it should be cancelled:—*Held*: the day on which the Order came into operation was that on which it was made known to the public, May 17, & not, as would have been the case with an Act of Parliament, on May 16, on the first moment after mid-

night of May 15; & therefore pltf. was not entitled to have the contract cancelled.—JOHNSON v. SARGANT & SONS, [1918] 1 K. B. 101; 87 L. J. K. B. 122; 118 L. T. 95; 62 Sol. Jo. 88.

*Annotations*:—**Consd.** Brightman v. Tate (1919), 35 T. L. R. 209. **Menid.** Shuttler v. Rolfe (1920), 36 T. L. R. 828.

**2689.** ———. ———. ———.]—**Deposit—Agreement to rescind.**—To entitle the purchaser to maintain an action for money had & received to recover back a deposit paid on a contract for the sale of goods, there must be either an agreement to rescind or circumstances upon which a special action for a breach of the contract would lie.—FITT v. CASSANET (1842), 4 Man. & G. 898; 5 Scott, N. R. 902; 12 L. J. C. P. 70; 134 E. R. 369; *sub nom.* PITT v. CASSANET, 6 Jur. 1125.

**2690.** ———. ———. ———.]—**Resale by seller—While buyer in default.**—PAGE v. COWASJEE EDULJEE, No. 2387, *ante*.

**2691.** ———. ———. ———.]—**Circumstances supporting special action for breach.**—FITT v. CASSANET, No. 2689, *ante*.

**2692.** ———. ———. ———.]—**Fraud of seller.**—Pltf. agreed to purchase a motor car from deft., & in accordance with the agreement he paid a deposit. Pltf. afterwards purported to repudiate the contract, wrongfully, as the judge found. During the pendency of an action by him for the recovery of the deposit pltf. died, & his exors. were substituted as pltf.s, & they then discovered that at the time the contract was entered into deft. had promised, without the knowledge of pltf., to give pltf.'s chauffeur a share of the profit on the sale of the car if pltf. bought it. On the ground of that secret arrangement the exors. now sought to avoid the contract & to recover the deposit:—*Held*: the surreptitious dealing between deft. & pltf.'s chauffeur was a fraud on pltf.; the fact that pltf., when he purported to repudiate the contract, was not aware of the fraud, did not prevent his exors. from now relying upon it; & they were entitled on the ground of the fraud to avoid the contract & to recover the deposit.—ALEXANDER v. WEBBER, [1922] 1 K. B. 642; 91 L. J. K. B. 320; 126 L. T. 512; 38 T. L. R. 42.

**2693.** ———. ———. ———.]—**Paid by bill—Proof in bankruptcy on dishonour.**—An agreement was entered into for the purchase of 4,000 tons of iron rails, at £12 12s. 6d. per ton, according to a section to be delivered by Nov. 1, 1846; & £11,500 was to be paid by the purchaser by way of deposit. According to the custom of the trade, this deposit was to be retained by the seller as a security against any damages from the non-performance of the contract. The deposit was paid in bills of exchange. In June, 1846, the purchaser became bkpt. On the bills becoming due they were dishonoured:—*Held*: the vendors were entitled to prove upon two of the bills remaining in their hands.—RE MACLEAN, *Ex p.* BOLCKOW (1850), 3 De G. & Sm. 656; 61 E. R. 648.

**2694.** **Right of buyer to resist payment—Resale by seller—While buyer in default.**—PAGE v. COWASJEE EDULJEE, No. 2387, *ante*.

#### SUB-SECT. 8.—RECOVERY OF SPECIAL DAMAGES.

*See* Sale of Goods Act, 1893 (c. 71), s. 54, & generally, DAMAGES, Vol. XVII., pp. 78 *et seq.*

**Immediate or proximate cause.**—*See* DAMAGES, Vol. XVII., pp. 96–99, Nos. 115, 116, 121–123, 130, 137–141.

#### PART VIII. SECT. 3, SUB-SECT. 8.

(1854), 11 U. C. R. 153.—CAN.

b. *Repair of goods & damage to other goods of purchaser.*—COLTON v. GOOD

c. *Whether conditional on payment of full price of goods.*—Purchaser of

goods cannot sue for general damages before paying the full price therefor, but he may sue for special damages.—NEW HAMBURG MFG. CO. v. WEBB



*Sect. 3.—Remedies of the buyer: Sub-sect. 8. Part IX. Sects. 1 & 2: Sub-sect. 1.]*

**2695. Circumstances must be in contemplation of parties—Loss of anticipated profits by sub-purchaser.]**—The measure of damages in the case of a breach of a contract to deliver goods at a specified time, is, the difference between the contract price & the market price at the time of the breach of contract, or the price for which the vendee had sold; but the latter cannot recover, as special damage, the loss of anticipated profits to be made by his vendees.—*PETERSON v. AYRE* (1853), 13 C. B. 353; 138 E. R. 1235.

*Annotation:—Refd. The St. Cloud* (1863), Brown. & Lush. 4.

**2696. ———.]—BORRIES v. HUTCHINSON,** No. 2590, *ante*.

**2697. ——— Additional freight & insurance.]—***BORRIES v. HUTCHINSON*, No. 2590, *ante*.

**2698. ——— Loss of profit on resale.]**—In an action for breach of contract to deliver goods it was shown that the goods were not procurable in the market, that pltf. had entered into a contract of subsale, which in consequence of the non-delivery he could not perform, that such contract was not known to deft. at the time of sale, but that he knew that the goods had been purchased by pltf. for resale:—*Held*: pltf. was not entitled to recover damages for loss of profit on the resale.—*THOL v. HENDERSON* (1881), 8 Q. B. D. 457; 46 L. T. 483; 46 J. P. 422.

*Annotation:—Distd. Grebert Borguls v. Nugent* (1884), Cab. & El. 337.

**2699.**

*WILSON, HOLGATE & Co.*, No. 2520, *ante*.

———.]—*See DAMAGES*, Vol. XVII., pp. 103–106, Nos. 173, 174, 178, 180, 182–194.

**2700. Costs & expenses—Cost of carriage—Goods intended for abroad.]—***MOLLING & Co. v. DEAN & SON, LTD.*, No. 1870, *ante*.

**2701. ——— Compensation to sub-purchaser.]**—B. sold copra cattle cake to R., who resold it to C., who resold it to first pltf. On the sale by C. to first pltf. C. stated that the cake was “free from castor.” In fact the cake had in it so large a quantity of the deadly castor bean that the article supplied was not copra cake at all, but first pltf., having received the above statement from C., resold the cake to various distributors, & when it was given to cattle by farmers it caused serious illness. The farmers claimed damages from first pltf. who settled the claims & then claimed damages from C., & C. claimed from R., & R. claimed from B.:—*Held*: the damages claimed by first pltf. from C. were not too remote, & as the real character of the article was not patent first

pltf. were entitled to deal with it on the assumption that it was the article contracted for, & therefore they could recover from C. all the damages claimed, including the compensation paid to sub-purchasers, & C. was similarly entitled to recover against R., & R. against B.—*BRITISH OIL & CAKE CO., LTD. v. BURSTALL & Co.*, *BURSTALL & Co. v. RAYNER & Co.*, *RAYNER & Co. v. BOWRING & Co.*, *LTD.* (1923), 39 T. L. R. 406; 67 Sol. Jo. 577.

**2702. ———.]**—In an arbn. concerning a dispute between the parties to a contract of sale of certain goods, which were also the subject of a series of sub-sales, the umpire stated a special case in which he made three different awards, leaving the ct. to decide which was right. The first two awards were made on the footing that the sellers were liable to the buyers for breach of contract in that the goods did not answer the description in the contract; the second award was for a considerably larger sum; the third was made on the footing that there had been no breach of contract. The judge in the K. B. Div. having decided that the first award was right, the buyers demanded & obtained payment of the amount of that award & gave a receipt therefor. They then appealed from the decision of the judge & contended that the second award was the right one. Upon a preliminary objection to the appeal:—*Held*: having demanded & accepted payment under the first award appls. were precluded from contending that it was wrong.

The appeal therefore fails on this preliminary point. But it may be some satisfaction to appls. to know that in view of the materials before us the umpire seems to have been clearly right in holding that he would not accept the amount awarded in the former arbn. as the measure of damages in the present one. It is uncertain how that amount was arrived at; claimants in that arbn. had sold the goods under a description which represented them as above their agreed value; they claimed £6,000 & were awarded £3,745, but upon what grounds we do not know. In these circumstances it is impossible to apply the amount recovered by a sub-purchaser as the measure of damages recoverable against the original seller (*BANKES, L.J.*).—*DEXTERS, LTD. v. HILL CREST OIL Co.* (*BRADFORD*), [1926] 1 K. B. 348; *sub nom. Re DEXTERS, LTD. & HILLCREST OIL Co.* (*BRADFORD*), 95 L. J. K. B. 386; 134 L. T. 494; 42 T. L. R. 212; 31 Com. Cas. 161, C. A.

———.]—*See DAMAGES*, Vol. XVII., pp. 110–114, Nos. 214, 215, 219, 220, 228, 230, 235.

**On sale of animals.]—***See ANIMALS*, Vol. II., pp. 271, 272, 296, 297, Nos. 487–496, 666–670.

(1911), 18 O. W. R. 216; 2 O. W. N. 588; 23 O. L. R. 44.—*CAN.*

*d. Duty of buyer to minimise damages.]—**STEVIN (A. & P.), LTD. v.*

*DICK (Alta.)* (1914), 27 W. L. R. 578; 16 D. L. R. 860.—*CAN.*

## Part IX.—Misrepresentation and Fraud.

### SECT. 1.—TRANSFER OF PROPERTY.

*See Sale of Goods Act, 1893 (c. 71), s. 61 (2), & generally, MISREPRESENTATION & FRAUD, Vol. XXXV., pp. 6 et seq.*

**2703. Whether property passes—Purchaser deluded as to value—Vendor having knowledge of delusion.]**—The agent of the vendor of a picture, knowing that the purchaser labours under a delusion with respect to the picture which materially influences his judgment, permits him to make the purchase without removing that delusion. The sale is void.—*HILL v. GRAY* (1816), 1 Stark. 434; 171 E. R. 521, N. P.

*Annotations:—***Consd.** *Pilmore v. Hood* (1838), 5 Bing. N. C. 97; *Keates v. Cadogan* (1851), 10 C. B. 591; *Peek v. Gurney* (1873), L. R. 6 H. L. 377. **Refd.** *Gregg v. Wells* (1839), 3 Jur. 555. **Mentd.** *Smith v. Hughes* (1871), 40 L. J. Q. B. 221; *Said v. Butt*, [1920] 3 K. B. 497.

**2704. — Fraud on seller.]**—A sale of goods effected by fraud does not change the property in them. Therefore, where deft. had fraudulently colluded with I., who was in insolvent circumstances, to obtain wines from pltf., the proceeds of which eventually came to deft.'s hands, in satisfaction of a debt before due to him from I.:—**Held:** pltf. was entitled to recover in an action for money had & received.—*ABBOTTS v. BARRY* (1820), 2 Brod. & Bing. 369; 5 Moore, C. P. 98; 129 E. R. 1009.

*Annotations:—***Refd.** *Selway v. Foggy* (1839), 5 M. & W. 83. **Mentd.** *Bradbury v. Anderton* (1834), 1 Cr. M. & L. 486; *Nicol v. Hennessy* (1896), 44 W. R. 584.

**2705. — —.]**—If a vendee under terms to pay for goods on delivery, obtains possession of them by giving a cheque, which is afterwards dishonoured, he gains no property in the goods, if at the time of giving the check he had no reasonable ground to expect that it would be paid.—*HAWSE v. CROW* (ASSIGNEE OF RAMSBOTTOM) (1826), Ry. & M. 414, N. P.

**2706. — —.]**—Liquidating debtor who had not obtained his discharge, engaged in trade. He ordered some goods from a wholesale house, who sent the goods to him in the belief that the order had come from a firm with whom they were acquainted, & whose name resembled that under which debtor traded. The trustee claimed the goods:—**Held:** debtor had acquired no property in the goods, & the trustee was bound to return them to the persons who sent them.—*Re REED, Ex p. BARNETT* (1876), 3 Ch. D. 123; 45 L. J. Rey. 120; 34 L. T. 664; 24 W. R. 904.

**2707. — —.]**—Where a sale of goods is induced by the fraud of the purchaser, the vendor, on discovering the fraud, is entitled within a reasonable time to disaffirm the sale & retake possession of his goods, although he does so with notice of the act of bkpcy. on which the purchaser is subsequently adjudicated bkpt.; for in such a case the trustee in bkpcy. has no higher or better title than the bkpt.—*Re EASTGATE, Ex p. WARD,*

[1905] 1 K. B. 465; 74 L. J. K. B. 324; 92 L. T. 207; 21 T. L. R. 198; 12 Mans. 11; *sub nom. Re EASTGATE, Ex p. TRUSTEE*, 53 W. R. 432.

*Annotation:—***Foldd.** *Tilley v. Bowman*, [1910] 1 K. B. 745.

**2708. — —.]**—*TILLEY v. BOWMAN, LTD.*, No. 2720, *post*.

**2709. — — Contract voidable—Disposal by buyer before avoidance.]**—Where a seller is induced to sell by the fraud & false pretences of the buyer, though it is competent to the seller by reason of such fraud to avoid the contract, yet, till he does some act to avoid it, the property remains in the buyer.—*MOYCE v. NEWINGTON* (1878), 4 Q. B. D. 32; 48 L. J. Q. B. 125; 39 L. T. 535; 43 J. P. 191; 27 W. R. 319; 14 Cox, C. C. 182.

*Annotations:—***Consd.** *R. v. Central Criminal Court JJ.* (1886), 55 L. T. 486; *Bentley v. Vilmont* (1887), 12 App. Cas. 471. **Refd.** *Babcock v. Lawson* (1879), 4 Q. B. D. 394.

**2710. — Sale in fraud of creditors.]**—*BOWES v. FOSTER*, No. 1034, *ante*.

**2711. — —.]**—Pltf., in order to defeat his creditors, assigned & delivered certain goods to A., deft. being privy to the transaction. A., without the knowledge of pltf., & not in furtherance of the fraud agreed on between himself & pltf., & while it remained unaccomplished sold the goods to deft. No composition was made by pltf. with his creditors, none of whom were paid or settled with:—**Held:** pltf. was entitled to recover back the goods.—*TAYLOR v. BOWERS* (1876), 45 L. J. Q. B. 163; 34 L. T. 263; *affd.*, 1 Q. B. D. 291, C. A.

*Annotations:—***Distd.** *Re Great Berlin Steamboat Co.* (1884), 54 L. J. Ch. 68. **Dbtd.** *Kearley v. Thomson* (1890), 24 Q. B. D. 742. **Consd.** *Hermann v. Charlesworth* (1905), 74 L. J. K. B. 620. **Apld.** *Petherpermal Chetty v. Munandy Servai* (1908), 24 T. L. R. 462. **Consd.** *Gordon v. Metropolitan Police Comr.*, [1910] 2 K. B. 1080. **Refd.** *Wilson v. Strugnell* (1881), 7 Q. B. D. 548.

**— Sale or pledge under voidable title.]**—*See Part IV., Sect. 2, sub-sect. 4, ante*.

**2712. Question for jury—Alleged misrepresentation in invoice.]**—*MOENS v. HEYWORTH*, No. 2729, *post*.

**Remedies of parties.]**—*See Sect. 2, post*.

### SECT. 2.—REMEDIES OF PARTIES.

#### SUB-SECT. 1.—SELLER.

*See, generally, MISREPRESENTATION & FRAUD, Vol. XXXV., pp. 6 et seq.*

**2713. Action for money had & received—Against defendant fraudulently inducing sale—Sale to third party unable to pay—Resale by third party to defendant.]**—*ABBOTTS v. BARRY*, No. 2704, *ante*.

**2714. Right to recover possession—Sale in fraud of creditors—By vendor.]**—*BOWES v. FOSTER*, No. 1034, *ante*.

**2715. — — —.]**—*TAYLOR v. BOWERS*, No. 2711, *ante*.

### PART IX. SECT. 1.

**e. No property passes—Sale in fraud of creditors.]**—*RODENHISER v. CRAGG* (1894), 27 N. S. L. (15 Il. & G.) 273.—CAN.

#### PART IX. SECT. 2, SUB-SECT. 1.

**f. Right to recover possession—Sale in fraud of creditors—By vendor.]**—*REID & DONNELLY v. MOORE* (1913), 24 W. L. R. 575; 12 D. L. R. 193.—CAN.

**g. — False representation by purchaser as to his solvency.]**—Where an action of replevin was brought for goods sold by pltf. to deft., & there was evidence to justify the judge in coming to the conclusion that deft. had made false representations to pltf. as to his solvency, knowing them to be false, the ct. refused to disturb the judgment for pltf.—*HOSKOCK v. NEILLY* (1880), 1 Il. & G. 388.—CAN.

**h. — Absolute sale of flour on short terms of credit—Set-off by buyer.]**—

Pltf. with the intention of parting with the possession & property in certain flour, made an absolute sale of the same on apparently short terms of credit to deft., who withheld from pltf. his intention to pay for the flour by setting off a claim he had acquired against pltf.—**Held:** this did not constitute a fraud on deft.'s part so as to entitle pltf. to disaffirm the contract & replevy the flour.—*BAKER v. FISHER* (1890), 19 O. R. 650.—CAN.

**k. Right to rescind contract—**

*Sect. 2.—Remedies of parties: Sub-sects. 1 & 2.]*

**2716. — Knowledge of act of bankruptcy by seller.**—*Re EASTGATE, Ex p. WARD, No. 2707, ante.*

**2717. Right to disaffirm sale—Within reasonable time.**—*Re EASTGATE, Ex p. WARD, No. 2707, ante.*

**2718. Rescission of contract—No intention of buyer to pay for goods.**—On Nov. 23, S. was served with a debtor's summons for a debt slightly exceeding £50, & on Dec. 1, committed an act of bkpcy. by non-compliance with it. On Dec. 3, the creditor filed & served a petition for adjudication. On Dec. 5, S. bought wool at an auction, & called for it on Dec. 12. The vendor, being unaware of his embarrassed circumstances, allowed him to take it away without his paying for it, & without his making any representation as to payment. On Dec. 14, S. was adjudged bkpt., not having taken any steps to oppose the adjudication. He had not sold any of the wool, nor did it appear that he had attempted to raise money on it; *semble*: if it had been made out that S. did not intend to pay for the wool, the vendor would have been entitled to rescind.

If it were clearly made out that . . . he [the buyer] did not intend to pay for them, I should consider that a case of fraudulent misrepresentation was shown (MELLISH, L.J.).—*Re SHACKLETON, Ex p. WHITTAKER* (1875), 10 Ch. App. 446; 44 L. J. Bcy. 91; 32 L. T. 443; 23 W. R. 555, L. JJ.

*Annotations*:—*Consd. Edgington v. Fitzmaurice* (1885), 29 Ch. D. 459. *Mentd. Re Wilson Ex p. Salaman*, [1926] Ch. 21.

**2719. — No fraud in misrepresentation.**—The ct. will not grant rescission of an executed contract for the sale of a chattel or chose in action on the ground of an innocent misrepresentation. In order for pltf. to succeed in such a case fraud must be proved.—*SEDDON v. NORTH EASTERN SALT CO., LTD.*, [1905] 1 Ch. 326; 74 L. J. Ch. 199; 91 L. T. 793; 53 W. R. 232; 21 T. L. R. 118; 49 Sol. Jo. 119.

*Annotations*:—*Refd. Hindle v. Brown* (1907), 98 L. T. 44; *Angel v. Jay*, [1911] 1 K. B. 666; *Armstrong v. Jackson*, [1917] 2 K. B. 822; *Compagnie Chemin De Fer Paris-Orleans v. Leeston Shipping Co.* (1919), 36 T. L. R. 68; *First National Reinsurance v. Greenfield*, [1921] 2 K. B. 260.

**2720. Damages caused by fraud—Right to set off against claim for return of purchase-money.**—A sale of goods upon credit was induced by the fraud of the purchaser, who upon obtaining them pledged them with a pawnbroker. After the purchaser had paid part of the price a receiving order in bkpcy. was made against him. The vendor then discovered the fraud & disaffirmed the contract, retaking possession of the goods upon payment to the pawnbroker of the sum advanced

upon them. The purchaser having been adjudicated bkpt. his trustee in bkpcy. brought an action against the vendor, claiming (a) to recover the goods or their value after giving credit for the sum paid to the pawnbroker to redeem them; or (b) in the alternative to recover the amount paid to the vendor on account of the purchase price:—*Held*: (1) upon the authority of *Re Eastgate, Ex p. Ward, No. 2707, ante*, the trustee acquired the property in the goods subject to the right of the vendor to disaffirm the contract of sale & to retake possession of the goods; the vendor had a right to disaffirm the contract after the date of the receiving order & therefore the trustee was not entitled to recover the goods or their value; (2) upon the authority of *Jack v. Kipping* (1882), 9 Q. B. D. 113, the vendor was entitled, under Bkpcy. Act, 1883 (c. 52), s. 38, to set off the damages caused by the fraud of the bkpt., in this case the sum paid to the pawnbroker to redeem the goods, against the amount paid on account of the purchase price.—*TILLEY v. BOWMAN, LTD.*, [1910] 1 K. B. 745; 79 L. J. K. B. 547; 102 L. T. 318; 54 Sol. Jo. 342; 17 Mans. 97.

## SUB-SECT. 2.—BUYER.

*See, generally, MISREPRESENTATION & FRAUD, Vol. XXXV., pp. 6 et seq.*

**2721. Right of action.**—*ANON.* (1507), Keil. 91; 72 E. R. 254.

*Annotations*:—*Consd. Barr v. Gibson* (1838), 1 Horn & H. 70. *Expld. Burnby v. Bolett* (1847), 16 M. & W. 644.

**2722. — Although retaining possession of goods.**—A person purchasing a chattel or goods, concerning which the vendor makes a fraudulent misrepresentation, may on finding out the fraud elect to retain the chattel or goods, & still have his action to recover any damage he has sustained.—*HOULDSWORTH v. CITY OF GLASGOW BANK* (1880), 5 App. Cas. 317; 42 L. T. 194; 28 W. R. 677, H. L.

*Annotations*:—*Refd. Ludgater v. Love* (1881), 44 L. T. 694; *Thorne v. Heard*, [1894] 1 Ch. 599; *Lloyd v. Grace, Smith, [1912] A. C. 716. Mentd. Re Hull & County Bank, Burgess's Case* (1880), 15 Ch. D. 507; *Chapleo v. Brunswick Permanent Bldg. Soc.* (1881), 6 Q. B. D. 696; *Re Great Australian Gold Mining Co., Ex p. Appleyard* (1881), 18 Ch. D. 587; *Re Addlestone Linoleum Co.* (1887), 37 Ch. D. 191; *British Mutual Banking Co. v. Charnwood Forest Ry.* (1887), 18 Q. B. D. 714; *Simson & Mason v. New Brunswick Trading Co.* (1888), 5 T. L. R. 148; *McKeown v. Boudard Peveril Gear Co.* (1896), 65 L. J. Ch. 446; *Re Railway Time Tables Publishing Co., Welton's Claim* (1898), 79 L. T. 679; *Whitechurch v. Cavanagh*, [1902] A. C. 117; *Hambro v. Burnand*, [1903] 2 K. B. 399; *Citizens' Life Assoc. v. Brown*, [1904] A. C. 423; *Pratt v. British Medical Assoc.*, [1919] 1 K. B. 244.

**2723. Representation must be fraudulent.**—Where upon the sale of goods the purchaser does not require a warranty, he cannot recover in an

*Sufficiency of evidence of fraudulent intent.*—*SCOTT FELL & CO. v. LLOYD* (1907), 7 S. R. N. S. W. 512; 24 N. S. W. W. N. 22.—*AUS.*

*l. — — — — —*—*SMALL v. GLASEL* (1896), 28 N. S. R. 245.—*CAN.*

*m. — — — — —*—*PRICE v. ORDWAY, VEILLEUX v. ORDWAY* (1903), 34 S. C. R. 145.—*CAN.*

*n. — — — — —*—*Pltf. on purchasing goods from A., indorsed over to A. a document purporting to be the promissory note of B., whom pltf. represented to be a solvent person. The goods were shipped & consigned to pltf. The promissory note was on an insufficient stamp, & there was evidence of the insolvency of B., & also that the note was a forgery. Held: evidence of fraud, sufficient to nullify the contract for the purchase of the goods.*

—*BUCKLEY v. JAMES* (1839), 1 Craw. & D. 138.—*IR.*

*o. — — — — —*—*Worthless cheque given by purchaser.*—On a sale of goods for ready money, if the purchaser gives in payment his cheque which he then knows he has not funds in the bank to meet, this amounts to a false representation of a material fact, which vitiates the sale & entitles the seller to rescind the contract; even though the purchaser at the time believed, & had reasonable grounds for believing, that the cheque would be paid.—*LOUGHNAN v. BARRY & BYRNE* (1872), 1 R. 8 C. L. 457.—*IR.*

*p. — — — — —*—*Fraudulent use of tradesman's name.*—*GOUS v. DE KOCK, COMBRINCK v. DE KOCK* (1888), 5 S. C. 405.—*S. AF.*

*q. — — — — —*—*Effect of Sale of Goods*

*Ordinance, c. 39, C. O.*—*LYNCH v. JACKSON* (1917), 13 Alta. L. R. 344.—*CAN.*

*r. False representation by seller's agent—Cancellation of order by purchaser—Whether seller right of action against purchaser.*—*NICHOLS & SHEPARD CO. v. ROSS* (1911), 18 W. L. R. 398; 4 Sask. L. R. 194.—*CAN.*

## PART IX. SECT. 2, SUB-SECT. 2.

**2723i. Representation must be fraudulent.**—*BRADY v. BELL* (1886), 7 R. & G. 356; 7 C. L. T. 408.—*CAN.*

*t. Knowledge of falsity of representation—Necessity for proof of knowledge.*—When the declaration is framed in case, charging a false & deceitful warranty, knowing it to be untrue, pltf. may recover on proving the warranty only, without the *scienter*.—

action on the case for deceit upon a mere representation of the quality by the seller, unless he can show that the representation was bottomed in fraud.—*ORMROD v. HUTH* (1845), 14 M. & W. 651; 14 L. J. Ex. 366; 5 L. T. O. S. 268; 153 E. R. 636, Ex. Ch.

*Annotations*.—*Consd.* Morley v. Attenborough (1849), 3 Exch. 500. *Apld.* Thom v. Bigland (1853), 8 Exch. 725. *Distd.* Osborn v. Hart (1871), 23 L. T. 851. *Apld.* Dickson v. Reuter's Telegraph Co. (1877), 2 C. P. D. 62. *Consd.* Jolliffe v. Baker (1883), 11 Q. B. D. 255. *Refd.* Collen v. Wright (1857), 7 E. & B. 301; Hall v. Conder (1857), 2 C. B. N. S. 22; Collins v. Cave (1859), 4 H. & N. 225; Rogers v. Hadley (1861), 7 Jur. N. S. 733; Udell v. Atherton (1861), 7 H. & N. 172.

**2724. Knowledge of falsity of representation—Necessity for.**—*ANON.* (1507), Keil. 91; 72 E. R. 254.

*Annotations*.—*Refd.* Barr v. Gibson (1838), 1 Horn & H. 70; Burnley v. Bollett (1847), 16 M. & W. 645.

**2725.** ———. *—*.]—*DOWDING v. MORTIMER* (1798), 2 East, 450, n.; 102 E. R. 440.

*Annotation*.—*Refd.* Williamson v. Allison (1802), 2 East, 446.

**2726.** Evidence of fraud.]—*ORMROD v. HUTH*, No. 2723, *ante*.

**2727.** ———. Examination of seller as to knowledge.]—In an action against a vendor for misrepresentation on the sale of goods if it is shown that a material representation has been made by the vendor to induce the purchaser to buy & that such representation is not true in fact & it is proved that it was untrue to the vendor's know-

ledge, he cannot be asked in chief whether he believed the representation to be true.—*HINE v. CAMPION* (1877), 7 Ch. D. 344.

**2728. Recovery of purchase-money—Property retained after discovery of fraud—Further matters of fraud discovered.**]—If a vendee after discovering the sale to be fraudulent, deals with the property as his own, he cannot recover the purchase-money, upon subsequently detecting further circumstances of fraud in the sale.—*CAMPBELL v. FLEMING* (1834), 1 Ad. & El. 40; 3 Nev. & M. K. B. 834; 3 L. J. K. B. 136; 110 E. R. 1122.

*Annotations*.—*Distd.* Wontner v. Sharp (1847), 4 C. B. 404; Imperial Ottoman Bank v. Trustees, Executors & Securities Insee. Corp'n. (1895), 13 R. 287. *Consd.* Re Duncan, Terry v. Sweeting, [1899] 1 Ch. 387. *Refd.* Ricketts v. Bowhay (1847), 3 C. B. 889; Stevenson v. Newnam (1853), 13 C. B. 285; Horsfall v. Thomas (1862), 6 L. T. 462; London & County Banking Co. v. London & River Plate Bank, Ltd. (1887), 4 T. L. R. 179. *Mentd.* East Anglian Ry. v. Eastern Counties Ry. (1851), 11 C. B. 775; Steele v. Williams (1853), 1 C. L. R. 258.

**2729. Misrepresentation question for jury.**]—A cargo of coffee was sold by a broker, for H. P. & co., of Liverpool; & the words "invoiced to the sellers as first shipping quality," were introduced into the bought & sold notes. At the same time the invoice was shown to the buyers, which stated the cargo to be shipped by H., Brothers & co., consigned to H. P. & co. for sale on account & risk of whom it may concern—3,150 bags "first shipping quality." H., Brothers & co. were a branch house at Rio de Janeiro, composed of the

*CHISHOLM v. PROUDFOOT* (1856), 15 U. C. R. 203.—*CAN.*

a. *Rescission of contract—False representation as to quality & fitness.*]—*CAMERON & Co. v. L. L. SLUTZKIN PTY., LTD.*, [1923] V. L. R. 491.—*AUS.*

b. ———.]—If a plff. is induced by false representations of deft. respecting the quality & fitness of an article manufactured by him, & intended for a particular purpose to enter into a contract of purchase, & pays a portion of the purchase money, a bill in equity lies to obtain repayment of the money, on the article turning out defective, though the plff. would have a remedy at law for breach of the warranty.—*HAGGETT MANUFACTURING Co. v. PUGSLEY* (1887), 26 N. B. R. 223.—*CAN.*

c. ———.]—*COHEN v. HANLEY*, *HANLEY v. COHEN* (1907), 3 E. L. R. 137.—*CAN.*

d. ———.]—*MCCULLOUGH v. DEFFEUR* (1909), 11 W. L. R. 524.—*CAN.*

e. ———.]—*EISLER v. CANADIAN FAIRBANKS Co.* (1912), 22 W. L. R. 888; 8 D. L. R. 390; 3 W. W. R. 173.—*CAN.*

f. ———.]—Deft. sold plff. a motor car, representing to her that it was a perfectly new car, which was untrue; as soon as plff. discovered that the car was not a new one, but had been used, damaged, & repaired, she repudiated the contract; but she had then used the car for seven or eight months.—*Held*: the untrue representation made by deft. was made with intent to mislead plff., & was a fraudulent misrepresentation, upon which the plff. relied, & by which she was induced to purchase the car, & she was entitled to rescind.—*ADDISON v. OTTAWA AUTO & TAXI Co.* (1913), 5 O. W. N. 479; 16 D. L. R. 318; 30 O. L. R. 51.—*CAN.*

g. ———.]—*SHACKLETON v. PUEVO* (Alta.), [1920] 1 W. W. R. 744; 51 D. L. R. 240.—*CAN.*

h. ———.]—*LEGRIS & BRAS-SARD v. McNAB-YOUNG Co.* (Sask.) (1922), 66 D. L. R. 788.—*CAN.*

k. ———. *Modern imitations of antiques.*]—*PATTERSON v. LANDS-BERG & SON* (1905), 7 F. (Ct. of Sess.)

675; 42 Sc. L. R. 542; 13 S. L. T. 62.—*SCOT.*

l. ———.]—*EDGAR v. HECTOR*, [1912] S. C. 348.—*SCOT.*

m. ———. *Retention for several months before discovery of misrepresentation.*]—A solr. who was induced to buy a set of law books on the false, but innocent, misrepresentation by the seller's agent that another solr.'s name was not on the books, did not discover the misrepresentation until he unpacked them several months after their delivery. In the meantime he had insured them in his own favour & accepted bills of exchange for the purchase price.—*Held*: the property in the books had passed to the deft. & the misrepresentation was not a ground for rejecting the goods.—*CANADA LAW BOOK Co., LTD. v. YULE* (Sask.), [1918] 2 W. W. R. 983; 41 D. L. R. 746.—*CAN.*

n. ———. *Retention of user after discovery of misrepresentation.*]—A purchaser of a mare was not allowed rescission on the ground of what the ct. found was an innocent misrepresentation as to her being in foal to a celebrated stallion, because after discovery that the mare was not in foal he repeatedly attempted to get her in foal by breeding her to another stallion, this being held to amount to an affirmation of the contract.—*MONTICELLO STATE BANK v. GUEST*, [1920] 3 W. W. R. 14.—*CAN.*

o. ———.]—A purchaser of goods was refused rescission of the contract on the ground of fraud because after discovering the alleged fraud he had used & retained the goods & had thereby elected to maintain the contract.—*J. I. CASE THRESHING MACHINE Co., INCORPORATED v. WEBB*, [1920] 1 W. W. R. 338; 13 Sask. L. R. 151.—*CAN.*

p. ———.]—*O'KEEFE v. OTTAWA CAR Co. (Ont.)*, [1923] 4 D. L. R. 45.—*CAN.*

q. ———.]—*RAMSON v. MITCHELL* (1845), 7 Dunl. (Ct. of Sess.) 813; 17 Sc. Jur. 423.—*SCOT.*

r. ———. *Innocent misrepresentation—Must alter substance of contract.*]

—*ANDRIES v. WRIGHT* (Man.), [1924] 2 D. L. R. 556.—*CAN.*

t. ———.]—A contract for the sale of goods cannot be rescinded on the ground of an innocent misrepresentation inducing the contract unless the misrepresentation was such that there is a complete difference in substance between the thing bargained for & the thing obtained, so as to constitute a failure of consideration.—*RINDFORD v. WARREN* (1901), 20 N. Z. L. R. 572.—*N.Z.*

aa. ———.]—*DURR v. BAM* (1890), 8 S. C. 22.—*S. AF.*

bb. ———. *Sale of bonds.*]—Bonds of a Dutch company, having property in America, were purchased on the faith of a representation that they were a charge on the property. They were not a charge on the property, but the representation was made innocently.—*Held*: the sale could not be set aside.—*LECKY v. WALTER*, [1914] 1 F. R. 378.—*IR.*

cc. ———. *Goods sold subject to seller obtaining loan for purchaser.*]—Where a contract for the purchase of goods is subject to a condition that the seller will obtain a loan for the purchaser & the loan is obtained, the purchaser is not entitled to rescission of the contract on the ground solely of the seller's misrepresentation of the goods, for the purchaser cannot restore to the seller the benefit of the latter's efforts in procuring the loan.—*LEE v. CHAPIN Co., LTD.* (1915), 9 Alta. L. R. 74; 9 W. W. R. 228; 32 W. L. R. 509; 25 D. L. R. 299.—*CAN.*

dd. ———. *Non-disclosure of material fact.*]—Where although representations inducing the making of a contract are true so far as they go they do not cover the whole truth, the non-disclosure, whether fraudulent or innocent, may, according to circumstances, so relate to the essence of the contract as to entitle the representee to rescission.—*CANADIAN FARM IMPLEMENT Co., LTD. v. ALBERTA FOUNDRY & MACHINE Co., LTD.* (Alta.), [1927] 2 D. L. R. 871; [1927] 1 W. W. R. 1025.—*CAN.*

ee. ———. *Or damages—Option of purchaser.*]—*AMAAN v. HANDYSIDE*

**Sect. 2.—Remedies of parties: Sub-sect. 2. Part X.]**

same partners as the firm of H. P. & co. In an action on the case against H. P. & co. for deceit:—*Held*: it was a proper question for the jury, whether the invoice imported that the coffee was invoiced to debts, by distinct parties as the sellers thereof.—*MOENS v. HEYWORTH* (1842), 10 M. & W

147; H. & W. 138; 10 L. J. Ex. 177; 152 E. R. 418.

**Annotations:—***Reid*. *Gorsuch v. Cree* (1860), 2 L. T. 567; *Udell v. Atherton* (1861), 7 H. & N. 172; *Mackay v. Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394; *London Asseo. v. Mansel* (1879), 11 Ch. D. 363; *Derry v. Peek* (1889), 14 App. Cas 337; *Joel v. Law Union v. Crown Insee.*, [1908] 2 K. B. 431; *Yorke v. Yorkshire Insee.*, [1918] 1 K. B. 662.

## Part X.—Sale Under Particular Colonial Statutes.

*See Cases infra.*

(1865), 3 Macph. (Ct. of Sess.) 526.—**SCOT.**

**f. — Duty to restore goods—***Except when perished through defect complained of.*—The general rule of law that when a contract is set aside even on the ground of fraud, the person seeking relief must tender to restore what he has obtained under the contract has no application where in a contract of sale after delivery but without any fault on the part of the purchaser the subject-matter of the contract has perished owing to the very defect complained of.—*MARKS, LTD. v. LAUGHTON*, [1920] App. D. 12.—**S. AF.**

**g. —**—*MOORE v. SCOTT* (1907), 16 Man. L. R. 492.—**CAN.**

**h. Excess paid for goods by mutual mistake—Whether recoverable from seller.**—*GRIMWOOD v. SMITH* (1880), 6 V. L. R. (L.) 433.—**AU.**

**k. Effect of knowledge by buyer of misrepresentation.**—A claim for repayment of moneys paid under an agreement for sale of timber on the ground of misrepresentation as to title to the timber was rejected, the ct. finding that the purchaser knew all the facts, paid his money voluntarily, & had received a benefit under the contract.—*CLARK v. MILLIGAN*, [1920] 1 W. W. R. 1044.—**CAN.**

### PART X.

**1. Under Bulk Sales Acts—To what sales applicable—Sale of furniture in hotel.**—Bulk Sales Act does not apply to the sale of the furniture used in an hotel.—*BARTHELS, SHEWAN & Co. v. SLOANE* (1914), 30 W. L. R. 101.—**CAN.**

**m. — Sale of real estate.**—Bulk Sales Act does not apply to the sale of real estate.—*BARTHELS, SHEWAN & Co. v. SLOANE* (1914), 30 W. L. R. 101.—**CAN.**

**n. — Sale of "goods, wares or merchandise"—Whether livery stable with fixtures & horses included.**—A transfer of a livery stable, including the horses, fixtures, harness, wagons, goodwill of the business, etc., is not such a "sale or transfer of a stock of goods, wares or merchandise" as to come within Bulk Sales Act, B. C. 1913.—*BROWN v. MCLEOD* (1915), 8 W. W. R. 110.—**CAN.**

**o. — Transfer of liabilities of vendor with property sold.**—Bulk Sales Act (Sask.), s. 3, does not apply in a case where an owner of a stock of goods sells under an agreement providing that the purchaser should assume all the vendor's liabilities in connection with the business with two exceptions & pay the balance of the price by transferring certain real estate & the agreement is not a document within that sect.—*PEARCE BROTHERS, LTD. v. MACDONALD (A.) Co., LTD.*, [1917] 1 W. W. R. 1118; 10 Sask. L. R. 6.—**CAN.**

**p. — Sale to creditor—Where claim of creditor exceeds purchase price.**—A debtor sold his stock

of goods to a creditor, the creditor to pay certain claims & also set off its own claim, which was found to exceed the, purchase-price:—*Held*: the transaction was within Bulk Sales Act, 1913, s. 3, & not complying therewith, was void as against unsatisfied creditors.—*PAISLEY v. LEESON* (R. C.), [1920] 1 W. W. R. 479; *affd.*, [1920] 2 W. W. R. 511.—**CAN.**

**q. —**—*"Cash or on credit."*—*HIGGINS v. ELLIOTT (N. S.)* (1922), 65 D. L. R. 154.—**CAN.**

**r. — Sale out of usual course of business.**—*DOUCET v. SALEM SODE & Co.* (1916), 49 N. S. R. 492.—**CAN.**

**t. —**—*Under an execution issued on a judgment recovered against W. T. & co., Ltd., the sheriff levied upon the goods in the shops of plffs., claimed to be the property of the co. The evidence showed that at the time the goods in question were sold to plffs. the W. T. co. was in a condition of hopeless insolvency, & that the sales were made at less than cost for the purpose of raising funds to pay notes or other claims falling due:—Held: the sales were made out of the usual course of business & were clearly within Bulk Sales Act; & sects. 2 & 3 of the Act apply not merely to the sale of the whole of a stock, but to sales of parts of the stock out of the usual course of the business or trade of the vendor.*—*WEBBER v. HALL, ARANOFF v. HALL, MOSHER v. HALL* (1921), 54 N. S. R. 192; 56 D. L. R. 253.—**CAN.**

**a. — Sales by manufacturers, traders or merchants—Whether job printer a "manufacturer."**—A job printing co., whose general & substantial business is printing upon the receipt of orders, is not a "manufacturer" within the meaning of the term "manufacturers" in Bulk Sales Act, 1922, s. 3, defining "traders & merchants" to whom the Act applies. The fact that it makes odd sales of envelopes or quantities of paper, such sales being quite out of the line of its regular business, does not make it a "trader or merchant" within said sect.—*JOHN MARTIN PAPER CO., LTD. v. AMERICAN TYPE FOUNDRY CO.*, [1924] 3 D. L. R. 1080; [1924] 2 W. W. R. 975; 20 Alta. L. R. 504.—**CAN.**

**b. — Sale of machine with which seller "carries on any business trade or occupation"—Sale of machine never used by seller.**—Bulk Sales Act (O.), 1917, must be strictly construed, & where the assets of a business purchased included a machine which the purchaser of the business never used, the subsequent sale of that machine by the purchaser was held not to be within the Act, it could not be said to be a machine with which the debtor "carries on any business trade or occupation."—*BANK OF MONTREAL v. IDEAL KNITTING MILLS, LTD.*, [1924] 4 D. L. R. 429; 55 O. L. R. 410.—**CAN.**

**c. — Sale by farmer en bloc of live stock & equipment.**—Bulk

Sales Act (O.), 1917, applies to a sale by a farmer *en bloc* of his live stock & equipment.—*WORTHINGTON v. ROBINS & CADIGAN* (1924), 56 O. L. R. 285; [1925] 2 D. L. R. 80.—**CAN.**

**d. — Sale by way of exchange—Application to deferred payments part of consideration.**—A transaction under which a merchant received chattels & land in part payment for his stock-in-trade & the land & premises on which the business was carried on & gave credit for the balance held not to be governed by Bulk Sales Act, 1913, as it stood in Aug. 1919, except, if at all, with respect to the deferred payments.—*TOLLEY v. GUERIN*, [1925] 3 D. L. R. 693; [1925] 3 W. W. R. 1; 21 Alta. L. R. 408.—**CAN.**

**e. — Loan by creditor before sale to pay off other debts—Agreement for original debt & loan to be first charge on proceeds of sale.**—*SCOTT v. HAYCOCK & NUTT*, [1926] 1 D. L. R. 430; 58 O. L. R. 179.—**CAN.**

**aa. — Effect of non-compliance with statute—Sale void as against creditors of seller.**—S. finding himself unable to pay his creditors & being sued by some of them, conspired with defts., one of whom was his brother, to remove & in pursuance of such fraudulent scheme did remove a large portion of his goods to defts., place of business for the purpose of cheating & defrauding his creditors:—*Held*: the transaction being out of the usual course of business, & in contravention of Bulk Sales Act, was to be deemed fraudulent & absolutely void.—*DOUCET v. SALEM SODE & Co.* (1916), 49 N. S. R. 492.—**CAN.**

**bb. — Postponement of creditors of purchaser under assignment for benefit of creditors.**—*DRAPER v. JACKSON* (1916), 33 W. L. R. 796; 10 W. W. R. 78.—**CAN.**

**cc. — When attacked within sixty days of sale.**—An action under Bulk Sales Act, 1917, for a declaration that a sale of goods by the deft. W. to the deft. S. was void, because the proceeds were not distributed in accordance with the Act, was dismissed because plffs., creditors of W., had notice of the sale more than sixty days before the commencement of this action.—*GOODYEAR TIRE & RUBBER Co. OF CANADA, LTD. v. WOODEN*, [1923] 2 D. L. R. 462; 52 O. L. R. 5.—**CAN.**

**dd. — Non-compliance with Bulk Sales Act, 1917, has the effect of rendering a sale of goods in bulk void as against creditors if the transaction is attacked within sixty days from the date of sale; but this is the only penalty for non-compliance; & when the transaction is not attacked within the sixty days, the transaction stands as though the Act had not been passed.**—*ALLEN v. PATTERSON* (1925), 57 O. L. R. 287.—**CAN.**

**ee. — Who may raise validity of transaction—Right of purchaser—Estoppel by registration of**



*transfer & acts of ownership over property.*—A purchaser of an hotel business cannot raise the question of non-compliance with Bulk Sales Act after he has obtained a transfer to the property, registered the transfer, executed a mortgage & promissory notes in accordance with the agreement of sale, entered into possession of the property, made very material alterations in the building, taken a transfer of the license, & thereafter continued to occupy the property.—*NATIONAL TRUST CO. v. NADON* (1915), 30 W. L. R. 588; 7 W. W. R. 1067.—CAN.

*m. — Right of trustee in bankruptcy of debtor.*—The trustee in bkpy. of the estate of a debtor has no status to attack a sale of goods made by the debtor as being void under Bulk Sales Act, 1917.—*RE PACKER*, [1927] 3 D. L. R. 330; 60 O. L. R. 402.—CAN.

*n. — Waiver by creditors—Proof by debtor.*—Where a trader is endeavouring to uphold a transaction which, without the waiver of his creditors, would be in plain disregard of Bulk Sales Act, it is his duty to show that the statute does not apply to the transaction by the clearest proof of such waiver as the statute calls for.—*WALTER v. LEDUC LUMBER CO.* (1915), 8 W. W. R. 360.—CAN.

*fled by statutory declaration.*—Any sale falling within the Bulk Sales Act (O.), 1917, is void as against the creditors of the vendor, unless the vendor furnishes, & the purchaser obtains, a written statement, verified by a statutory declaration, giving the names & addresses of all creditors of the vendor, with the amount of his indebtedness to each, & unless the purchaser on obtaining this declaration either obtains a written waiver from the creditors or puts the whole of the purchase-money into the hands of a trustee for distribution *pro rata* among the creditors.—*INTERLAKE TISSUE MILLS CO., LTD. v. GEORGE EVERALL CO., LTD.* (1921), 64 D. L. R. 206; 50 O. L. R. 165.—CAN.

*p. — Whether sale void as between vendor & purchaser.*—Non-compliance with Bulk Sales Act, 1913, s. 5, does not make the agreement void between the vendor & purchaser.—*SCOTT v. MILLER*, [1921] 3 W. W. R. 163.—CAN.

*q. — Rights of creditors — On failure to claim against trustee for debt.*—There is nothing in Bulk Sales Act, 1920, which precludes a creditor from claiming against his debtor a portion of his debt which he, for some reason or another, has not claimed from the trustee. A creditor who, it was admitted, was entitled to interest from debt., the debtor, on overdue accounts, but who filed his proved claim with the trustee for the amount due for principal & interest accrued up to the date of the claim, without claiming subsequent interest, was, therefore, held entitled to recover such interest from the debtor.—*J. H. ASHDOWN HARDWARE CO. v. COOPER*, [1927] 3 D. L. R. 246; [1927] 2 W. W. R. 188; 21 Sask. L. R. 500.—CAN.

*r. — Right of official assignee—To sue for property before assignment.*—Bulk Sales Act does not give the official assignee thereunder the right to sue for money or property before it has been transferred or assigned to him.—*NATIONAL TRUST CO. v. NADON* (1915), 30 W. L. R. 588; 7 W. W. R. 1067.—CAN.

*t. — Right of trustee—As assignee of mortgage by debtor — Recovery of principal & interest from debtor & transferee of mortgaged land.*—Where a trustee under Bulk Sales Act, 1922, takes an assignment of a mtge. made by the vendor & makes payments to the mtgee. out of the proceeds of the sale in bulk he is entitled to recover

against the vendor & also against the transferee of the mtged. land, where the covenant implied by Land Titles Act, 1922, s. 54, has not been negatived or modified in the transfer, the amount due on the mtge. for principal & interest without deduction for any of the payments made to the mtgee.—*SANFORD v. FRIZZLE & ELLIOTT*, [1925] 3 D. L. R. 750; [1925] 2 W. W. R. 601.—CAN.

*a. Under Conditional Sales Acts—Formation of contract—Must be in writing.*—The Ordinance respecting Hire Receipts & Conditional Sales of Goods only requires that evidence of the fact of a sale must be in writing, & that such writing must contain the special conditions as to the retention of the right of the property or possession by the vendor.—*WENBOURNE v. CASE* (1916), 34 W. L. R. 265; 10 W. W. R. 183.—CAN.

*b. — Retention of ownership by seller essential.*—*HARRIS v. WHITEHEAD* (1914), 30 W. L. R. 32; 25 Man. L. R. 105; 7 W. W. R. 660; 19 D. L. R. 722.—CAN.

*c. —*—*WENBOURNE v. CASE* (1916), 34 W. L. R. 265.—CAN.

*d. — Description of subject-matter—Sufficiency of—Description of horse by reference to brand mark.*—*ARICINSKI v. ARNOLD* (1906), 6 Terr. L. R. 240; 4 W. L. R. 556.—CAN.

*e. — "Motor cycle."*—*BOWSER v. GOODWIN* (1911), 19 W. L. R. 873.—CAN.

*f. — Admissibility of oral evidence.*—In determining whether the description of an article covered by a conditional sale agreement is sufficient, the judge is entitled to the aid of oral evidence of surrounding circumstances, & the sufficiency is relative to the rarity of the article in the particular locality where the document directs that it is to be found.—*BRANDON v. PLIMLEY* (B. C.), [1918] 1 W. W. R. 831.—CAN.

*g. —*—*motor described by wrong engine number.*—A lien note covering an automobile described it by the wrong engine number. It was the only automobile bought by the purchaser from the vendor & the only one of its kind in the vicinity.—*Held*: the engine number was not essential to the description, the error was not misloading, & it did not avoid the lien note.—*FOSS v. WILMOTH* (Sask.), [1920] 2 W. W. R. 291.—CAN.

*h. — Duty of seller to stamp name on goods—Whether abbreviations allowed.*—Upon a piano made by a company whose corporate name was "The Mason & Risch Piano Co., Ltd.," & place of business Toronto, claimed by them in replevin as against a mtgee. thereof, there was painted the words "Mason & Risch, Toronto":—*Held*: if the transaction came within Conditional Sales Act, 1897, this was not a compliance with sect. 1 of that Act.—*MASON v. LINDRAY* (1902), 4 O. L. R. 365; 22 C. L. T. 371; 1 O. W. R. 561.—CAN.

*k. —*—*COCKSHUTT PLOW CO. v. COWAN* (1910), 13 W. L. R. 256; 3 Sask. L. R. 47.—CAN.

*l. —*—*ERICSSON MANUFACTURING CO. v. ELK LAKE TELEPHONE & TELEGRAPH CO.* (1912), 24 O. W. R. 161; 3 O. W. N. 1309; 4 D. L. R. 576.—CAN.

*aa. — Effect of obliteration of name by purchaser.*—The lien of an unpaid vendor of a manufactured article is not invalidated if, without his direction or connivance, the purchaser paints out or obliterates the name & address of the vendor, which were, pursuant to 51 Vict. c. 19 (O.), properly marked on the article at the time of the conditional sale.—*WETTLAUFER v. SCOTT* (1893), 20 A. R. 652.—CAN.

*bb. —*—*]*—The removal of the manufacturer's name-plate, the affixing of which on a machine dispenses with the necessity of recording the conditional sale contract under Conditional Sales Act (O.), will not, where the name-plate is taken off by the purchasing co., prevent enforcement of the seller's right on default to the possession & property in the machine as against sub-purchasers from them who were aware that the machine was supplied to their vendors by the manufacturer claiming the lien.—*CANADIAN WESTINGHOUSE v. MURRAY SHOE CO.* (1914), 31 O. L. R. 11; 20 D. L. R. 672; 5 O. W. N. 5.—CAN.

*cc. —*—*]*—*UNION BANK OF CANADA v. IRISH*, [1926] 1 D. L. R. 529; [1926] 1 W. W. R. 248; 35 Man. L. R. 349.—CAN.

*dd. — Affidavit of bona fides—Sufficiency of—Mistake in date on jurat.*—*ROSS v. WRIGHT* (1896), 3 Terr. L. R. 361.—CAN.

davit in the following words: "That the copy of the within agreement truly sets forth the agreement between the parties mentioned therein, & that the agreement therein set forth is *bona fide* & not to protect the goods in question against the creditors of the said buyer or bailee," held not to be a compliance with sect. 3 of the Act respecting Lien Notes & Conditional Sales of Goods, 1909.—*THEATRE AMUSEMENT CO., LTD. v. SQUIRES* (Sask.), [1918] 3 W. W. R. 831; 43 D. L. R. 496.—CAN.

*ff. —*—*]*—An affidavit filed with the copy of lien note which says the agreement "is *bona fide*" sufficiently complies with the requirement of the Act that the affidavit state that the agreement "was entered into *bona fide*."—*FOSS v. WILMOTH* (Sask.), [1920] 2 W. W. R. 291.—CAN.

*gg. —*—*]*—The affidavit of *bona fides* on a conditional sale agreement in stating merely that the writing "truly sets forth the agreement between the parties" thereto & "the agreement therein set forth is *bona fide*," not stating that the agreement "was entered into *bona fide*," is fatally defective under Ordinance Respecting Hire Receipts & Conditional Sales of Goods.—*Re H. H. KERR MOTORS, LTD. & DE LONG*, [1920] 3 W. W. R. 245.—CAN.

*hh. — Registration—Necessity for.*—In order to obtain the benefit of C. S. N. B. 1903, c. 143, s. 8, the vendor of a chattel, under a contract that the sale shall not pass the title until the chattel is paid for, must file a copy of such contract with the registrar of deeds of the county in which the conditional purchaser resided at the time of the sale within fifteen days from the delivery of possession of the chattel mentioned in the contract.—*HARRISON v. NEPIQUIT LUMBER CO.* (1911), 11 E. L. R. 314.—CAN.

*kk. — Effect of non-registration — Contract void against purchaser for value.*—Where lien notes were not registered, as required by the Ordinance respecting Hire Receipts & Conditional Sales of Goods.—*Held*: the vendor had not a valid lien as against pltf., a subsequent *bona fide* purchaser for value, & were not entitled to take possession.—*DIONNE v. MASSEY-HARRIS CO.* (1910), 13 W. L. R. 557; 3 Sask. L. R. 18.—CAN.

*ll. —*—*]*—A purchaser for value with notice of the existence of an unregistered lien is a purchaser in good faith for valuable consideration, & the effect of the Act respecting Lien Notes & Conditional Sales of Goods is to render the lien void.—*FERRIE v. MEIKLE* (1915), 30 W. L. R. 913; 8 W. W. R. 336.—CAN.

*mm. — Whether goods*



*subject to execution for debt of purchaser incurred prior to sale.*—Although a conditional sale agreement has not been registered as required by Conditional Sales Act, 1924, the goods are not subject to seizure by a creditor of the buyer under an execution with respect to a debt which was outstanding prior to the making of the conditional sale.—UNITED ELECTRIC CO., LTD. v. WATSON (B. C.), [1927] 1 W. W. R. 87.—CAN.

**e.** — *Whether rights of landlord of purchaser affected.*—The fact that a lien note given by a tenant to a seller of goods has not been properly registered does not bring the landlord within the protection of sect. 1 of the Act respecting Lien Notes & Conditional Sales of Goods.—THEATRE AMUSEMENT CO., LTD. v. SQUIRES (Sask.), [1918] 3 W. W. R. 831; 43 D. L. R. 496.—CAN.

**f.** — *Power to register charge on land separate from order for chattel.*—Lien Notes Act, 1902, s. 4, does not forbid the registration of a separate document creating a charge on the land of the person signing it, for a named sum of money, or of a caveat founded on such document, although it is really given to secure the purchase money of a chattel bought by him under a conditional sale agreement simultaneously entered into. If the document registered does not contain as a portion thereof & has not annexed thereto or endorsed thereon any order, contract, or agreement for the purchase or delivery of any chattel.—SMITH v. AMERICAN-ABELL ENGINE & THRESHER CO. (1907), 6 W. L. R. 179; 17 Man. L. R. 5.—CAN.

**g.** — *Of assignment of interest of vendor—Necessity for.*—Where a vendor, after a conditional sale of chattels, assigns to a third person his interest in them, the assignment, to give it validity against anyone, does not require registration under Act respecting Lien Notes & Conditional Sales, R. S. S., c. 145.—REID v. MOORE (1914), 27 W. L. R. 616; 16 D. L. R. 561; 7 Sask. L. R. 69.—CAN.

**h.** — *To what contracts applicable—Promissory note reserving property & right of possession in vendor till payment.*—A promissory note given for the price of a horse provided that the title, ownership, right of property & right of possession in the property for which the note was given should remain in the vendor or holder of the note, until the note should be fully paid.—*Held:* this instrument was neither a receipt note, nor a hire receipt, nor an order for chattels within Lien Notes Act, 1892, s. 2, & an endorsee of the note was entitled to the horse as against an innocent purchaser for value.—SUTHERLAND v. MANNIX (1892), 8 Man. L. R. 541.—CAN.

**k.** — *—*—INTER-NATIONAL HARVESTER CO. OF CANADA v. MAXWELL (1914), 27 W. L. R. 41.—CAN.

**l.** — *Goods to be paid for as used—Goods supplied for packing other goods—Price of goods added to price of goods purchased.*—*Re* GLAVES, *Ex p.* SWAN (Ont.), [1924] 4 D. L. R. 320; 5 C. B. R. 78.—CAN.

**m.** — *Contract for work done & materials supplied.*—AGRICULTURAL DEVELOPMENT BD. v. DE LAVAL CO., LTD., [1925] 4 D. L. R. 981.—CAN.

**n.** — *New agreement after default in payment.*—Conditional Sales Act, s. 8 (5), has no application to a new arrangement made after the occurrence of default under the terms of a conditional sale.—BROOKS & SON v. DRURY, [1927] 2 D. L. R. 399; 60 O. L. R. 192.—CAN.

**o.** — *Rights of unpaid vendor—To retake possession of goods.*—The vendor or his assigns have the legal

right, the purchase money being in arrear & unpaid, to enter upon the premises where the property is, in order to resume actual possession, giving notice & using all care in so doing, but it would be illegal for him to take possession by force, & an injunction might properly issue to restrain acts of force on behalf of the vendor, but only on the terms that the assignee of the vendee be likewise enjoined from using force in resisting the vendor.—TRADERS BANK OF CANADA v. BROWN (G. & J.) MANUFACTURING CO. (1889), 18 O. R. 430.—CAN.

**p.** — *What amounts to seizure—Precise act or form of word not essential.*—PETERSON v. JOHNSTON (Sask.) (1911), 17 W. L. R. 596.—CAN.

**q.** — *Right to add expenses of keeping goods to charge.*—PEASE v. JOHNSTON (1905), 7 Terr. L. R. 416; 1 W. L. R. 208.—CAN.

**r.** — *Time extended but not expired.*—BRIDGMAN v. ROBINSON (1904), 24 C. L. T. 214; 7 O. L. R. 591; 3 O. W. R. 503.—CAN.

**t.** — *Right to retain possession & credit value of goods to purchaser—Whether right to balance affected.*—Where, in an agreement for conditional sale, it is provided that upon default the seller may take possession of & hold the goods until payment, or sell the same & apply the proceeds on the purchase price, & recover the balance, & the seller takes possession & retains the goods, the contract is not thereby rescinded, but he may recover the purchase price under the contract after crediting the value of the goods.—HOPKINS v. DANROTH (1907), 7 W. L. R. 303; 1 Sask. L. R. 225.—CAN.

**a.** — *Power to seize goods before maturity of note—Necessity for declaring note due.*—When a lien note contains a provision empowering the payee to declare it due & take possession of the property covered by the note before maturity it is unlawful to take possession before maturity without first declaring the note due & serving notice thereof on the party liable.—COLWILL v. WADELL (1902), 7 Terr. L. R. 139.—CAN.

**b.** — *Where note deemed insufficient security.*—TROTTER v. RUSSELL (N. W. T.) (1906), 5 W. L. R. 67.—CAN.

**c.** — *—*—HARMAN v. GRAY-CAMPBELL, LTD., [1925] 2 D. L. R. 904; [1925] 1 W. W. R. 1134; 19 Sask. L. R. 526.—CAN.

**d.** — *Goods moved from premises by purchaser.*—HOODLESS v. LONG (1921), 51 O. L. R. 419; 67 D. L. R. 600.—CAN.

**aa.** — *On sale of goods by purchaser.*—UTTERSON LUMBER CO. v. PETRIE (H. W.), LTD. (1908), 17 O. L. R. 570; 13 O. W. R. 104.—CAN.

**bb.** — *Assignment in bankruptcy.*—A vendor secured by a lien note may seize the goods & obtain an order for sale under the Act respecting Extra-Judicial & other Seizures, notwithstanding that prior to such seizure the purchaser has made an assignment under Bkpey. Act.—*Re* EMPIRE TRACTION CO., LTD., [1920] 3 W. W. R. 515.—CAN.

**cc.** — *Whether right waived by acceptance of payment after default.*—By accepting payment after default, the vendor, having a power of sale, does not waive his right to retake possession.—STOCK v. MEYERS & COOK (1920), 46 O. L. R. 420; 51 D. L. R. 328; 17 O. W. N. 297.—CAN.

**dd.** — *On abandonment of possession by purchaser.*—If the purchaser has made default & has abandoned the *de facto* possession of the goods, the vendor has the right to possession & the legal possession attaches to such right. Physical

contact by the vendor with the goods is not essential.—ANKER v. BACKSON & OBERKIRSCH (Sask.), [1923] 3 D. L. R. 897; [1923] 2 W. W. R. 858.—CAN.

**ee.** — *Effect of abandonment of possession by vendor.*—An abandonment of a seizure under a conditional sale agreement & of the interpleader proceedings resulting from such seizure is not necessarily an abandonment of the right of property in the goods.—CANADIAN EQUIPMENT & SUPPLY CO. v. CUSHING (Alta.), [1917] 3 W. W. R. 618.—CAN.

**ff.** — *Whether amounting to rescission.*—WHITE v. SMITH (1895), 28 N. S. R. 5.—CAN.

**gg.** — *—*—Pltfs. sold an automobile to deft. under a conditional sale agreement. After making several payments deft. made default. Pltfs., without any previous notification to deft., seized the car & took it into their own possession. Pltfs. did not notify deft. as to what their intentions were, & so far as deft. knew, pltfs. treated the car as their own & might have sold it.—*Held:* pltfs., upon resuming possession of the automobile with an apparent intention of retaining possession thereof forever as against deft., rescinded the original contract in reference thereto, & thereby disentitled themselves to enforce payment of the note.—BOYCE CARRIAGE CO. v. SQUIRES (1914), 29 W. L. R. 934; 25 Man. L. R. 47; 7 W. W. R. 555.—CAN.

**hh.** — *—*—The repossession by a seller in accordance with a provision therefor in an agreement for the sale of goods on deferred payments is not a rescission of the agreement & a bar to recovery of the purchase-price.—NICHOLS & SHEPARD CO. v. CHAMBERLAIN, [1918] 3 W. W. R. 308.—CAN.

**kk.** — *—*—Conditional Sales Act, 1914, s. 8, has altered the rights of vendor & purchaser & the vendor may no longer, if default is made, put an end to the purchaser's rights by taking possession.—STOCK v. MEYERS & COOK (1920), 46 O. L. R. 420; 51 D. L. R. 328; 17 O. W. N. 297.—CAN.

**ll.** — *Neglect of vendor to take proper care of goods after seizure.*—The buyer of an article under a contract of sale conditioned upon the property in the article remaining in the vendor until paid for is entitled to treat the contract as rescinded if the seller takes possession of the article & neglects to take proper care of it.—ROBERT BELL ENGINE & THRESHER CO. v. FARQUHARSON, [1918] 1 W. W. R. 924; 11 Sask. L. R. 81; 39 D. L. R. 625.—CAN.

**mm.** — *Use after seizure.*—Where a buyer of a motor car under a contract of conditional sale defaulted in his payments & the seller retook possession, the contract providing for retaking of possession & resale, but before selling the car used it for his own purposes in such a way as to justify the buyer in concluding that the seller had repudiated the contract, the buyer was held entitled to have the contract declared rescinded & to cancellation of the notes yet unpaid.—LAMBERT v. SLACK, [1926] 2 D. L. R. 166; [1926] 1 W. W. R. 614; 20 Sask. L. R. 422.—CAN.

**nn.** — *Resale—Notice to purchaser—Necessity for—Where goods stamped with name of vendor.*—GREAT WEST LIFE ASSURANCE CO. v. LEIB (1912), 21 W. L. R. 877; 2 W. W. R. 781.—CAN.

STONE v. SCOTT (1908), 9 W. L. R. 257.—CAN.

*By registered mail.*—The notice of intended sale which the Act respecting Lien Notes & Conditional Sales of Goods, s. 8, requires to be given to the buyer

may be sent to him by registered mail, even though he be not absent.—*TOTH v. HILKEVICS*, [1918] 1 W. W. R. 905; 11 Sask. L. R. 95.—**CAN.**

**b.** ————— *Sufficiency of contents.*—*NICHOLS & SHEPARD Co., Inc. v. McCULLOUGH*, [1920] 1 W. W. R. 885.—**CAN.**

**c.** ————— *Effect of failure to give notice—Rescission of contract.*—If a vendor under a lien note resells without giving the notice required by sect. 8 of the Act respecting Lien Notes & Conditional Sales of Goods it amounts to a rescission of the contract.—*ADVANCE RUMELY THRESHER Co., INCORPORATED v. DANKERT*, [1920] 1 W. W. R. 246; 50 D. L. R. 144; 13 Sask. L. R. 104.—**CAN.**

**d.** ————— *Whether purchaser released from liability for balance.*—Conditional Sales Act does not clearly indicate that the failure to give notice required by sect. 8 shall operate to release the purchaser from his liability to pay the deficiency upon a resale.—*BROOKS & SON v. DRURY*, [1927] 2 D. L. R. 399; 60 O. L. R. 192.—**CAN.**

**e.** ————— *Defective notice—Whether purchaser released from liability for unrealised balance.*—Where a notice relied on as a compliance with Conditional Sales Act, 1924, s. 10, stated that the balance due was \$1,799.52 whereas it was in fact \$132.79 less than that amount, the notice was held to be defective, & a judgment for the seller for the deficiency on the resale of the goods was reversed.—*ASH TEMPLE Co., LTD. v. WESSELS*, [1926] 1 D. L. R. 1063; [1926] 1 W. W. R. 654; 36 B. C. R. 424.—**CAN.**

**f.** ————— *Waiver—By express agreement.*—A clause in a contract under the Act respecting Lien Notes & Conditional Sales of Goods that in the event of the vendor resuming possession "the purchaser hereby waives all legal notice" was held not sufficiently definite to be construed as a waiver of the notice required by sect. 8 of the Act.—*ADVANCE RUMELY THRESHER Co., INCORPORATED v. DANKERT*, [1920] 1 W. W. R. 246; 50 D. L. R. 144; 13 Sask. L. R. 104.—**CAN.**

**g.** ————— *By attendance of buyer at sale.*—Strict compliance with Conditional Sales Act, 1922, s. 11, which provides that 5 days' notice of the intended sale shall be given the buyer, is waived where he attends & bids at the sale.—*SOICE v. HAFNER* (Alta.), [1927] 2 D. L. R. 1148; [1927] 2 W. W. R. 1.—**CAN.**

**h.** ————— *Right of vendor to bid at auction.*—Where the vendor of goods sold under a lien note purchases them himself at a public auction held after default on the note, the position is the same as if there had been an abortive sale by auction.—*TOTH v. HILKEVICS*, [1918] 1 W. W. R. 905; 11 Sask. L. R. 95.—**CAN.**

**k.** ————— *With leave of court.*—Where goods sold under a conditional sale agreement have been seized thereunder, & an order, in accordance with Extra-Judicial Seizures Act, has been made for an auction sale of the goods by the sheriff, the vendor cannot, at least without leave, bid at the sale. The result of his bidding & buying without leave is to make the sale abortive.—*GRAY-CAMPBELL Co. v. MORRISON*, [1924] 2 D. L. R. 487; [1924] 2 W. W. R. 112; 20 Alta. L. R. 328.—**CAN.**

**l.** ————— *Under Extra-Judicial Seizures Act, 1922, a judge making an order for the removal & sale of goods seized under a conditional sale agreement has power to give the seller the right to bid at the sale.*—*SOICE v. HAFNER* (Alta.), [1927]

2 D. L. R. 1148; [1927] 2 W. W. R. 1.—**CAN.**

**m.** ————— *Right to sue for unrealised balance.*—After default in payment by the purchaser of a machine under an agreement whereby the property was not to pass until payment in full, with a provision that on default the whole price should fall due, & that the vendors should be at liberty to resume possession, nothing being said as to resale, the vendors seized the machine & resold it, & after crediting the proceeds, brought this action to recover the balance of the original price.—*Held*: by the resale the original agreement had been put an end to, & plffs. had no right of action.—*SAWYER v. PRINGLE* (1891), 18 A. R. 218.—**CAN.**

**n.** ————— *Right to sue for unrealised balance.*—After default in payment by the purchaser of a machine under an agreement whereby the property was not to pass until payment in full, with a provision that on default the whole price should fall due, & that the vendors should be at liberty to resume possession, nothing being said as to resale, the vendors seized the machine & resold it, & after crediting the proceeds, brought this action to recover the balance of the original price.—*Held*: by the resale the original agreement had been put an end to, & plffs. had no right of action.—*SAWYER v. PRINGLE* (1891), 18 A. R. 218.—**CAN.**

**o.** ————— *Arnold v. Playter Waterous Engine Works Co.'s Claim* (1892), 22 O. R. 608.—**CAN.**

**p.** ————— *Harris v. Cummings* (1893), 3 Terr. L. R. 189.—**CAN.**

**q.** ————— *Default having been made the vendors resumed possession & sold the goods, & sued the vendee upon promissory notes for the price, crediting the proceeds of the sale.*—*Held*: the vendor must fail because the contract did not expressly provide that on a resale debts were to remain liable notwithstanding the provision for sale "towards paying the amount remaining unpaid."—*ABELL v. CAMPBELL*, 21 C. L. T. 303.—**CAN.**

**r.** ————— *Jones v. Okada* (1908), 8 W. L. R. 557.—**CAN.**

**t.** ————— *Peebles v. Johnson* (1908), 9 W. L. R. 616.—**CAN.**

**a.** ————— *Where possession & resale after judgment for price.*—*DONNELLY, WATSON & BROWN, LTD. v. ROBERTS* (B. C.) (1912), 22 W. L. R. 379.—**CAN.**

**aa.** ————— *Where payment for goods by instalments.*—*GAAR SCOTT Co. v. MITCHELL*, (1912), 20 W. L. R. 6; 1 D. L. R. 283; 1 W. W. R. 761; 22 Man. L. R. 474.—**CAN.**

**bb.** ————— *Where a vendor under a conditional sale contract retakes possession of & resells the property, he cannot sue the purchaser for the unrealised balance of the price unless the agreement so provides.*—*ADVANCE RUMELY THRESHER Co., INCORPORATED v. COTTON*, [1919] 2 W. W. R. 912; 47 D. L. R. 566; 12 Sask. L. R. 327.—**CAN.**

**cc.** ————— *Commission on resale—Extra commission by special agreement.*—Debts sold machinery to plffs. on conditional sale agreement, possession to be vendors' until price paid. Default having been made in payments, debts repossessed & resold. Under agreement debts were to get 20 per cent. commission on price for which machinery was resold.—*Held*: such seizure as took place here comes within Saskatchewan R. Ordinance, c. 34, which fixes the rate of commission & expressly forbids parties having, taking, or receiving larger commissions.—*ALBERTAN PUBLISHING Co. v. MILLER & RICHARDS* (Alta.) (1909), 10 W. L. R. 528.—**CAN.**

**dd.** ————— *Authority of sales agent—To authorise removal of property.*—*ROBB ENGINEERING Co., LTD. v. RINES* (1906), 39 N. S. R. 274.—**CAN.**

**ee.** ————— *When right of*

*purchaser to surplus proceeds arises—Receipt by vendor.*—*CANADIAN PORT HURON Co. v. FAIRCHILD* (1910), 14 W. L. R. 525; 3 Sask. L. R. 228.—**CAN.**

**ff.** ————— *Whether amounting to rescission—Sale contrary to agreement.*—*SAWYER v. PRINGLE* (1890), 20 O. R. 111; 18 A. R. 218.—**CAN.**

**gg.** ————— *Harris Son & Co. v. Dustin* (1892), 1 Terr. L. R. 404.—**CAN.**

**hh.** ————— *Fairchild Co. v. Hammond* (1903), 7 Terr. L. R. 20.—**CAN.**

**kk.** ————— *In the case of a conditional sale which reserves the property in the goods sold to the vendors, a resale by the vendors operates as a rescission of the contract, unless such resale was provided for in the agreement.*—*AMERICAN-ABELL ENGINE & THRESHER Co. v. WEIDENWILT* (1911), 19 W. L. R. 730; 1 W. W. R. 321; 4 Sask. L. R. 388.—**CAN.**

**ll.** ————— *Sawyer-Massey Co. v. Dagg* (1911), 18 W. L. R. 612; 4 Sask. L. R. 228.—**CAN.**

**mm.** ————— *Gray-Campbell Co. v. Morrison*, [1924] 2 D. L. R. 487; [1924] 2 W. W. R. 112; 20 Alta. L. R. 328.—**CAN.**

**nn.** ————— *Where goods attached to premises.*—*JOSEPH HALL MANUFACTURING Co. v. HAZLITT* (1885), 11 A. R. 749.—**CAN.**

**oo.** ————— *If a purchaser of a chattel annexes it to land in such a manner that it would ordinarily become a part of the realty, it cannot be deemed to remain a chattel because of an agreement between the purchaser & the vendor that, until paid for, the property in it should remain in the vendor, & that, in case of default of payment, the vendor might detach it & take it away. Such an agreement merely confers a license to enter on the land & sever what is no longer a chattel so as to make it again a chattel & to remove it, & a purchaser of the realty without notice of the agreement is not bound by it, nor can the vendor of the chattel recover possession of it, or damages for its conversion from him.*—*ANDREWS v. BROWN* (1909), 19 Man. L. R. 4.—**CAN.**

**pp.** ————— *The retention of title by agreement till payment is made for goods sold & attached to the premises of the purchaser, even where the agreement contains a lease of the goods with a right to the lessee to purchase, is in no way inconsistent with the statutory lien given by Mechanic's Lien Act (Man.) on the land. The retention of title is in the nature of a specific lien upon the identical goods furnished: it is not inconsistent with the lien given by the statute upon the premises upon which the goods are placed or erected. The incorporating in the agreement of the provisions as to leasing the goods, does not in substance make the agreement other than one for sale, & the provision that it shall be regarded as a lease is for the purpose of giving the vendor an additional remedy he is not bound to exercise. The other remedies at law on the covenant or under the Act remain open to the vendor.*—*UNITED STATES CONSTRUCTION Co. v. RAT PORTAGE LUMBER Co.* (1915), 33 W. L. R. 101; 9 W. W. R. 657; 25 D. L. R. 162; 25 Man. L. R. 793.—**CAN.**

**qq.** ————— *Attachment conditional on goods becoming property of landlord.*—*Grill & Kitchen fixtures were supplied & installed by their owners in an hotel, under a conditional sale agreement with the lessee of the hotel whereby they were to remain the property of the owner until they were paid for. The agreement was not filed under Sale of Goods Act. The landlord allowed the lessee to attach*

the said fixtures to the premises upon the understanding that the articles were to remain attached to the freehold & become the landlord's property:—*Held*: in an action by the vendors for the recovery of the articles, they had no title to them as against the landlord. —HAYWARD & DODS v. LIM BANG (1914), 19 B. C. R. 381.—CAN.

t. ——— Agreement by purchaser with landlord not to remove goods.]—HAYWARD & DODDS v. GRAHAM (1914), 27 W. L. R. 922.—CAN.

a. ——— Goods built into ship by purchaser.]—HOOVER-OWENS RENT-SCHLER Co. v. GULF NAVIGATION CO. INC., [1924] 3 D. L. R. 1003; 54 O. L. R. 483.—CAN.

b. ——— Sale covering present & future orders—Whether lien extended to future orders.]—Re CANADIAN CAMERA & OPTICAL CO., WILLIAMS (A. R.) Co.'s CLAIM (1901), 22 C. L. T. Occ. N. 677; 2 O. L. R. 677.—CAN.

c. ——— Right to sue for instalments.]—TRAVIS v. WAY (1901), 33 N. S. R. 551.—CAN.

proviso for retention of partial payments as liquidated damages on default.]—Under a conditional sale contract which contains in addition to the reservation of property in the goods until paid for, a stipulation that in case of default the sellers may retain all partial payments as liquidated damages, & may also retake possession, the sellers may avail themselves of their common law right of suing for the instalments as they become due or prove against the purchasing co. in liquidation proceedings, & still retain the property in the goods.—CANADIAN WESTINGHOUSE v. MURRAY SHOE CO. (1914), 1 O. L. R. 11; 20 D. L. R. 672; 5 O. W. N. 5.—CAN.

e. ——— Extension of time subject to payment of part of profits to vendor—Right of vendor to sue third parties for profits.]—SAWYER-MASSEY Co. v. STAHL (1914), 29 W. L. R. 274; 20 D. L. R. 88.—CAN.

f. ——— Effect of taking chattel mortgage as collateral security—Operation as acknowledgment of title of vendor.]—Taking from one of two conditional purchasers, to whom the interest of his co-purchaser has been transferred, a chattel mtge. on the chattels conditionally sold, does not operate as an acknowledgment of title in the mtgor. or terminate the title of the conditional vendor or put an end to the liability of the conditional purchasers on the lien notes.—CAMPBELL v. HELMKA (1914), 28 W. L. R. 297.—CAN.

g. ——— Whether right of action on lien note postponed.]—Taking from one of two conditional purchasers, as collateral security for a claim covered by lien notes, a mtge. maturing at a date later than the date of maturity of the notes does not postpone or suspend the right of action on the notes.—CAMPBELL v. HELMKA (1914), 28 W. L. R. 297.—CAN.

h. ——— To mortgage interest in goods.]—Both the seller & buyer, on a conditional sale of goods, have such an interest therein as may be mortgaged.—SHARP v. INGLIS (1915), 32 W. L. R. 150; 23 D. L. R. 636; 21 B. C. R. 584.—CAN.

k. ——— To claim under mechanic's lien.]—Where the claimants of a lien upon land for materials supplied for the erection of a building under Mechanics & Wage-Earners Lien Act, 1914 insist upon the terms of a conditional sale contract whereby they have a lien upon the materials until payment, they cannot rank as lienholders & compete with others who have no right as against the materials.—

l. ——— Defective sale—Priority against landlord distraining for rent.]—The fact that a conditional sale agreement does not comply with Conditional Sales Ordinance does not disentitle the vendor from setting up a claim to the goods comprised in such agreement as against a landlord distraining for rent.—RE OSBORNE & HUDSON'S BAY CO. (1915), 8 W. W. R. 821.—CAN.

m. ——— Acceptance of surrender & extension of time on same day—Whether surrender absolute.]—A farm implement co. accepted an absolute written surrender of its debtor's interest in farm machinery formerly sold by the co. to him under lien notes & chattel mtge., & on the same date also accepted another document embodying an arrangement for extending the period of payment of the debtor's notes in respect of the machinery. The extension arrangement lapsed & the co. acting as an absolute owner removed the machinery without process of law:—*Held*: the surrender was absolute & not a mere security.—COX v. J. I. CASE THRESHING MACHINE CO. (Alta.), [1922] 3 W. W. R. 712; 70 D. L. R. 506.—CAN.

n. ——— Power to recover on lien note when deemed insecure—Necessity for proof of insecurity.]—Where a lien note gives the vendor the right, if he deems the note or any renewal to be insecure, to declare the note or any renewal due & payable at any time, he must show, in an action brought to recover the amount of the note—that the notes were deemed insecure at the time they were declared insecure.—HARRIS v. MARK (1915), 32 W. L. R. 53; 8 Sask. L. R. 90.—CAN.

o. ——— Extension of lien to cover expenses of repair of goods—Where purchaser liable for repairs.]—Re BROWNING PRESS, [1923] 1 D. L. R. 407; 3 C. B. R. 425; aff'd., 24 O. W. N. 106; 4 C. B. R. 177.—CAN.

p. ——— Goods delivered by vendor to sub-purchaser by agreement—Right of vendor to recover goods on default of purchaser.]—INTERNATIONAL HARVESTER CO. OF CANADA, LTD. v. SVEICER (Sask.), [1927] 3 D. L. R. 1140; [1927] 3 W. W. R. 77.—CAN.

q. ——— Rights of purchaser—Authority to sell goods—Where goods bought for resale—Purpose known to seller.]—When a person makes a conditional sale of a team of horses, & delivers them to one whom he knows to be a dealer in horses & to be buying them for the purpose of reselling them at a profit, although he takes an agreement in the form usually called a lien note on the horses to secure the price, he thereby clothes the purchaser with implied authority to sell the horses & to transfer a good title, free from the lien, to a bona fide purchaser who has no notice or knowledge of the existence of the lien.—BRETT v. FOORSEN (1907), 7 W. L. R. 13; 17 Man. L. R. 241.—CAN.

sold a motor car to M. & H., a firm of dealers in motor cars, under a conditional sale agreement. The vendors assigned the benefit of the agreement to the defts.; the agreement was duly registered in accordance with Conditional Sales Act, 1914, & its regularity was not questioned:—*Held*: although M. & H. were dealers in cars, this car was not sold to them "for the purpose of resale in the course of business," & upon a resale by them, even to an innocent purchaser, the property in & ownership of the goods did not pass.—DULMAGE v. BANKERS FINANCIAL CORPN., [1923] 1 D. L. R. 1185; 51 O. L. R. 433.—CAN.

aa. ——— ]—INTERNATIONAL BUSINESS MACHINES Co. v. GUELPH BOARD OF EDUCATION, [1927] 4 D. L. R. 632; 61 O. L. R. 85.—CAN.

bb. ——— To mortgage interest

in goods.]—Both the seller & buyer, on a conditional sale of goods, have such an interest therein as may be mortgaged.—SHARP v. INGLIS (1915), 32 W. L. R. 150; 23 D. L. R. 636; 21 B. C. R. 584.—CAN.

cc. ——— To authorise repairs—subject goods to lien therefor.]—COMMERCIAL FINANCE CORPN., LTD. v. STRATFORD (1920), 47 O. L. R. 392; 18 O. W. N. 156.—CAN.

dd. ——— Where express agreement to maintain goods free from charges.]—ALLIANCE FINANCE CO. & STANDARD MOTORS, LTD. v. SIMONS GARAGE & GOODCHAP (1925), 36 B. C. R. 117.—CAN.

ee. ——— To surplus proceeds on resale by seller.]—On the buyer's default under a conditional sale agreement the seller repossessed & resold the chattel, realising a sum in excess of the unpaid instalments:—*Held*: in view of the terms of the agreement & the wording of its clauses the relationship of the parties did not differ essentially from that of mtgor. & mtgee., with an obligation for payment by the former, & therefore the surplus proceeds of the resale belonged to the buyer.—C. C. MOTOR SALES, LTD. v. CHAN (B. C.), [1926] 3 D. L. R. 712; [1926] S. C. R. 485.—CAN.

ff. ——— Right to redeem after possession retaken by vendor.]—Conditional Sales Act, 1914, s. 8, has altered the rights of the vendor & purchaser as those rights existed before the statute; the vendor may no longer, if default is made, put an end to the purchaser's rights by taking possession, but the purchaser is given the right, for twenty days after possession is taken, to redeem: the effect is to postpone the right to exercise the power of sale until the expiration of twenty days from the time possession is retaken.—STOCK v. MEYERS & COOK (1920), 46 O. L. R. 420; 51 D. L. R. 328; 17 O. W. N. 297.—CAN.

gg. ——— Right to relief after time expired.]—Re STANLEY & BUNTING (Ont.), [1924] 3 D. L. R. 599; 5 C. B. R. 18.—CAN.

hh. ——— Remedy for wrongful resale by vendor—Measure of damages—Difference between true value & amount realised.]—BOUCHER v. LUNN (1911), 18 W. L. R. 694.—CAN.

kk. ——— Rights of third parties—Assignee of vendor—Right to possession on surrender by purchaser to vendor.]—TUDHOPE-ANDERSON Co. v. KERR (1913), 25 W. L. R. 332; 5 W. W. R. 1352.—CAN.

ll. ——— Warehouseman—Lien for storage charges as against vendor.]—Pltf. sold to lt. a quantity of furniture under a lien & hire agreement, in the usual form, duly registered, by which the property in the furniture was retained by pltf. lt., before making all her payments, stored the furniture with deft., a warehouseman, without the consent or knowledge of pltf. After the furniture had remained with deft. for some months, pltf. demanded it under the agreement, but deft. refused to deliver it up until his warehouse charges had been paid, & pltf. brought this action for damages for the wrongful detention & conversion of the goods:—*Held*: deft. was not entitled to retain the goods until his warehouse charges were paid.—SMITH v. CAMPBELL (B. C.) (1911), 17 W. L. R. 493.—CAN.

mm. ——— Assignee of purchaser—For valuable consideration without notice—Assignment after sale & before lien note given.]—Pltf., claiming under a lien note made by the persons from whom deft. S. bought the goods, sued for possession of certain cattle & other goods or to recover their value & damages for their detention:—*Held*: upon the evidence, the lien note was not given until the year after the sale

by plffs., to defts. S.'s vendors, & it was invalid as against defts. S., who had no

705.—CAN.

*consideration with notice.*—Goods removed to another district without registration.]—Deft. while pasturing D.'s horse removed it, on at least implied instructions from D., & along with other horses he was pasturing, to grazing lands he owned in another registration district. Before the removal pltf. had informed deft. that he held a lien note on the horse. Subsequent to the removal deft., to whom D. was indebted for pasturing, purchased the horse from D., paying the balance of the price in oats. Held: deft. was a purchaser "in good faith for valuable consideration," & owned the horse free from pltf.'s claim under the lien note which had not been registered, as required by statute, in the registration district to which the horse was removed.—BARBOUR v. MOORE, [1921] 3 W. W. R. 576.—CAN.

*n.* — Assignment for benefit of creditors.]—A conditional sale effective between the parties is also effective as against the assignee for the benefit of the creditors of the buyer & against a receiver who by the order appointing him is given the same rights as he would have had if he had been an assignee for the benefit of creditors.—CANADIAN EQUIPMENT & SUPPLY CO. v. CUSHING (Alta.), [1917] 3 W. W. R. 618.—CAN.

*o.* — Vendor of mineral claims with lien on goods on claims sold.]—SULLIVAN MACHINERY CO. v. BANK OF MONTREAL (B. C.), [1918] 3 W. W. R. 16.—CAN.

*p.* — To lien for repairs.—Goods deposited for repairs by vendor after retaking possession.—Sale under lien before expiration of purchaser's right of redemption.]—WHITNEY-MORTON CO., LTD. v. SHORT (B. C.), [1922] 2 W. W. R. 1014; 67 D. L. R. 573.—CAN.

*q.* — Right of vendor of land reacquiring by surrender land to which goods conditionally sold attached.]—If a vendor under an agreement of sale of land reacquires, by surrender, the purchaser's interest in the land, & obtains, for a consideration, immediate possession, & during the purchaser's possession the latter bought, under conditional sale agreement not complying with Conditional Sales Act (Alta.), articles, such as stable fittings, which were affixed to the realty, the land vendor, on reacquiring the interest & possession as aforesaid, is not a "purchaser from the buyer or bailee of such goods in good faith for valuable consideration," so as to entitle him to the articles.—KNIGHT SUGAR CO., LTD. v. BEATTY BROTHERS, LTD. (Alta.), [1923] 4 D. L. R. 743; [1923] 3 W. W. R. 1120.—CAN.

*r.* — Where an agreement for the sale of land provides that all buildings now on or to be erected on the land shall become part of the freehold & shall not be removed without the consent of the vendor, & the purchaser buys a building under a conditional sale agreement reserving the ownership to the seller, & afterwards releases by quit claim, to the vendor of the land all his interest in the land & its appurtenances, the vendor of the land is not by virtue of such agreement for sale & quit claim a purchaser for value within the meaning of Conditional Sales Act, 1920, s. 2, & is, therefore, not entitled to the building as against the seller thereof because of the lack of registration of the lien agreement.—HELMER v. GRAIN, [1925] 2 W. W. R. 509; 19 Sask. L. R. 541.—CAN.

*t.* — Rescission.—By new agreement.—Repair & return of damaged

goods with delivery of further goods.]—ROBB ENGINEERING CO., LTD. v. RINES (1906), 39 N. S. R. 274.—CAN.

*a.* — Breach of condition by vendor.—Failure to credit to account of purchaser profits from hire of goods.]—A conditional sale of a threshing separator was held to be rescinded, by reason of the vendors' conduct in dealing with the machine & renting it to a third person, although the moneys paid for its use were to be applied on the purchaser's indebtedness.—STUBLEY v. AULTMAN-TAYLOR MACHINERY CO. (Alta.), [1923] 2 W. W. R. 897.—CAN.

*b.* — Combined sale of land & goods.—Rescission of sale of land by quit claim rescinding sale of goods.]—SCOTT v. IRVING (Sask.), [1927] 3 D. L. R. 35.—CAN.

*c.* — Breach of warranty.—Right of purchaser to set up against seller.—Whether passing of property essential.]—FRYE v. MILLIGAN (1885), 10 O. R. 509.—CAN.

*d.* — —.—TOMLINSON v. MORRIS (1886), 12 O. R. 311.—CAN.

*e.* — —.—COPELAND v. HAMILTON (1893), 9 Man. L. R. 143.—CAN.

*f.* — In reduction of price.]—In an action between vendor & purchaser for the price of a machine sold under a conditional sale, deft. may show that the machine was not as warranted & so reduce the claim by the difference between the value of the machine as warranted & its actual value.—CULL v. ROBERTS (1894), 28 O. R. 591.—CAN.

*g.* — —.—Damages for breach of warranty may be set up in diminution or extinction of the purchase-price of goods sold under a lien note.—WESTWOOD v. McMILLAN (Sask.), [1920] 2 W. W. R. 857; 53 D. L. R. 317.—CAN.

*h.* — Right of sub-purchaser against vendor.—Where sale by purchaser with consent of vendor.]—Goods sold under a conditional sale agreement were sold by the conditional purchaser to defts. at a price larger than the amount due to the conditional vendor. The conditional vendor assented to the sale, & defts. agreed to pay to it the amount of its claim. Judgment was given in the conditional vendor's favour for this amount, & it was held that it was not concerned with the contention of defts. that the conditional purchaser had given to them a guarantee as to the condition of the goods & that this guarantee had been broken.—J. I. CASE THRESHING MACHINE CO. v. WRENSHALL (1915), 30 W. L. R. 521.—CAN.

*k.* — Extension of time for payment.—Authority of agent to grant.]—SAWYER-MASSEY CO. v. DAGG (1911), 18 W. L. R. 612; 4 Sask. L. R. 228.—CAN.

*l.* — Validity.—Fictitious sale & resale without delivery.]—TAEGAR v. ROWE (1908), 1 Sask. L. R. 466, 9 W. L. R. 129; *affd.* (1909), 10 W. L. R. 674; 2 Sask. L. R. 159.—CAN.

*aa.* — Lien note in blank.—Unintentional omission.]—BELL v. SCHULTZ (1912), 21 W. L. R. 408; 4 O. L. R. 400; 2 W. W. R. 491.—CAN.

*bb.* — Non-compliance with Act.—Onus of proof.]—Deft. must affirmatively plead & prove any failure to comply with the Act respecting Lien Notes & Conditional Sales of Goods, upon which he intends to rely.—MOUNT v. HOLLAND (Sask.), [1917] 1 W. W. R. 1188.—CAN.

*cc.* — Whether property passes.]—M. received from plffs. certain articles of furniture, under the following written memorandum, signed by her, "Received from Messrs. W. F. & Son the following articles of furniture, for which I am to pay two hundred & twenty dollars & twenty-five cents or

more, in monthly payments of twenty dollars each month from date. The said furniture to remain the property of W. F. & Son, till paid for in full, & in the event of non-payment monthly the said W. F. & Son can take the furniture back."—Held: possession delivered on condition till payment should be made does not pass the property, & the part payment made will be forfeited, if the agreement be not fulfilled.—FRASER v. WALLACE (1878), 2 R. & C. 337; 2 S. C. R. 522.—CAN.

*dd.* — Surety for payment.—Release by surrender by purchaser to vendor of part of goods.—Where full value credited to purchaser.]—Where a purchaser under a lien note, of certain chattels by agreement with the vendor, surrendered some of the chattels to him & received a credit upon the amount of the note & it was not shown that the chattels returned would under any other conditions or circumstances of sale have realized a greater price, or that if the lien note had been turned over to him & he had proceeded under it, the chattels would have brought more, the surety who signed the note was not released.—TOOVEY v. BROCK & BROCK (1916), 34 W. L. R. 973.—CAN.

*ee.* — Incidence of risk.—Agreement by buyer to insure for seller.]—Where a lien note provides that the ownership of the goods is to remain in the seller until the note is paid, but that the risk usually incident to ownership is to be in the buyer as long as the seller has the ownership, & the goods for which the note was given are seized by the seller for default in payment of the note & while under seizure & in possession of the seller pending resale, are destroyed without fault of the seller, the buyer is liable for the amount of the purchase-price remaining unpaid. Under a conditional sale agreement the fact that the buyer agreed to insure the goods for an amount sufficient to protect the interest of the seller therein is relevant to show that it was intended that the buyer should take the risk.—HOLM v. MORGAN, [1921] 3 W. W. R. 671; 63 D. L. R. 383; 15 Sask. L. R. 83.—CAN.

*ff.* — Exclusion by oral agreement amounting to absolute sale.]—An action on lien notes given for the purchase-price of farm machinery dismissed, on the grounds that the oral bargain between the parties was wholly different from that expressed in the notes, in the fact that it, the oral bargain, was an out-and-out sale, & the lien notes were not read to the purchaser, who was illiterate.—GILLESPIE v. TILLIE (Man.), [1922] 2 W. W. R. 350; 66 D. L. R. 779.—CAN.

*gg.* — Sale to which Farm Implement Act applies.]—Where a conditional sale is one to which the Farm Implement Act, 1920, applies the provisions of said Act must be read together & applied with those of Conditional Sales Act, 1920, as one body of law. In the case of such a sale, Farm Implement Act, s. 22, does not implicitly override the provisions of Conditional Sales Act with respect to the rights of the seller under a lien note.—INTERNATIONAL HARVESTER CO. OF CANADA, LTD. v. POSTNECOFF (Sask.) [1925] 2 W. W. R. 769.—CAN.

*hh.* — —.—Farm Implement Act, 1920, states exclusively the rights & liabilities of vendors & vendees under contracts & lien notes. The only right to a lien for unpaid purchase-money is that given by the Act, & the only rights & liabilities attached to or incidental to the lien are those which are created by the Act. The whole object of the Act is to define clearly & exclusively the whole agreement between the parties, & any attempt to enlarge the liabilities of the purchaser is of no effect. The statutory contract is the entire contract between the parties, &

any lien notes taken by the vendor must not vary the terms of the contract in that regard.—*CHURSENOFF v. BAILEY BROTHERS*, [1924] 2 D. L. R. 1105; [1924] 1 W. W. R. 1105; 18 Sask. L. R. 234.—CAN.

b. ——— *Assignment of lien note—Whether property in goods transferred.*—In Manitoba an assignment by a vendor of a lien note or lien agreement under Farm Implement Act, 1919, does not, in the absence of express terms, transfer the vendor's right of property in the chattels therein comprised. It merely transfers the debt or chose in action. The combined effect of the lien agreement & Farm Implement Act, ss. 18 & 19, does not alter the result.—*KILGOUR v. WHITE (Man.)*, [1923] 3 W. W. R. 229.—CAN.

c. *Under Farm Implement Acts—Formation of contract—Must be in writing—In appropriate form.*—Where the sale of farm machinery falls under Farm Implement Act, 1920, & is not evidenced by a contract in writing in appropriate form provided by the Act, the transaction is void.—*DORSON v. BARR & BRINKWORTH (Sask.)*, [1923] 4 D. L. R. 562; [1923] 2 W. W. R. 260.—CAN.

d. ——— *Contract for the sale of a second-hand farm implement which is not in writing in the Form C. as required by Farm Implement Act, 1920, s. 14, is invalid, whether or not the implement be a large or small implement within the Act.*—*OGDEN v. GARRETT (Sask.)*, [1924] 4 D. L. R. 599; [1924] 3 W. W. R. 314.—CAN.

e. ——— *Sumner v. SQUIRES*, [1924] 4 D. L. R. 1309; 17 Sask. L. R. 98; [1923] 2 W. W. R. 243; *varying*, [1923] 1 D. L. R. 102; [1922] 3 W. W. R. 1174.—CAN.

f. ——— *Description of goods—Necessity for setting out horse power of engine.*—*HAPPY FARMER CO., LTD. v. SOLBERG*, [1921] 3 W. W. R. 259.—CAN.

g. ——— *Duty of vendor to post copy of contract to purchaser.*—*EDGINGTON v. JONES TRACTOR & IMPLEMENT CO., LTD.*, [1921] 2 W. W. R. 733.—CAN.

h. ——— *ELLARD v. WATERLOO MANUFACTURING CO.*, [1926] 3 D. L. R. 207; [1926] 2 W. W. R. 294; 20 Sask. L. R. 601.—CAN.

k. ——— *Contract must be read & explained to purchaser unable to read English.*—Where a purchaser of a large farm implement does not read English, Farm Implement Act, 1920, s. 18, is not complied with unless the whole contract is read over & explained to him in his own language, even though he understands some English & after the whole contract has been read to him in English, those portions of it which he says he does not understand in English are read over & explained to him in his language, & he says he understands it all. Where said sect. has not been complied with the contract of sale is invalid.—*ADVANCE RUMELY THRESHER CO. v. YORGA*, [1925] 4 O. L. R. 5; 20 Sask. L. R.; [1925] 3 W. W. R. 150; *affd.*, [1926] 5 S. C. R. 397.—CAN.

l. ——— *Exclusion of verbal agreement by express stipulation in written contract.*—An alleged verbal agreement on the sale of an engine was not given effect to in view of the clause in the written contract of sale against any verbal agreement.—*SERVICE v. ADVANCE RUMELY THRESHER CO., INCORPORATED (Sask.)*, [1919] 2 W. W. R. 646.—CAN.

m. ——— *To what contracts applicable—Order for chattels containing lien.*—An order for chattels containing a lien entered into before the passing of the Farm Implement Act (Sask.), is not subject to sects. 16 or 17 of that Act.—*MOUNT v. HOLLAND (Sask.)*, [1917] 1 W. W. R. 1188.—CAN.

n. ——— *Isolated sale of farm implement.*—Farm Implement Act, 1915, applies only to dealers in implements & not to a person who makes an isolated sale of a farm implement.—*ROBINSON v. BURGESSON*, [1918] 2 W. W. R. 879.—CAN.

o. ——— *J. I. CASE THRESHING MACHINE CO. & OSTER v. WELSH*, [1918] 3 W. W. R. 57.—CAN.

p. ——— *Farm Implement Act, 1917, does not apply to an isolated sale of an agricultural implement by the owner thereof, even though such seller is an "implement agent."*—*BOYCE v. JOLLY*, [1921] 1 W. W. R. 81; 55 D. L. R. 714; 14 Sask. L. R. 16.—CAN.

q. ——— *Sale of all implements—Application to sale of second-hand large implement.*—Farm Implement Act, 1917, applies to the sale of all "implements" as defined by the Act, & therefore where a contract of sale of a second-hand "large implement" is not in the form which the Act prescribes it is invalid, even though the vendor be not a dealer in implements. The distinction between dealers & persons making isolated sales is of importance only in respect to those sects. 5, 7, & 8, which require dealers to file with the Minister lists of their goods & statements of the selling price.—*AITKEN v. CURRIE*, [1921] 2 W. W. R. 973; 14 Sask. L. R. 397.—CAN.

r. ——— *Sale of second-hand small implement on credit.*—On the sale on credit of a second-hand farm implement, if the contract is not in the form required by Farm Implement Act, s. 14, no action can be brought thereon, even though the implement is a "small implement" within the Act.—*STEWART v. TOALFSON*, [1921] 3 W. W. R. 154.—CAN.

t. *Sale—salesman of implement firm of own implements.*—A person employed on salary by a farm implement co. as a travelling salesman & collector is not a "dealer" within Farm Implement Act, 1920, & therefore a sale by him of his own implements used by him in farming is not one to which the said Act applies.—*HARMON v. RUSSELL*, [1927] 3 D. L. R. 626; [1927] 2 W. W. R. 505; 21 Sask. L. R. 686.—CAN.

a. ——— *Warranties essential to validity of contract—Sale of large implement—Warranty that machine is "well made & of good materials."*—Under Farm Implement Act, 1915 (Sask.), there must be inserted in a contract for sale of a "large implement" the clause that "the vendor warrants that the said machinery is well made & of good materials," without which clause the contract is invalid.—*FROST v. COMPAGNIE DES JARDIN (Sask.)*, [1919] 2 W. W. R. 457.—CAN.

aa. ——— *Machinery warranted designed to work for which it is intended.*—*KOSTIUK v. BALL* (1921), 59 D. L. R. 72.—CAN.

bb. ——— *Duty of seller to incorporate current improvements.*—It was within the intention of the legislature in imposing upon the implement cos. a warranty that machinery is so designed as to do satisfactory work, to impose upon them the obligation of keeping up to date in adapting, with reasonable promptness, improvements which have become generally recognised as such, & to the end that they are not to be permitted to go on selling their old stock of implements when it has become generally recognised that much more satisfactory implements adapted for the same purpose are on the market. Said statutory warranty goes far beyond the warranties implied by virtue of Sale of Goods Ordinance that the goods are merchantable & suitable for the purpose intended.—*JOHN DEERE PLOW CO. v. PALMER*, [1923] 1 D. L. R.

132; 18 Alta. L. R. 471; [1922] 3 W. W. R. 883.—CAN.

*Breach of warranty—Failure of purchaser to notify or remedy defect—Limitation of damages.*—A tractor in working lost compression because the pistons were too small for the cylinders & therefore it lacked the power which it otherwise would have had.—*Held*: this was a breach of the statutory warranty on sale contained in Farm Machinery Act, s. 5; but because the purchaser, although complaining to the vendors of lack of power, failed to notify them of the defect which caused the trouble, although he knew of it & could have remedied it at small expense, his duty being to remedy it even if the vendors had been notified of it & had disregarded it, his right to damages was limited to the cost of remedying it & incidental loss & expenses whilst this was being done.—*NORTON v. SMITH*, [1920] 2 W. W. R. 121.—CAN.

dd. ——— *Right to reject goods—Whether right lost by retention & user—User pending efforts of seller to put goods in proper condition.*—Purchasers were held entitled to rescission, where an engine sold was not such as was contracted to be sold, inasmuch as it did not, on being properly operated, develop the horse power set out in the description of the engine in the contract. The use of the engine by the purchasers was held not to amount to an acceptance, in view of repeated requests on their part to the vendors to make it work properly, the vendors having made two unsuccessful efforts to do so.—*DAVENPORT v. MINNEAPOLIS THRESHING MACHINE CO.*, [1920] 3 W. W. R. 153.—CAN.

ee. ——— *Right of unpaid seller—Retaking possession—Duty of seller to have large implement appraised.*—The provision in Farm Implement Act (Sask.), 1920, s. 17 as amended by R. S. S. 1920, c. 128, s. 24, that a vendor on repossessing a large implement must have the same appraised by arbitrators is not retrospective & is not applicable to a contract for the sale of a large implement made prior to the date of the Act.—*J. I. CASE THRESHING MACHINE CO. v. WHITNEY (Sask.)*, [1922] 3 W. W. R. 643; 70 D. L. R. 1.—CAN.

ff. ——— *Rights & remedies on invalid contract—Right of vendor to return of goods.*—An agreement for the sale of machinery which does not comply with Farm Implement Act is invalid & will not support an action; it is, however, not illegal & the vendor has an equitable right to the return of the property parted with or compensation for the same.—*WHITE & SONS CO., LTD. v. JASHANSKY*, [1917] 2 W. W. R. 173; 34 D. L. R. 271; 10 Sask. L. R. 81.—CAN.

gg. ——— *FROST v. COMPAGNIE DES JARDIN (Sask.)*, [1919] 2 W. W. R. 457.—CAN.

hh. ——— *TAYLOR v. JONES (Sask.)*, [1919] 2 W. W. R. 789.—CAN.

kk. ——— *DAVENPORT v. MINNEAPOLIS THRESHING MACHINE CO.*, [1920] 3 W. W. R. 153.—CAN.

ll. ——— *EDGINGTON v. JONES TRACTOR & IMPLEMENT CO., LTD.*, [1921] 2 W. W. R. 733.—CAN.

mm. ——— *With compensation for depreciation not due to ordinary use.*—A purchaser of farm machinery, sold to him by an implement dealer without a contract in writing, where that is required in the form prescribed by Farm Implement Act, 1920, on being sued for the price, may successfully set up as a defence the absence of such a contract, & may recover what he has paid on account of the purchase with interest. The cts., however, will not allow either party to enrich himself at the expense of the other party, but will order a



return to the vendor of the machinery, compensation for its use, & compensation for any depreciation not due to ordinary use, on the other hand. The return of the machinery will not be ordered to be made conditional on the return of the purchase money & notes.—*SUMNER v. SQUIRES*, [1924] 4 D. L. R. 1309; 17 Sask. L. R. 98; [1923] 2 W. W. R. 243; *varying*, [1923] 1 D. L. R. 1192; [1922] 3 W. W. R. 1174.—**CAN.**

*o.* ———— [Where a contract of sale of farm machinery under Farm Implement Act, 1920, made after Mar. 31, 1920, is invalid by reason of failure to comply with sect. 31 of the Act, the transaction is void & the vendor cannot recover the price nor can the purchaser recover damages, but the vendor is entitled to the return of the machinery, payment by the purchaser for its use during the time it was in his possession, & damages for any depreciation caused by the negligence of the purchaser.—*SASKATCHEWAN GRAIN GROWERS' ASSOCN., LTD. v. HATLIN* (Sask.), [1923] 4 D. L. R. 611; [1923] 3 W. W. R. 282.—**CAN.**

*p.* ———— *Return not conditional on repayment of purchase money.*—*SUMNER v. SQUIRES*, [1924] 4 D. L. R. 1309; 17 Sask. L. R. 98; [1923] 2 W. W. R. 243; *varying*, [1923] 1 D. L. R. 1192; [1922] 3 W. W. R. 1174.—**CAN.**

*q.* ———— *Right of assignee of vendor.—To recover purchase price from buyer.*—Where an order for a grain separator & the lien notes given in respect of the price were altered in a material particular after they had been signed by the purchaser, & where the contract under Farm Implement Act, 1920, was admittedly invalid, *pltf.*, the assignee of the vendor, was held to be not entitled to recover the price. *Pltf.*, however, was granted equitable relief by way of a return of the separator & payment by the purchaser of any financial benefit which the latter

had derived from the use of the machinery, it being made a condition of the granting of such equitable relief that *pltf.* should repay to the purchaser the amount paid by him on account of the price together with the interest thereon at the legal rate, & should return to the purchaser the lien notes given in respect of the price.—*ROYAL BANK OF CANADA v. FRANK*, [1924] 3 D. L. R. 479; [1924] 2 W. W. R. 949; 18 Sask. L. R. 485.—**CAN.**

*r.* ———— *Right of purchaser.—Cancellation & return of lien notes & money paid.*—*FROST v. COMPAGNIE DES JARDIN* (Sask.), [1919] 2 W. W. R. 457.—**CAN.**

*t.* ———— [On the sale of a traction engine the vendors failed to deliver or post to the purchaser a copy of the contract as required by Farm Implement Act, s. 19. The engine did not satisfy the warranty as to working properly & the vendors did not make it work properly. The purchaser did not give the notice of rejection provided for by Form A. of the Act within the proper time. The purchaser's use of the machine was not such as to give rise to the presumption that he had accepted it prior to his repudiation of the contract by letter:—*Held*: the purchaser was entitled to recover the moneys paid with interest, return of his notes, & cancellation of the contract, & costs; the vendor to have possession of the engine.—*EDGINGTON v. JONES TRACTOR & IMPLEMENT CO., LTD.*, [1921] 2 W. W. R. 733.—**CAN.**

*a.* ———— [Where a contract of sale of farm machinery under Farm Implement Act, 1920, made after Mar. 31, 1920, is invalid by reason of failure to comply with sect. 31 of the Act, the transaction is void & the vendor cannot recover the price nor can the purchaser recover damages, but the latter is entitled to a return of the lien note signed by him

& of the money paid by him on account of the price.—*SASKATCHEWAN GRAIN GROWERS' ASSOCN., LTD. v. HATLIN* (Sask.), [1923] 4 D. L. R. 611, [1923] 3 W. W. R. 282.—**CAN.**

*b.* ———— *Return of purchase price less profits made on machine.*—*Deft.* sold to *pltf.* a tractor, but the written agreement purported to be made between M. co. & *pltf.*, whereas M. co. had nothing to do with the sale. The ct. therefore found that there was no agreement in Form A. under Farm Implement Act between vendor & purchaser for the sale, & judgment was given to *pltf.* for return of the purchase-price less the profits made by him with the machine, & *deft.* to have repossession.—*TAYLOR v. JONES* (Sask.), [1919] 2 W. W. R. 789.—**CAN.**

*c.* ———— *Return of purchase money.—Waiver in absence of fraud by payment with full knowledge.*—Although where a contract for the sale of a "large implement" does not comply with Farm Implement Act, 1920, it is not enforceable, it is, nevertheless, the statute not being prohibitory, one which the parties may make & carry out if they wish; & where money has been paid voluntarily thereunder, with full knowledge of all the facts, & there has been no fraud, compulsion, or undue influence, the money cannot be recovered.—*HAUBRICH v. KEEFNER*, [1922] 1 W. W. R. 1079; 65 D. L. R. 50; 15 Sask. L. R. 271.—**CAN.**

*d.* ———— *Rectification.*—A written contract of sale of a farm motor failed to comply with Farm Implement Act in not stating the purposes for which it was to be used. On application by the vendors the ct. refused to rectify it, because the form of the agreement goes to the agreement itself.—*DAVENPORT v. MINNEAPOLIS THRESHING MACHINE CO.*, [1920] 3 W. W. R. 153.—**CAN.**

## SALE OF HAY AND STRAW.

See MARKETS AND FAIRS.

## SALE OF HORSES.

See ANIMALS; MARKETS AND FAIRS.

## SALE OF INTOXICATING LIQUORS.

See INTOXICATING LIQUORS.

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